

RESURRECTING “ROMANTICS AT WAR”: INTERNATIONAL SELF-DEFENSE IN THE SHADOW OF THE LAW OF WAR— WHERE ARE THE BORDERS?

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I. INTRODUCTION

Rules relating to the use of force are among the traditional concerns of international law. “Although nowadays provisions of the United Nations Charter mark the starting point in debates about the legality of the use of force

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under international law,” until 1945 theologians and international law theorists worked to define limits on permissible use of force.¹

The horrifying consequences of World War II promoted a trend to restrict all means of the use of force, imposing legal restraints on the legitimacy of states to go to war, as well as on the means used in time of war. The victors of World War II re-cast the rules of the use of force, especially through the establishment of the UN Charter in 1945 and the Geneva Conventions in 1949. Ultimately, this trend was represented by the manifest desire of the international community to limit the use of force only to “international legal personalities,” namely states,² and thus impose clear limits on the conditions by which states may invoke the permissible use of force; and to create a distinction between combatants and noncombatants; a distinction that alludes to what I view as a distinction between war among states and war among nations.

Holding this aspiration, the international community provided an explicit limit to the use of force, permissible only for performing an act of self-defense, as articulated in Article 51 of the UN Charter.³ In time, the language of Article 51 proved not to be without ambiguities.⁴ Among these ambiguities is the discussion on the precise meaning of the term “if an armed attack occurs.”⁵ This has been the subject of many articles and other discussions. However, in my view, this discussion ought to be led by a wide perspective of the international right to self-defense. Wide perspective requires not a mere inquiry of the historical cases in which the right to self-defense was invoked, or a limited discussion on the context for which Article 51 was established. Instead, wide perspective requires a deep interaction between, what I view as, vertical and horizontal analysis.

From the vertical point of view, it is remarkable that the international right to self-defense is a genuine product of the interplay between the law of war and international law. The development of the doctrine of *jus ad bellum* (the right to go to war) was reinstated by the international community following World War II, but this time with new restricted borders. The international community deemed it of much importance to prohibit all means of the use of force under Article 2(4) of the UN Charter, and thus promoted a new era of peace and

1. MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 504 (West Group 2001) (1997).

2. See generally Charter of the United Nations (providing that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”); see also Werner Levi, *Contemporary International Law*, in JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 6 (Erwin Chemerinsky et al. eds., 2002) [hereinafter: DRW].

3. Charter of the United Nations, art. 51 (providing a general prohibition on the use of force).

4. See *id.*

5. *Id.*

security.⁶ Nevertheless, considering the right to self-defense as an inherent right of every sovereign state,⁷ the international community has acknowledged the right to self-defense as “permissible use of force.” This was the “Exception” and not the rule. Therefore, it is the notion of limiting states’ power to go to war, limited only to actions of self-defense. Yet the question is: limited to what extent? This is a question for the horizontal analysis to answer.

Horizontal analysis invites to the discussion a parallel phenomenon; it is the domestic theory of self-defense—the original grounds of the concept of self-defense. It is true: one may plausibly argue against the application of a domestic theory over the international sphere, mainly because the actor is a human being in the former case, and a state in the latter. Nonetheless, it has never been denied that the legal philosophy behind both of them is alike. Moreover, the domestic theory can elaborate on the international theory by showing the need to restrict self-defense to an “armed attack,” which of course does not include all kinds of “threats.” Thus, a sensitive interplay between the two theories may provide the international legal community with a plain and defined notion of self-defense, and thus help to avoid misuse of the vagueness of the contemporary interpretation granted to the international right to self-defense.

Therefore, in the first section, I present the romantic notion of the law of war, by which I mean the traditional concept of the law of war, which is best illustrated by the almost unlimited power to use force both against military targets and civilian targets, and accordingly the horrific implications of such an understanding of the concept. In the second section, I address the post-World War II transition toward what I view as “the golden age of the law of war,” namely the post-Charter era, focusing on the outstanding limits imposed by the international community on the use of force. That is, deeming the law of war as war between states, rather than nations, as well as drafting a general prohibition on the use of force, except in self-defense. Focusing on the exception for the general prohibition of the use of force, in the third section I challenge the traditional reading of Article 51 of the UN Charter. I provide three possible defense arguments under Article 51: 1) reactive; 2) anticipatory/preemptive; and 3) preventive. The reactive approach is a very restrictive form of the right to self-defense, for which an act of self-defense is permissible only in response to an armed attack that had already occurred or to an imminent threat of an armed attack. The anticipatory/preemptive approach is a broader form of self-defense. It includes a potential, but not visible, threat that has not reached a level of “imminent threat.” Finally, the preventive

6. *Id.* at art. 2, para. 4.

7. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 189 (4th ed. Aspen Publishers 2003) (1988).

approach is the broadest and almost the unlimited form of self-defense. It includes threats that have not yet emerged at all. They are not even potential threats. They are solely threats that might emerge one day. Inquiring these three defense arguments, I assert that the international right to self-defense should be limited solely to reactive self-defense, by which I mean in response to an armed attack or to an imminent threat of an armed attack. This position is best advocated by the general and consistent trend of the international community to restrict all means of the use of force, and ultimately by understanding the essential features of the domestic theory of self-defense. In my view, adopting any defense argument other than the restrictive one would miss the goal that Article 51 was hoped to achieve. Finally, I conclude by criticizing the rise of the preventive approach as a legitimate ground for permissible use of force, argued to be the necessary approach in the contemporary “Age of Terrorism” as well as in the age of the non-conventional and nuclear arming.

II. ROMANTICS AT WAR:⁸ NATIONS AND THE “UNLIMITED” *JUS AD BELLUM*

Medieval writers distinguished between *jus ad bellum*, the justice of war, and *jus in bello*, the justice in war.⁹ *Jus ad bellum* requires making judgments about aggression and self-defense. *Jus in bello* is “about the observance or violation of the customary and positive rules of engagement.”¹⁰ The distinction between war among nations and war among states is of significant importance under the theory of *jus in bello*.¹¹ One of the important questions, therefore, is who takes part in the war.

Nationhood refers to people—ordinary people—who may or may not have a state. Something stronger than a state bounds the people together. That is the Shakespearean narrative of brotherhood (family-hood),¹² which encompasses a national identity for the people. The nation bears the factors that constitute

8. In his book, Professor George Fletcher provides a novel analysis of the law of war from a romantic perspective. See GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* (2002). On the theory of Romanticism, see ISAAH BERLIN, *THE ROOTS OF ROMANTICISM* (Henry Hardy ed., Princeton University Press 2001) (1999). In the context of the law of war, I provide the romanticism theory as binoculars by which I can view traditional views throughout modern ones.

9. See JANIS & NOYES, *supra* note 1, at 505.

10. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 21 (3d ed. 2000).

11. FLETCHER, *supra* note 8, at 47, 58 (“This body of rules that legitimates conduct otherwise subject to punishment.”).

12. WILLIAM SHAKESPEARE, *THE LIFE OF HENRY V ACT 4, SC. 3* (“[W]e band of brothers; For he today that sheds his blood with me [s]hall be my brother . . .”). The Notion of the brotherhood was raised again in the context of the American war on Iraq and on Afghanistan, namely a “war for honor and glory.”

each individual—the language, the history, the culture, the bond between geography and self.¹³ The “nation” is what people feel “part of,” rather than merely “belong to.” It is one large entity, which has its own existence; it is a “self.” “Nation” is personal; people have loyalty to it, e.g. they can betray the nation whether it is embodied in a state or not. The nation acts in history, achieving greatness and committing crimes, and for its glory as well as its shame. The nation must receive a share of both the credit and the blame.¹⁴ Literally, the concept of nation is derived etymologically from the Latin *natio* (birth). That is, the nation includes all those born and unborn.¹⁵ Unlike a nation, a state is a political entity. It has no “self” existence. It is derived from the “will of the people” and for the “will of the people.” State is what people “belong to,” but not necessarily what they feel “part of.” If the people are part of the nation, it follows that the nation comes first, and thus legitimizes the establishment of the state. Unlike “nation,” state is timeless; it does not exist in time. State is not about death and birth, but about organization of power.

Reading the general context of the Lieber Code,¹⁶ deemed as the first original and official codified rules on the law of war,¹⁷ it is more likely that Francis Lieber viewed the war as among nations. For Lieber, not only combatants take part in the warfare but also noncombatants, as best illustrated by Article 20, which provides: “[P]ublic war is a state of armed hostility between *sovereign nations* or governments. It is a law and requisite . . . *called states or nations*, whose constituents bear, enjoy, and suffer, *advance and retrograde together, in peace and in war.*”¹⁸ However, Lieber was not off track in his time. Six months after the Lieber Code came into existence Abraham Lincoln delivered his famous Gettysburg address, invoking precisely the establishment of “a new nation.”¹⁹ This was, therefore, a notion of warfare in the shadow of nationhood: “A war energetically carried on cannot be entirely

13. The sense of nationhood has played a great role in American history. See FLETCHER, *supra* note 8, at Xiii.

14. FLETCHER, *supra* note 8, at 139.

15. *Id.* at 140. When Lincoln cast his regard back “four score and seven years,” he thought not of the American people but of the American nation as the concept embracing generations over time.

16. U.S. War Department, General Orders No. 100 (1863), reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 3 (Martinus Nijhoff Publishers 1988) (1973).

17. It is “the first” in the sense that it had a large impact not only on the United States but also on other comparative jurisprudences. If I had to describe its importance in two words, I would say “*Universal Code.*”

18. U.S. WAR DEPARTMENT, *supra* note 16, at art. 20 (emphasis added). See also *id.* at art. 21 (“[T]he citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.”).

19. ABRAHAM LINCOLN, *GETTYSBURG ADDRESS* (Nov. 19, 1863). Note: this is an outmoded notion of the 19th century, which replaced the notion of warfare as among religions.

confined to acts against the enemy under arms and his means of defense, but it will tend also to cause the destruction of his materials and moral resources. No consideration can be given to the dictates of humanity, such as consideration for persons and property, unless they are in accordance with the nature and object of the war.”²⁰

Ultimately, the Lieber Code represents the romantic notion of the law of war—a common perception until the end of the 19th century—namely war between nations. The romantic war at its best is the escape of the quotidian and the pursuit of glory.²¹ Every citizen, every woman, every child, and every soldier are all alike. They are all combatants in the field, they all have the glory of the victory and the shame of the defeat, and thus they all have the right to kill and the risk to be killed. This is the romantic thinking; the nation acts as a character in the drama of war and reconciliation. It is an entity of the people; each is a major component of this united fabric. This is a war of all people, namely the nation is the actor in the battlefield. The “nation” is the soldier.²² That is, once there is a war, all are part of it, and therefore individuals do not exist anymore; they disappear merely as being part of the nation. They become a legitimate target, exactly as they are legitimized for targeting others.²³ This I view as a notion of “heavy war,” where no limits on warfare, and where no protected person exists. It is a war with one ultimate goal: “winning the war.”²⁴

However, the romantic perspective of the law of war affected not only the *jus in bello*, but also the *jus ad bellum* doctrine, which concerns itself with the justice of war. Akin to the ultimate unlimited notion of *jus in bello*, the 19th century imposed fewer restraints, if any, on the right to go to war. It is true: the international community recognized the legitimacy to self-defense long before the United Nations ever existed.²⁵ Nonetheless, the right to self-defense was

20. See PETER MAGUIRE, LAW AND WAR, AN AMERICAN STORY 71 (2000) (quoting German General Staff's *Manual of Land Warfare (Kriegsgebrauchim Landkriege)*).

21. FLETCHER, *supra* note 8, at 17.

22. See generally JOHN RAWLS, THE LAW OF PEOPLES: WITH “THE IDEA OF PUBLIC REASON REVISITED,” (1999) (Rawls uses the word “people” synonymously with “nation”).

23. On the “equal right to kill,” see WALZER, *supra* note 10, at 41. See also FLETCHER, *supra* note 8, at 92.

24. This notion of “heavy war” is a flawed approach, as it exposes innocent people, who are not willing to take part in the warfare, to the harsh conditions of the war, merely because they are part of the nation. See also *The Prize Cases*, 67 U.S. 635 (1862) (J. Nelson, dissenting). On the issue of collective guilt, see FLETCHER, *supra* note 8, at 37.

25. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UNITED NATIONS CHARTER PARADIGM 72 (1993); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5 (1963). See also Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 128 (1999) (discussing the justification of military action in response to the threat that Iraq poses).

recognized as a vague concept,²⁶ it was deemed to be more a right to self-preservation,²⁷ namely an absolute right, laying at the foundation of all of the other rights of states.²⁸ This was the case until World War II ended.

III. THE GOLDEN AGE OF THE LAW OF WAR: LIMITING STATES' POWER

World War II exposed an inevitable need for re-casting the international rules on the use of force. This was an urgent requisite to minimize, to the greatest extent possible, the exceptions for the use of force. The international community, therefore, promoted the emergence of the UN Charter in 1945 and the Geneva Conventions in 1949. Both documents came into the world with a new terminology on the law of war. The UN Charter limited the international legal personality to states, and provided a general prohibition on the use of force, subject to exceptions.²⁹ In the same vein, the Geneva Conventions enhanced the international community with the concept of protected persons,³⁰ as distinguished from states, more precisely, from the combatant forces (the military). In sum, the UN Charter provided a new meaning for the *jus ad bellum*,³¹ and the Geneva Conventions superseded the romantic meaning of the *jus in bello*. It is in my view a clear transition from the concept of nationhood to the idea of statehood.

Accordingly, the modern law of war has restricted the reciprocal relationship to combatants. Only combatants are subject to being killed, and therefore only combatants enjoy the collective right to use force.³² The 1949 Geneva Convention changed the romantic meaning of war: sick people, civilians, and prisoners "cannot be touched."³³ It is a new concept of what I view as "light war," namely, the ultimate goal of the war is not simply winning

26. LOUIS HENKIN, *RIGHT V. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE* 37 (2d ed. 1991).

27. As once argued by jurist William Hall: "[International law has] no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up. See WILLIAM E. HALL, *A TREATISE ON INTERNATIONAL LAW* (A. Pearce Higgins ed., 8th ed. 2001).

28. JANIS, *supra* note 7, at 189.

29. Charter of the United States, *supra* note 2.

30. Sick people, civilians, and prisoners.

31. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 *YALE J. INT'L L.* 279, 281 (1985) (providing criteria for the justification of the lawful use of force in international law).

32. See FLETCHER, *supra* note 8, at 54.

33. The Fourth Geneva Convention, Aug. 12, 1949, 75 U.N.T.S. 973. See SHAKESPEARE, *supra* note 122; (Henry V orders his troops neither to humiliate the French language nor to touch the church, women and children. These are innocent persons, unlike the prisoners whom he orders to kill). See also Department of Defense, Military Commission Instruction No. 2 5(G) (2003).

the war, but rather keeping noncombatants away from the atrocities of war. In the same vein, the UN Charter limited the right to self-defense, both individual and collective, to states.³⁴ States are the ultimate subject of the Charter; hence it is only for the military forces (the “lawful combatants”) to use force.

Unfortunately, whereas the need to restrict the gross means used in the battlefield has been in large consensus among the international community, the meaning and the essence of a state’s right to self-defense is still in dispute.³⁵ That is, what are the borders of the right to self-defense? Under what circumstances may a state invoke it? Is it derived from the same rationales as the domestic right to self-defense? What difference does it make, if any? Is there any interplay between the rules of the UN Charter and the unwritten rules of international law of the pre-Charter era, what modern international lawyers call Customary International Law?

IV. STATES AND THE INTERNATIONAL RIGHT TO SELF-DEFENSE

On June 5, 1967, the turmoil between Israel and its neighboring Arab states escalated into a military confrontation, as Israel commenced a series of air strikes on the Egyptian air forces. Apparently, the crisis had its origin in reports circulated by Soviet officials in mid-May, to the United Arab Republic (UAR),³⁶ that Israel was amassing its forces on the Syrian border.³⁷ Upon learning that, Egypt amassed its troops on Israel’s border, closed the Straits of Tiran to Israeli shipping, and secured command control over the armies of Jordan, Syria, and Iraq. In addition, Egypt had engaged in hostile propaganda against Israel, and President Nasser of Egypt had repeatedly made bellicose threats, including the total destruction of Israel.³⁸ The scope and intensity of Egypt’s buildup, together with the mobilization of virtually every Arab army, was observed with near-panic in Israel. For Israel, the Egyptian attack was only hours away, and, therefore, Israel launched the first strike on June 5, 1967.

34. Charter of the United Nations, *supra* note 3. This is unlike the right to self-defense under the Rome Statute of 1998, which grants individuals the right to self-defense. See Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute]. Cf. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 31 (July 9).

35. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 659 (2d ed. 1987).

36. A country that existed as a union between Egypt and Syria, established on February 1, 1958.

37. WALZER, *supra* note 10, at 82–83.

38. GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 20–21 (1988); MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* 75, 97, 108–09 (2002).

Whereas Israelis believed that Israel's use of force was justified by the dramatic threatening events of the previous weeks, Arab states argued that in the absence of an armed attack, Israel was not allowed to use any means of force under the UN Charter.³⁹ That is, unless an armed attack had occurred, Israel was not allowed to invoke a right to self-defense. Nevertheless, the United Nations Security Council took no position, as to whether Israel acted under self-defense or not. The Israeli attacks were neither proscribed nor praised.⁴⁰ The question, therefore, is whether Israel could have argued any defensible position under international law?

Under the UN Charter, which introduces the notion of a general prohibition on the unilateral use of force by states,⁴¹ war is inherently unjust. The only "justified war"⁴² would be a war against an aggressor,⁴³ namely in self-defense by a victim state.⁴⁴ Under the terms of Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs"⁴⁵

Reading the simple words of Article 51, it becomes obvious that the international community recognizes, ultimately, a limited right of permissible use of force. However, the international right to self-defense was recognized, though in other versions, long before the international community drafted or ratified the UN Charter. The pre-Charter right to self-defense, known nowadays as the inherent right to self-defense, is considered as not limited to an armed attack. Nevertheless, given the vagueness of the right to self-defense in the pre-Charter climate, known as customary international law, and the narrowness of this right under the post-Charter, the question becomes, did this customary international law survive the establishment of the UN Charter? If yes, in which context, and to what extent?

39. AREND & BECK, *supra* note 25, at 76–77.

40. Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks against Iraq Justified?*, 12 MICH. ST. J. INT'L L. 1, 15–16 (2003) (discussing the legitimacy of attacking Iraq).

41. Charter of the United Nations, *supra* note 2, at art. 2, para. 4.

42. In the fifth century, St. Augustine and other church fathers distinguished just from unjust wars, arguing that:

[J]ust wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further that kind of war is undoubtedly just which God Himself ordains.

JANIS, *supra* note 7, at 171.

43. Compare G.A. Res. 3314 (XXIX), ¶ 3, U.N. GAOR, 29th Sess., 2319th plen. mtg., with U.N. Doc A/RES/3314 (1974).

44. JANIS & NOYES, *supra* note 1, at 514.

45. Charter of the United Nations, *supra* note 2.

V. THE INTERNATIONAL RIGHT TO SELF-DEFENSE: A RESTRICTED APPROACH

In time, the language of Article 51 proved not to be without ambiguities. However, it has been accepted that the right to self-defense is subject to limitations of “necessity” and “proportionality.”⁴⁶ It has also been accepted that self-defense includes both a right to repel an armed attack and to take the war to the aggressor state,⁴⁷ in order to terminate the attack and prevent a recurrence. The ambiguity upon Article 51, therefore, is limited to the arguable meaning of the term “if an armed attack occurs.”⁴⁸ The question, therefore, what is “permissible use of force” under Article 51 of the UN Charter?

A. Reactive Self-Defense

The reactive self-defense approach is derived from the precise meaning of the term “if an armed attack occurs.” That is, self-defense to an aggression that is already done or in progress. The classic case⁴⁹ is the war on Afghanistan, which is regarded as a response to the September 11 attacks. Nonetheless, the 1967 Israeli-Egyptian case is more controversial, and thus raises the question as to whether the term “if an armed attack occurs” includes “imminent threat” as a legal ground for invoking the right to self-defense.⁵⁰ Perhaps the mere presence of the Egyptian army in Sinai was not grounds for launching a “preemptive attack.”⁵¹

46. See JANIS & NOYES, *supra* note 1, at 518.

47. I may note that the notion of taking the war to the aggressor state raises, in my view, several interesting legal questions. The classic rationale behind the right to self-defense is to repel the aggression or the threat of the aggression, but not to go after the aggressor to his “house” and continue the aggression. That would be a clear case of excessive self-defense which is impermissible use of force. Whereas this rationale plainly corresponds to the domestic right to self-defense, it might need to be addressed from a different angle in the context of the international law. However, I leave this issue for a separate inquiry.

48. Charter of the United Nations, *supra* note 2. Note that in the lack of the word “unlawful,” besides the term “armed attack,” one may plausibly argue that once there is an armed attack, the other side can respond as means of self-defense, but also the one that waged the first attack can respond to the attack waged as means of self-defense, also as means of self-defense. *Remember:* unlike “aggression,” “armed attack” does not include in itself the unlawful feature of aggression. However, since I believe that the drafters did not pay much attention to this term, the right to self-defense should be interpreted as limited to “unlawful armed attack.” Otherwise, it will be contrary to the rationale behind treating self-defense as permissible use of force rather than aggression, namely as a defense of justification rather than an excuse.

49. It is arguable though if the right to self-defense might be invoked against non-state actor, e.g., Al-Qaeda or PLO. For instance, see Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 31 (July 9).

50. FLETCHER, *supra* note 38, at 21; Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 222, 254 (2004).

51. As Eskol, the Israeli Prime Minister and the Minister of Defense, at that time, argued. See

But, why would we include “imminent threat” if it is not mentioned explicitly in Article 51? Is it necessarily built into the “inherent right to self-defense?” I argue: “It is.” To illustrate my argument, allow me to make an analogy to domestic law, and address *Goetz*,⁵² an American homicide case, as a case whose issue parallels the Israeli-Egyptian case. Goetz had been asked for five dollars by four black guys in the subway of New York City.⁵³ The presence context of the request for five dollars was critical, as it could be understood as intimidation or a simple request that could be declined, depending on the tone and the circumstances. If the request was an act of threat of coercion, the circumstances are much closer to an imminent attack, and therefore the response of Goetz, shooting the four black youths,⁵⁴ should be considered as a legal act of self-defense. The idea is that once a person is attacked, repelling the aggression is the right thing to do. A person does not have to wait until the aggressor achieves his goal. Once there is “sufficient evidence” for an imminent threat to be attacked, the victim is not required to wait. Our focus therefore is on the coercion leading up to an arguable attack. Once it is obvious, the victim may act. “The requirement of imminence means that the time for the use of force will brook no delay.”⁵⁵ The defender cannot wait any longer.⁵⁶

What would be considered “an imminent threat” under this analysis? When A’ raises his arm toward B’ in order to assault him, A’ is not required to wait. It is his right to repel this assault before reaching him. This is right as to individuals, but how does that apply under international law, *i.e.* to states? Allow me to take an advantage, again, of the 1967 Six Days of War.⁵⁷ There is no doubt that Egypt was attempting to intimidate Israel by behaving as though it was about to attack. All evidence indicated that Nasser would soon stage a provocation,⁵⁸ and thus “every delay was a gamble with the Israel’s survival.”⁵⁹ Therefore, though Israel could have waited to be actually attacked,

OREN, *supra* note 38, at 134. Note that it is possible that Egypt had already breached international law by closing the straits of Tiran to Israeli shipping.

52. See generally *New York v. Goetz*, 68 N.Y.2d 96 (1986).

53. *Id.* at 100.

54. *Id.*

55. GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 133 (1998).

56. See also *The Model Penal Code*, § 3.04, and *Rome Statute of the International Criminal Court*, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999.

57. See OREN, *supra* note 38.

58. As General Yariv informed Eshkol. See *id.* at 97.

59. As Netanyahu, a platoon commander in the paratroopers wrote to his girlfriend back home. *Id.* at 98.

the requirement of imminence does not mean that bombs must be in the air. The actions of the Arab states were irrevocable steps toward war, were rightly seen as such, and constituted a prior armed attack to which the intended victim could legitimately respond.⁶⁰ And if anything short of letting the missiles fly constitutes an imminent attack, then this requirement was fulfilled when Israel launched its first strike.⁶¹ To say, states, unlike individuals, do not have arms to raise, but rather they have troops, air forces, and missiles. Once a state launches its missiles or amasses its troops on the borders, under circumstances of intimidation, the intended state is not required to wait anymore, and it can legitimately perform an act of self-defense seeking to avert the intended attack.

However, if amassing troops on the border is not sufficient to illustrate the “imminent threat” argument, how about the Soviet Union building medium-ranged ballistic missile sites in Cuba and transporting weapons to the island, all in 1962. Could have President John Kennedy let the offensive military preparation continue? “Yes.” Should have he done so? “No.” The threat was imminent. Although the United Nations Security Council did not pass a resolution, the Council of the Organization of American States supported America’s plan and recommended that its member “take all measures . . . including the use of armed force which they may deem necessary.”⁶² The Cuban Missile Crisis of 1962–63 illustrates the extent to which states deemed a threat as imminent, and that actions against it shall be taken, including the use of force.

B. Anticipatory/Preemptive Self-Defense

Having said all that, I am aware that this is not how international law scholars view Article 51. Invoking the so-called anticipatory/preemptive self-defense, scholars rely on the *Caroline* precedent of 1837,⁶³ where Webster, the

60. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 112–13 (2d ed. 2000); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 173 (Cambridge University Press 2001) (1988) (Dinstein uses the term “interceptive self-defense,” which takes place where after the aggressor state takes irrevocable steps to make an armed attack but before the aggressor is able to actually fire the first shot); W. Michael Reisman, *Assessing Claims to Revise the Law of War*, 97 AM. J. INT’L L. 82, 87–88 (2003) (Reisman argues that the relation that prevailed between Egypt and Israel at the time may have already been one of belligerency so that the air attack could have been seen as reactive self-defense under Article 51 of the UN Charter).

61. FLETCHER, *supra* note 38, at 21.

62. See Resolution on the Adoption of Necessary Measures to Prevent Cuba from Threatening the Peace and Security of the Continent, Annex A, OEA/Ser.G/V/C-d-1024 Rev. 2 (Oct. 23, 1962).

63. The facts of *Caroline* arose in the context of an insurrection in Canada in 1837, where insurgents moved supplies and gained recruits from the United States. The *Caroline* was a steamer employed by an insurgent group. On December 29, 1837, while the steamer was docked on the American side of the Niagara River, Canadian soldiers crossed to the American side of the river, destroyed the ship, and caused casualties among American citizens defending the vessel. British Foreign Minister Lord Palmerston claimed a right of self-defense.

Secretary of State, wrote that to make a showing of self-defense, a state must show "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." It was a case with which only potential threat existed, and therefore some international law scholars view the reference to "inherent right" as incorporating a right to anticipatory/preemptive self-defense, derived from long-standing international practice, so-called by modern international lawyers Customary International Law.⁶⁴

With this view I cannot agree. This is nothing but a misuse of the *Caroline* precedent. It is right that the *Caroline* circumstances were those of which there was no imminent threat, but rather a potential one, and thus force was used as means of preemptive power. Nevertheless, in his letter, Webster did not address the conditions by which states are entitled to use preemptive force. He did not even invoke the term "preemption/anticipation." Rather, Webster addressed precisely the notion of "imminent threat," as equivalent to the clear case of aggression that is already done. In my view, there has been a large and deep misunderstanding of the *Caroline* precedent. If at all, it is a strong precedent for acknowledging "imminent threat" as a legal ground for permissible use of force.

The trouble is that scholars do not distinguish between cases of "imminent threat" and others of "anticipation/preemption." This cannot be correct: an anticipatory/preemptive strike is grounded on a prediction of how the feared enemy is likely to behave in the future. Though it could be a rational assumption, it is not based on a visible aggression, and thus it is illegal.⁶⁵ Whereas in cases of anticipatory/preemptive self-defense there is neither a visible aggression nor a visible threat in vista, "imminent threat" cases deal not only with visible aggression in vista, but in particular with aggression visible just beyond the threshold. It is an aggression that a state can see and not just feel. One does not need binoculars to see it. The classic case for illustrating anticipatory threat, but not imminent, is the Israeli strike against the Iraqi nuclear reactor in 1981. Not only was the Israeli attack clearly grounded on potential fear, but also, Israel was unable to show a shred of evidence either to support its claim that the Iraq's plutonium purchases had more to do with the creation of weapons than with nonviolent means, or for the assertion that a nuclear attack was imminent or at least visible. Therefore, in 1981, the United Nations Security Council adopted a resolution, *inter alia*, condemning the Israeli attack.⁶⁶

64. E.g., Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26:2 THE WASHINGTON QUARTERLY 89, 92 (Spring 2003).

65. FLETCHER, *supra* note 38, at 20.

66. See S.C. Res. 487, at 10, U.N. SCOR, 36th Sess., U.N. Doc. S/RES/487 (June 19, 1981).

To those who insist on relying on *Caroline*, argued to be Customary International Law, it is notable that Customary International Law is not only about the practice of states but also about *Jus Cogens* (Compelling and Higher Law). Not only that in the period between *Caroline* and the establishment of the UN Charter, states considered it acceptable to engage in military action where a state's neighbor state had massed forces along the border between the two; but also I doubt if any *Jus Cogens* was ever developed to support an attack of anticipation/preemption.⁶⁷ If that is not enough to overturn *Caroline*, as arguably understood, and if the UN Charter's language is also not sufficient, it is thus the conflict between Nicaragua and the United States that demonstrates how narrowly Article 51, and its threshold of an armed attack, is defined by the United Nations Security Council, the General Assembly, and the International Court of Justice.⁶⁸

C. "Preventive" Self-Defense

Preventive self-defense is nothing but the romantic extension of the right to self-defense. Accordingly, there is no dispute among international law scholars that this form of the romantic concept of self-defense is illegal under the UN Charter. If so, how does it fit in this context of our discussion?

The modern resurrection of preventive self-defense argument has emerged in the post September 11 "War against Terror," which included the invasion of Iraq. Invoking a right to preemptive self-defense, the Bush Administration articulated this right as an adaptation of the concept of imminent threat to the capabilities and objectives of today's adversaries. The Administration theory was that it was no longer fair to require a state to wait until a threat is imminent,

67. In addition, the acceptability of a first strike was also gauged against the level of threat of invasion from the invaded state. See Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87, 107-08 (2004). See also JOHN CHILDS, *ARMIES AND WARFARE IN EUROPE 1648-1789* (1982).

68. United States used force to support the government of El Salvador against rebels being sustained by Nicaragua. Nicaragua complained to the United Nations Security Council in March of 1982. However, the Security Council found Nicaragua's complaints to be groundless. One year later, Nicaragua convened the Security Council to investigate a new aggressive escalation of acts by the American Administration, in the form of massive infiltration of military units and task forces of counter-revolutionaries. The Security Council unanimously reaffirmed the right of Nicaragua and all other countries in the area to live in peace and security, free from outside interference. Despite the Security Council's position on this matter, Nicaragua continued to complain of attacks and, therefore, requested yet another Council meeting to review the situation on September 12, 1983. In March 1984, Nicaragua confirmed that the United States had mined its harbors. By this time, the United State's support in the United Nations was deteriorating quickly. See SANDGREN, *supra* note 40, at 12. It is remarkable though that in *Nicaragua*, only one of the dissenting judges expressed his support for a right of anticipatory/preemptive self-defense under Article 51.

and it argued that “with weapons of mass destruction, any enemy must be stopped upon or prior to possession of these weapons.”⁶⁹

To my view, even though the Bush Administration used the expression “preemptive self-defense,” the facts of the invasion of Iraq do not support the case for preemption, as there was neither visible nor potential threat, if any. Therefore, the war on Iraq seems, at best, to qualify as an instance of preventive war, to say a war of deterrence. Preventive war is not an acceptable exception, however, to the Charter system’s prohibition on the use of force.⁷⁰

D. Conclusion

There is no doubt that the UN Charter is the ultimate legal source for permissible use of force. The permissible use of force is limited to acts of state self-defense, which can be performed only in response to an armed attack, including an imminent threat to amount to an armed attack. This is the only possible reading of Article 51 of the UN Charter, paying primarily attention to the establishment of the United Nations, holding the desire of the international community to maintain peace and security in the world. This is correct in general, but also in particular in reference to the devastation of World War II, which was the primary incentive for the establishment of the United Nations, deemed to be the ultimate police power of the worldwide security. These restricted premises are the only legitimate form of self-defense under Article 51.

VI. EPILOGUE: RESURRECTING ROMANTICS AT WAR— ALL THE WAY BACK TO “HELL”⁷¹

If it was World War II that promoted the constitution of the UN Charter, here is the aftermath of the September 11 attacks resurrected, in the hands of the Bush Administration, the romantic notion of the law of war, which was bypassed by the UN Charter. Whereas the western world deems 9/11 as an act of terror or an unlawful attack (aggression) against the United States of America, fanatic Islamic organizations, on top of them Al-Qaeda, deem it as a war against the “Western Nation.” That is, no protected western person exists anymore for the purposes of this war. Persons are a means of an ultimate end: winning the war. Akin is the war on Afghanistan, which is led by the desire or

69. White House, *The National Security Strategy of the United States of America* 15 (Sept. 17, 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Oct. 3, 2006).

70. Richard A. Falk, *Agora: Future Implication on the Iraq Conflict: What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590, 598 (2003). WALZER, *supra* note 10, at 76 (Walzer argues that a preventive war is a war fought to maintain the balance; a key to peace among states).

71. WALZER, *supra* note 10, at 22.

the need to bring back the lost honor of the American nation, and thus to achieve a glory for the American People. The September 11 attacks were deemed by the American People as a sense of national shame.

This becomes manifest by waging the war on Iraq. The invasion of Iraq by the United States created a new precedent for preventive self-defense, which is clearly prohibited by almost all views of international law. I feel that the international law, and in particular the United Nations and the International Court of Justice, will be required to break their silence and take a position within the coming three years, assuming that the Bush Administration will continue to apply the same policy of preventive self-defense articulated with terms of preemptive self-defense.

Unlike municipal law, international law is not a packet of rules. Rather, it is a packet of rulers. The United States is one of the five permanent members in the Security Council, and in addition to the veto power, it enjoys the most meaningful military power worldwide. Moreover, international law is not conclusive to what states achieve by concluding consensual treaties. It includes also customary international law, which is usually not pre-defined, and is constructed of various practices, among them the resolutions of the Security Council. Given this picture, the application of the preventive self-defense approach, with the mere silence of the international community, may evolve one day to become part of the legal international law, namely customary international law—whether by explicit consent or by acquiescence. If that happens, and I believe it has already begun to emerge, that would be the certain sway toward the resurrection of “Romantics at War,”⁷² leading the scholars of the future by what would be remembered as the Invasion of Iraq precedent.

To end with, in my view self-defense either exists or not. There is no category in between. Once there is “imminent threat,” always the right to self-defense can be invoked. It is only a question of evidence. However, I have to admit that giving the rapid expansion of technology a threat may not always be visible. Nevertheless, it is our duty as scholars to draw the theory regardless the event, but never articulate a theory in light of the event. But, as Winston Churchill once argued: “This is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”⁷³

72. See generally FLETCHER, *supra* note 8.

73. See Winston Churchill, This is Not the End, Speech given at the Lord Mayor's Luncheon in Mansion House, London (Nov. 10, 1942), available at <http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=388#beaches> (last visited Oct. 3, 2006).

PRESIDENTIAL WAR POWERS IN A NEVER-ENDING “WAR”

*Seth Weinberger**

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I. INTRODUCTION

On December 16, 2005, the *New York Times* ran an article revealing that the Bush Administration had, in the months immediately following the attacks of September 11, secretly authorized the National Security Agency (NSA) to monitor the international telephone and email communications of “hundreds, perhaps thousands, of people inside the United States without warrants in an effort to track possible ‘dirty numbers’ linked to al Qaeda.”¹ The resulting firestorm from the disclosure was extremely fierce as civil liberties activists, scholars and pundits from all political perspectives weighed in on the legality and constitutionality of the surveillance program. President Bush and members of his administration, including United States Attorney General Alberto Gonzales, quickly offered arguments supporting the operation.

The main thrust of the administration’s defense—and the argument considered herein—of the NSA surveillance program is that “the Authorization for the Use of Military Force (AUMF) [passed by the United States Congress on September 18, 2001 in response to the September 11 attacks] places the President at the zenith of his powers in authorizing the NSA activities.”² In essence, the administration is arguing that by authorizing the President to use force against those who were involved in any way in the 9/11 attacks on the World Trade Center and the Pentagon, Congress declared war against al Qaeda and other terrorist organizations, and by doing so gave the President power to

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1. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

2. Legal Authorities Supporting the Activities of the National Security Agency Described By The President (Jan. 19, 2006), U.S. Department of Justice, *available at* <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (last visited Sept. 27, 2006).

“intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations.”³

The argument that the United States is currently at war with al Qaeda and other international terrorist groups and that, therefore, the AUMF passed on September 18, 2001 gave the President sufficient legal authority to conduct the NSA program has been repeated multiple times by members of the Bush Administration. According to this logic, since the United States is involved in a war, the President’s constitutionally-designated role as Commander-in-Chief of the armed forces provides the necessary constitutional authority. In the words of Attorney General Alberto R. Gonzales:

The President’s authority to take military action—including the use of communications intelligence targeted at the enemy—does not come merely from his inherent constitutional powers. It comes directly from Congress as well. First, [Congress] expressly recognized the President’s authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States. Second, it supplemented that authority by authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons her determines planned, authorized, committed or aided the terrorist attacks” in order to prevent further attacks on the United States. The Resolution means that the President’s authority to use military force against those terrorist groups is at its maximum because he is acting with the express authorization of Congress.⁴

President Bush has echoed this logic, arguing that “Congress gave the President additional authority to use the traditional tools—or ‘fundamental incidents’—of war in the fight against terror when Congress passed the authorization for the use of military force in 2001.”⁵ This part of the administration’s defense of the NSA domestic surveillance program rests, therefore, on the argument that the country is at war in the formal and legal sense and that that war was declared by Congress, in accordance with congressional constitutional authority and responsibility, in the AUMF of September 18, 2001.

3. *Id.* at 1.

4. Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center (Jan. 24, 2006), U.S. Department of Justice, *available at* www.USDoj.gov/ag/speeches/2006/ag_speech_0601241.html (last visited Sept. 27, 2006).

5. Remarks by the President of the United States at the National Security Agency (Jan. 25, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/01/20060125-1.html> (last visited Sept. 27, 2006).

The NSA operation has come under attack from many different approaches. In a letter written to various members of Congress a group of legal scholars attacked the legality and constitutionality of the surveillance program on several grounds, arguing that even if it could be reasonably concluded that Congress, by passing the AUMF, had “silently authorized” the NSA program, the explicit prohibition of domestic wiretapping in the Foreign Intelligence Surveillance Act (FISA) would override such a tacit understanding of the AUMF, especially when combined with the Fourth Amendment’s restriction on unwarranted searches.⁶ The Congressional Research Service, in a memo entitled *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, concluded that it is difficult to conclude that the passage of FISA did not imply specific and explicit congressional intention to limit and control domestic surveillance operations. Furthermore, because Congress wrote into FISA a fifteen-day exception following a declaration of war in which the President could conduct warrantless domestic surveillance, “Congress seems clearly to have contemplated that FISA would continue to operate during war.”⁷

However, all of these critiques, while certainly trenchant and possibly correct, fail to engage the more fundamental constitutional questions of war powers that are posed by the dispute. What are the powers contained within a formal “declaration of war” and how do those powers fit into the balance between congressional and executive war powers? How does the authority and scope of Presidential power depend on whether a formal declaration has been made? Is the AUMF passed by Congress in the wake of the September 11th attacks tantamount to a declaration of war? These are some of the questions that will be considered herein.

Specifically, this paper will first examine the essential nature of a formally declared “war,” and will argue that the difference between “war” and “not war” is the degree to which the executive branch is given power by Congress to control the domestic arena with acts of an essentially legislative nature as a means of prosecuting a conflict. Thus, the President has wide latitude in the deployment of troops and the use of force, but, lacking explicit Congressional approval, is heavily restricted in the ability to mobilize or transform the home front, as when President Truman’s seizure of steel mills during the Korean War was rejected by the Supreme Court. Second, this paper will consider whether

6. Why the NSA Surveillance Program is Unlawful (Jan. 9, 2006), available at http://uchicagolaw.typepad.com/faculty/2006/01/why_the_nsa_sur.html (last visited Sept. 27, 2006).

7. ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 43 (2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (last visited Sept. 27, 2006).

Senate Joint Resolution 23 (the AUMF of September 18, 2001) is a declaration of war, arguing that it is not and consequently the power of the President to affect the domestic sphere is limited. Therefore, authorizing the NSA domestic surveillance program, as well as attempts to replace civilian courts with military tribunals or indefinitely detain suspected terrorists without allowing for writs of habeas corpus, is beyond the scope of executive power in peacetime. Finally, this paper will conclude that in an undefined war with little prospects of ever being “won” in a traditional sense, extreme caution should be exercised when handing the legislative reins to the executive branch in pursuit of “victory.”

II. THE MEANING OF “WAR” AND EXECUTIVE WAR POWERS

The first question to be considered is whether the AUMF passed by Congress, on which the President is basing much of his authorization for the NSA program, is the legal and constitutional equivalent of a declaration of war, and what difference the distinction of whether the country is “at war” makes, especially in the powers of the President. This is an offshoot of the more fundamental question of Presidential war powers which is broached in the Constitution itself. So, before considering what is meant by the constitutional authority to declare war, we shall first examine how the war powers are delegated.

The Constitution is actually quite specific in spelling out which branch has which power, though it fails to define exactly what certain powers entail. Article I, Section 8 gives Congress the power to declare war, but does not describe what a state of war is, nor whether there can be hostilities without a formal declaration of war.⁸ Congress is also given the power to raise and support armies with appropriations for no longer than two years, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces.⁹ The Presidential war powers are summed up in Article II, Section 2, in the line, “The President shall be Commander-in-Chief of the Army and Navy of the United States,” a power also left undefined.¹⁰ Thus, the delineation, at least at a very basic level, seems to be that Congress has the power to provide the President with military force that is to be commanded at the discretion of the executive. Declaring war is clearly and solely within congressional purview, but what is meant by declaring war is unexplained.

One logical place to examine the intentions of the Founding Fathers is the Federalist Papers. The first paper concerning war powers is Federalist Paper

8. U.S. CONST. art. I, § 8.

9. *Id.*

10. U.S. CONST. art. II, § 2.

24, which assures that the fear of an unchecked executive figure, able to command an army at his will, is assuaged by the division of the war powers.¹¹ This is a clear response to the colonial fear of a standing army being controlled by a king, or other ruler, without popular control. By vesting solely in Congress the power to raise an army, and by limiting all appropriations to no more than a two year period, it is ensured that “no military establishment without evident necessity” can be maintained.¹² It is the decision of Congress, and Congress alone, whether an army should be raised and funded, and thereby exists at all. Thus, the President’s control over the command of the forces is checked by the congressional power to cut off monies.

Federalist Paper 26 further confirms the opinion that the primary congressional war power is the power of the purse.¹³ Alexander Hamilton does recognize that Americans have a fear, and a well-justified one, of standing, peace-time armies, but responds that under the Constitution only the legislature, or in other words, the representatives of the people, will have the authority to raise an army, removing the threat of an imperial President using the troops to violate citizens’ liberties.¹⁴ Furthermore, the obligation to reconsider the need for the army and vote on its funding every two years will prevent the armed forces from being abused. These two provisions guarantee that American liberty can not be subverted by the executive branch’s command of the army.

The clearest indication of the constitutional intent for executive war powers can be found in Federalist 69, where Hamilton argues that the President’s authority as Commander-in-Chief:

[w]ould be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the *supreme command and direction* of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies¹⁵

Nowhere is it, or could it be, stated more plainly or directly that the President is to have ultimate and unchallenged ability to command and employ United States Armed Forces, with the checks and balances being his inability to raise, fund or regulate them.¹⁶ Federalist Paper 74 reinforces this claim, asserting that

11. THE FEDERALIST NO. 24 (Alexander Hamilton).

12. *Id.*

13. THE FEDERALIST NO. 26 (Alexander Hamilton).

14. *Id.*

15. THE FEDERALIST NO. 69 (Alexander Hamilton) (emphasis added).

16. *Id.*

it is essential in the conduct of hostilities for the command of the troops to be in one, single hand.¹⁷

Not only do the Federalist Papers assert that the President has sole power to order and command American soldiers, and that the congressional war powers are centered around appropriation powers, but case law supports this view as well. *Ex Parte Milligan* states that Congress has not only the power to raise and support armies, but also to declare war, a power that “extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.”¹⁸ Along these same lines, *Swaim v. United States* declares that while Congress may increase or reduce the military, or even abolish it altogether, “so long as we have a military force Congress can not take away from the President the supreme command.”¹⁹ As neither of these cases have ever been overturned, the principle still holds that the President has ultimate control over the order and employment of American armed forces, and Congress may neither command troops nor conduct their campaigns.

As to the constitutional emphasis on congressional appropriations power, *Holtzman v. Schlesinger* sets forth the principle that continued congressional appropriations, undoubtedly being used to prosecute hostilities (the Vietnam War, in the case in question), do constitute an implied authorization for the use of force.²⁰ Therefore, if Congress is opposed to the continuation of hostilities being conducted by the President, it would have the constitutional right to cut off funding to the troops, or to earmark that those funds could not be used in the specified conflict (a tactic which was ultimately used by Congress to end the United States military involvement in Vietnam).²¹ Elaborating on this point, *Spaulding v. Douglass Aircraft* gives Congress broad authority to control the manner in which funds appropriated in a budget may be used.²² Specifically, it allows Congress to not only designate the purpose of any given appropriation, but also to set terms and conditions under which the money may be spent.²³ Thus, it was within congressional authority to declare, for example, that funds

17. THE FEDERALIST NO. 74 (Alexander Hamilton).

18. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

19. *Swaim v. United States*, 28 Ct. Cl. 173 (1893).

20. *Holtzman v. Schlesinger*, 361 F.Supp. 553 (E.D.N.Y. 1973).

21. RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS (Jan. 10, 2001), available at <http://www.fas.org/man/crs/RS20775.pdf> (last visited Sept. 27, 2006).

22. *Spaulding v. Douglas Aircraft Co.*, 60 F.Supp. 985 (S.D.C. 1945).

23. *Id.* at 988.

delegated to the army in 1973 could not be used to conduct hostilities in Vietnam, or when, in 1984, Congress forbade the President from using monies to pursue conflicts in Latin America.²⁴ These restrictions do not interfere with the role of the Commander-in-Chief to command the troops in the field, but rather are a direct outgrowth of the power to raise and support an army. The power of the purse is recognized to be wholly in the hands of Congress, and is a broad means for the legislative branch to exercise checks and balances on the executive branch, by making it impossible to use appropriated funds in a particular manner.

However, *Holtzman v. Schlesinger* only addressed the issue of hostilities in progress at the time of the appropriation, and does not tell whether the President may use an already-funded army to initiate military operations without the express permission of Congress. In fact, the decision states that “appropriations bills do not necessarily indicate an open-ended approval of all military operations which may be conducted.”²⁵ The implication is that some other form of Congressional authorization may be required for the President to commit American soldiers into hostilities.

Mitchell v. Laird firmly established that it is constitutionally acceptable for Congress to use other means than a formal declaration of war to authorize approval for the conduct of hostilities.²⁶ In the unanimous decision, the court stated that “any attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences”²⁷ The decision also says that the manner in which Congress may or may not give its assent is largely a political one, and is to be determined by the other two branches.²⁸ Nevertheless, we have a firm decision that there are other acceptable means of congressional assent to the deployment of military force than a formal declaration of war.²⁹

Returning to *Spaulding v. Douglas Aircraft*, it is possible to determine one such means of “alternative” authorization. If it is within congressional rights to place rules and conditions on their appropriations packages, then what is the message when no such stipulations are made? Since Congress is aware, or should be aware, of its ability to place conditions on funds, if it does not choose to do so, then the money is free to be spent. Knowing full-well that the President often uses military force, Congress could place a restriction on the defense budget, by stating that appropriated funds do not give authorization to

24. *Id.* at 985.

25. *Holtzman v. Schlesinger*, 361 F.Supp. 553 (E.D.N.Y. 1973).

26. *Mitchell v. Laird*, 488 F. 2d 611 (1973).

27. *Id.* at 615.

28. *Id.*

29. *Id.*

conduct operations in a particular area, if they desire to restrain the President from engaging in such activities. It is within congressional authority to control how the United States military is funded and what it is funded for, but once it is funded, Congress has no control over how the troops are used. By placing no conditions on the funds, Congress tacitly assents to an “alternative” authorization of hostilities, permitted by *Mitchell v. Laird*.³⁰

Critics will argue this point, saying that specific Congressional authorization for the action in question is needed, and that such an indirect authorization is not valid or constitutional.³¹ However, neither precedent nor case history support this view, with both establishing that specific congressional assent to military actions may not be needed. *Durand v. Hollins* states that as the only legitimate organ of foreign policy, it is the President's job to protect the lives and interests of American citizens both at home and abroad.³² When the President is acting in this role, he is not required to obtain prior Congressional authorization to commit troops into hostilities.

Furthermore, since the inception of the United States Army, only five states of war have been declared by Congress, while there have been well over 215 instances in which United States military forces have been sent into conflict, or potential conflict, to protect United States citizens or promote American interests.³³ Commenting on this very point in the debate over the United Nations (U.N.) Charter, Senator Arthur Vandenberg noted that:

[i]f we were to require the consent of Congress to every use of our armed forces, it would not only violate the spirit of the Charter, but it would violate the spirit of the Constitution of the United States, because under the Constitution the President has certain rights to use our armed forces in the national defense without consulting Congress. [I]t is just as much a part of the Constitution as is the congressional right to declare war.³⁴

If Congress had thoroughly and completely objected to any of these instances of Presidentially-initiated hostilities, it could have passed a resolution against the action, cut off funding for the military, or even in the words of *Swaim v.*

30. *Mitchell v. Laird*, 488 F. 2d 611 (1973).

31. Karl Schonberg, *Global Security and Legal Restraint: Reconsidering War Powers After September 11*, 119 POLITICAL SCIENCE QUARTERLY 115 (2004).

32. *Durand v. Hollins*, 8 F.Cas. 111 (S.D.N.Y. 1860).

33. For a list of all uses of force by the United States, see RICHARD F. GRIMMETT, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2004, available at <http://www.history.navy.mil/library/online/forces.htm> (last visited November 18, 2006).

34. H.R. Rep. No. 1383, 79th Cong., 1st Sess. 7-8 (1945).

United States, “abolish it altogether.”³⁵ However, the normal congressional response has been silence. The existence and continued funding of a permanent standing military force, in light of a clear precedent of Presidential usage of the force, constitutes tacit congressional authorization of the Presidential utilization of that force.

Congress has never even tried to restrain a Presidential deployment of force using the War Powers Resolution, which was passed in 1973 as a response to the deployment of United States forces in Vietnam pursuant to the Gulf of Tonkin Resolution in lieu of a declaration of war. However:

[e]very President from President Nixon forward has taken the position that the War Powers Resolution is an unconstitutional infringement on the authority of the President, as Commander-in-Chief, to utilize the Armed Forces of the United States to defend what he determines are the vital national security interests of the United States.³⁶

By taking no action in over 200 cases, Congress has essentially resolved the political question and created a gloss on the Constitution, which, in the words of Justice Frankfurter's concurrence in the “Steel Seizure” case, constitutes:

a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive power’³⁷

By assenting time and time again to unilateral commencements and conduct of hostilities by the President, Congress has agreed that such actions are a recognized part of the executive power, which answers the political question raised in *Mitchell v. Laird*.³⁸ Congress, by continually appropriating the military budget with no restrictions or conditions, and by refusing to challenge the Presidential authority to unilaterally commence hostilities, Congress has granted the President the power to send American troops into combat without specific legislative authorization.

But, congressional silence on an unconstitutional Presidential action does not make it legal. Is it within his delegated powers for the President to send

35. *Swaim v. United States*, 28 Ct. Cl. 173 (1893).

36. RICHARD F. GRIMMETT, *supra* note 21, at 3.

37. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

38. *Mitchell v. Laird*, 488 F. 2d 611 (1973).

troops into hostilities without seeking either a declaration of war or other specific congressional approval? *Bas v. Tingy* established the principle that there are levels of hostility below a declared war, referred to as “imperfect wars” by Justice Washington.³⁹ These low-intensity conflicts are restrained by domestic law, and the President has no special emergency powers, the granting of which can only come from a Congressional declaration of war. The imperfect war, according to Justice Washington, is one in which an army has been raised and funded by Congress, and is limited in its nature.⁴⁰ Since Congress has raised and funded the United States Army, Air Force, Navy, and Marines, uses of the United States military power conducted without a formal declaration of war fits the category of imperfect war.

Almost all uses of U.S. military force meet the criteria of imperfect, rather than perfect, wars.⁴¹ *Bas v. Tingy* makes it clear that the President does have the right to use force without a declaration of war from Congress, but that in such conflicts, Presidential power to conduct those hostilities must be restrained.⁴² When combined with the “alternative authorizations” described above, a picture of executive war powers emerges; one in which the President has wide latitude to deploy U.S. military force without explicit authorization from Congress, let alone a formal declaration of war.

What good then is the congressional power to declare war? If the President can send troops into battle whenever and wherever he deems necessary, why would the President ever seek a declaration of war in the formal sense, and why is the power to declare war one of the war powers, along with power of the purse, explicitly given to Congress in the Constitution? The answer is in the distinction between perfect and imperfect wars as described in *Bas v. Tingy*, or in the difference between “war” and “not war.”

Bas v. Tingy describes an imperfect war as a “limited, partial, war” in which “those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission.”⁴³ A perfect war is defined as one in which “one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and

39. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

40. *Id.* at 40.

41. It has not yet been discussed whether the Authorization to Use Military Force, upon which President Bush is basing his authority for the NSA domestic surveillance program, is tantamount to a formal declaration of war, which would make the War on Terror a “perfect” war. This question will be considered below.

42. *Bas*, 4 U.S. at 41.

43. *Id.* at 43.

under every circumstance.”⁴⁴ These definitions are critical in understanding the importance of both the congressional power to declare war and the consequences of the distinction between “war” and “not war.”

The vast majority of instances of the use of U.S. military might fall well short of a conventional understanding of war, or that given in *Bas v. Tinny*. A war, in the formal sense, is one in which the entire effort of the country is given to the prosecution of the conflict.⁴⁵ This definition is supported by the description of the legal consequences of a declaration of war given by Justice Nelson in his dissent in *The Prize Cases*.⁴⁶ Nelson’s description included: The citizens of the warring nations become enemies, the suspension of all legal contracts, a right of interdiction of trade and commerce into the enemy nation, the ability to capture and confiscate the property of the enemy, and the right to blockade ports.⁴⁷ Furthermore, Nelson wrote that “no power short of [a congressional declaration of war] can change the legal status of the Government or the relations of its citizens from that of peace to a state of war The war power of the Government must be exercised before this changed condition of the Government and people . . . can be admitted.”⁴⁸

The difference between war and not war, therefore, is about the ability of the President to act in a legislative manner in the domestic sphere (as well as in the international sphere), and is not primarily concerned with the use of force. A war in the formal sense, or a perfect war in the language of *Bas v. Tinny*, involves a level of hostilities that are much higher than in an imperfect war and requires the effort and focus of the entire country. A state of war, thus, affects both domestic and international law, and changes conditions and circumstances, as well as the scope of Presidential power, to allow for a more effective and complete national effort in prosecuting a war. Such conditions and circumstances involve acts of an inherently legislative nature that would normally require an act of Congress to authorize. For example, actions taken by Presidents during wartime include the suspension of *habeas corpus*, the rationing of food or material stocks, and the internment of American citizens of Japanese descent.

44. *Id.* at 40.

45. *The Prize Cases*, 67 U.S. (2 Black) 365 (1863).

46. *Id.*; Justice Nelson’s dissent was not related to the definition of war, but rather whether President Lincoln needed a declaration of war to blockade Confederate ports in the absence of such a declaration; the majority agreed that Lincoln did not need a declaration of war to do so.

47. *Id.*

48. The majority decision in *The Prize Cases* found that previous congressional legislation, including the Acts of Congress of February 28, 1795 and March 3, 1807, served as a declaration of war by expressly giving the President the power to use the U.S. military in case of invasion or insurrection. Thus, the logic of Justice Nelson in the cited quote is not contradicted.

When the country is not in a state of war by virtue of a declaration of war, the ability of the President to take such actions is restricted. The logic of this distinction is supported in *Youngstown Sheet Tube Co. v. Sawyer*, commonly referred to as the “Steel Seizure” case.⁴⁹ During the Korean War—which despite being called a war was not fought with a congressional declaration of war but rather a U.N. resolution—President Truman attempted to seize domestic steel mills in an effort to force striking steel workers back to their jobs, arguing that the steel mills produced material that was vital to the war effort.⁵⁰ The action was struck down as it was, according to Justice Black’s opinion, “lawmaking, a legislative function which the Constitution has expressly confided to Congress and not to the President”⁵¹ In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁵² Furthermore:

the order cannot properly be sustained as an exercise of the President’s military power as Commander-in-Chief of the Armed Forces. Even though the ‘theater of-war’ is an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.⁵³

When the President wants to take, pursuant to his powers as Commander-in-Chief, an action that is inherently legislative in nature, he must have explicit permission from Congress to do so—“from an act of Congress or from the Constitution itself.”⁵⁴ Since the Constitution does not give this kind of power to the President, it can only come from an act of Congress. A formal declaration of war meets such a definition.⁵⁵ This is the reason for the declaration itself, as well as the strength and relevance of congressional constitutional war powers.

49. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Youngstown Sheet*, 343 U.S. 579.

55. The argument that Congress, when it passes a declaration of war, knowingly and deliberately gives the President power to take actions of a legislative nature will be presented in the following section.

III. THE AUMF AND THE MEANING OF A DECLARATION OF WAR

With regards to the NSA domestic surveillance program, the President's claim is that the AUMF passed by Congress in the wake of the September 11 attacks was, in fact, a declaration of war.⁵⁶ Thus, the argument follows that Congress authorized the President to take domestic actions of a legislative nature, in this case approving the wiretapping of U.S. citizens. If Congress did declare war in a legal sense, then the President's claim is, on these narrow grounds, valid.⁵⁷ So, the question becomes: is the AUMF the functional equivalent of a declaration of war and did Congress intend to give legislative authority to the President?

Not every use of American military force has been conducted under the aegis of a declaration of war. Far from it. Out of the more than 200 uses of force, war has only been declared by the U.S. Congress five times: the War of 1812; the Mexican-American War; the Spanish-American War; World War I; and World War II.⁵⁸ However, while no conflict involving U.S. soldiers has involved casualties like those in World War I or II (126,000 dead and 234,300 wounded, and 407,289 dead and 671,846 wounded, respectively), several have approached, if not surpassed, the world wars in terms of length (the Korean and Vietnam Wars, lasting three and nine [counting from the Gulf of Tonkin resolution until the withdrawal of U.S. troops] years, respectively).⁵⁹ Furthermore, while many of the more than 200 uses of force are fairly small-scale instances in terms of relevant measures such as intensity, scope, troops involved, and casualties, ranging from the use of U.S. air assets to strike at Libyan leader Moammar Qaddafi to the invasions of Panama and Grenada, several others have involved large troop deployments that strike most observers as "wars," such as the first and second Persian Gulf wars. And yet, none of these conflicts was a war in the legal sense.⁶⁰

The key to understanding the necessity of a declaration of war is the scale and scope of the conflict. Under the framework developed in the previous section, the difference between a state of "war" and "not war" is the degree to which the President has been given power by Congress to act in a legislative manner in the domestic arena. Only in conflicts in which such powers would

56. See generally Remarks by the President of the United States at the National Security Agency, *supra* note 5.

57. There are many other arguments for and against the legality and constitutionality of the NSA program. Here we are only considering whether it is part of the President's war powers.

58. RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2004, NAVY DEP'T LIBRARY (2004), available at <http://www.history.navy.mil/library/online/forces.htm> (last visited Sept. 27, 2006).

59. *Id.*

60. *Id.*

be necessary for the prosecution of the fight would a declaration of war be needed. Since the turn of the 20th century, only the two world wars have risen to such a level.

This level is known as “total war,” a concept first developed by Prussian military strategist Carl von Clausewitz. “Total war” referred to war in the manner discussed in the previous section in which one entire state is in a state of war with another state, a war in which conflict was not just limited to the troops in the field, but also the industrial base and infrastructure as well as the political leadership of the combatants.⁶¹ Such conflicts are not limited in any sense of the word; the entire nation is at risk and therefore contributes to the war effort. This mirrors the logic expressed in *Bas v. Tingy*, with the distinction between perfect and imperfect wars, the latter of which demands that the President’s power be constrained. It is inconceivable that the United States could have successfully prosecuted either World War I or II without massive contributions from the home front. Furthermore, the domestic populace of the United States has made few, if any, sacrifices in pursuit of other military conflicts, such as in Korea, Vietnam, Kosovo, Panama, Grenada, or Iraq.⁶²

Accordingly, World War I and II were both fought under declarations of war, allowing the Presidents at the time to act in the domestic arena by establishing rationing laws, seizing industry, and taking other actions as deemed necessary. But, can it be said that ceding such power was specifically intended by Congress?

The declarations of war for World Wars I and II both contain particular language that provides clear indication that Congress did intend to cede legislative power to the President in recognition of the unlimited scope and scale of the conflicts. The language is found at the end of the declarations of war against Germany in both world wars and against Japan in World War II: “the President is hereby authorized and directed to employ the entire naval and military forces of the [United States] and the resources of the Government to carry on war against the [specified country]; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.”⁶³ Furthermore, the declarations all

61. See generally CARL VON CLAUSEWITZ, ON WAR, (Michael Howard & Peter Paret eds. & trans., 1976). See also PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 196 (2003); B.H. LIDDELL HART, STRATEGY 338–44 (1991).

62. This is not to minimize the loss of life incurred in any of these conflicts. However, as a nation, the United States contributed or sacrificed little during any of these wars in comparison to World War I or II.

63. D e c l a r a t i o n s o f W a r , a v a i l a b l e a t www.firstworldwar.com/source/usofficialawardeclaration.htm; www.law.ou.edu/hist/germwar.html; www.law.ou.edu/hist/japwar.html (note that the phrase “and the resources of the Government” is absent in the declaration against Germany in World War II) (last visited Sept. 27, 2006).

specify that “a state of war” between the United States and the enemy is “formally declared.”⁶⁴ This language makes it clear that Congress understands the implication of “war” as opposed to “not war” and that Congress recognizes in “war” the President will need more tools at his disposal than when using force in a less comprehensive manner.⁶⁵

“All the resources of the country” means exactly that: when the country is in a state of war with an enemy, the President must be able to call upon the domestic arena with powers of a fundamentally legislative nature. Without a declaration of war, a President may not seize a domestic industry deemed crucial to the war effort, as President Truman tried to do; with such a declaration, a President can intern more than a hundred thousand American citizens, establish rationing, or divert industrial or transportation assets to the military cause.⁶⁶ The President can only call upon such powers when they are expressly and explicitly given to the President by Congress. So, did Congress intend to give such powers to President Bush with the passage of the AUMF on September 18, 2001?

The AUMF contains none of the critical language that is found in the official declarations of war. It does not mention the establishment of a state of war to create a “perfect” or “total” war. It does not commit “all the resources of country” to the President to prosecute the conflict. Rather, the AUMF merely states that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”⁶⁷ This language cannot be interpreted to meet the criteria establishing a perfect war outlined in *Bas v. Tingy*, to create

64. *Id.*

65. FAREED ZAKARIA, FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA’S WORLD ROLE (1998) (since these three wars were not fought in the same way as the wars of the 20th century, the absence of the “resources of the country” language does not undo the argument); While the declarations of war for the War of 1812 and the Mexican- and Spanish-American Wars do formally declare the existence of a state of war, they do not contain the language about ceding all the resources of the country to the President. But this should not be surprising. The concept of “total” war did not really come into existence until the beginning of the 20th century, and World War I represents the first real “total” war. Furthermore, during the 19th century, the U.S. did not yet possess the domestic infrastructure or capability to mobilize much power from the home front.

66. See JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 151 (2005).

67. S.J. RES. 23, 107th Cong. (2001) (enacted), available at www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm (last visited Sept. 27, 2006).

a state of war as described in the dissent from the *Prize Cases*, or to function as a declaration of war.

In the absence of a declaration of war, the logic of *Youngstown* holds sway over Presidential power, restricting the ability of the President to act in a legislative nature in the domestic arena. Authorizing the NSA to conduct domestic wiretapping of U.S. citizens is such an action which would require congressional approval. If the President would not be allowed to seize property for the purposes of aiding the war effort in the absence of a declaration of war, it is hard to imagine that eavesdropping on U.S. citizens in violation of existing U.S. laws would be permitted in a similar circumstance.

Furthermore, in *Youngstown*, Justice Jackson established, in his concurrence, three categories of “practical situations” that can be used to assess the legality of a Presidential action.⁶⁸ The first is when the “President acts pursuant to an express or implied authorization of Congress.”⁶⁹ In such a situation, “his authority is at its maximum, for it implies all that he possesses in his own right plus all that Congress can delegate.”⁷⁰ In instances when “the President acts in absence of either a congressional grant or denial of authority,” there exists “a zone of twilight in which he and Congress may have concurrent authority, on in which its distribution is uncertain,” meaning that “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”⁷¹ Finally, the third situation occurs when “the President takes measures incompatible with the expressed or implied will of Congress.”⁷² In such cases, Presidential power is at “its lowest ebb” and “Presidential claim to a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”⁷³

Neither the AUMF nor any other act of Congress expressly gave the President the authority to conduct warrantless wiretapping of U.S. citizens. And, since the AUMF is not a declaration of war it cannot be read as giving implied authorization either. Thus, the NSA surveillance program does not fall into Justice Jackson’s first category, where the legality of the program would “be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon

68. *Youngstown Sheet*, 343 U.S. 634–56.

69. *Id.* at 635.

70. *Id.*

71. *Id.* at 637.

72. *Id.*

73. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

any who might attack it.”⁷⁴ But does the NSA program then fall into the second or third category?

As has already been mentioned earlier, Congressional Research Service (CRS) published a study of the NSA surveillance program, in which it concluded that the passage of FISA by Congress firmly places the NSA program in the third category. CRS wrote that:

[w]here Congress has passed a declaration of war, 50 U.S.C. § 1811 authorizes the Attorney General to conduct electronic surveillance without a court order for fifteen calendar days following a declaration of war by Congress. This provision does not appear to apply to the AUMF, as that does not constitute a congressional declaration of war. Indeed, even if the authorization were regarded as a declaration of war, the authority to conduct warrantless electronic surveillance under 50 U.S.C. § 1811 would only extend to a maximum of fifteen days following its passage.⁷⁵

Furthermore, “the history of Congress’s active involvement in regulating electronic surveillance within the United States leaves little room for arguing that Congress has accepted by acquiescence the NSA operations here at issue.”⁷⁶

If, as argued here, the NSA program falls into the third category of Justice Jackson’s analysis, and if the AUMF did not constitute a declaration of war, then President Bush did not have the authority to authorize the National Security Agency to eavesdrop on U.S. citizens, regardless of its utility in pursuing and fighting terrorists. In the analysis herein, the President does have wide latitude to use military force in the absence of an explicit declaration of war; however that latitude does not extend to actions like authorizing a U.S. intelligence agency to spy on American citizens.

IV. CONCLUSIONS: WAR POWERS IN A NEVER-ENDING WAR

In his concurrence to *Youngstown*, Justice Jackson wrote that “the tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced structure of our Republic.”⁷⁷ Indeed, much of the administration’s defense has rested on the argument that the NSA program is an effective and necessary component of the War on Terror. In the Department of Justice memo, *Legal*

74. *Id.* at 637.

75. BAZAN & ELSEA, *supra* note 7, at 26.

76. *Id.* at 43.

77. *Youngstown Sheet*, 343 U.S. at 634.

Authorities Supporting the Activities of the National Security Agency Described by the President, the argument is made that:

[t]he Government's interest in engaging in the NSA activities is the most compelling interest possible—securing the Nation from foreign attack The Government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in [the NSA surveillance program].⁷⁸

Even if the threat from al Qaeda is in fact, as President Bush has often asserted, an existential threat to the United States, it does not necessarily follow that the President should be freed from congressional restraints to pursue whatever policies the executive may deem necessary to fight that threat. In a "normal" war like either of the two world wars, an end can be envisioned, metrics exist for assessing progress towards that end, and extraordinary legislative powers ceded to the President by Congress can one day be given up. However, the "War on Terror" is not such a war. The enemy is unclear, as are the desired goals. Is the aim of the "War on Terror" defeating all terrorism, reducing terrorism to a nuisance, or simply lowering the likelihood of another large-scale attack? How can it be known if the U.S. is winning the war? Does an absence of attacks mean that the war is successful, or that the terrorists haven't tried? At what point would victory, if victory is even possible, be declared, and any extraordinary legislative powers be given back to Congress by the President?

In such a situation, the burden of caution must recommend against a broad interpretation of executive powers. In the absence of a clear and specific congressional authorization, the President must not claim powers that exceed his normal authority. In the words of Justice Jackson:

[n]o doctrine that the Court could promulgate would seem more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.⁷⁹

However, in light of the comprehensive war powers argument developed herein, the claim by the executive branch for the legitimacy of the NSA program is damaging in a previously unforeseen way. For years, Presidents

78. Legal Authorities Supporting the Activities of the National Security Agency Described By The President, *supra* note 2, at 40.

79. *Id.* at 33.

have been making the case that they have the constitutional right to deploy force without a specific congressional authorization, and have refused to recognize congressional attempts to assert legislative authority, as with the War Powers Resolution. The argument here supports that position. But by claiming that the AUMF is the functional and intentional equivalent to a formal declaration of war, the administration has unwittingly undermined the executive branch's case for wide latitude and deference in force deployment. If such an argument rests on a narrow interpretation of the congressional power to "declare war"—that that power refers to the creation of a "state" of war and not the deployment of troops—the argument that any congressional authorization of force meets the constitutional mandate must necessarily broaden congressional war powers. The President's rush to find authorization in the AUMF suggests that other similar congressional legislation might also be tantamount to a declaration of war. Such an interpretation would therefore expand congressional power over the deployment of military force. In the wake of the NSA surveillance program, Congress may very well attempt to reassert itself. Fearing additional encroachments by the President, Congress may claim that, in line with the very arguments made by the President, any and all congressional authorizations for the use of military force should be seen as part of a declaration of war and thus subject to congressional authority.

The decision by President Bush to task the National Security Agency to eavesdrop on the conversations of American citizens is an extremely contentious one, but one that was no doubt made in good faith. The President very likely believes, perhaps even accurately, that such a program is a vital tool in protecting the nation from another terror attack and a critical asset in fighting the war on terror. However, noble goals and successful policies are not the arbiters of a policy's legality and constitutionality. The power to act in a legislative manner rests with Congress, and does so in order to preserve the delicate balance of powers and authority that defines American government. In the absence of a clear and pressing threat to the country that is identified by Congress as needing a state of war to be properly contested, the President must not and cannot claim broad domestic powers. The NSA domestic surveillance program is illegal and unconstitutional. In a war that will likely have no end in the immediate future and has no real metrics for victory, policy must flow from process. Extreme caution must be taken before handing this—or any President—unmonitored domestic powers.