April 2003

The Last Page: Debating Preventive War: An arena of law of power?

Kenneth Rodman
Colby College

Recommended Citation

debating preventive war
an arena of law of power?
By Kenneth Rodman

THE BUSH DOCTRINE

INTERNATIONAL LAW

By the time you read this essay, we will almost certainly be at war, probably without the authorization of the United Nations. A group of students asked me whether such a war would be legal under international law. A second question is, "Do such considerations matter?"

The traditional international law answer to the first question is no. Under Article 51 of the U.N. Charter, a state has the right to act unilaterally in case of individual or collective self-defense against an armed attack. The Bush Doctrine exceeds these stipulations by asserting a right to wage preventive war against rogue states, such as Iraq, that augment their capabilities through weapons of mass destruction (WMD) even in the absence of a specific provocation. Under Chapter VII, the charter does allow for responses to "threats to the peace" other than armed attack, but such actions must be enforced multilaterally through the Security Council.

Administration officials counter this with the doctrine of "implied authorization." If the Security Council passes a Chapter VII resolution declaring Iraqi possession of WMD to be contrary to international law, the U.S. has the implicit right to enforce that resolution militarily even if the Security Council does not explicitly authorize force itself.

Should these legal debates matter? To some extent, the answer is yes. Legal critics of the Bush Doctrine rightly note that by stretching the traditional definition of self-defense to include preventive war, it may set precedents for others—e.g., India with Pakistan—to which the U.S. might object. Acting through the Security Council also confers more legitimacy and, hence, more cooperation with U.S. actions. Administration defenders could plausibly argue that without unilateral pressure from the United States, Security Council resolutions would be meaningless.

Realists, however, warn that such arguments ought not to be definitive because international relations is not primarily an arena of law but one of politics and power. The relevant question to a realist is not whether a U.S.-led war violates the U.N. Charter or whether Iraq is in noncompliance with Security Council resolutions. Rather, it is whether the threats we face render traditional definitions of self-defense obsolete.

The Bush Doctrine answers both questions in the affirmative. September 11 demonstrates that we live in a different world from the Cold War, when we faced geopolitical adversaries who could be contained and deterred. These old devices won't work against stateless terrorists against whom we can't retaliate, fanatical or irrational leaders who welcome martyrdom or increasingly destructive weapons. Traditional legal rules regarding self-defense have been overtaken by events.

In my view, the administration has it right when it comes to terrorists, such as Al Qaeda, since they act on an ideology of martyrdom and lack a return address. Iraq, however, is a more familiar strategic threat. Some administration officials contend that Saddam is undeterrable as evidenced by his use of chemical weapons against the Kurds. While that represents a war crime for which Saddam should be indicted at The Hague, it does not demonstrate that he is undeterrable, since the Kurds lack the ability to respond in kind. And when confronted with adversaries who could retaliate with disproportionate power, he was deterred—which explains his reluctance to use chemical and biological weapons against the U.S. and Israel during the first Persian Gulf War. Or as one foreign policy analyst wrote: "These regimes [e.g., Iraq] are living on borrowed time, so there need be no sense of panic about them. Rather, the first line of defense should be a clear and classical statement of deterrence—if they do acquire WMD, their weapons will be unusable because any attempt to use them will bring national obliteration." Those words were published in January 2000 by an advisor to the Bush campaign named Condoleeza Rice.

If you were to ask Rice what changed her view, her answer would be 9-11 and the fear that Iraq may transfer WMD to groups like Al Qaeda. If it were true, it would irrefutably merge the Iraqi problem with the threat of terrorism and, in my view, justify the use of force, even unilaterally.

While one cannot rule this out, history and logic indicate otherwise. First, Iraq's Ba'athist Party and Al Qaeda are radically different organizations, the former being a secular nationalist movement that exterminated its religious opposition. Second, Iraq's support of terrorist organizations has been limited to those under its absolute control. Al Qaeda, by contrast, would not be controllable by Baghdad. Hence, Saddam is unlikely to transfer weapons whose use against U.S. targets would almost inevitably be linked to Baghdad and trigger the very regime-changing invasion he would like to avoid.

The final factor in establishing a political test is the cost and risk of war. First, given that our goal will be regime change, Iraq can be expected to use whatever capability it has to inflict maximum damage—e.g., the use of WMD against U.S. troops. Second, the war is likely to increase the ability of Al Qaeda to find additional recruits to its cause in the Middle East and the West, to the detriment of the war on terrorism. Finally, there are the burdens of occupation and post-war reconstruction. As one former cabinet official put it: "Once you've got Baghdad, it's not clear what you do with it. … How long does the military have to stay, and what happens once we leave?" Former Defense Secretary Dick Cheney raised those questions in 1991 and they are no less pertinent today.

At one level, the debate over the war can be seen in terms of competing legalisms—i.e., a traditional defense of the U.N. Charter versus enforcement of what would otherwise be toothless U.N. resolutions. Those arguments, however, should be subordinated to the more relevant tests of prudence and necessity. Ultimately, it is on those grounds that one needs to make the case against unilateral war.

Ken Rodman is the William R. Cotter Distinguished Teaching Professor of Government. This essay is based on a presentation he gave in the Page Commons Room on Feb. 19, 2003.