

Annotated Aggression: Being Jay Bybee

What the OPR Report Won't Say

By David Swanson

It's October 23, 2002, and you're Jay Bybee, the man in charge of the Office of Legal Counsel in the United States Department of Justice. John Yoo and a bunch of other lawyers willing to claim that absolutely anything is legal work for you. But you'd much rather be a judge. That would be a cushy job, a lifetime job, a job with a book of the Bible named for it, a job where you would get to decide which crimes to legalize rather than being told by someone else, a job where you might eventually even get to rule on the legality of some of the crimes you were presently engaged in committing. At the moment, however, if you want to become a judge you're going to have to follow instructions, and that means legalizing the greatest crime of them all. Millions may die in the process, but you will get that nomination and you will become a judge.

You pray for divine guidance and sit down to write (or at least sign) this apology for, authorization of, and confession to mass murder, another term for which is often genocide. Here's your opening line in all caps:

"AUTHORITY OF THE PRESIDENT UNDER DOMESTIC AND INTERNATIONAL LAW TO USE MILITARY FORCE AGAINST IRAQ"

This is a remarkable thing for you (or even Yoo, your psychotic sidekick) to have written, because the Constitution is the supreme law domestically, and it gives Congress the exclusive power to decide to wage war. And under the United Nations Charter, no nation has the authority to attack another. But you were Jay Bybee. You were the man. You were the authority handing out personalized torture laws for individual victims. You were, in fact, already a judge convicting and sentencing people in lengthy rulings before "legalizing" and imposing their sadistic punishments. Granting U.S. presidents the power to launch aggressive wars didn't trouble you in the way it might have someone who cared about people and their lives. But this single memo would mean far more pain and suffering than all of your soon-to-be-famous torture memos put together.

You added a bit more to your composition, about 50 pages more in fact. You (or whoever wrote this for you) began thus:

"The President possesses constitutional authority to use military force against Iraq to protect United States national interests."

Now you were showing off, digging yourself deeper. Now you would need to explain how the United States could have national interests in somebody else's distant nation that outweighed that nation's own interest in not being attacked or invaded.

And you were just warming up. You dug deeper:

"This independent constitutional authority is supplemented by congressional authorization in the form of the Authorization for Use of Military Force Against Iraq Resolution."

This is apparently a reference to the 1991 version of this type of congressional buck passing. In fact, such a resolution could not alter the Constitution to either remove or augment anything. In addition, it was more than a decade old. That wouldn't faze you, Jay Bybee, because you'd already given the president "independent constitutional authority" to treat such an authorization as redundant and superfluous. Its primary purpose was to pack these pages and obscure the simplicity of your primary argument, if that's a name merited by your bald assertion that verily this is that.

You did some international digging too:

"Using force against Iraq would be consistent with international law because it would be authorized by the United Nations Security Council or would be justified as anticipatory self-defense."

Now you were digging deep indeed. By citing the two exceptions that the UN Charter makes to its ban on war, you were acknowledging its authority. But neither exception applied. The UN rejected a US attack on Iraq as something it could not authorize, and such an attack would -- of course -- not be self-defense. But that didn't matter either, because you'd already begun to alter the law. You invented something called "anticipatory self-defense." But international law did not recognize such a thing, and no international authority agreed that it legalized an attack on Iraq. Your citation-packed memo failed to present any citations for this hooley.

Through such alterations, of course, you were increasing the "legal" acceptability of almost any future war launched by any nation against any other.

What could possibly be more damaging? Or more well documented? Your crime is in black and white and continues for almost 50 more pages. Yet, as of December 2009, congressional committees were pretending to await a report on your memos from the Justice Department itself, with the incorporation of watering-down edits from you and your co-conspirators. Even bar associations were awaiting the same report before concluding that a desk-chair mass-murderer like you was unfit to be a lawyer.

Rule for civilians: first kill all the lawyers. Rule for lawyers: first kill everyone else?

This "memo" you were drafting for White House Counsel Alberto Gonzales was going to be treated as a secret law, but it would remain on record as some sort of quasi-law after becoming public. Years later it still hasn't been rejected (its existence in fact barely acknowledged), even if your public reputation has been ruined and the failure of Congress to impeach you now in your current office is commonly cited as evidence of the death of Congress as an institution. In fact, you're facing civil prosecutions at home and a possible indictment in Spain for having drafted much less criminal memos than this one. Here's what you wrote to Gonzales, who had asked you on behalf of President George W. Bush to legalize aggressive wars for him:

"You have asked our Office whether the President has the authority, under both domestic and international law, to use military force against Iraq. This memorandum confirms our prior advice to you regarding the scope of the President's authority. We conclude that the President possesses constitutional authority for ordering the use of force against Iraq to protect our national interests. This independent authority is supplemented by congressional authorization in the form of the Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991), which supports the use of force to secure Iraq's compliance with its international obligations following the liberation of Kuwait, and the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), which supports military action against Iraq if the President determines Iraq provided assistance to the perpetrators of the terrorist attacks of September 11, 2001."

Now this is curious. You've already granted the president absolute authority. Then you've granted him authority on the basis of an AUMF from 1991. Now you throw in the 2001 version that allowed the attack on Afghanistan. That one will provide additional redundant authorization, you claim, if Iraq provided assistance to 9-11, or rather: if the president determines that to be the case. Congress passed yet another non-declaration of war less than two weeks before the date on your memo. This one, even if you chose to accept it as constitutional, had terms attached to it that George W. Bush had no intention of complying with and in fact violated. And none of these domestic justifications for the crime you are here "legalizing" fit with any of the international justifications you were alleging in this same memo. A war is no more authorized by the UNSC or defensive because Congress misplaces its spine or the president "determines" that pigs fly. And your arguments for the domestic legality of the war do not attempt to portray it as defensive of U.N.-approved.

So, you returned to the international arena with this thesis, to be argued for below:

"In addition, using force against Iraq would be consistent with international law, because it would be authorized by the United Nations ("U.N.") Security Council, or would be justified as anticipatory self-defense."

And you were still just clearing your throat:

"This memorandum is divided into three sections. First, we explain the background to the current conflict with Iraq, touching upon the U.N. Security Council resolutions related to the Persian Gulf War and its aftermath, and highlighting the situations in which the United States has used force against Iraq between 1991 and the present. Second, we discuss the President's authority under domestic law to direct military action against Iraq, examining both his constitutional authority and supplementary congressional support. Finally, we detail the justification under international law for the United States to use force against Iraq, considering the circumstances in which the U.N. Security Council has authorized such action and the scenarios in which it would be appropriate to use force in anticipatory self-defense."

Appropriate? If what is legal morphs into what is appropriate, and the determiner of what is appropriate is Jay Bybee, what are the law books for? And what would best make an aggressive war appropriate? Why, pretending it was simply an ordinary and even defensive continuation of a war long-since legalized. Making that case, however, would require

providing some background. Forgive me if I quote and then quickly dismiss a large stinking, steaming pile of it (background). I've deleted your footnotes throughout, by the way, Mr. Bybee, simply because they are in the same vein as the rest of the document and consequently make it even worse, not better. Those wanting to read the footnotes can go to your original: [PDF](#).

"I. Background "Prior to examining the President's legal authority to use force in Iraq, it is useful to explain some of the background to the current conflict. On August 2, 1990, Iraq invaded Kuwait. The next day, the U.N. Security Council ("Security Council") passed U.N. Security Council Resolution ("UNSCR") 660, the first of many resolutions condemning Iraq's actions and demanding withdrawal from Kuwait. See S.C. Res. 660 (1990). For months, the world community sought a diplomatic solution, including sanctions, to persuade Iraq to leave Kuwait. See Address to the Nation Announcing Allied Military Action in the Persian Gulf, 1 Pub. Papers of George Bush 42, 43 (1991).

"On November 29, 1990, the Security Council adopted UNSCR 678, which gave Iraq until January 15, 1991 to implement UNSCR 660 fully. See S.C. Res. 678 (1990). In the absence of compliance by Iraq, paragraph 2 of UNSCR 678 authorized member states 'to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.' Id. Iraq refused to withdraw from Kuwait before the January 15th deadline, and Operation Desert Storm began the next day. Allied air forces commenced an attack on military targets in Iraq and Kuwait. Ground forces were introduced on February 23, 1991, and Iraq was expelled from Kuwait four days later. Exactly 100 hours after ground operations began, President George H.W. Bush suspended offensive combat operations. See Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf, 1 Pub. Papers of George Bush 187 (1991).

"On April 3, 1991, the U.N. Security Council adopted UNSCR 687, which established the conditions for a formal cease-fire suspending hostilities in the Persian Gulf. UNSCR 687 'reaffirm[ed] the need to be assured of Iraq's peaceful intentions' given Iraq's invasion and occupation of Kuwait, its prior use of chemical weapons and ballistic missiles in unprovoked attacks, and reports that it had attempted to acquire materials to build nuclear weapons. S.C. Res. 687, pmb. ¶ 4. To that end, section C of UNSCR 687 imposed a variety of conditions on Iraq. First, the Security Council "decide[d]" that Iraq must: unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of: (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities; [and] (b) All ballistic missiles with a range greater than [150] kilometres, and related major parts and repair and production facilities.

"S.C. Res. 687, ¶ 8. Second, Iraq must agree to "urgent, on-site inspection" to ensure its compliance with this requirement. Id. ¶ 9(a). Third, Iraq must "unconditionally undertake not to use, develop, construct or acquire" such weapons of mass destruction ("WMD") and their delivery systems. Id. ¶ 10. Finally, Iraq must "unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapon[s]-usable material or any subsystems or components or any [related] research, development, support or manufacturing facilities," and to accept "urgent on-site inspection and the destruction, removal or rendering harmless as appropriate" of all such nuclear-related weapons or materials. Id. ¶ 12. To carry out on-site inspections of Iraq's WMD programs, the Resolution called for the establishment of a Special Commission ("UNSCOM") to act in cooperation with the International Atomic Energy Agency ("IAEA"), which was to take custody of all of Iraq's nuclear-weapon[s]-usable materials. Id. ¶¶ 9, 13.2 In addition, UNSCR 687 required Iraq, inter alia, to renounce international terrorism. Id. ¶ 32. On April 6, 1991, Iraq officially accepted the terms set forth in UNSCR 687, and a formal cease-fire went into effect between Iraq, Kuwait and the U.N. members who had cooperated with Kuwait under UNSCR 678, including the United States. Id. ¶ 33.

"Toward the end of the Gulf War, Iraq brutally suppressed Kurdish insurrections throughout Iraqi Kurdistan, causing the flight of hundreds of thousands of civilians into Iran and Turkey. See generally Letter to Congressional Leaders on the Situation in the Persian Gulf, 1 Pub. Papers of George Bush 521, 521-22 (1991). In response, the Security Council adopted UNSCR 688, which "condemned" the repression of the Iraqi civilian population and found that the consequences of such repression—"a massive flow of refugees towards and across international frontiers and . . . cross-border incursions"—threatened international peace and security in the region. S.C. Res. 688 (1991). To aid the refugees who had fled northern Iraq, the United States joined the allied coalition in launching Operation Provide Comfort, which provided humanitarian relief for the Kurds. In addition, the coalition established a no-fly zone prohibiting Iraqi military aircraft from flying north of the 36th parallel. See Remarks on Assistance for Iraqi Refugees and a News Conference, 1 Pub. Papers of George Bush 378, 378- 79 (1991). Due to increased repression against the civilian population in 1992 by Saddam Hussein in both the northern and southern parts of Iraq, British, French and U.S. coalition forces began patrolling an additional no-fly zone south of the 32nd parallel to protect Iraqi Shiites. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council

Resolutions, 2 Pub. Papers of George Bush 1574, 1574-75 (1992-1993). The no-fly zones were intended to assist in the monitoring of Iraqi compliance with UNSCR 687 and UNSCR 688, and to discourage significant Iraqi military operations against the civilian population. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of George Bush 2269, 2269-70 (1992-1993); Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 1 Pub. Papers of William J. Clinton 715, 716 (1993). Iraq does not accept the no-fly zones as legitimate and periodically threatens coalition forces patrolling the zones. The United States and Britain have responded by repeatedly attacking Iraqi surface-to-air missile sites and related facilities in self-defense. See, e.g., 2 Pub. Papers of George Bush at 2269 (1992-1993); Status of U.S. Efforts Regarding Iraq's Compliance with UN Security Council Resolutions 3 (submitted as an attachment to Letter to Congressional Leaders Transmitting a Report on Iraq's Compliance With United Nations Security Council Resolutions, 38 Weekly Comp. Pres. Doc. 113 (Jan. 23, 2002)) ("2002 Report on Iraq").

"From its inception, UNSCOM encountered resistance from Iraq. On August 15, 1991, little more than three months after the adoption of UNSCR 687, the Security Council "condemn[ed]" Iraq's "serious violation" of a number of its obligations regarding the destruction and dismantling of its WMD program and of its agreement to cooperate with UNSCOM and the IAEA, and stated that the violation "constitutes a material breach of the relevant provisions of [UNSCR 687] which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region." S.C. Res. 707, ¶ 1 (1991). Shortly thereafter, President George H.W. Bush warned that the United States would not tolerate Iraq's misrepresentations regarding, and denial of U.N. access to, its WMD program: "[I]f necessary [the United States] will take action to ensure Iraqi compliance with the Council's decisions so as to fully implement Resolution 678's call for the restoration of international peace and security to the Persian Gulf region." Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of George Bush 1164, 1164-65 (1991). Several months later, on January 17, 1993, President Bush ordered the destruction by U.S. missiles of a nuclear facility near Baghdad, "to help achieve the goals of U.N. Security Council Resolutions 687, 707 and 7153 requiring Iraq to accept the inspection and elimination of its weapons of mass destruction and ballistic missiles." 2 Pub. Papers of George Bush at 2270. Although the nuclear facility had been inspected, and some equipment had been removed, President Bush warned that it could be used again to support Iraq's nuclear weapons program. *Id.*

"In addition to directing the use of force to respond to threats to coalition forces in the no-fly zones, President Clinton ordered military action against Iraq on three separate occasions. First, in June 1993, President Clinton ordered a cruise missile attack on the principal command-and-control facility of the Iraqi intelligence service ("IIS") in Baghdad. The strike was in response to "compelling evidence" that the IIS had directed and pursued a failed attempt to assassinate President George H.W. Bush in April of that year. Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 Pub. Papers of William J. Clinton 940 (1993) ("1993 Letter to Congressional Leaders"). President Clinton explained that the goal of the strike was "to target Iraq's capacity to support violence against the United States and other nations and to deter Saddam Hussein from supporting such outlaw behavior in the future." Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 1 Pub. Papers of William J. Clinton 938 (1993) ("1993 Address to the Nation").

"Second, President Clinton ordered U.S. cruise missile strikes in September 1996 to respond to an Iraqi attack in northern Iraq ("Operation Desert Strike"). When U.S. intelligence revealed that Iraq had engaged in a military buildup near Irbil, the United States warned Iraq not to use military force. Iraq ignored the warning and stormed Irbil. In response, the United States extended the no-fly zone in southern Iraq from the 32nd to the 33rd parallel and conducted military strikes against fixed, surface-to-air missile sites, command-and-control centers, and air defense control facilities south of the 33rd parallel. See Letter for the Honorable Newt Gingrich, Speaker of the House of Representatives, from President William J. Clinton 1-2 (Sept. 5, 1996) ("Gingrich Letter") (claiming authority under, *inter alia*, UNSCRs 678, 687, and 688). The strikes were designed to show Saddam Hussein that he must halt all actions that threaten international peace and security. See *id.* at 1.

"Third, in December 1998, President Clinton directed missile and aircraft strikes against Iraq in response to Iraqi breaches of its obligations under various UNSCRs, particularly Iraq's failure to cooperate fully with U.N. inspections of its WMD program. See Letter to Congressional Leaders on the Military Strikes Against Iraq, 2 Pub. Papers of William J. Clinton 2195, 2195-96 (1998) (claiming authority under, *inter alia*, UNSCRs 678 and 687). The 1998 strikes were the culmination of a stand-off between Iraq and the United Nations regarding Iraq's refusal to permit effective international inspections of its WMD program. In the fall of 1997, for example, Iraq demanded that all U.S. members of the UNSCOM inspection team depart Iraq immediately and asked that UNSCOM withdraw its "cover" for the U-2 reconnaissance aircraft flown by the United States as part of UNSCOM's efforts to detect Iraq's WMD

program. See UNSCOM: Chronology of Main Events (Dec. 1999), available at www.un.org/Depts/unscom/Chronology/chronologyframe.htm (last visited May 9, 2002); see also Michael L. Cornell, Comment: A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction, 16 Conn. J. Int'l L. 325, 337 & n.95 (2001).

"The Security Council responded by adopting UNSCR 1137, which "condemn[ed] . . . the continued violations by Iraq of its obligations under the relevant resolutions to cooperate fully and unconditionally with [UNSCOM]," found that the situation continued to constitute a threat to international peace and security, and warned that "serious consequences" would result if Iraq failed to comply unconditionally and immediately with its international obligations. S.C. Res. 1137, ¶ 1 (1997).

All of which is to make a political, not a legal argument having the essential form: "Clinton did it too, or more or less, so Democrats better keep quiet." (Yoo, who may have written this memo, is also fond of making "Lincoln did it" sound like a legal defense.) Of course, Bill Clinton having done something, whether an equivalent something or a dramatically more limited version of something, doesn't actually make it legal. Imagine Bush arguing for the appropriateness (you see, already I've learned to equate the appropriate and the legal) of massive intern orgies in the oval office on the grounds that Clinton and Monica had played with a cigar. In fact, some of us wanted Clinton impeached for his crimes and the Monica nonsense left alone. But Clinton was not impeached for his more serious high crimes and misdemeanors. Nor was he prosecuted for his serious crimes. The predictable result was his successor claiming the legal right to expand upon anything Clinton had begun. This did not legalize aggressive war, rendition, warrantless spying, or anything else. It merely gave these crimes political protection. By Bybee's argument, the lawless drone strikes by Bush and Obama into Pakistan legalize a full-scale assault on that nation as well. You can see where this leads. So could Bybee. And he signed this memo nonetheless, shoving aside to some hidden corner of his skull the blood and gore of millions of wasted people's lives cut short by a rush of power and a bid to become, of all things, a judge. It continues:

"In early 1998, Iraq's continued intransigence prompted the United States to threaten military force to compel its compliance. See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law: Legal Regulation of the Use of Force, 93 Am. J. Int'l L. 471, 472 (1999). Although U.N. Secretary General Kofi Annan secured a Memorandum of Understanding ("MOU") confirming Iraq's acceptance of all relevant Security Council resolutions and its reaffirmation to cooperate fully with UNSCOM and the IAEA in February 1998, Iraq formally halted all cooperation with UNSCOM at the end of October. *Id.* at 473. The Security Council responded by adopting UNSCR 1205, which condemned Iraq's decision as a "flagrant violation of resolution 687 . . . and other relevant resolutions." S.C. Res. 1205, ¶ 1 (1998). On November 15, the United States refrained from launching a massive missile attack against Iraq, only after Iraq committed to full cooperation with U.N. inspections. Remarks on the Situation in Iraq and an Exchange with Reporters, 2 Pub. Papers of William J. Clinton 2035 (1998). But despite Iraq's promises, on December 15, the Executive Director of UNSCOM reported that the Commission could not complete its mandate due to Iraq's obstructionism.

"The next day, the United States and Britain launched a seventy-hour missile and aircraft bombing campaign against approximately one hundred targets in Iraq—facilities that were actively involved in WMD and ballistic missile activities, or that posed a threat to Iraq's neighbors or to U.S. forces conducting the operation. See 2 Pub. Papers of William J. Clinton at 2196 (1998). President Clinton explained:

"I believe our action in Iraq clearly is in America's interest. Never again can we allow Saddam Hussein to develop nuclear weapons, poison gas, biological weapons, or missiles to deliver them. He has used such terrible weapons before against soldiers, against his neighbors, against civilians. And if left unchecked, he'll use them again.

"The President's Radio Address, 2 Pub. Papers of William J. Clinton 2197 (1998). President Clinton warned that if UNSCOM was not allowed to resume its work, the United States would "remain vigilant and prepared to use force if we see that Iraq is building its weapons programs." Address to the Nation on Completion of the Military Strikes in Iraq, 2 Pub. Papers of William J. Clinton 2199, 2200 (1998). He also cautioned that the United States must be prepared to use force again if Saddam Hussein threatened his neighbors, challenged the no-fly zones, or moved against the Kurds in Iraq. See Address to the Nation Announcing Military Strikes on Iraq, 2 Pub. Papers of William J. Clinton 2182, 2184 (1998).

"Since the 1998 airstrikes, Iraq has continued to refuse to permit U.N. inspections of its WMD program. In December 1999, the Security Council decided to disband UNSCOM and replace it with the United Nations Monitoring, Verification and Inspection Commission ("UNMOVIC"). S.C. Res. 1284, section A, ¶ 1 (1999). Although the Security Council "decide[d]" that Iraq must allow UNMOVIC teams immediate, unconditional and unrestricted

access to any and all areas, facilities, equipment, records and means of transport that they need to inspect in accordance with their mandate, id. ¶ 4, Iraq has not permitted UNMOVIC to conduct any inspections."

What Bybee's memo argues here is that because Clinton threatened to commit acts of aggression, Bush should be allowed to actually commit them, and magnified a thousand fold into a full-scale invasion and occupation. Publicly, the argument of the Bush White House was that Clinton had failed to be sufficiently militaristic. Privately, the argument in this memo, to be treated as *LAW*, was that Clinton's militarism legalized Bush's. Republicans rely on actual Democrats when justifying their crimes, and mythical Democrats when selling their campaigns. The actual Clinton, with blood up to his elbows, was real. But that provides no legal justification for anything Bush did, not in the traditional pre-Bybeean sense of "legal". (Similarly, it is -- ironically enough -- a Socialistic Muslim foreign-born grandmother killer now pouring our nation's legal resources into court battles to protect you, Judge Bybee, and your sadistic subordinates.) Nor does Vice President Dick Cheney threatening an aggressive attack on Iran, for example, somehow legalize such an attack by a future government. In fact, the threat is itself a crime.

What would YOU pay for the power to have your lawyer give you immunity for something like aggressive war, and do THIS smashing a job of it?

Don't answer! There's more! Part Two, in fact:

"II. Domestic Legal Authority for Use of Force Against Iraq

"A. Constitutional Authority "We have consistently advised that the Constitution grants the President unilateral power to take military action to protect the national security interests of the United States. See generally Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001) ("Constitutional Authority to Conduct Military Operations")."

And yet somehow you can't trace this central bit of insanity back even as far as Clinton? Seriously, who were you kidding, your Honor? When you invented something so crazy that no previous president could be cited, you quoted yourself as having "consistently" coughed up the same bit of craziness? As if we care whether you were consistent. Did you give Bush the idea to quote himself as an authority in his report to Congress on March 19, 2003? Are we supposed to laugh or cry?

"Under Article II, Section 2, the President is the "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2. The Constitution also gives the President exclusive powers as the Chief Executive and the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); see also *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'" (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). Although Article I vests in Congress the power to "raise and support Armies," "provide and maintain a Navy," and to appropriate funds to support the military—powers that give Congress effective control over the supply of military resources to the President as Commander in Chief—as well as the power to issue formal declarations of war, U.S. Const. art. I, § 8, cls. 1 & 11-13, Article II vests in the President, as Chief Executive and Commander in Chief, the constitutional authority to use such military forces as are provided to him by Congress to engage in military hostilities to protect the national interest of the United States. The Constitution nowhere requires for the exercise of such authority the consent of Congress. Cf. U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."); Articles of Confederation, art. IX, § 6, 1 Stat. 4, 8 (1778) ("The United States, in Congress assembled, shall never engage in a war . . . unless nine States assent to the same . . ."). Thus, as then-Attorney General Robert Jackson explained more than sixty years ago, the President's authority as Commander in Chief "has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting . . . American interests." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (Robert H. Jackson, Att'y Gen.)."

This is the sort of hideously selective sourcing that polite commentators refer to as "amateurish" when what they mean is dishonest. The Constitution says nothing about "formal" declarations of war. Rather, it gives the Congress the exclusive power to declare war, a power listed in conjunction with other substantive powers. There are no formalities in the Constitution. Congress also has the power to fund (or not fund) wars. Article I, Section 8, begins with a clause that gives Congress the power to raise funds and to "provide for the common Defence and general Welfare of the United States."

Later in section 8 we find Congress given the powers to: "regulate Commerce with foreign Nations . . . To define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States" This is a significant portion of the short document we call our Constitution. It came out of a publicly recorded debate in which Elbridge Gerry of Massachusetts exclaimed: "I never expected to hear in a republic a motion to empower the executive alone to declare war." And George Mason of Virginia announced: "I am against giving the power of war to the executive, because he is not safely to be trusted with it -- or to the Senate [...] I am," he said, "for clogging rather than facilitating war." The Constitutional Convention gave the power to declare war, to begin war, to engage in war (or not!) -- not the power to issue a formality -- to Congress, and no one other than Congress. And if this were not clear, Mr. Bybee, you might have looked, as you will shortly in a different context, at the War Powers Act. This U.S. law, an actual law, not a Bybee memo, weakens the Constitutional division of war powers, allowing presidents to initiate wars for 60 days without congressional authorization. And yet, Your Honor, you are interpreting the Constitution in a way that makes the War Powers Act extremely strong by comparison. However, you prefer not to take note of its existence. Nor, in fact, do you appear to have read Article II of the Constitution, for you claim to find there the presidential "authority to use such military forces as are provided to him by Congress to engage in military hostilities to protect the national interest of the United States." This is intentionally misleading. The president, according to the actual Constitution, "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States." That's it. It's about the same number of words that you used. So why didn't you quote the original? Because the actual language makes clear that it is Congress, not the executive, who calls a militia -- or an army or navy -- into service. Imagine if these "secret law" memos had to be public, and if the public had to read the Constitution (as opposed to holding rallies to shout about the defense of it)? Or imagine something easier and work your way up to imagining that. Here's more of your "legal" handiwork, Judge Bybee:

"Presidents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief and to conduct U.S. foreign relations. In fact, the establishment of a large peacetime military force in the twentieth century has given rise to numerous unilateral exercises of military force grounded solely in the President's constitutional authority. For example, the deployment of U.S. troops in the Korean War by President Truman was undertaken without congressional authorization. See *Bosnia Opinion*, 19 Op. O.L.C. at 331-32 n.5. More recently, when President Clinton directed the extensive and sustained 1999 air campaign in the Former Republic of Yugoslavia, he relied solely on his "constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive." Letter to Congressional Leaders Reporting on Airstrikes against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 Pub. Papers of William J. Clinton 459, 460 (1999).

"As we recently explained, "[t]he role of practice" in determining the proper allocation of authority between the political branches "is heightened in dealing with issues affecting foreign affairs and national security, where 'the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions.'" *Constitutional Authority to Conduct Military Operations* at 13 (quoting *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994)); see, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Haig v. Agee*, 453 U.S. 280, 292-94 (1981).

"Accordingly, we believe that the President's constitutional authority to undertake military action to protect the national security interests of the United States is firmly established in the text and structure of the Constitution and in executive branch practice. Thus, to the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary. For example, were the President to conclude that Iraq's development of WMD might endanger our national security because of the risk that such weapons either would be targeted against the United States, or would be used to destabilize the region, he could direct the use of military force against Iraq to destroy its WMD capability. Or, were it the President's judgment that a change of regime in Iraq would remove a threat to our national interests, he could direct the use of force to achieve that goal.

"Were the President to take such action, he would be acting consistent with the historical practice of the executive branch."

In this section, you have moved from an argument about the Constitution to one about both the Constitution and

established practice, and finally to an assertion about historical practice alone. And yet, these are two different elements being blended, conflated, confused, and abused together. Out the final conveyor belt of this sausage factory comes the bald claim that a president can simply launch a war of aggression on his whim, even for explicitly illegal reasons, such as his own personal belief, based on who knows what (possibly even another chapter of the Bible), that a distant foreign nation might destabilize its region of the world (and of the U.S. empire). Imagine applying this standard to any nation other than the United States!

Now let's watch you, Judge, trying to find a legalistic-like defense of this. While ignoring the most straightforward passages of the Constitution and inconvenient pieces of legislation, not to mention international treaties that are the supreme law of our land under Article VI of the Constitution, what can you cherry-pick that might appear to help you (not, of course, that you need help, this all being redundant and almost offensive to the powers of the elected despot)?

"B. Statutory Authority

"At times throughout our history, the President's constitutional authority to use force has been buttressed by statute. Such statutory support is not necessary in light of the President's independent constitutional authority to direct military action. See Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 Pub. Papers of George Bush 40 (1991) ("my request for congressional support did not, and my signing [Pub. L. No. 102-1] does not, constitute any change in the long-standing positions of the executive branch on . . . the President's constitutional authority to use the Armed Forces to defend vital U.S. interests"); see also Bosnia Opinion, 19 Op. O.L.C. at 335 ("the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances"); Haiti Opinion, 18 Op. O.L.C. at 175-76 ("the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress").

"Nonetheless, congressional support of presidential action removes all doubt of the President's power to act. According to the analysis set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), and later followed and interpreted by the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the President's power in such a case would be "at its maximum." See *Constitutional Authority to Conduct Military Operations* at 19. Were the President to direct military action against Iraq, he would be acting at the apex of his power because, as we discuss below, his constitutional authority to use such force is supplemented by congressional authorization.

"Pub. L. No. 102-1. On January 14, 1991, shortly before the United States and allied nations began Operation Desert Storm, Congress enacted Pub. L. No. 102-1, the "Authorization for Use of Military Force Against Iraq Resolution." Subsection 2(a) authorizes the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677." 105 Stat. at 3.8 As explained above, UNSCR 678, in turn, authorizes member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." S.C. Res. 678, ¶ 2. The other resolutions listed in Pub. L. No. 102-1 relate to Iraq's invasion of Kuwait on August 2, 1990 and are identical to the resolutions "recall[ed] and reaffirm[ed]" in UNSCR 678.9

"By authorizing the use of U.S. Armed Forces "pursuant to" UNSCR 678, Pub. L. No. 102-1 sanctions not only the employment of the methods approved in that resolution—i.e., "all necessary means"—but also the two objectives outlined therein—that is, "to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." S.C. Res. 678, ¶ 2.10 Two of the most important "subsequent relevant resolutions" are UNSCR 687, which requires, inter alia, the inspection and destruction of Iraq's WMD program, and UNSCR 688, which demands that Iraq halt the repression of its civilian population. The second purpose for UNSCR 678, the restoration of peace and security to the Persian Gulf region, depends, at a minimum, on the effective implementation of both of these resolutions, although UNSCR 678 is not limited to implementing these two resolutions. See, e.g., S.C. Res. 687, preamble ("bear[ing] in mind [the] objective of restoring international peace and security in the area"); S.C. Res. 688, ¶ 1 (end to repression would "contribut[e] to removing the threat to international peace and security in the region").

"The President could, consistent with Pub. L. No. 102-1, determine that using force in Iraq was necessary to implement the terms of UNSCR 687 and thereby to restore international peace and security to the region. Under Pub. L. No. 102-1, the President also could authorize force to prevent the repression of Iraqi civilians condemned in UNSCR 688, i.e., repression that threatens international peace and security by contributing to cross-border incursions and migration of refugees. Given Saddam Hussein's history of intransigence and refusal to cooperate

with inspections of Iraq's WMD program and his continued repression of Iraqi civilians, the President could determine that a change of regime in Iraq is necessary to implement UNSCR 687 and thereby restore international peace and security to the region. Were the President to take any of these actions, he would be acting at the zenith of his authority because it would include "all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) (footnote omitted)."

That is to say, if the president based a war of aggression on a UN resolution or a combination of UN resolutions that justified and permitted no such action, he would therefore have the constitutional authorization of Congress, which he would not need, but which would strengthen his act's legality (a legality that would be even more pregnant, as it were) despite its (the congressional authorization's) inappropriate uselessness. Dare we read further? Like a rubbernecker passing highway carnage, how can we turn away?

"It could be argued that Iraq's expulsion from Kuwait in February 1991 by the United States and the allied nations fully implemented the UNSCRs listed in Pub. L. No. 102-1, and that therefore the authorization in subsection 2(a) for the use of U.S. Armed Forces has expired. Subsequent congressional legislation demonstrates, however, that the authorization in Pub. L. No. 102-1 remains in effect. First, the same Congress that enacted Pub. L. No. 102-1 twice expressed its "sense" that Pub. L. No. 102-1 continued to authorize the use of force even after Iraq's withdrawal from Kuwait.¹¹ Enacted on December 5, 1991, section 1095 of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1095, 105 Stat. 1290, 1488 (1991) ("1992-1993 Defense Authorization Act") contains a congressional finding that Iraq is violating UNSCR 687's requirements relating to its WMD program and expresses Congress's sense that "the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1)." *Id.* § 1095, 105 Stat. 1488.¹² And section 1096 of the 1992-1993 Defense Authorization Act expresses the same Congress's "sense" that "Iraq's noncompliance with United Nations Security Council Resolution 688 constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region . . . and [that] the Congress supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688," which condemns the repression of the Iraqi civilian population, "consistent with all relevant United Nations Security Council Resolutions and . . . Public Law 102-1." *Id.* § 1096, 105 Stat. 1489. Second, in 1999, Congress amended Pub. L. No. 102-1 to extend the reporting requirements from every 60 days to every 90 days, thereby indicating that the law continues in effect. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Div. B, § 1000(a)(7), 113 Stat. 1501, 1536 (1999)."

Yet, neither Congress nor the United Nations took these claims seriously, and to argue that Congress approved of years ago a war it had not yet heard about and currently might oppose hardly legalizes it domestically, much less internationally. Consequently, Bush was forced to ask Congress for a new authorization, one granted following the presentation to Congress of numerous false claims and misleading statements, and one -- as noted -- the reporting requirements of which were not honestly complied with. But that's all beside the point, since your argument is about to revert again to the justification of past illegal practice:

"In addition, executive branch practice confirms that Pub. L. No. 102-1 continues to be in effect and to provide statutory authority for the President to implement applicable Security Council Resolutions, including UNSCRs 678, 687, and 688. Consistent with the reporting requirement in section 3 of Pub. L. No. 102-1, President Bush and his two predecessors have written to Congress at regular intervals to report on the status of efforts to secure Iraqi compliance with the applicable Security Council resolutions.¹³ This practice has gone unchallenged by Congress."

EVERYTHING goes unchallenged by Congress! Take, for example, your own immunity to impeachment. That is not an argument for exponentially increasing the magnitude of an abusive practice. Nor is it an argument for having obtained a congressional declaration or authorization of war, either of which things requires a positive action.

"Even more significant, President George H.W. Bush and President Clinton authorized the use of force on several occasions under Pub. L. No. 102-1 after the successful completion of Operation Desert Storm. For example, in 1998, President Clinton directed missile and aircraft strikes against Iraq "under" Pub. L. No. 102-1. See 2 Pub. Papers of William J. Clinton at 2196 (1998). Two years earlier, in September 1996, President Clinton reported to Congress that he had ordered U.S. cruise missile strikes "[c]onsistent with" Pub. L. No. 102-1 and section 1096 of the 1992-1993 Defense Authorization Act. See Gingrich Letter at 1. President Bush also reported to Congress that he had ordered the 1992 participation of the United States in the enforcement of the southern no-fly zone in Iraq "[c]onsistent with" Pub. L. No. 102-1. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of George Bush at 1575 (1992). Congress has acquiesced in each of these uses of force.

"In sum, both legislation passed by Congress and the consistent practice of the executive branch indicate that the authorization to use force in Pub. L. No. 102-1 has survived the cease-fire with Iraq. Although congressional authorization is not constitutionally required before the President may direct military action against Iraq in response to threats to the national security and foreign policy of the United States, the President would be acting with the support of Congress were he to direct such action pursuant to Pub. L. No. 102-1.

"Pub. L. No. 105-235. Pub. L. No. 105-235, a Joint Resolution finding that Iraq "is in unacceptable and material breach of its international obligations," and "urg[ing]" President Clinton "to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance," also arguably expresses Congress's support for the President to direct military action against Iraq. Pub. L. No. 105-235, 112 Stat. 1538, 1538, 1541 (1998). The resolution contains multiple "whereas" clauses detailing almost two dozen Security Council findings of Iraqi violations of its WMD obligations and concluding that "Iraq's continuing weapons of mass destruction programs threaten vital United States interests and international peace and security." *Id.* at 1540. Although the Joint Resolution does not specifically authorize the use of force, and cautions that any action taken must comply with the Constitution and relevant laws, insofar as the President determines that directing military action against Iraq is "appropriate . . . to bring Iraq into compliance with its international obligations," and consistent with the Constitution and relevant U.S. law, Congress has expressed its support for such action. *Id.* at 1541. In addition, subsequent legislation passed by the same Congress that enacted Pub. L. No. 105-235 reflects at least implicit support for military action. In the Iraq Liberation Act, Congress noted with approval Pub. L. No. 105-235's recommendation that the President take appropriate action. See Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178. Significantly, the Iraq Liberation Act was passed shortly after President Clinton submitted his September 1998 report under Pub. L. No. 102-1, which made clear that military options were "on the table" if Iraq did not resume cooperation with the U.N. inspection regime. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of William J. Clinton 1519, 1520 (1998). Read in this context, Pub. L. No. 105-235 grants at least implicit congressional authorization for the President to use force."

Call me a stickler, but I prefer for laws -- at least those purporting to legalize mass slaughter -- to be explicit, not implicit. I'm sure that's very unromantic, but there it is.

"Pub. L. No. 107-40. Pub. L. No. 102-1 and Pub. L. No. 105-235 are not the only potential sources of congressional support for a decision by the President to use force against Iraq; there could be situations in which military action against Iraq would be statutorily authorized pursuant to Pub. L. No. 107-40, the "Authorization for Use of Military Force" that was enacted shortly after the terrorist attacks of September 11, 2001. Pub. L. No. 107-40 authorizes the President to use "all necessary and appropriate force" against those nations, organizations or persons whom he determines "planned, authorized, committed, or aided the [September 11th] terrorist attacks . . . 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." 115 Stat. at 224. Were the President to determine that Iraq provided assistance to the perpetrators of the September 11th attacks, this authorization would apply to the use of military force against Iraq.

You wisely leave this as a hypothetical, Mr. Bybee, but your boss did not. Bush obtained a new congressional authorization to use force requiring that he make a determination very much like this one, and he subsequently did so, orally and in a written report to Congress, while in possession of evidence that his statements were false. Nonetheless, we have to take a step back and recognize that there was still no Constitutional declaration of war, and no sense in which a war launched on this basis would be legal under the UN Charter, no matter what an aspiring judge had to say in a drunken secret memo.

Now, having reviewed laws you like, Mr. Bybee, let us turn to a law you don't like, a law so inconvenient that you prefer to argue that the law is invalid. In fact, you choose to treat as valid precedent a president's veto, even though the veto was over-riden by Congress. Funny how that works. Perhaps you've again misplaced your copy of the Constitution? The War Powers Resolution can be read [here](#).

"C. The War Powers Resolution

"Under the 1973 War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1994) ("WPR"), whenever U.S. Armed Forces are deployed for combat, the President shall submit a written report to Congress within forty-eight hours. See 50 U.S.C. § 1543(a). Under section 5(b), the President shall terminate any continuous and sustained use of U.S.

Armed Forces within sixty days unless Congress has declared war, enacted a specific authorization for such use of U.S. Armed Forces, or extended the sixty-day period or unless Congress cannot meet because of an armed attack on the United States. See *id.* § 1544(b). To the extent that Pub. L. No. 102-1 or Pub. L. No. 107-40 authorizes the actions being contemplated by the President, those resolutions explicitly state that they satisfy the requirements of section 5(b). Insofar as any of the military options being contemplated fall outside the scope of the authorizations in Pub. L. No. 102-1 and Pub. L. No. 107-40, and instead would be conducted solely on the basis of the President's independent constitutional authority, significant constitutional issues regarding the sixty-day clock would be raised.

"[E]very President has taken the position that [WPR] is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief." Congressional Research Service, Library of Congress, War Powers Resolution: Presidential Compliance at 2 (2002) ("War Powers Resolution: Presidential Compliance"); see also Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 281-83 (1984) (listing examples of President's introduction of U.S. Armed Forces into actual or imminent hostilities or hostile territory, without complying with the WPR's reporting requirements, that took place during the Nixon, Ford, Carter, and Reagan Administrations). Indeed, the War Powers Resolution was enacted over a presidential veto based on constitutional objections as well as foreign policy concerns. See Veto of the War Powers Resolution, Pub. Papers of Richard Nixon 893 (1973). As President Nixon explained in justifying his veto:

"the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation. . . . [The resolution] would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. . . . The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force. *Id.*; see also 1 Pub. Papers of George Bush at 40 (1991) (preserving "long-standing positions of the executive branch on . . . the constitutionality of the War Powers Resolution")."

"This Office has never formally opined on the constitutionality of the WPR; we have, however, questioned the WPR's constitutionality on numerous occasions. See, e.g., Overview of the War Powers Resolution, 8 Op. O.L.C. at 274 ("The Executive Branch has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces."); Executive Power with Regard to the Libyan Situation, 5 Op. O.L.C. 432, 441 (1981) ("We do not believe . . . that the purpose and policy statement should be construed to constrain the exercise of the President's constitutional power."); cf. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 195 (1980) ("there may be applications [of the reporting or consultation requirements of WPR] which raise constitutional questions"); Supplementary Discussion of the President's Powers Relating to the Seizure of the American Embassy in Iran, 4A Op. O.L.C. 123, 128 (1979) (same); Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115, 121 (1979) ("The Resolution includes in its statement of purposes and policy a list of situations in which the President is authorized to introduce the armed forces into hostilities or situations of imminent hostility. . . . However, we do not consider that the purpose and policy statement should be construed to constrain the exercise of the President's constitutional power in this instance.") (citation omitted).¹⁸ Most recently, this Office has stated that "action taken by the President pursuant to the constitutional authority recognized in [section] 2(c)(3) cannot be subject to the substantive requirements of the WPR." Constitutional Authority to Conduct Military Operations at 21.

"Finally, we note that the WPR has been controversial ever since its enactment in 1973 and has been the subject of litigation when Presidents have used military force, allegedly in violation of the WPR. See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Sanchez Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). To date, no court that we are aware of has ever reached a judgment on the merits; cases have been dismissed on the basis of a variety of procedural defects, including lack of standing, lack of ripeness, and the political question doctrine. See War Powers Resolution: Presidential Compliance at 2 ("The courts have not directly addressed [whether WPR is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief]"). If the President were to take military action without complying with the WPR, it is likely that litigation would be brought. We think it is unlikely, however, that a court would rule on the merits of the WPR."

In January 2007, an official of the U.S. Department of Justice went before the House Judiciary Committee and argued that any law could be violated by any president up until the Supreme Court had ruled in favor of the law. This seems to have been a perspective shared by you, Mr. Judge. But the Constitution has it differently, requiring that the president faithfully execute the laws as passed by Congress and signed into law, or passed by Congress through a veto-override. Laws, for

most Americans, are laws until they are overturned. Laws, for all of us, are not considered overturned from day 1 until the Supreme Court supports them. On what basis do you and your gang claim that things are different in this regard for the president? You appear quite openly here to be establishing two classes of citizens, those beneath the law, and those above. And it's apparent which class you have placed yourself in.

That, ultimately, is the core of your case for the domestic legality of attacking distant unarmed nations with oil.

What could possibly top this?

In the immortal words of an infomercial for pots and pans: "Covers!"

And what covers they are! Read along as international law is transformed into international criminal license:

"III. Authority Under International Law to Use Force Against Iraq

"The United Nations Charter ("U.N. Charter") requires member states to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. U.N. Charter, art. 2, ¶ 4. Nonetheless, the Security Council may act under chapter VII of the Charter to authorize member states to use such force "as may be necessary to maintain or restore international peace and security." Id. art. 42. In addition, article 51 of the U.N. Charter recognizes the "inherent right of individual or collective self-defense." Id. art. 51. Authority under international law for the use of force against Iraq stems from two different sources—Security Council authorization in the form of UNSCR 678, which authorizes the use of "all necessary means" to implement various UNSCRs relating to Iraq and to restore international peace and security, and the inherent right of self-defense, recognized in article 51. We will discuss each in turn.

"A. U.N. Security Council Authorization "On November 29, 1990, the Security Council, acting under chapter VII of the U.N. Charter, adopted UNSCR 678, which authorizes member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." Two such relevant resolutions are: (1) UNSCR 687, which established the conditions for a formal cease-fire suspending hostilities in the Persian Gulf;²¹ and (2) UNSCR 688, which demanded that Iraq cease its repression of its civilian population because the consequences of that repression threatened international peace and security in the region. Fundamental to the restoration of international peace and security to the region is Iraq's compliance with the terms of both UNSCR 687, particularly its requirements that Iraq permanently dismantle its WMD program and permit U.N. inspections for verification purposes, and UNSCR 688. If UNSCR 678 is read together with UNSCRs 687 and 688, the Security Council has authorized the use of force against Iraq to uphold and implement the conditions of the cease-fire and to encourage Iraq to cease repression that threatens international peace and security in the region by, for example, contributing to refugee migration and cross-border incursions. To determine whether the existence of the cease-fire would prevent such a use of force, we turn to a consideration of the conditions under which the cease-fire may be suspended.

"The Cease-Fire, Material Breach, and Treaty Law. No clearly established rule of international law exists regarding the appropriate circumstances in which a cease-fire established by a U.N. Security Council resolution may be suspended. To discern an applicable standard, we look for guidance to general principles of treaty law.

"UNSCR 687 explicitly establishes "a formal cease-fire . . . between Iraq and Kuwait, and "the [U.N.] Member States cooperating with Kuwait in accordance with resolution 678 (1990)." S.C. Res. 687, ¶ 33. UNSCR 687 is not a multilateral treaty, but for our purposes it may be useful to analogize it to such a treaty, as defined by the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 60(2)(b), 1155 U.N.T.S. 331, 346 ("Vienna Convention"). Under the Vienna Convention, a "treaty" is a written international agreement between States that is governed by international law. See id. art. 2(1)(a). The State parties to the cease-fire agreement are Iraq, Kuwait, the United States, and the other members of the coalition in the Persian Gulf War. Cf. Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 *Am. J. Int'l L.* 724, 726 (1998) (pointing out that the original cease-fire on the ground was a decision of the individual members of the coalition, not the Security Council as a whole). Even if some of the State-parties to the cease-fire did not specifically agree to its terms because they were not members of the Security Council when Resolution 687 was adopted, the resolution is binding on them as members of the United Nations. See U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."); *Glencore v. Department of Nat'l Store Branch 1 (Vietnam)*, No. 99 Civ. 8607 (NRB), 2000 WL 777904, at *5 (S.D.N.Y. June 15, 2000) (under article 25, "all members of the United Nations are

obliged to accept and carry out . . . decisions of the Security Council" acting under chapter VII); Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Proposed Executive Order Entitled "Transactions Involving Southern Rhodesia" at 2 (Dec. 13, 1977) ("Rhodesia Executive Order") (United States is obligated under international law to implement a UNSCR adopted under chapter VII); see also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114, 126, ¶ 42 (Apr. 14); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 53, ¶ 115 (June 21) ("South Africa Advisory Opinion").

"In the multilateral context, it is well-established that a material breach of a treaty by one of the parties entitles a party "specially affected" by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part vis-à-vis the defaulting state. See Vienna Convention, art. 60(2)(b);²⁴ see also Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees at 23 (Jan. 22, 2002); Letter for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel at 4 n.4 (Nov. 15, 2001); International Load Line Convention, 40 Op. Att'y Gen. 119, 124 (1941); 1 Restatement (Third) of the Foreign Relations Law of the United States § 335(2)(b) (1987). Even if the United States were not "specially affected" by Iraq's noncompliance with UNSCR 687, however, a material breach of a multilateral treaty also permits any non-defaulting party to cite the breach as a ground for complete or partial suspension with respect to itself "if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty." See Vienna Convention, art. 60(2)(c); 1 Restatement (Third) § 335(2)(c). According to the Vienna Convention, a "material breach" includes "[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty." Vienna Convention, art. 60(3)(b); see also Black's Law Dictionary 183 (7th ed. 1999) (defining "material breach" as "a substantial breach of contract, usually excusing the aggrieved party from further performance").

"Regardless of whether a material breach must amount to non-compliance that "specially affects" the United States or that effects a "radical change" in circumstances, it seems clear that Iraq has sufficiently violated the cease-fire to meet either standard. Iraq's repeated refusals to comply with the international on-site inspections of its WMD program mandated by UNSCR 687 qualify as a material breach because they violate core provisions of the resolution. See, e.g., S.C. Res. 687, ¶ 9 (Iraq shall "agree to urgent, on-site inspection" of its biological, chemical and missile capabilities); id. ¶ 12 (Iraq shall accept "urgent on-site inspection" of its nuclear materials and facilities). Iraq's continuing efforts to prevent the U.N. from inspecting potential WMD sites directly interferes with U.N. Security Council efforts to restore international peace and security in the region. Immediately after the ceasefire, for example, Iraq refused to cooperate with UNSCOM and the IAEA. On August 15, 1991, little more than three months after the adoption of UNSCR 687, the Security Council "condemn[ed]" Iraq's "serious violation" of a number of its obligations regarding the destruction and dismantlement of its WMD program and of its agreement to cooperate with UNSCOM and the IAEA, and stated that the violation "constitutes a material breach of the relevant provisions of [UNSCR 687] which established a cease-fire and provided the conditions essential to the restoration of peace and security in the region." S.C. Res. 707. Over the next two years, the President of the Security Council issued six different statements reiterating that Iraq's refusal to cooperate with UNSCOM and the IAEA qualified as material breaches of UNSCR 687.²⁶

"Further, in the years preceding the December 1998 missile strikes, Iraq continued to violate the WMD-related requirements in UNSCR 687. The Security Council adopted several resolutions condemning Iraq's noncompliance as "clear," "deeply disturbing," "unacceptable," "flagrant" and "a threat to international peace and security."²⁷ Although these denunciations by the Security Council do not use the particular phrase "material breach," the conduct criticized fits within the Vienna Convention's definition of that phrase: it violates conditions of the cease-fire that are essential to its purpose. Moreover, over the past few years, the absence of military force to compel Iraq's compliance with the terms of the cease-fire seems only to have increased its material breach. Since the 1998 airstrikes, Iraq has continued its flagrant violation of the terms of the cease-fire by refusing to permit any U.N. inspections of its WMD program. See S.C. Res. 1284 (noting Iraq's failure to implement fully UNSCR 687 and other relevant resolutions).

"In sum, Iraq's repeated interference with international inspections of its WMD program qualifies as a "material breach" of the cease-fire under international law. In addition, were there to be evidence that Iraq is continuing to develop its WMD program, or has not destroyed its WMD and their means of delivery, such actions also would

constitute material breaches of Iraq's obligations under UNSCR 687 unconditionally to destroy, and cease to develop, WMD and their delivery systems."

In other words, even though the president can launch an aggressive war anytime he sees fit, at least under domestic law, he can do the same under international law if he finds an earlier authorization for war in the same part of the world and blames the nation against which war was previously waged of breaking a cease-fire. "They started it!" However, no international authority considered this valid, and on March 6, 2003, Bush told a reporter that he would call for a vote on a new UN resolution no matter what. He never did because the votes to pass it were not there. Strike one, Jay B.

"Remedies. Having determined that the President has sufficient grounds to find Iraq in material breach of the cease-fire, we must address whether unilaterally suspending the cease-fire constitutes a proper remedy for the violation. We believe that Iraq's material breaches of the cease-fire entitle the United States, as a party to the cease-fire, unilaterally to suspend its operation.²⁸ Cf. Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty at 20-21 (Nov. 15, 2001) ("Authority to Suspend ABM Treaty") (In *Charlton v. Kelly*, 229 U.S. 447, 473 (1913), the Supreme Court held that "if a partner to a treaty commits a material breach, the President has the option whether to void the treaty or to overlook the breach and regard the treaty merely as voidable."). Under accepted principles of international treaty law, the United States need not obtain the concurrence of the other parties to the cease-fire prior to suspending its terms. See Wedgwood, *The Enforcement of Security Council Resolution 687*, supra at 726 (United States did not need to wait for Security Council approval before responding to a breach of the cease-fire because "[i]t is not unreasonable to regard the terms of such a cease-fire [UNSCR 687] as self-executing, just as the violation of a newly settled boundary line or demilitarized zone would entitle a neighboring state to act upon a violation"); cf. Vienna Convention, art. 60 (no requirement that all parties to a multilateral treaty agree to suspend the treaty—one party may suspend the treaty with respect to itself).

"Some commentators have argued that, before the cease-fire may be suspended, the United States must first obtain a new UNSCR finding that Iraq is in material breach of its obligations. The circumstances that gave rise to the Security Council's finding in UNSCR 707 that Iraq's noncompliance with the terms of the cease-fire constituted a material breach are still present today—Iraq continues its significant obstruction of international inspections of its WMD program. Moreover, we believe that it is within the power of the United States to ascertain for itself whether, as an objective fact, there has been a material breach of an agreement to which it is a party. See *Legal Authority for the Possible Use of Force Against Iraq*, 92 Am. Soc'y Int'l L. Proc. 136, 141 (1998) ("Whether there [is] a material breach is an objective fact. It is not necessary that it be the [Security] Council that determines or states that a material breach has occurred.") (statement of Michael Matheson, Principal Deputy Legal Adviser, Department of State); see also Michael L. Cornell, *Comment: A Decade of Failure: The Legality and Efficacy of United Nations Actions in the Elimination of Iraqi Weapons of Mass Destruction*, 16 Conn. J. Int'l L. 325, 355 (2001) ("nothing in UNSCR 687, the U.N. Charter, or international law . . . requires a finding of material breach to be documented by the UNSC"); cf. Wedgwood, *The Enforcement of Security Council Resolution 687*, supra at 728, n.26 (definition of material breach is objective). For example, the United States launched the 1998 airstrikes without first obtaining either a Security Council resolution or a statement by the President of the Security Council that Iraq had materially breached its international obligations.

"Thus, in response to Iraq's material breaches of the conditions of the cease-fire established in UNSCR 687, the United States may suspend the cease-fire, which otherwise obligates the United States, Iraq, Kuwait, and the other members of the coalition in the Persian Gulf War to refrain from military action. Once the cease-fire is suspended, the United States may again rely on the authorization in UNSCR 678 to use force against Iraq to implement UNSCR 687 and to restore international peace and security to the area. See Wedgwood, *The Enforcement of Security Council Resolution 687*, supra at 726 (Iraq's breach of the terms of the cease-fire in 1997-1998 "allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions"); cf. Joseph Murphy, *De Jure War in the Gulf: Lex Specialis of Chapter VII Actions Prior to, During, and in the Aftermath of the United Nations War Against Iraq*, 5 N.Y. Int'l L. Rev. 71, 84-85 (1992) (continuing material breach of UNSCR 687 by Iraq would effectively nullify the permanent cease-fire and would reinstate UNSCR 678 and its authorization to use military force to implement all subsequent relevant resolutions, including UNSCR 687). In our view, UNSCR 678's authorization to use force has continued in effect since it was first adopted in 1990. We disagree with the idea that, due to the cease-fire established in UNSCR 687, UNSCR 678's authorization has expired. The consistent position of the United States has been that UNSCR 678 survived the cease-fire. See, e.g., *Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council*

Resolutions, 2 Pub. Papers of George Bush at 1164-65 (1991) (explaining—after the adoption of UNSCR 687—that the United States was willing to take military action to implement UNSCR 678's call for the restoration of international peace and security to the region); Legal Authority for the Possible Use of Force Against Iraq, 92 Am. Soc'y Int'l L. Proc. at 142 ("In the U.S. Government's view, there is a continuing right to use force [to respond] to such [material] breaches regardless of whether there is further [Security Council] authorization to respond.") (panelist Michael Matheson, Principal Deputy Legal Adviser, Department of State). As discussed earlier, see *supra* § II(B), at 10, n.9, UNSCR 678 has been explicitly reaffirmed by UNSCR 687 itself, as well as by UNSCRs 686 and 949.29 And, as we explain below, see *infra* § III(A), at 27-29, general principles of armistice law confirm that the cease-fire did not extinguish the Security Council's authorization to use force, but rather suspended hostilities between Iraq, the United States, and other members of the coalition.

"In our view, the President could reasonably determine that suspending the cease-fire and resuming hostilities with Iraq is an appropriate response to Iraq's material breaches of the cease-fire. Over the years, Iraq repeatedly has refused to respond to diplomatic overtures and other non-military attempts to force Iraq to comply with its obligations to permit full U.N. inspections of its WMD program. The President could reasonably conclude that military force is necessary to obtain Iraqi compliance with the terms of the cease-fire, thereby restoring international peace and security to the region. And, as we will explain below, state practice confirms that the suspension of the cease-fire and the subsequent use of military force against Iraq constitute an appropriate remedy for Iraq's material breaches of the cease-fire, provided that such use of force is necessary and proportional."

In other words, the best authority on what the United Nations thinks is the president of the United States, never mind what the United Nations may have to say about the matter. Strike two, Bybee.

"State Practice on Suspension in Response to Material Breach.

"Suspension of treaties or international agreements in response to a material breach is a well-established practice in which the United States has engaged on several occasions. Such state practice is relevant as a demonstration of customary international law. See 1 Restatement (Third) § 102(2) (customary international law stems from "a general and consistent practice of states followed by them from a sense of legal obligation"); *id.* § 103 cmt. a (best evidence of customary international law is proof of state practice, ordinarily provided by official documents and other indications of governmental action).

"The United States has repeatedly suspended the cease-fire established by UNSCR 687 in response to Iraq's material breach of that resolution. The United States and Britain, for example, used force against Iraq in 1993 and 1998 in response to Iraq's material breach of UNSCR 687. On January 17, 1993, President George H.W. Bush ordered missile strikes against a nuclear facility near Baghdad due to both Iraq's refusal to permit certain U.N. aircraft to land in that city, and a series of incidents in which Iraq challenged the authority of the U.N. Iraq-Kuwait Observation Mission along the Iraq-Kuwait border. The Security Council found each of these actions by Iraq to be material breaches of the cease-fire. In addition, the United States was responding to UNSCOM's findings on January 15 and 16 that Iraq had abdicated its responsibilities to safeguard UNSCOM personnel and was unacceptably attempting to restrict the Commission's freedom of movement. See Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of George Bush at 2269-70 (1992-1993). The strikes were designed "to help achieve the goals of U.N. Security Council Resolutions 687, 707, and 715," which required Iraq to accept the inspection and dismantlement of its WMD program. *Id.* at 2270.

"Just four days prior to the January 17th strikes, President Bush ordered an air attack on surface-to-missile sites and related facilities in the southern no-fly zone. The January 13th attack, which was joined by Britain and France, appears to have been primarily in response to Iraqi violations of the southern no-fly zone—Iraq had moved surface-to-air missiles into the zone to threaten coalition aircraft, but President Bush also pointed to Iraq's "failure to live up to the resolutions." Barton Gellman & Ann Devroy, U.S. Delivers Limited Air Strike on Iraq; Bush Sends Battalion to Kuwait; Baghdad Appears to Make Concessions, Wash. Post, Jan. 14, 1993, at A1, available at 1993 WL 2211867 (quoting President Bush); see also Press Release, United States Mission to the United Nations, USUN-1 (Jan. 13, 1993) ("[T]he Government of Iraq should understand that continued defiance of U.N. Security Council resolutions and related coalition demarches will not be tolerated.") (statement by Marlin Fitzwater). The President's report to Congress on the attack takes note of a statement by the U.N. Secretary General explaining that "the forces that carried out the [January 13th] raid have received a mandate from the Security Council, according to Resolution 687, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the cease-fire. . . . [T]his action . . . conformed to the Charter of the United Nations." 2 Pub. Papers of George Bush at 2269 (1992-

1993) (quoting U.N. Secretary General Boutros-Ghali).

"In December 1998, President Clinton explained that the U.S. launched seventy hours of missile and aircraft strikes against Iraq "in response to Iraqi breaches of its obligations under resolutions of the United Nations Security Council." See Letter to Congressional Leaders on the Military Strikes Against Iraq, 2 Pub. Papers of William J. Clinton at 2195 (1998). President Clinton's justification for the military action, which targeted facilities actively involved in Iraq's WMD programs or that threatened Iraq's neighbors or U.S. forces, was that

"[i]t is consistent with and has been taken in support of numerous U.N. Security Council resolutions, including Resolutions 678 and 687, which authorize U.N. Member States to use "all necessary means" to implement the Security Council resolutions and to restore peace and security in the region and establish the terms of the cease-fire mandated by the Council, including those related to the destruction of Iraq's WMD programs.'

"Id. at 2195-96. As the Acting U.S. Ambassador to the United Nations A. Peter Burleigh explained to the other members of the Security Council, Iraq had acted in "flagrant material breach of resolution 687" by interfering with UNSCOM's inspections, and coalition forces responded under the authority provided by UNSCRs. See Security Council Press Release, U.N. Doc. SC/6611, at 1-2, 7 (1998). Professor Ruth Wedgwood agrees:

"Iraq's calculated defiance of [the terms of the cease-fire regarding elimination of WMD and verification by UNSCOM] in the 1997-1998 confrontation allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions, subject to the requirements of necessity and proportionality. . . . The right to use force unilaterally to vindicate the inspection regime is also ratified by . . . the events of January 1993 [in which] Iraq was warned [by the Security Council] that "serious consequences" would flow from "continued defiance." On January 13, 1993, the United Kingdom and France joined the United States in conducting air raids on sites in southern Iraq.'

"Wedgwood, The Enforcement of Security Council Resolution 687, *supra* at 726-27. International support for the 1998 airstrikes is reflected by the offer of Argentina, Australia, Canada, the Czech Republic, Denmark, Germany, Hungary, the Netherlands, New Zealand, Portugal, Spain and the United Kingdom to contribute facilities, equipment or forces to the U.S. military effort, and of Kuwait for the use of its air facilities. See *id.* at 727."

"The United States engaged in the practice of suspending treaties or international agreements in response to a material breach long before the conflict with Iraq. For example, on June 20, 1876, President Grant informed Congress that he was suspending the extradition clause of the 1842 "Webster-Ashburton Treaty" with Britain, Convention as to Boundaries, Suppression of Slave Trade and Extradition, Aug. 9, 1842, U.S.-Gr. Brit., art. 10, 8 Stat. 572, 576. In President Grant's view, the release of two fugitives by Britain whose extradition was sought by the United States was "an abrogation and annulment" of the extradition clause of the treaty, and in response the United States refused to surrender fugitives sought by the British Government until the British resumed performance. See Authority to Suspend ABM Treaty, *supra* at 17-18; Jacques Semmelman, The Doctrine of Specialty in the Federal Courts: Making Sense of *United States v. Rauscher*, 34 Va. J. Int'l L. 71, 125-30 (1993).

"More recently, in 1973, the United States charged the Democratic Republic of Vietnam with serious violations of the recently-concluded Agreement on Ending the War and Restoring Peace in Viet-nam, Jan. 27, 1973, 24 U.S.T. 1. In response, the United States declared that it would suspend its mine-clearing operations, which were mandated by the Agreement. See Arthur W. Rovine, *Digest of United States Practice in International Law* 482 (1973). The United States explained: "This suspension is justified as a response to the numerous material breaches of the Agreement by the Democratic Republic of Viet-Nam in accordance with the rule of international law as set forth in Article 60 of the 1969 [Vienna] Convention on the Law of Treaties." *Id.*

"The United States also partially suspended a multilateral treaty due to a material breach by one of the other parties in August 1986. In response to a policy adopted by New Zealand under which U.S. vessels and aircraft could not enter New Zealand ports unless they declared that they were not nuclear-armed or nuclear-powered, the United States suspended its security obligations under the ANZUS Pact—the Security Treaty Between Australia, New Zealand, and the United States, Sept. 1, 1951, 3 U.S.T. 3420—as to New Zealand but not to Australia. See 1 Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981-1988*, at 1279-81. The United States explained that "[a]ccess for allied ships and aircraft . . . is essential to the effectiveness of the ANZUS alliance. . . . Because of New Zealand's decision to renege on an essential element of its ANZUS participation, it has become impossible for the United States to sustain its security obligations to New Zealand." 86 Dep't St. Bull., Oct. 1986, at 44. The United States determined that New Zealand had committed a material breach

of article 2 of the ANZUS Pact, which states that the parties, "by means of continuous and effective . . . mutual aid will maintain and develop their individual and collective capacity to resist armed attack." 3 U.S.T. 3422; see Joint Statement by Secretary of State George Shultz, Secretary of Defense Caspar Weinberger, Australian Minister for Foreign Affairs Bill Hayden, and Australian Minister for Defense Kim Beazley, in 86 Dep't St. Bull., at 48 (agreeing that access for allied ships and aircraft is essential to the effectiveness of the ANZUS alliance and that New Zealand's policies were detracting from the individual and collective capacity to resist armed attack); see generally Authority to Suspend ABM Treaty, *supra* at 18.

"In sum, for more than a century, the United States has engaged in the well-established practice under international law of suspending treaties in response to a material breach by one of the other parties to the treaty. The United States has extended this practice to the conflict with Iraq, viewing material breaches by Iraq of the UNSCR that established the cease-fire as justification for the suspension of that cease-fire. The United States has then proceeded to use force as authorized by the Security Council in UNSCR 678."

Why stop at "more than a century"? Aren't the top experts on past U.S. conduct in the use of treaties the remaining survivors of Native American tribes? And yet exactly how any of this history, distant or recent, establishes international law -- as distinct from international organized crime -- is unclear. Strike three, you Honor.

"Armistice Law. Using force in response to a material breach of the cease-fire also would be consistent with general principles of armistice law. The cease-fire established by UNSCR 687 is similar to an armistice—unlike a peace treaty, it does not terminate the state of war, but merely "suspends military operations by mutual agreement between the belligerent parties." Regulations annexed to the Hague Convention on the Law and Customs of War on Land, Oct. 18, 1907, art. 36, 36 Stat. 2277, 2305 ("Hague Regulations");³¹ see also *Ludecke v. Watkins*, 335 U.S. 160, 167 (1948); *Commercial Cable Co. v. Burleson*, 255 F. 99, 104-05 (S.D.N.Y.) (L. Hand, J.), *rev'd and vacated as moot*, 250 U.S. 188 (1919) ("An armistice effects nothing but a suspension of hostilities; the war still continues."); Yoram Dinstein, *War, Aggression and Self-Defence* 50 (3d ed. 2001) ("A labelling of Resolution 687 as a 'permanent cease-fire' is a contradiction in terms: a cease-fire, by definition, is a transition-period arrangement."); cf. *In re Yamashita*, 327 U.S. 1, 11-12 (1946) (a state of war exists from the time war is declared until peace is proclaimed); *Hijo v. United States*, 194 U.S. 315, 323 (1904) ("A truce . . . does not terminate the war. . . . At the expiration of the truce, hostilities may recommence without any fresh declaration of war.") (internal quotations omitted); *Termination of Wartime Legislation*, 40 Op. Att'y Gen. 421, 422 (1945) (statutes effective only "in time of war" remain effective until restoration of a formal state of peace); Sydney D. Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council*, 71 Am. J. Int'l L. 461, 463, 469-71 (1977) (whereas an armistice is negotiated directly between the belligerents, the Security Council has introduced a new concept—the cease fire—that "is simply a suspension of acts of violence . . . resulting from the intervention of a third party"). Thus, the cease-fire established in UNSCR 687 merely suspended, rather than terminated, hostilities with Iraq.

"A cease-fire allows a party to a conflict to resume hostilities under certain conditions. Under the Hague Regulations, "[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately." Hague Regulations, art. 40; see also Army Field Manual ¶ 493 (hostilities may be resumed only with "convincing proof of intentional and serious violation of [the armistice's] terms by the other party").³² The Hague Regulations do not contain any explanation of what might qualify as "urgency," but the Department of the Army's Field Manual sheds some light on the question. According to the Army Field Manual, warning must be given to the other side, unless "the delay incident to formal denunciation and warning seems likely to give the violator a substantial advantage of any kind." Army Field Manual ¶ 493; cf. 2 L. Oppenheim, *International Law: Disputes, War, and Neutrality* 556 (H. Lauterpacht ed., 7th ed. 1952) ("since the terms 'serious violation' and 'urgency' lack precise definition, the course to be taken is in practice left to the discretion of the injured party").

"The missile strikes in 1993 and 1998 serve as clear examples of the suspension of a cease-fire and a resumption of hostilities due to serious violations by Iraq. As one scholar has described, "[t]he [1998-1999] air campaign must be seen as a resumption of combat operations in the face of Iraqi violations of the cease-fire terms. The hostilities merely continue a decade-long war, which started when Iraq invaded Kuwait in August 1990." Dinstein, *supra* at 50-51. Whether or not required under international law, warnings were given. See generally U.N. Doc. S/25091 (1993) (warning Iraq of the "serious consequences" that would follow if it failed to comply with its obligations); U.N. Doc. S/25081 (1993) (same); 2 Pub. Papers of George Bush at 2269-70 (1992-1993) (noting Security Council's warnings prior to the January 17th attack and explaining that the United States and the coalition warned Iraq prior to the January 13th strikes); 2 Pub. Papers of William J. Clinton at 2197 (1998) ("Last month, when [Saddam

Hussein] agreed to fully cooperate, I canceled an American military action. But I . . . made it absolutely clear that if he did not fully cooperate, we would have no choice but to act without further negotiation or warning."). It is our understanding based on information supplied by the Department of Defense that in neither case did the United States obtain the express agreement of all of the other members of the Persian Gulf War coalition before suspending the cease-fire and using force.

"Under general principles of armistice law, therefore, because the initial use of force in response to the invasion of Kuwait—Operation Desert Storm—was authorized under UNSCR 678, subsequent uses of force against Iraq in response to serious violations of the terms of the cease-fire established by UNSCR 687 would be authorized as well, provided either that Iraq has been warned, or that such a warning may be avoided because it would be likely to give Saddam Hussein a substantial advantage.

"If Iraq is currently in "serious violation" of the cease-fire, the United States may respond with force. It is our understanding that Iraq continues to violate, in particular, the conditions set forth in section C of UNSCR 687. As outlined above, supra § I, at 2-3, that section requires Iraq to: (1) accept unconditionally the destruction, removal, or rendering harmless, under international supervision, of its chemical and biological weapons and its ballistic missiles with a range greater than 150 kilometers (and related major parts, and repair and production facilities) and agree to urgent on-site inspection of such weapons and their delivery systems; (2) undertake unconditionally not to use, develop, construct or acquire such WMD and their delivery systems; (3) agree unconditionally not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any related research, development, support or manufacturing facilities; and (4) accept on-site inspection and the destruction, removal or rendering harmless as appropriate of all such nuclear-related weapons or materials. Iraq must comply with all four conditions to be in compliance with the terms of the cease-fire, and the President could determine that violation of any one of these conditions constitutes a serious violation of the cease-fire. Even if Iraq were to accept the return of U.N. inspectors and grant them unimpeded access, if Iraq has not destroyed its WMD and their delivery systems, or continues to seek to build such weapons, the United States may still respond with force because Iraq would be in "serious violation" of the cease-fire agreement."

Did Alberto make you put that in there, the part about how Iraq could be attacked because it was interfering with inspections, but Iraq could be attacked just the same if it fully cooperated with inspections. On what basis? Why, it might have weapons. Or it could just "seek to build such weapons". That would be grounds for the gravest crime there is: aggressive war.

"UNSCR 688. Apart from material breach and armistice law, the use of force against Iraq also may be justified in certain circumstances in response to threats to international peace and security caused by Iraq's violation of UNSCR 688. UNSCR 678 authorizes the use of "all necessary means" not only to eject Iraq from Kuwait, but also to uphold and implement "subsequent relevant resolutions" and to restore international peace and security to the Persian Gulf region. UNSCR 688 condemned Iraq's repression of its civilian population, found that such repression endangered international peace and security in the region, and demanded that Iraq cease such repression. By its terms, UNSCR 688 qualifies as a "subsequent relevant resolution" and its effective implementation is necessary to the restoration of peace and security to the region. Thus, UNSCR 688, in combination with UNSCR 678, provides authorization from the U.N. Security Council to use force, if necessary, to stop Iraq from repressing its civilian population if such repression would threaten international peace and security by, for example, causing refugee flows that would destabilize the region."

The pain that millions of refugees of the 2002-2009 Iraq War would feel upon learning that the war was justified as a way to prevent people being made refugees is just unimaginable. Oh, and, Clinton did it:

"The Clinton Administration focused on this combination of UNSCRs 678 and 688 to justify its September 1996 airstrikes and the subsequent expansion of the southern no-fly zone. When Saddam Hussein moved against the Kurdish civilian population in northern Iraq in 1996, the Administration stated that he violated UNSCR 688 and thereby threatened international peace and security by increasing the risk of cross-border incursions by neighboring countries or large flows of refugees across international borders. In response, the United States relied on UNSCR 678 to bring Iraq into compliance with UNSCR 688 and to restore international peace and security. See generally Gingrich Letter at 1 ("Our response demonstrates to Saddam Hussein that he must cease all actions that threaten international peace and security."); id. at 2 ("The no-fly zones were originally established pursuant to and in support of [UNSCRs] 678, 687, and 688 Expanding the no-fly zone was a reasonable response to the enhanced threat posed by Iraq."); Glyn Davies, U.S. Dep't of State, Daily Press Briefing at 3 (Sept. 4, 1996) ("678 and 688 together, I think, form the basis for the action we took"), available at <http://dosfan.lib.uic.edu/>

ERC/briefing/daily_briefings/1996/9609/960904db.html; Nicholas Burns, U.S. Dep't of State, Daily Press Briefing at 13-14 (Sept. 3, 1996) ("There was no need for Security Council action. The United States has clear authority under U.N. Security Council Resolution 688."), available at http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1996/9609/960903db.html; cf. 1 Pub. Papers of George Bush at 521-22 (1991) (explaining that introduction of U.S. forces into northern Iraq for emergency relief purposes was "consistent with" UNSCR 688, but not an attempt to intervene militarily into Iraq's internal affairs or to impair its territorial integrity).

"In sum, we believe that the Security Council has authorized the United States to resort to the use of force against Iraq either (1) in response to Iraq's material breaches or substantial violations of the terms of the cease-fire, which permit the United States to suspend the cease fire and rely on UNSCR 678 as an authorization to use "all necessary means" to bring Iraq into compliance with UNSCR 687, or (2) in response to violations of UNSCR 688 that threaten international peace and security."

For black is white, escalation is peace, and war is always justifiable. Wars are approved by the Security Council not by asking the Security Council but by asking you, Jay Bybee. You tell us what the UNSC thinks, no matter what it has to say for itself. And its not needed anyway, because, of course, aggression is actually self-defense:

"B. Anticipatory Self-Defense

"Independent of the support provided by U.N. Security Council resolutions, authority under international law for armed intervention in Iraq could come from the national right of self-defense. The right of self-defense under customary international law is well-established. Article 51 of the U.N. Charter recognizes and affirms that "inherent" right:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

"U.N. Charter, art. 51; see also North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (agreeing that if an armed attack occurs against one of the parties, the others will exercise the right of individual or collective self-defense recognized by article 51); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, 21 U.N.T.S. 77, 93 (Rio Treaty) (same). Although recognized by these agreements, the right to self-defense is broader in scope than suggested by these provisions. For example, in July 1940, the British used force in self-defense against the French, absent any armed attack by the French and even though Britain and France had recently been fighting Hitler side-by-side. Shortly after the Vichy regime was established in June 1940, the British gave the French an ultimatum requiring the French to take certain steps to protect their ships at Mers-el-Kabir—a small base on the Algerian coast—from being taken over by the Germans. When the French refused to comply, the British opened fire under "Operation Catapult," killing more than 1,200 French officers and men. See generally Alistair Horne, *Mers-el-Kebir Was a Bizarre and Melancholy Action*, 16 *Smithsonian* 122 (July 1985); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L. Rev.* 335, 349 (1962-1963). Prime Minister Winston Churchill took this action believing that "the life of the State and the salvation of our cause were at stake. . . . [N]o act was ever more necessary for the life of Britain and for all that depended upon it." Winston S. Churchill, *The Second World War: Their Finest Hour* 232 (1949); see also Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas at 5 (June 13, 2002) ("Boarding and Searching Foreign Vessels") (discussing 1939 blockade on the high seas adjacent to the American continent to prevent any belligerent nation from taking hostile action in these waters as an example of anticipatory self-defense).

"Despite the longstanding recognition of a nation's right to self-defense, some argue that article 51 has limited the right to permit only a response to an actual "armed attack." See, e.g., Dinstein, *supra* at 167-68. Some even argue that an armed attack must occur across national borders before the article 51 right is triggered. See, e.g., Ian Brownlie, *International Law and the Use of Force by States* 275-80 (1963). Such an interpretation, however, would mean that the U.N. Charter extinguished the pre-existing right under customary international law to take reasonable anticipatory action in self-defense. There is no indication that the drafters of the U.N. Charter intended to limit the customary law in this way. See Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 *Am. J. Int'l L.* 597, 599 (1963) ("There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states."); see also Abraham D. Sofaer, *International Law and Kosovo*,

36 Stan. J. Int'l L. 1, 16 (2000).³⁷ Instead, as we have explained at length elsewhere, article 51 merely reaffirms a right that already existed independent of the Charter. See *Boarding and Searching Foreign Vessels*, supra at 10; see also Bowett, supra at 187."

Not the slightest evidence that the UN Charter intended to limit the ability of nations to attack each other? Not the slightest? What about these words in the text of the Charter: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. . . . Should the parties to a dispute . . . fail to settle it by the means indicated . . . they shall refer it to the Security Council." Does that constitute not the slightest evidence? Or look at article 51 closely, your Honor: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence **if an armed attack occurs against a Member of the United Nations**. . . ." When and where did Iraq attack the United States? And I mean in truth, not in the minds of Fox News viewers.

"The customary international law right to use force in anticipatory self-defense is a well- established aspect of the "inherent right" of self-defense. As we explained forty years ago:

"The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

"Memorandum for the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Re: Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union at 2 (Aug. 30, 1962); cf. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) ("the [domestic] power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion"). Thus, under existing Department of Justice opinions, the United States has the right under international law to use force against another state even before we actually come under armed attack, in order to prevent or forestall that attack."

Attacking Cuba would likely have created a catastrophe, so maybe that wasn't the best example. But what's stunning here is that all of your examples are from OLC memos like this one. You're not citing any actual laws here. The U.N. Charter does not change because one of your gung-ho predecessors favored attacking Cuba.

"We now turn to the task of explaining the legal principles that give content to the doctrine of anticipatory self-defense.

This will have to be good!

"The Caroline Test. The classic formulation of the right of anticipatory self-defense arose from the Caroline incident. In 1837, the steamer *Caroline* had been supplying armed insurgents against British rule in Canada with reinforcements of men and materials from the United States. In response, a British force from Canada entered U.S. territory at night, seized the *Caroline*, set the ship on fire, and launched it down Niagara Falls, killing two U.S. citizens in the process. The British claimed that they were acting in self-defense, and Secretary of State Daniel Webster called upon the British to show that the:

"necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment of deliberation . . . [and that the British force], even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."

"Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington, Apr. 24, 1841, reprinted in *1 British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print, Pt. I, Series C 153, 159* (Kenneth Bourne, ed. 1986) ("Webster Letter"). The next year, Lord Ashburton, who had been sent by the British as a special minister to resolve the *Caroline* dispute and other related matters, implicitly accepted this test by justifying Britain's actions in these terms. See Letter from Lord Ashburton to Daniel Webster, U.S. Secretary of State, July 28, 1842, reprinted in *1 British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print, Pt. I, Series C 332-35* (Kenneth Bourne, ed. 1986). Although Secretary Webster disagreed that his test had been satisfied, viewing the burning of the ship in the middle of the night as an unnecessary and disproportionate response to the threat, he agreed to accept Great Britain's apology and dismiss

the matter. See Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, Aug. 6, 1842, reprinted in *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print, Pt. I, Series C 346-47* (Kenneth Bourne, ed. 1986); see generally R.Y. Jennings, *The Caroline and McLeod Cases*, 32 *Am. J. Int'l L.* 82-91 (1938). Webster's formulation was reaffirmed a century later by the International Military Tribunal at Nuremberg when it ruled that the German invasion of Norway in 1940 was not defensive because it was unnecessary to prevent an "imminent" Allied invasion, and instead was an impermissible act of aggression because the primary objective of the invasion was to secure operational bases in Norway. See *International Military Tribunal (Nuremberg)—Judgment and Sentences*, 41 *Am. J. Int'l L.* 172, 205 (1947) ("[P]reventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment for deliberation.'") (quoting the *Caroline* case); see also Bowett, *supra* at 142-43."

Hmm. So we're going back prior to the existence of the UN Charter to find standards that in the case of Iraq you did not come close to meeting anyway. And this helps you how?

"The *Caroline* test has been distilled into two principal requirements for legitimate self-defense. First, the use of force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option. Second, the response must be proportionate to the threat. See Bowett, *supra* at 53, 188-89; see also McDougal, *supra* at 597-98.39 International legal authorities seem to agree that necessity and proportionality apply to the use of force in all cases, not just in cases of self-defense."

You can "distill" it down to the principle that the president has to despise people of a dominant religion in the next nation to be attacked, but you still won't be dealing with a law that displaces the current laws on the books. And there was absolutely no imminent threat from Iraq whatsoever, something Bush was painfully aware of. No bombing campaign, whether aimed at shocking and awing or not, can possibly be proportionate with a nonexistent threat from an unarmed nation.

"Necessity. International law does not supply a precise or detailed definition of what it means for a threat to be sufficiently "imminent" to justify the use of force in self-defense as necessary. Even outside the use-of-force context, although the term "imminent" is used in a variety of international agreements, it is rarely defined. Although the dictionary definition of "imminent" focuses on the temporal, see Webster's Third New International Dictionary (Unabridged) 1130 (1993) (defining "imminent" as "ready to take place: near at hand: impending: hanging threateningly over one's head: menacingly near"), under international law the concept of imminence encompasses an analysis that goes beyond the temporal proximity of the threat."

It seems to me that all depends on the definition of "definition". Giving imminent a temporal definition may be biased in favor of reality, whereas fantasy is a patriotic right under U.S. law.

"The ICJ, for example, has attempted to define imminence in the context of the necessity doctrine as it relates to relieving a state of its international obligations. In *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. 7 (Sept. 27), the ICJ addressed whether Hungary was justified in suspending work on the Gabčíkovo-Nagymaros dam because of Hungary's fears regarding the environmental consequences of such work on the Danube. A treaty with Slovakia required Hungary to perform the work. The court considered whether Hungary's suspension of work was justified by a "state of necessity," which it defined by reference to article 33 of the Draft Articles on the International Responsibility of States adopted by the International Law Commission. The ICJ described article 33 as reflecting customary international law. *Id.* ¶ 52. Article 33 permits a state to invoke a state of necessity as a ground for failing to comply with an international obligation if, *inter alia*, "the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril." *Id.* ¶ 50. The ICJ declared that:

"'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility.' As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time.' That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."

Of course the long-term environmental damage expected from a dam is in many ways equivalent to the long-term Imperial Homeland damage expected from peaceful relations with Iraq. For one thing, both water and Iraqis cannot be spoken to or dealt with using anything other than violence. Also scientists recognized the possible damage of the dam, and nobody could find a single "weapon of mass destruction" in Iraq or explain how or why such weapons would be used against the

United States if they sprang into existence.

"Id. ¶ 54 (internal citations omitted). The court thereby acknowledged that evaluating imminence requires an analysis of not just the timing, but also the probability of the threat.

"In addition to the probability the threat will materialize, international law recognizes the need to evaluate the magnitude of harm the threat would cause. Over time, the advent of nuclear and other sophisticated weapons has dramatically increased the degree of potential harm to be factored in. Weapons of mass destruction threaten devastating and indiscriminate long-term damage to large segments of the civilian population and environment. As the ICJ explained in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. No. 95, at ¶ 36 (July 8), nuclear weapons possess unique characteristics, "in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come." In addition, the danger posed by WMD is exacerbated by the possibility that the means of delivery may be relatively unsophisticated—for example, a "dirty bomb" driven into a building by a suicide bomber, or the spread of a biological agent with an ordinary crop duster. At the same time, development of advanced missile technology has vastly improved the capability for stealth, rendering the threat of the weapons they deliver more imminent because there is less time to prevent their launch."

Great, now look what you did: justified and "legalized" any attack on the United States or any other nuclear power, on top of attacks on nations we pretend are nuclear powers or fear could become nuclear powers. But that's a price worth paying, I guess, because it lowers the bar for your war justifying operation:

"With these developments in offensive arms and their means of delivery, the calculus of whether a threat is sufficiently imminent to render the use of force necessary has evolved. Indeed, the importance of the temporal factor has diminished. As Professor Myres McDougal explained in 1963, referring to the necessity prong of the Caroline test: "[T]he understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists." McDougal, *supra* at 598; see also Mallison, *supra* at 348 ("In the contemporary era of nuclear and thermo-nuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide if it actually were applied instead of merely repeated."). Similarly, the U.S. Navy's Commander's Handbook on the Law of Naval Operations explains that Daniel Webster's requirement of immediacy is "too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning." U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M), ¶ 4.3.2.1, n.32 (Oct. 1995), available at <http://www.cpf.navy.mil/pages/legal/NWP%201-14/NWP1-14%20cover.htm> ("Commander's Handbook"). Nor does the Caroline test take into account the modern realities of international terrorism: "[T]he traditional theories of customary international law were developed in a completely different era, with no concern for the danger presented by a modern well-financed terrorist organization in a world of chemical, biological, and nuclear weapons capable of horrific destruction, and yet portable by a single individual. A terrorist 'war' does not consist of a massive attack across an international border . . ." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 *Wis. Int'l L.J.* 145, 173 (2000).

The funny thing about actual laws, though, as opposed to Bybeelaws, is that when circumstances change, a society must first change the laws before randomly choosing to violate them on the pretense that they have been changed. Otherwise, some nutcase could unilaterally claim that circumstances had dramatically changed and throw all kinds of laws to the wind without any sort of democratic process.

"State Practice. State practice since the development of nuclear weapons and sophisticated delivery systems confirms the evolution of the degree of imminence and proportionality that would justify the use of force in self-defense. Such practice is relevant because it is the source of customary international law. See *supra* § III(A), at 24.

"Cuban Missile Crisis. During the Cuban Missile Crisis, for example, this Office adopted a more elastic concept of necessity than that articulated in the Caroline test. In that case, we labeled the secret establishment of long-range nuclear missile bases in Cuba by the Soviet Union as an "immediate threat" to U.S. security and found that the imposition of a blockade of offensive military equipment to Cuba was a justifiable act of self-defense. Unsigned Office of Legal Counsel Memorandum, Re: Summary of Legal Justification of Quarantine of Shipment of Offensive Weapons and Material to Cuba at 1 (Oct. 23, 1962) ("Cuba Quarantine Memorandum");⁴³ see also Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba, Pub. Papers of John F. Kennedy 809, 810 (1962)

(ordering U.S. Armed Forces to interdict offensive weapons and associated materiel en route to Cuba "to defend the security of the United States"); White House Statement on Soviet Proposals Relating to International Security, *id.* at 813 (describing threat as "immediate"); McDougal, *supra* at 601-03. But cf. Abram Chayes, Legal Adviser to the Secretary of State, *The Legal Case for U.S. Action on Cuba*, 47 *Dep't St. Bull.*, Nov. 19, 1962, at 763, 764-65 (arguing that the quarantine was justified because it was taken in accordance with a resolution of the Organization of American States and observing that "[t]he quarantine action was designed to deal with an imminent threat to our security. But the President . . . did not invoke article 51 or the right of self-defense."); Commander's Handbook at ¶ 4.3.2.1, n.31 (U.S. government characterized Cuba quarantine as a sanction imposed under article 52 of the U.N. Charter rather than as self-defense).

"The presence of nuclear weapons in the Cuban Missile Crisis changed the conception of the right to self-defense. Although the sudden and secret preparation of the missile bases undoubtedly "add[ed] to an already clear and present danger," Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, *Pub. Papers of John F. Kennedy* 806, 806-07 (1962), their positioning in Cuba constituted a less immediate temporal threat of armed attack on the United States than that contemplated by previous applications of the Caroline test because there was no indication that the Soviet Union would use them either immediately, or even in the near term. President Kennedy explained our more elastic concept of imminence:

"We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use . . . may well be regarded as a definite threat to peace.'

"*Id.* As the President articulated, as the magnitude of the possible harm caused by an attack increases, the probability that the attack will occur may be reduced and still justify an exercise of the right to anticipatory self-defense."

And yet Kennedy ended up acting in actual self-defense by refraining from launching an aggressive war. Is that "state practice" not "relevant"?

"Osirak Reactor Strike. The analysis becomes more complicated, however, when the threat of attack comes not from deployable nuclear weapons, but from fixed facilities engaged in the production of WMD. In that situation, the potential harm that would be caused by an attack remains high, but the probability that it will occur is more remote. In 1981, for example, Israel attacked a nuclear reactor under construction in Iraq, claiming that the strike was justified as anticipatory self-defense because the reactor was intended to manufacture nuclear bombs and very soon would have become operational. Israel also emphasized the limited window of opportunity in which to strike—once the reactor became operational, an attack would have been impossible because it could not have been carried out without exposing the inhabitants of Baghdad to extensive lethal radioactive fallout. See U.N. Doc. S/PV. 2280, at 52 (1981) (statement of Israeli Ambassador to the U.N.). Nonetheless, the international community, including the United States, condemned the Israeli attack. President Reagan's displeasure, however, appears to have been centered on Israel's failure to consider other options. He acknowledged that Israel may have genuinely viewed its actions as self-defense. See *The President's News Conference*, *Pub. Papers of Ronald Reagan* 519, 520 (1981); see also *Statement and Remarks by the Department of State Spokesman (Fischer) at the Daily Press Briefing*, June 8, 1981, reprinted in *Am. Foreign Pol'y Current Documents 1981*, Doc. 301, at 684 (1984) ("The United States Government condemns the reported Israeli air strike on the Iraqi nuclear facility, the unprecedented character of which cannot but seriously add to the already tense situation in the area.").

"Two weeks after the raid, the Security Council unanimously adopted a resolution "[s]trongly condemn[ing]" the Israeli strikes as a "clear violation of the Charter of the United Nations and the norms of international conduct." S.C. Res. 487 (1981). Several members of the Security Council quoted the Caroline test and argued that the attack did not meet the requirements for necessity, noting in particular that Israel had spent several months planning for the attack. See Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 *Brook. J. Int'l L.* 493, 508-09 (1990). The Israeli Ambassador to the United Nations disagreed, claiming that "[t]o assert the applicability of the Caroline principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence." U.N. Doc. S/PV. 2288, at 32 (1981). The United States voted for the resolution, with the caveat that it was imperfect, and that the U.S. determination that the strike violated the U.N. Charter was "based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute." *Statement by the [U.S.] Representative at the United Nations (Kirkpatrick) Before the U.N. Security Council*, June 19, 1981, reprinted in *Am. Foreign Pol'y Current Documents 1981*, Doc. 306, at 689-90 (1984); cf. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture*

in *International Law: Terrorism, the Law, and the National Defense*, 126 *Mil. L. Rev.* 89, 109 (1989) (writing as Legal Adviser to the Secretary of State) (noting "absence of any evidence that Iraq had launched or was planning to launch an attack that could justify Israel's use of force")."

How does this help you? You can't even get Reagan to agree with you, and that's a point in favor of your madness somehow? Are we supposed to imagine that, unlike Israel in 1981, George W. Bush in 2003 exhausted peaceful alternatives. That would be interesting if it had any connection to what actually happened.

"1986 Strike Against Libya. Like the development of nuclear weapons, the rise in international terrorism has resulted in an expansion of the concept of imminence. For example, one aspect of the U.S. justification for the air strikes of April 14, 1986 against terrorist-related targets in Libya was the doctrine of anticipatory self-defense. The strikes were prompted in part by the terrorist bombing of the La Belle discotheque in Berlin on April 5, which was frequented by U.S. military personnel. The blast killed two people, including an American soldier, and injured over two hundred others, fifty of whom were Americans. President Reagan cited conclusive evidence that Libya had planned and executed the Berlin bombing, *Address to the Nation on the United States Air Strike Against Libya*, 1 *Pub. Papers of Ronald Reagan* 468 (1986), which was only the most recent in a long line of terrorist attacks against U.S. installations, diplomats and citizens supported and directed by Muammar Qadhafi.⁴⁷ *Id.* at 468-69; see generally *Constitutional Authority to Conduct Military Operations*, *supra* at 18-19 (listing attacks by Libya on U.S. interests). Several of these attacks had been planned to occur in the weeks immediately preceding the La Belle bombing. In addition, the United States had clear evidence that Libya was planning a "multitude" of future attacks. *Provisional Verbatim Record of the Two Thousand Six Hundred and Seventy-Fourth Meeting of the Security Council, U.N. Doc. S/PV. 2674*, at 17 (1986) (statement of Ambassador Vernon A. Walters, U.S. Permanent Representative to the United Nations) ("Walters Statement").

"The United States explained that the strikes on Libya were undertaken in self-defense and were fully consistent with article 51. See 1 *Pub. Papers of Ronald Reagan* at 469 ("Self-defense is not only our right, it is our duty."); *Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Air Strike Against Libya*, 1 *Pub. Papers of Ronald Reagan* 478 (1986); see also *Letter from the Acting Permanent Representative of the United States of America to the United Nations to the President of the Security Council, U.N. Doc. S/17990* (1986) ("The Libyan policy of threats and use of force is in clear violation of Article 2, paragraph 4, of the Charter. It has given rise to the entirely justifiable response by the United States."). We justified the strikes in large part as anticipatory self-defense. President Reagan argued that the primary objective of the U.S. strikes was to forestall future terrorist attacks on the United States: "This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5 [1986]." 1 *Pub. Papers of Ronald Reagan* at 478; see also *Walters Statement* at 14-15 (strikes were designed to disrupt Libya's ability to carry out terrorist acts and to deter future such acts). In addition to the threat of future Libyan-sponsored terrorist attacks, the United States pointed to the exhaustion of nonmilitary remedies as meeting the customary international law standard of necessity. See 1 *Pub. Papers of Ronald Reagan* at 469 ("We always seek peaceful avenues before resorting to the use of force—and we did. We tried quiet diplomacy, public condemnation, economic sanctions, and demonstrations of military force. None succeeded."). Moreover, President Reagan emphasized that the strikes were proportional—the targets "were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians." 1 *Pub. Papers of Ronald Reagan* at 478. Although several countries criticized the U.S. strikes, supporting a UNSCR condemning the attack as a violation of the U.N. Charter, Australia, Denmark, France and Britain and Northern Ireland joined the United States in vetoing the resolution. See *U.N. Doc. S/PV. 2682* (1986)."

It was helpful of you, Judge Bybee, to make this case for the criminal prosecution of Ronald Reagan, but unfortunate that you kept it secret until he was dead.

"1989 Intervention in Panama. The United States again responded in self-defense to an imminent threat to U.S. lives when it took military action in Panama on December 20, 1989. Shortly before the U.S. military action, Panama's National Assembly of Representatives (a 510-member body appointed by General Manuel Noriega) had declared that a state of war existed between Panama and the United States, and General Noriega had delivered an inflammatory anti-American speech. A few days earlier, Panamanian armed forces had killed an unarmed U.S. Marine officer, beat an unarmed U.S. Naval officer, and physically abused and threatened the Navy officer's wife. The combination of "General Noriega's reckless threats and attacks upon Americans in Panama [had] created an imminent danger to the 35,000 American citizens in Panama." *Address to the Nation Announcing United States Military Action in Panama*, 2 *Pub. Papers of George Bush* 1722, 1723 (1989). As President Bush explained: "The

deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger" Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, 2 Pub. Papers of George Bush 1734 (1989). According to the State Department spokesperson, the "right of self-defense entitles the United States to take necessary measures to defend U.S. military personnel, U.S. nationals, and U.S. installations." Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law: Use of Force*, 84 Am. J. Int'l L. 545, 548 (1990).⁵⁰ The United States noted that they had "exhausted every available diplomatic means to resolve peacefully disputes with Mr. Noriega, who has rejected all such efforts." 1989 U.N. Letter, *supra*. The United States assured the Security Council that the use of force would be proportionate, see *id.*; and President Bush chose removing Noriega from power as the only way to protect U.S. citizens in Panama. Cf. Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 Colum. J. Transnat'l L. 281, 290 (1991). In the midst of the fighting, the Security Council considered a draft resolution that would have labeled the invasion as "a flagrant violation of international law," but Great Britain, France, and Canada joined the United States in vetoing the resolution. U.N. Doc. S/21048 (1989); U.N. Doc. S/PV. 2902 (1989)."

George Bush the First is still alive.

"1993 Strike Against Iraq. The United States justified the June 1993 strike on Iraqi intelligence service headquarters, which was undertaken in response to "compelling evidence" that Iraq had attempted to assassinate President George H.W. Bush two months earlier, as an exercise of the inherent right of self-defense as recognized in article 51 of the United Nations Charter. See 1993 Letter to Congressional Leaders, *supra* at 940. President Clinton explained the necessity for U.S. action:

"The evidence of the Government of Iraq's violence and terrorism demonstrates that Iraq poses a continuing threat to United States nationals and shows utter disregard for the will of the international community as expressed in Security Council Resolutions and the United Nations Charter. Based on the Government of Iraq's pattern of disregard for international law, I concluded that there was no reasonable prospect that new diplomatic initiatives or economic measures could influence the current Government of Iraq to cease planning future attacks against the United States.'

"*Id.* The objective of the strikes was to diminish Iraq's capability to support violence against the United States and others, and "to deter Saddam Hussein from supporting such outlaw behavior in the future." 1993 Address to the Nation, *supra* at 938. President Clinton described the strikes as "limited and proportionate." 1993 Letter to Congressional Leaders, *supra* at 941. The reaction of the Security Council was largely favorable, and its members rejected the plea of the Iraqi ambassador that the Council condemn the U.S. action as an act of aggression against Iraq. See Julia Preston, *Security Council Reaction Largely Favorable to U.S. Raid*, Wash. Post, June 28, 1993, at A12."

Of course, in contrast to shock and awe, this crime was indeed limited.

"1998 Attack on Afghanistan and Sudan. On August 7, 1998, terrorists bombed the U.S. embassies in Kenya and Tanzania, killing over 250 people, including twelve Americans. Two weeks later, based on "convincing information from a variety of reliable sources" that the Osama bin Laden organization was responsible for these bombings, the United States launched cruise missile attacks against terrorist training camps and installations in Afghanistan used by that organization and against a facility in Sudan being used to produce materials for chemical weapons. Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers of William J. Clinton 1464 (1998). President Clinton explained the international law justification for the strikes:

"The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat.'

"*Id.*; see also Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers of William J. Clinton 1460 (1998) (noting the existence of "compelling information" that additional terrorist attacks against U.S. citizens were being planned, and that the groups affiliated with bin Laden were seeking to acquire chemical and other dangerous weapons). As Professor Wedgwood recognized: "Even by the demanding test of the Caroline . . . the danger of renewed assault by bin Laden's

network justified action." Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 *Yale J. Int'l L.* 559, 564-65 (1999). In its report to the Security Council after the strikes, the United States emphasized that the attacks were undertaken only after repeated warnings to Afghanistan and Sudan that they must stop harboring and supporting terrorist groups such as bin Laden's organization. See Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (1998) ("1998 U.N. Letter").⁵⁵ The response of the international community was mixed, but the Security Council took no formal action in response to the attacks. See Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 *Harv. J.L. & Pub. Pol'y* 559, 563-64 (2002).

"In sum, recent practice demonstrates that the United States has used force in response to a threat of aggression that is less imminent in the temporal sense than described by Secretary Webster over 150 years ago. Rapid advances in weapons technology have changed the calculus, in large part because a state cannot defend itself if it waits until such weapons are launched.

"The new threat of nuclear weapons apparently is not, however, sufficient to erase completely any requirement of temporality. For example, the international community did not consider the threat posed by an Iraqi nuclear reactor before it had become operational to be sufficient to justify its destruction by Israel in 1981. Nonetheless, the backdrop against which the threat to Israel was evaluated has changed significantly in the past twenty years. In 1981, Iraq was permitted to have nuclear materials under the safeguards of the IAEA, and Saddam Hussein had not yet used chemical weapons against Iran and his own people, militarily invaded an innocent neighbor, or spent over a decade flouting his country's international obligations to destroy and cease to develop WMD and their means of delivery. In other words, the imminence of a likely attack by Iraq has increased since 1981 because Iraq has demonstrated a WMD capability and a willingness to use it. Moreover, even at the time of the Osirak attack, some international law scholars believed that, were Israel's argument that it acted in the last window of opportunity to be true, the attack would have qualified as lawful self-defense, even if the materialization of the threat—the development of a nuclear bomb by Iraq—were as many as five years away. See *The Israeli Air Strike: Hearings before the Senate Comm. on Foreign Relations, 97th Cong.* 251-52 (1981) (statement of Professor John Norton Moore).

"The rise of international terrorism, characterized by unpredictable, sporadic, quick strikes against civilians, see Travalio, *supra* at 173, similarly has expanded the elasticity of the imminence requirement. If a state waits until a terrorist attack is on the verge of being launched, it likely will be unable to protect the civilians who are being targeted, especially in light of the mentality of suicide bombers, who are immune to traditional methods of deterrence. Terrorists are also difficult to locate and track, and seek to escape detection by concealing themselves and their activities among an innocent civilian population. As terrorists burrow more deeply into the population, defensive options may become more limited. Due to these considerations, a state may need to act when it has a window of opportunity to prevent a terrorist attack and simultaneously minimize civilian casualties. See Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 *Yale J. Int'l L.* 609, 648 (1992). The United States acted in self-defense to prevent future terrorist strikes in 1986, 1993 and 1998, even though the attacks it sought to prevent were in the planning rather than the implementation stage. As Secretary of State Shultz explained in the context of the conflict with Libya in the mid-1980's:

"A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the rights of states to use force in exercise of their right of individual or collective self-defense.

"The UN Charter is not a suicide pact."

"Shultz, *Low-Intensity Warfare*, *supra* at 17.

"Finally, we note that U.S. military action in Panama, which was not in response to the threat of WMD or international terrorism, demonstrates that the degree of imminence required to justify the use of force in self-defense has broadened even in response to conventional threats. Although the attacks by Panamanian forces on unarmed U.S. military personnel and Noriega's anti-American rhetoric indicated that future attacks on the 35,000 Americans in Panama were likely, the threat does not appear to have been one that was "instant, overwhelming, leaving no choice of means, and no moment of deliberation." Webster Letter, *supra* at 159. The Panama precedent also reveals that, when using force in self-defense, the removal of a world leader from power, or "regime change," may be a proportionate response to the threat posed by that leader."

Because the first Bush did it? That's your legalization? And you think you deserve to be a judge?

"The Current Test.

"The use of force in anticipatory self-defense must be necessary and proportional to the threat. As outlined above, however, we believe that, at least in the realm of WMD and international terrorism, the test for determining whether a threat is sufficiently "imminent" to render the use of force necessary at a particular point has become more nuanced than Secretary Webster's nineteenth-century formulation. Factors to be considered include: the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat. See Travaglio, *supra* at 172 (while use of force in self-defense against terrorists need not meet the Caroline standard for imminence, "there must be a substantial likelihood that the threat will become manifest before it can be eliminated by means other than the use of military force"). If a state instead were obligated to wait until the threat were truly imminent in the temporal sense envisioned by Secretary Webster, there is a substantial danger of missing a limited window of opportunity to prevent widespread harm to civilians. As the President recently cautioned: "If we wait for threats to fully materialize, we will have waited too long." Remarks by the President at 2002 Graduation Exercise of the United States Military Academy, West Point, New York, at 2 (June 1, 2002) available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (last visited June 26, 2002). Finally, in an age of technologically advanced delivery systems and WMD, international law cannot require that we ignore the potential harm represented by the threat.

"Iraq.

"Applying the reformulated test for using force in anticipatory self-defense to the potential use of force against Iraq reveals that it may well be reasonable for the President to determine that the threat of a WMD attack by Iraq, either directly or through Iraq's support for terrorism, is sufficiently "imminent" to render the use of force necessary to protect the United States, its citizens, and its allies.

Was it indeed reasonable? Is that what you think?

"First, based on Iraq's WMD capability"

Its WHAT?

"and Saddam Hussein's previous use of WMD against both his enemies and his own people, the President could find that there is a high probability that he will use them again. Prior to the Persian Gulf War and the subsequent adoption of UNSCR 687 and the U.N. inspection regime in 1991, Iraq possessed a significant, extensive WMD capability. Saddam Hussein employed chemical weapons against Iranian troops and civilians during the Iran-Iraq war, and he used nerve gas against Kurdish civilians in northern Iraq in 1988, killing nearly 5,000 men, women and children. See Bureau of Political Military Affairs, Department of State, Chronology of Events Leading to the U.S.-led Attack on Iraq 1 (Jan. 8, 1999), available at <http://www.state.gov/www/regions/nea/iraqchronyr.html>. Saddam Hussein also has revealed his willingness to use biological weapons. See Wedgwood, The Enforcement of Security Council Resolution 687, *supra*; Report of the Secretary-General on the Status of the Implementation of the Special Commission's Plan for the Ongoing Monitoring and Verification of Iraq's Compliance with Relevant Parts of Section C of Security Council Resolution 687 (1991), UN Doc. S/1995/864, at 29, ¶ 75(w). Moreover, Iraq attempted to assassinate former President Bush in 1993. In addition, after the September 11th attacks, the official Iraqi news station stated that the United States was "reaping the fruits of [its] crimes against humanity." Department of State, Patterns of Global Terrorism 2001, at 65 (May 2002). Iraq has a long history of using weapons of mass destruction."

So, now a statement by a news commentator is grounds for war too? Quick, don't let the world see Fox!

Now, here's an interesting little subtlety. While Bush and gang were proclaiming their certainty that Iraq possessed and intended to use massive stockpiles of weapons, Bybee was years ahead, already speaking in terms of "weapons programs" . . .

"The Central Intelligence Agency recently assessed that Iraq has the capability to reinstate its chemical weapons programs within a few weeks or months. See Central Intelligence Agency, Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions, 1

January Through 30 June 2001, at 4 (2002), available at http://www.cia.gov/cia/publications/bian/bian_jan_2002.htm (last visited June 21, 2002) ("CIA Report"). In addition, the Administration has stated that it strongly suspects that Iraq has used the time without U.N. inspections to improve all phases of its offensive biological weapons program. See John R. Bolton, Under Secretary of State for Arms Control and International Security, Remarks to the 5th Biological Weapons Convention RevCon Meeting 2 (Nov. 19, 2001), available at <http://www.state.gov/t/us/rm/jan/july/6231pf.htm>; see also CIA Report, supra at 4 (UNSCOM believes that Iraq maintains a knowledge base and industrial infrastructure that could be used to produce quickly a large number of biological agents at any time). The Intelligence Community also is concerned that Iraq is reconstituting its nuclear weapons program. Id. at 4-5. Finally, Iraq has refurbished trainer aircraft that are believed to have been modified to deliver chemical and biological warfare agents. Id. at 4. Second, although we do not have available the information regarding whether the use of force against Iraq at a particular time would be necessary to take advantage of a window of opportunity to prevent the threat of a WMD attack from materializing, the State Department has reported that a growing number of terrorist groups are interested in acquiring and using WMD to rival the attacks of September 11. See Patterns of Global Terrorism 2001, supra at 66. The President could determine that, were we to wait until after Iraq has transferred WMD to terrorist groups, it would be very difficult to determine where and when WMD would be used, given the sporadic nature of terrorist attacks and the terrorist tactic of infiltrating the civilian population. Moreover, the President could reasonably conclude that pursuing diplomatic remedies is not a practical alternative given that the United States has engaged in more than a decade of unsuccessful attempts to work through the United Nations to obtain Iraqi compliance with its disarmament obligations under UNSCR 687."

This would have begun to make sense if any of it had been true. Of course, the White House knew perfectly that disarmament efforts had been completely effective. Bybee, you have jumped from responding to an actual attack, to responding to a possible attack, to responding to the possibility of a future attack, to responding to the fictional possibility of a future attack. Where to draw the line? One place would have been to draw it with actual laws and treaties of the sort you chose to ignore and work around.

"Third, as we have discussed earlier, the degree of harm that could result from Iraq's use of WMD could well be catastrophic. The combination of the vast potential destructive capacity of WMD and the modest means required for their delivery make them more of a threat than the military forces of many countries. See Travalio, supra at 155; see also Wedgwood, Responding to Terrorism, supra at 560 ("The indiscriminate nature of [biological] weapons and their extraordinary range of destruction multiplies the threat."). Chemical weapons and biological agents are easy to hide, and small quantities can have a devastating effect on the civilian population. Perhaps even more frightening is the tinder-box that would result were Iraq to transfer WMD to terrorists.

"We observe, therefore, that even if the probability that Iraq itself would attack the United States with WMD, or would transfer such weapons to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if we do not use force, the threat will increase, could lead the President to conclude that military action is necessary to defend the United States."

Can you hear yourself? Your "military action" was designed to itself be catastrophic, and so it was.

"Were the President to determine that the use of force in self-defense is necessary to counter the threat posed by Iraq's WMD program, such force should be proportional; in other words, it should be limited to that which is needed to eliminate the threat posed by Iraq. The President could reasonably determine that such proportionate response might include destruction of Iraq's WMD capability or removing Saddam Hussein from power. Finally, to the extent that the President were to have credible evidence that Saddam Hussein was giving WMD to the terrorists responsible for the September 11th attacks, the use of force against Iraq also would be justified as an exercise of self-defense expressly contemplated by article 51: responding to an armed attack. **There is no doubt that the events of September 11th qualify as an "armed attack" under international law.** See Sean D. Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter, 43 Harv. Int'l L. J. 41, 47-51 (2001); cf. Wedgwood, Responding to Terrorism, supra at 564 ("[T]he massacre of civilians and destruction of facilities in Kenya and Tanzania must surely qualify as an armed attack warranting self-defense under Article 51.")"

No doubt that a crime by non-state actors constitute an "armed attack"? And by Iraq?

"IV. Conclusion

"The President has broad authority under domestic law to use military force against Iraq. The Constitution grants the President unilateral power to take military action to protect the national security interests of the United States. In the case of Iraq, the President's independent constitutional authority is supplemented by Pub. L. No. 102-1, Pub. L. No. 105-235, and Pub. L. No. 107-40. While congressional authorization is not needed before the President may direct the use of force against Iraq to protect our national security, were he to do so pursuant to any or all of these provisions, he would be acting with approval previously granted by Congress.

"In addition, international law authorizes the President to use force against Iraq on two independent grounds. First, the Security Council has authorized military action against Iraq to implement the terms of the cease-fire, and in response to the threat to international peace and security caused by Iraq's repression of its civilian population. Due to Iraq's material breaches of the cease-fire, established principles of international law—both treaty and armistice law—currently permit the United States to suspend its terms and use force to compel Iraqi compliance with its disarmament and inspection requirements or redress any threat to international peace and security caused by Iraq's repression of its civilian population. Such a use of force would be consistent with U.S. practice. Second, international law also permits the President to use force against Iraq in anticipatory self-defense if the use of force would be both necessary due to an imminent threat, and a proportional response to that threat."

/s/

JAY S. BYBEE

Assistant Attorney General

This memo remained secret law for years, prior to becoming public "law" and part of the revolting tradition of illegal practice and precedent upon which the current and future presidents can draw.

This memo authorizes any president to single-handedly commit what Nuremberg called "the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

The result was and still is guaranteed to be massive death, no matter how "proportional" to the nonexistent threat. But the permission was also guaranteed to be wildly exceeded by anybody's definition. The result has been 1.2 - 1.3 million deaths in Iraq according to Just Foreign Policy's updated figure based on the Johns Hopkins / Lancet report, and according to the British polling company Opinion Research Business's estimate as of August 2007. According to the United Nations High Commissioner for Refugees (UNHCR), the number of Iraqis who have fled their homes has reached 4.7 million. If these estimates are accurate, a total of nearly 6 million human beings have been displaced from their homes or killed. Many times that many have certainly been injured, traumatized, impoverished, and deprived of clean water and other basic needs, including the need to have parents.

And what has accumulated in the evil of the whole? The current occupation of Iraq has seen the United States target civilians, journalists, hospitals, and ambulances; use antipersonnel weapons including cluster bombs in densely settled urban areas; use white phosphorous as a weapon; use depleted uranium weapons; employ a new version of napalm found in Mark 77 firebombs; engage in collective punishment of Iraqi civilian populations; including by blocking roads, cutting electricity and water, destroying fuel stations, planting bombs in farm fields, demolishing houses, and plowing down orchards; detain people without charge or legal process without the rights of prisoners of war; imprison children; torture; and murder. Michael Haas has published a well-documented book with the clear title: "George W. Bush, War Criminal? The Bush Administration's Liability for 269 War Crimes." Jay Bybee's liability must not be minimized.

He's not minimizing it. He's launched a website to raise funds for his legal defense.

I've launched a different website whose name speaks for itself: <http://impeachbybee.org>