A Misreading of Law and History on Preemptive Strikes

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By Peter Berkowitz - March 11, 2012

Liberalism these days seems to encourage an illiberal and anti-democratic tendency to turn hard questions of morality and politics into easy questions of law. In accordance with this tendency -- and timed to coincide with the major White House meeting on Iran last week between President Obama and Israeli Prime Minister Benjamin Netanyahu -- Bruce Ackerman, a Yale law professor and political scientist, took to the pages of the Los Angeles Times to appeal to the authority of law to end debate about the use of military force to destroy or disable Iran's nuclear program.

Ackerman maintains that American support for a preemptive strike "would be a violation of both international law and the U.S. Constitution." Article 51 of the U.N. Charter, according to Ackerman, is unambiguous: "This provision allows states to use military force in self-defense only when responding to an 'armed attack.' Preemptive attacks are another matter."

Preemption, he argues, is foreign to the American constitutional tradition. Apart from the "aberration" of the George W. Bush administration, America has adhered "to a tradition of U.S. statesmanship that began with Secretary of State Daniel Webster," according to which a state may respond with force only if it confronts, in Webster's words, "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."

Ackerman cites Ronald Reagan as a prime example. According to Ackerman, Reagan affirmed the Webster test in 1981 when "the United States joined in the U.N. Security Council's unanimous condemnation of Israel's preemptive assault on an Iraqi nuclear reactor."

The Bush administration's invasion of Iraq in 2003, Ackerman asserts, represented a unique "departure from this restrictive approach." The failure to find weapons of mass destruction has legal significance as it "only emphasizes the wisdom of Webster's insistence that the 'necessity of self-defense' be 'instant' and 'overwhelming.' "

Ackerman is wrong in both the history and the law.

Article 51 of the U.N. Charter, which recognizes states' "inherent" right of self-defense, does not exclude preemption. Ackerman is not alone among progressive law professors in preferring a narrow interpretation of self-defense, but Article 51 has always presumed a right of anticipatory self-defense that is significantly broader than the Webster test.

The traditional right of anticipatory self-defense, broad enough to include the Bush position on imminent threats, was given apt expression three months before the outbreak of World War I by Elihu Root, a former secretary of war and secretary of state. In a speech at the 1914 annual meeting of the Society of International Law, Root, then a U.S. senator, invoked "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

When the U.N. Charter was ratified in 1945, Article 51 did not change things. As esteemed Yale Law School scholar of international law, Myres McDougal, wrote in 1963 about the Cuban Missile Crisis, "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 the provision new limitations upon the traditional rights of states."

Moreover, Ackerman is mistaken in portraying the U.S. constitutional tradition as embracing the Webster test. In 1818 -- 25 years before Webster penned his famous formulation -- Secretary of State John Quincy Adams, in defense of Gen. Andrew Jackson's raids into Spanish Florida, propounded a doctrine of preemptive military action. And Presidents Theodore Roosevelt, William Howard Taft and Woodrow Wilson subsequently deployed American troops -- in the Caribbean, Central America and Mexico -- to preempt threats to the international order. Post-World War II American practices have continued this precedent, ranging from George H.W. Bush's 1989 invasion of Panama to Bill Clinton's 1993 strikes against Iraq and Serbia.

As for the Reagan administration's response to the Israeli bombing of Iraq's Osirak nuclear reactor in 1981, it is true that several nations voting for the unanimously adopted Security Council Resolution 487 condemning the raid argued that the threat posed by Iraq to Israel failed to meet the clear and exacting standards of Webster test. But contrary to Ackerman's assertion, the Reagan administration did not embrace this rationale. Rather, as U.N. Ambassador Jeane J. Kirkpatrick stated at the time, the United States' decision to support the Security Council resolution was "based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute."

Concerning the failure to find weapons of mass destruction in Iraq in 2003 after removing Saddam Hussein from power, this no more proves the wisdom of the Webster test and the illegality of preemption than would the discovery of weapons of mass destruction in Iraq have established the legality of preemption. The scope of nations' inherent right of self-defense is grounded in centuries of state practice and contemporary analysis of evolving threats and changing military capabilities.

Indeed, 40 years before Operation Iraqi Freedom, in his 1963 analysis of the Cuban Missile Crisis, Professor McDougal reported that a consensus had formed around the view that the advent of the nuclear era rendered the Webster rule a dead letter: "The 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."

Ackerman's misconceptions do not end with his sweeping claim that before George W. Bush the American constitutional tradition did not recognize the legality of preemption. They extend as well to his insinuation that support for preemption vanished after Bush left the White House.

Actually, without ever quite saying so for obvious political reasons, the Obama administration has adopted -- and elaborated in major speeches by State Department Legal Counsel Harold Koh, top counterterrorism adviser John Brennan, and Attorney General Eric Holder -- the Bush opinion that in an era of transnational terrorism, rogue states, and the proliferation of weapons of mass destruction, considerable flexibility is needed in determining when a threat is imminent, and when preemptive action is justified.

Those opposed to launching a strike against Iran should guard against the temptation to bend the precedents and provisions of international law and twist the facts of American politics to conform to their policy preferences. At the same time, a brief in behalf of the

legality of a military strike against Iran must not be confused with a brief in behalf of a military strike against Iran.

Whether to launch a strike to destroy or disable Iran's nuclear program is the weightiest decision Obama and Netanyahu face. It depends on multilayered judgments about the efficacy of diplomacy and sanctions, windows of opportunity for military action, and how far the program can be set back at this late stage.

And it depends on complex calculations about the likely backlash: thousands of missiles raining down on Tel Aviv by Iran-sponsored Hamas in the south, Iran-sponsored Hezbollah in the north, and Iran to the east; intensification of the international opprobrium to which Israel is already subject; military operations against American military assets and allies in the Persian Gulf and the spread of war throughout the region; closure by Iran of the Strait of Hormuz, triggering skyrocketing oil prices and paralysis of the international economy; and a wave of terrorist attacks on Israeli and American targets around the globe.

Grave, too, would be the costs of allowing Iran to build a nuclear weapon. A rogue state ruled by theocrats and Holocaust deniers and dedicated to the expansion by force of Shia Islam, Iran would threaten Israel, the Arab world, Europe, and soon the United States with nuclear-armed missiles. It would also be likely to set off a nuclear arms race in the Gulf, resulting in not one but several regimes that contain Islamist elements sympathetic to jihadists and terrorism possessing the world's most dangerous weapons.

What can be safely said is that the effort to close off discussion about striking Iran by concocting a legal prohibition out of fragments of international law and cropped photos of the American constitutional tradition does more than betray illiberal and anti-democratic tendencies. It also would deprive the nation of the informed debate on which our security depends.

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