Self-Defense - From the Wild West to 9/11: Who, What, When

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"Rhetoric is a poor substitute for action, and we have trusted only to rhetoric. If we are really to be a great nation, we must not merely talk; we must act big."\(^1\)

"[D]etached reflection cannot be demanded in the presence of an uplifted knife."\(^2\)

Introduction

The above quotations reflect important tensions inherent in self-defense—how does the United States "act big," and is "detached reflection" truly possible in the face of a potential attack? For the past six years, much of the Bush Administration's operational counterterrorism has been largely ineffective. In addition, serious questions have been raised as to whether or not a counterterrorism strategy has been developed since the attacks of September 11, 2001 (9/11).

Counterterrorism tactics must not be confused with counterterrorism strategy. For example, the question of whether a suspected terrorist is killed is tactical. Alternatively, strategic questions include why that individual was targeted, what is the long term significance of his death, and what threat did he present. Institutionalized, legal-based process is of paramount importance in developing a counterterrorism strategy. The gathering and analysis of intelligence information is the essence of operational counterterrorism. Checks and balances and the doctrine of separation of powers are the essence of the American constitutional paradigm and protect against an unfettered executive. The paradigm this article proposes articulates a confluence between intelligence gathering, making that intelligence operational, and the checks required on the executive to ensure the legality of the President's decisions.

A. Background

One of the most important questions post-9/11 is how a nation-state defends itself against an unseen enemy.\(^3\) This article will focus on how a nation-state that believes in the rule of law and morality in armed conflict prevents attacks against its innocent citizens. Self-defense, or active preemptive self-defense,\(^4\) against the unseen enemy is extraordinarily difficult and fraught with enormous risks and dangers.\(^5\) How and when a nation-state defends itself against such an enemy is not only critical to address, but it is the combat of the future. In the context of post-9/11 operational

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4. See infra notes 16-17 and accompanying text for definitions of self-defense.
counterterrorism, the question is whether self-defense, as presently articulated by international law, enables the United States to act preventively in an effective way. This article will address this issue in an interdisciplinary manner, analyzing American criminal and constitutional law, as well as international law. This analysis will enable policy and decisionmakers, academics, the general public, and military commanders to develop and implement a definition of self-defense relevant to post-9/11 conflicts.

An introduction of this nature invariably raises the question of whether there is a need for another article on this subject. Although case law addressing self-defense are boundless and impressive, this article, through an interdisciplinary analysis of self-defense, articulates a new process-based self-defense standard predicated on a historical analogy to the Wild West. This article also proposes expanding substantive procedural measures between the U.S. judicial and executive branches in operational counterterrorism.

The attacks of September 11, 2001, taught decisionmakers and commanders alike that in future military conflicts, nation-states will usually confront non-state actors, rather than other nation-states. The traditional state versus state war as understood by the "founding fathers" of international law is largely a historical relic. Given this change in the nature of the conflict, the events of 9/11 clearly suggest the need to re-articulate international law.


10. For examples of articles emphasizing the need to re-articulate self-defense in international law see Mark B. Baker, Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter), 10 Hous. J. INT'L L. 25 (1988); Mikael Nabati, International Law at a Crossroads: Self-Defense, Global Terrorism, and Pre-
In the debate regarding the re-articulation of international law, the question to be addressed is how the nation-state should defend itself—preemptively—against an unseen enemy. In the traditional war paradigm, nation-states defend themselves against either armies massing on their borders or an attack by another nation-state. Self-defense in the “unseen enemy” paradigm is ambiguous. It is not inherently clear who is attacking the state or against whom the state is protecting itself. It is this issue that has significantly affected the self-defense discussion.

Determining the extent of self-defense is critical in examining the relationship between international law and counterterrorism. Unlike traditional warfare during which militaries face off with planes, tanks, and warships, counterterrorism is characterized by an often unseen enemy and the battles take place in “back alleys with dark shadows.” Self-defense in this environment is enormously complicated. The decision to preemptively attack a highly elusive target, often near civilians, is based almost exclusively on intelligence information.

This article’s fundamental argument is that existing international law does not provide sufficiently clear guidelines to nation-state decisionmakers regarding when to take preemptive or anticipatory action.
against a non-state actor. It is proposed that the Caroline Doctrine, UN Charter Article 51, and the post-9/11 Security Council Resolutions 1368 and 1373 are insufficient to enable the nation-state to act early enough, provided intelligence is available.

How the nation-state—under the rubric of the rule of law and morality in armed conflict—protects itself by acting before an attack is a question of enormous significance. In answering this question, guidelines and criteria that regulate if and when a nation-state may take anticipatory action are critical. The creation of guidelines does not suggest that the nation-state may not act—it is quite the opposite. It does, however, forcefully advocate that the underlying reasons for state action must be sound, legal, and moral. By examining international, criminal, and constitutional law, this article seeks to do just that.

This article proposes a new, process-based, strict-scrutiny approach to preemptive self-defense against non-state actors. This strict-scrutiny approach would allow a nation-state to act against a non-state actor earlier than allowed under existing international law; however, the act must be based on reliable, viable, valid, and corroborated intelligence. A court of law will decide if the intelligence passes the strict-scrutiny standard, which is comparable to admissibility requirements of the criminal law paradigm. The court of law that this article proposes is not a vague concept. To minimize intelligence-based counterterrorism mistakes, this article proposes that the Executive branch submit the intelligence that is relevant to the specific counterterrorism operation to the Foreign Intelligence Surveillance Court (FISA Court). Although this proposal suggests a curtailing of Executive power, in essence it is philosophically akin to the FISA Court's issuance of a wiretapping warrant in response to an executive branch request.
Self-defense—whether personal or state—is a universal concept; however, this article analyzes the concept from an American perspective. To that end, the analysis will focus on American criminal and constitutional law and how they affect the American interpretation of international law. This article does not propose an internationalization of the American process, but rather the articulation of an American standard for an American process. The interdisciplinary approach this article adopts, however, establishes a paradigm that may be relevant to other civil, democratic regimes.

The interdisciplinary legal analysis of self-defense in the post-9/11 world will be augmented by historical analogy to the American Wild West. This analogy does not suggest that operational counterterrorism is akin to the Wild West—President Bush is not Wyatt Earp, and Osama bin Laden is not Jesse James. Furthermore, it does not imply that American forces in Iraq are the vigilantes in Montana seeking to protect narrow interests. However, the Wild West analogy assists us in analyzing two critical issues: the limits of self-defense and the criteria for determining when it is appropriate to use force in self-defense.


28. See Bhoumik, supra note 13, at 303.

29. See also Amos N. Guiora, CONSTITUTIONAL LIMITS ON COERCIVE INTERROGATION, (forthcoming 2008); Amos N. Guiora, Interrogation of Detainees: Extending a Hand or a Boot?, 41 U. MICH. J.L. REFORM 375 (2008) (using the historical analogy approach to address a post-9/11 issue in examining the “limits of interrogation” through the lens of the interrogations that African-Americans were subjected to in the American Deep South in the 1930's and 1940's).

30. The Regulators, The History of the Wild West, http://www.theregulators.co.uk/page6.htm (last visited Nov. 19, 2008). The Wild West “is comprised of the history, myths, legends, stories, and beliefs that collected around the Western United States from 1865 to 1890. Most often the term refers to the late 19th century, between the American Civil War and the 1890 closing of the frontier.” Id.


32. Jesse James (1847-1882) was an American West outlaw and bandit, known for robbing and raiding banks, residences, trains, and stagecoaches. See id. at 133-39.

33. In December 1863, a group of citizens in Montana met secretly to form a vigilance committee, an extrajudicial group designed to keep local order. See Andrew P. Morriss, Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law, 33 LAND & WATER L. REV. 581, 644 (1998). During January and February of 1864 the committee executed twenty-two men by hanging, with more to come in the months and years ahead. See id. at 644-46. None of the executed men had a trial, an appeal, or a chance to set his affairs in order before being hanged. Id. at 646-48.
may be invoked. Not every threat justifies self-defense. Those threats that are justified must be limited by proportionality requirements.

B. Historical Analogies

Historical analogies rarely, if ever, are perfect because no set of events and circumstances are exactly similar. Nevertheless, sufficient similarities between the Wild West and the post-9/11 world exist to justify the comparison—particularly the need to develop limits to self-defense in an environment that pitted the nation-state against a variety of perceived, though not clearly identified, enemies.

The Wild West is relevant to the post-9/11 world because it helps establish self-defense standards in an amorphous environment. In defending society, the sheriff of the Wild West acted against those perceived to be threatening either the existing or the developing civil society. By examining the sheriff's actions, this article seeks to propose a new standard of self-defense. That is, when—and on the basis of what—did the sheriff determine that he could open fire against a particular individual? Against whom was the sheriff acting defensively? These questions form the core of this article. It is important to emphasize—and re-emphasize—that this analogy does not suggest that the nation-state today is akin to the sheriff of the past. It does, however, propose that analyzing the sheriff in the Wild West facilitates the development of a new self-defense standard. With that caveat addressed, this article may move forward.

In adopting the Wild West as a valid historical analogy, this article's fundamental aim is to propose a process indicating how nation-states may defend themselves in the post-9/11 world. Although international law grants nation-states the right to protect themselves, when that right becomes operational remains an open question. That is, does the nation-state have to await attack or can it act preemptively on the basis of intelligence? The answer—akin to the situation in the Wild West—is that pre-emptive action is lawful, provided the actor has cause to act. How "cause" is defined is critical to the discussion. If cause is loosely defined, then the power of the nation-state is best described as literally unlimited. Such a scenario would threaten the world order for all. Although this situation may be tempting, it is also illegal and self-destructive. Unlimited state action frequently involves the killing of innocent civilians and could lead to

34. See Richard O'Connor, Pat Garrett: A Biography of the Famous Marshal and the Killer of Billy the Kid 8-9 (1960).
the birth of the next generation of terrorists. International law, however, clearly justifies self-defense. What is unclear is when the nation-state can act.

The question is, under what circumstances and subject to what conditions can a commander order a military unit to preemptively attack an identified enemy. The critical variable in this discussion is how “identified” the enemy has to be. Perhaps the question can best be phrased as “how certain is certain?” The policy and legal discussions must provide the commander and decisionmaker with concrete responses to these questions. Otherwise, not only will the enemy continue to be unseen but the guidelines will be unseen as well. That combination—in the context of operational counterterrorism—is unworkable.

A “who, what, when” analysis of preemptive self-defense will enable the commander and decisionmaker to better understand who the enemy is. This analysis inherently presupposes that the nation-state may act; it does not, however, suggest that the nation-state may always act. The proposed model explicitly involves limits—after all, the essence of the rule of law paradigm is an inherent limit on state power. In the self-defense debate, the critical questions are what are those restraints, when can the nation-state act, against what target, and who is the enemy.

This article seeks to answer these questions. Part I scrutinizes the analysis of intelligence information. Part II examines self-defense in the Wild West, particularly Billy the Kid and Wyatt Earp. Part III discusses the foundational principles of the right to self-defense in United States Constitutional Law. Part IV describes the conceptual view of self-defense in United States Criminal Law. Part V discusses the right to, and the conceptual view of, self-defense according to customary international law. Finally, Part VI presents the proposed strict scrutiny standard.

I. The Need for Information

Self-defense subject to the rule of law requires reliable, viable, valid, and corroborated intelligence information. Otherwise, the actor—an individual or the state—will be engaged in nothing more than “lashing out” at an unspecified target with tragedy around the corner. Still, the

37. See, e.g., George Anastaplo, September 11th, a Citizen’s Responses (Continued), 4 LOY. U. CHI. INT’L L. REV. 135, 135 (2006) (stating that “the American invasion and occupation of Iraq have helped spawn a new generation of Islamic radicals”).
40. See Fitzpatrick, supra note 11, at 349 (discussing the necessity to distinguish members of Al Qaeda from other “criminal gangs”).
42. See Targeted Killing, supra note 5, at 325.
44. Steven W. Bender, Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os, 81 OR. L. REV. 1153, 1164 (2002).
intended—or presumed—victim need not wait to be attacked. Taking the offensive to prevent the attack before it has begun is justified. This offensive requires identifying the threat, the attacker, and the appropriate proportional response. The threat must be deemed legitimate, however, to justify preemptive action.

Intelligence is one of the most important aspects of counterterrorism. Some would argue intelligence is the most critical issue. Without it, operational counterterrorism would be reacting blindly. Intelligence information provides justification for state self-defense. Intelligence tells decisionmakers that a risk of attack exists and who is planning the attack, and it facilitates appropriate self-defense measures. It is, however, imperfect, subject to interpretation, and full of uncertainties, misinformation, and disinformation. Therefore, intelligence is far from empirical. Nevertheless, intelligence is the essential basis for effective operational counterterrorism.

Intelligence has been defined as the collection and analysis of information relevant to a government’s formulation and implementation of policy designed to further its national security interests and respond to threats from actual or potential adversaries. Critical to fully understanding this definition is how actors translate intelligence information into operational measures. Without knowing who the terrorist is, governments cannot know where he is. Without knowing where he is, governments cannot prevent attacks. Without intelligence information, governments are unable to

46. Reisman & Armstrong, supra note 16, at 539, 541 (discussing international support for this statement from countries such as Australia and the United Kingdom).
47. Glennon, supra note 16, at 27.
49. *See* Marks, supra note 16, at 83–84.
52. *See* Unholy Trinity, supra note 15, at 428.
53. *See* id. at 428–29; *see also* Schmitt, supra note 15, at 756.
54. Unholy Trinity, supra note 15, at 446 (defining disinformation as consciously telling an interrogator what the interrogated person think the interrogator wants to hear, and misinformation as unconsciously doing so).
55. *Id.* at 428.
"connect the dots" in the best case; and in the worst case, governments are unable to even identify the "dots."

Intelligence gathering must be specifically tailored to the means by which terrorists and their supporters communicate. Intelligence gathering primarily comes from three sources: (1) human intelligence (HUMINT); (2) signal intelligence (intercepted communications or SIGINT); and (3) open sources (such as newspapers or the internet).\(^5\) Each mode of obtaining information is critical to a nation's counterterrorism strategy.\(^5\)

Analyzing self-defense requires understanding the relationship between intelligence gathering and the decision to act. In seeking to objec- tify self-defense, it is important that the intelligence information justifying state action be evaluated according to established criteria. To that end, the following preliminary principle and strategic questions are relevant:

1) When does the actor possess information sufficient to justify taking action?
2) How is sufficient information defined?
3) What are the criteria for determining whether the intended victim needs additional time or "another sign" prior to acting?

These questions are posed with the understanding that if the actor waits too long, an otherwise preventable attack will occur.\(^5\)\(^9\) Use of intelligence information requires decisionmakers to answer the following four tactical or practical questions:

1) How reliable is the source?
2) Is the information corroborated?
3) How viable is the information?
4) How actionable is the information?

Lawful self-defense predicated on the limits of power requires developing a model based on rationality. While intelligence gathering and analysis is not an empirical science, maximum effort is required to minimize guess work and best estimates; if commanders are to act on intelligence informa-

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57. See Thomas S. Szayna et al., Improving Army Planning for Future Multinational Coalition Operations 324 (2001); see also Amos N. Guiora, Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists, 56 Cath. U. L. Rev. 805, 810 n.33 (2007) [discussing HUMINT and SIGINT as the two primary intelligence gathering sources] [hereinafter Comparative Analysis].
58. See Szayna et al., supra note 57, at 324.
59. See Robert M. Chesney, Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism, 80 S. Cal. L. Rev. 425, 429-30 (2007) ("Nevertheless, the events of the summer of 2006 suggest that there is at least a presumption in favor of maximizing early intervention in terrorism cases."); David A. Westbrook, Law Through War, 48 Buff. L. Rev. 299, 309 (2000) ("If security is now better procured than defended, then early intervention will often be more effective and cheaper than late intervention. Contemporary strategic thinking inclines to the adage 'a stitch in time saves nine.' Diffuse threats to security should be addressed before they have time to gain focus and momentum. The task for contemporary strategic thinking is therefore the avoidance, rather than the development, of the logic of war."). See generally Clive Walker, Constitutional Governance and Special Powers Against Terrorism: Lessons Learned from the United Kingdom's Prevention of Terrorism Acts, 35 Colum. J. Transnat'l L. 1 (1997); Clive Walker, Keeping Control of Terrorists Without Losing Control of Constitutionalism, 59 Stan. L. Rev. 1395 (2007).
tion, the information must be subject to strict scrutiny.\(^{60}\)

Unlike evidence the prosecutor submits in court that is subject to the defendant's right to confront his or her accuser,\(^{61}\) intelligence information is gathered and analyzed only by the decisionmaker. In the current model, the commander or decisionmaker assumes the role of judge or jury\(^{62}\) in determining whether the information is actionable. The proposed model—critical to a re-articulation of self-defense—suggests expanding the FISA Court's purview to include reviewing intelligence information relevant to operational counterterrorism. However, a recommended standard for analyzing the reliability and sufficiency of the information is dependent on the adoption of a modified version of the right to confront.

Such a test seemingly limits the nation-state's right to self-defense. Perhaps one could perceive it as at odds with the proposition this article advocates. In essence, however, this article suggests a balancing test. Balancing would enable the nation-state to act earlier than currently allowed, but only after subjecting the intelligence information to strict scrutiny by a court.\(^{63}\) The preemptive self-defense model proposed in this article grants state actors greater latitude with respect to when to act. In the proposed model, the information justifying state action would be subject to strict scrutiny by an independent court. Unlike the criminal law paradigm which is comprised of checks and balances,\(^{64}\) operational counterterrorism predicated on intelligence information is not presently subject to institutionalized criteria or independent analysis. The proposed strict scrutiny standard reflects a balanced approach regarding operational counterterrorism: act earlier but with greater certainty.

In 2006, Department of Homeland Security Secretary Michael Chertoff articulated the relationship between intelligence and operational decisions in the following manner:

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\(^{61}\) U.S. Const. amend. VI.

\(^{62}\) The distinction depends on whether the trial is a bench or jury trial.

\(^{63}\) Perhaps the most egregious example of not submitting intelligence information (not to mention the politicization of the information) is President Bush's decision to invade Iraq because of CIA reports regarding the presence of Weapons of Mass Destruction (WMD) in Iraq or a purported link between Saddam Hussein and 9/11. See generally Bob Woodward, *Plan of Attack* (2004). Rather than submitting the information to a review similar to the proposed strict scrutiny, the Administration acted based on the "slam dunk" assurance by then CIA Director George Tenet regarding the WMD and Vice-President Cheney's assertion regarding the link. See id. at 25, 195-201. Both of these assurances have been subsequently proven to be incorrect. See generally Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* (2004); Gregory Hooker, *Shaping the Plan for Operation Iraqi Freedom: The Role of Military Intelligence Assessments* (rev. ed. 2005); Bob Woodward, *Bush at War* (2002).

\(^{64}\) The prosecutor's actions and motives are checked by the trial court, the jury, defense counsel, and an available appeals process. See Michael M. O'Hear, *What's Good About Trials?*, 156 U. Pa. L. Rev. PENNumbra 209, 217 (2007).
We don’t wait until someone has lit the fuse to step in and prevent something from happening. That would be playing games with people’s lives. . . . We always intervene at the earliest possible opportunity, just as we’ve done in a series of operations we’ve undertaken over the last couple of months . . . . Last year’s attacks in London, 2004’s attacks in Madrid and, of course, the attacks in 2001, are all reminders of the fact that we cannot drop our guard, but at the same time, people can rest assured that we move very swiftly at the first sign of a plot and we do not wait until the last minute to intervene. . . . We swoop in as early as possible because experience shows—and I think London is a great example—that the distance between planning and actually [sic] operational activity is a very short distance. And anybody who thinks they have time to wait and see how things play out, I think is really taking a foolish approach to the issue of security.65

A. Invasion of Privacy

Intelligence gathering inherently violates an individual’s privacy.66 Articulating the limits of self-defense requires addressing the individual’s right to privacy.67 Whether the individual is subjected to wiretapping, mail or email interceptions, or any other form of intelligence gathering, the process invariably involves an invasion of privacy.68 In seeking to re-articulate the limits of self-defense it is incumbent on policymakers to analyze the limits of intelligence gathering.

The Bush Administration’s warrantless wiretapping69 of both American and non-American citizens in an effort to gather intelligence information represents an unbalanced approach.70 It is equally unbalanced, however, to argue that the nation-state may neither wiretap nor intercept. Were that the case, operational self-defense would truly be “groping in the

66. Baldwin & Shaw, supra note 26, at 431.
67. Id.
68. Id.
70. The Bush Administration argued that Article II of the U.S. Constitution should be read to authorize this particular executive action and its secrecy, and painted the program as absolutely necessary to national security. For articles supporting the President’s argument see generally John C. Eastman, Listening to the Enemy: The President’s Power to Conduct Surveillance of Enemy Communications During Time of War, 13 ILSA J. INT’L & COMP. L. 49 (2006); John Yoo, The Terrorist Surveillance Program and the Constitution, 14 GEO. MASON L. REV. 565 (2007). Critics of the wiretapping program pointed to existing mechanisms to maintain secrecy and deemed warrantless wiretapping as not only a violation of the Fourth Amendment, but also as a dangerous maneuver to misconstrue the balance between organs of the government. See the following articles supporting this view: Bob Barr, Post-9/11 Electronic Surveillance Severely Undermining Freedom, 41 VAL. U. L. REV. 1383 (2007); David Cole & Martin S. Lederman, The National Security Agency’s Domestic Spying Program: Framing the Debate, 81 IND. L.J. 1355 (2006); Richard A. Epstein, Our Ignorance About Intelligence, 17 STAN. L. & POL’Y REV. 233 (2006).
dark,” if not impossible. Accordingly, the challenge is to define the limits of self-defense that enable sufficient intelligence gathering and ensure that preemptive self-defense is operationally viable.

Criminal law has a long history trying to maintain the delicate balance between preventing criminal action and maintaining privacy interests of individuals. The excerpt below from *Katz v. United States* demonstrates the Supreme Court’s analysis of the issues surrounding privacy protection, the individual, and the manner in which the government obtains information in a criminal context.

The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government’s position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner’s activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner’s unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government’s actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.

Searches conducted without warrants have been held unlawful “notwithstanding facts unquestionably showing probable cause,” for the Constitution requires “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . .” “Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,” and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.

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71. See *Terry v. Ohio*, 392 U.S. 1, 22-25 (1968), for a discussion of criminal law’s underlying mission in balancing governmental interests, such as crime prevention and detection, and individual interests, such as those involving privacy.


73. See generally id.
... The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree.

Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.\textsuperscript{74} Katz sought to minimize government invasion of privacy with respect to wiretaps.\textsuperscript{75} It is relevant to the self-defense paradigm because it helps to articulate what measures the government can take—and when—to protect itself.

B. Limits of Intelligence—Limits of Power

Intelligence failures and successes are important in understanding the limits of self-defense. On the one hand, limiting how the nation-state collects intelligence directly impacts how the nation-state engages in self-defense.\textsuperscript{76} On the other hand, the nation-state cannot protect itself "by all means necessary."\textsuperscript{77} As the 9/11 Commission made clear, however, just because one has received intelligence does not guarantee that the intelligence will be used effectively.\textsuperscript{78} The flip side of gathering intelligence is analyzing the information received.\textsuperscript{79} Without analysis, the information will be merely information without context or significance. In the self-defense paradigm, accurately and correctly analyzing intelligence is critical.\textsuperscript{80} After all, operational decisions are based on the most effective utilization of that information.

Before making operational decisions based on gathered intelligence, the nation-state must analyze it. The nation-state must determine who the source is, whether the source is reliable, and whether outside factors are at play.\textsuperscript{81} If the nation-state acts on the received information without satis-
factorily answering all three of these questions, the result may be unfortu-
nately irreversible. The potential fallout from inaccurate intelligence is
too significant not to subject it to additional review. Accordingly, in addi-
tion to review by the executive branch, intelligence information must be
subject to strict scrutiny from a separate branch of government—namely
the FISA Court. From a substantive perspective, strict scrutiny requires
the executive to convince the FISA Court that the available intelligence
addresses the issues of source reliability and credibility.

For preemptive self-defense to be lawful, the intelligence must meet a
strict-scrutiny standard. The Court in Katz limited government's intrusion
into privacy. In the same way, the proposed strict-scrutiny test would
limit the executive branch, not from the perspective of how the intelligence
is gathered, but rather how it is used in operational counterterrorism. To
what degree the standard should be quantified is beyond the purview of
this article; there is a need to develop a model for the quantification of
reliability of intelligence information. What is critical, however, is that it
must pass judicial muster akin to admissibility in the criminal law
paradigm.

II. Self-Defense and the Wild West

What is the connection between the Wild West and the aftermath of
9/11? The Wild West conjures up multiple images: the gun-slinging sher-
iff, the cowboy in the saloon, the frontier settlers chasing Native Americans
off Native land. The images of Wyatt Earp and Billy the Kid are promi-
nent points of reference when discussing the Wild West. Furthermore,
the term "Wild West" is commonly used to express a paradigm of lawless-
ness or, at the very least, of a situation where one man—the sheriff—was to

(explaining that intelligence information must be shown to be "valid, viable, relevant,
and corroborated") [hereinafter Choosing a Forum].

82. Id.
83. See Comparative Analysis, supra note 57, at 835.
84. Id. at 834–35.
86. Choosing a Forum, supra note 81, at 361.
87. See id.
88. Wyatt Earp (1848–1929) was an American farmer, teamster, officer of the law,
gambler, saloon-keeper, and miner best known for his participation in the Gunfight at
the O.K. Corral. See Jeff Meyer, A Tree of the Wild, Wild West, AM. FORESTS,
Summer 2002, at 47, 47. Earp resided in the American West and established himself as a
lawman unafraid to use force to keep the peace. Id.
89. Billy the Kid (1859–1881), also known as Henry McCarty and William H. Bon-
ney, was a noted gunfighter and outlaw, known for his involvement in the Lincoln
County War and for escaping jail sentences several times throughout his life. See
Thomas Korosec, Trail of a Desperado: Is the Real Billy the Kid Buried in Central Texas?,
90. See Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction
of Dialogic Responsibility, 75 B.U. L. Rev. 57, 96 (1995); see also Jason J. Ben,
America's Need to Explore Alternatives to Incarceration: Can America Purport to Be the
"Land of the Free" When It Currently is the World's Leading Incarcerator?, 30 S.U. L. Rev.
bring and preserve peace and tranquility to a particular community.91

Any discussion regarding the Wild West invariably involves analyzing the role of the local sheriff. Society has glorified the sheriff as the ultimate manifestation of good—he protects the weak and helpless and drives out, if not kills, those who would destroy society. He is perceived as the representative of the community, acting on its behalf without personal gain or benefit. Presented here are two very different scenarios: the story of Wyatt Earp and the Gunfight at the O.K. Corral, and the story of Sheriff Pat Garrett and his quest for Billy the Kid.92 As seen in both stories, however, many questions remain as to whether the glory was rightfully bestowed on both Wyatt Earp and Pat Garrett. Who were these sheriffs protecting society against? How did these sheriffs protect society? Defining the limits of, or establishing criteria for, self-defense ultimately depends first on accurately identifying the enemy.93

A. Pat Garrett and the Death of Billy the Kid

Pat Garrett's alleged killing of Billy the Kid raises the question of preemptive self-defense. Although Billy the Kid was known as a notorious outlaw,94 several pertinent questions surround his death. According to Garrett's own account, after Billy escaped from jail, Garrett got wind of where Billy was hiding in Fort Sumner; Garrett then entered the house and sat on a bed.95 Billy entered the room where Garrett was sitting and Billy shouted "quien es?" (who is it).96 Garrett saw that Billy had a "revolver in his right hand and a butcher knife in his left. [Billy] came directly towards me."97

Others, however, question whether or not Garrett told the correct version of the story:

91. See Laura E. Gómez, Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico, 34 LAW & Soc'y REV. 1129, 1130 (2000); see also Jeffrey J. Look, Law and Order on the Wild, Wild West (WWW), 24 U. ARK. LITTLE ROCK L. REV. 817, 817 (2002) ("However, like Wyatt Earp and his brothers riding into town to bring order to chaos, Congress and the Internet Corporation for Assigned Names and Numbers (ICANN) stepped in to give intellectual property owners additional weapons to control infringers . . . .").

92. Pat Garrett (1850-1908) was a noted sheriff of the American West who was responsible for bringing famed outlaw Billy the Kid to justice and then killing Kid after his final escape from jail. O'CONNOR, supra note 34, at 86-87, 133-34.


96. Id. at 175.

97. Id.
Was Pat Garrett justified in killing the Kid in the parlor . . . without having given him even the slightest chance to know that his life was in jeopardy? Did the Kid, at the time he was killed, have a butcher knife in his hand, and was he on his way to the kitchen to slice off a chunk of meat from the hind-quarter of beef, because he was hungry . . . ?

This event is of seminal importance in the self-defense debate. Although the Kid's outlaw status was widely recognized and the threat he posed to society was indisputable, it is not clear whether he presented a threat at the time he was killed. One of the critical questions in the self-defense debate is what threat does the perceived enemy present at a specific moment in time.

The Billy the Kid incident raises an additional question—is a perceived enemy a legitimate target at all times? That is, should the preemptive self-defense doctrine enable the nation-state to kill a serious threat regardless of whether the individual was engaged in harmful or threatening activity when attacked?

Accounts regarding the death of Billy the Kid suggest a controversy regarding whether Garrett acted based on intelligence information. The true story of what happened on that night in Fort Sumner may never be known. Garrett was never questioned about his actions, and the questions remain. Nation-states, however, do not have the luxury of Pat Garrett; a nation-state is held accountable for its actions. Precisely because decisionmakers bear substantive responsibility for their actions, by addressing source reliability and credibility, the strict-scrutiny model protects nation-states from relying on inaccurate intelligence information.

Billy the Kid's past was literally a matter of public record. However, his future actions were unknown to Pat Garrett. There was no available intelligence information justifying self-defense. Though it is clear that Garrett initiated the event, his basis for doing so was predicated on past events rather than future actions. If Garrett had possessed intelligence information indicating that Billy had plans to commit future crimes, then arguably self-defense (in protecting the community) could be claimed. By analogy, the Billy the Kid paradigm represents how not to practice active self-defense. It is at the far end of a spectrum regarding action based on past acts devoid of intelligence information regarding future acts.

B. Wyatt Earp and the Gunfight at the O.K. Corral

While Garrett's killing of Billy the Kid is controversial precisely because of the uncertainty over whether Billy held a gun in his hand, Wyatt Earp's "showdown" at the O.K. Corral presents an alternative paradigm regarding self-defense. Wyatt Earp migrated to Tombstone in 1879 to help his brother Virgil, the deputy U.S. Marshal. After a year of incidents between the Earp brothers and the Clantons and the McLaurys (lawless

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98. Ramon F. Adams, A Fitting Death for Billy the Kid 15 (1960).
99. See id.
Cowboy families), a shoot-out took place on October 26, 1881, at the O.K. Corral.\textsuperscript{101}

Just before the bullets started flying, Virgil had been told that Ike Clanton had taken to the streets and was threatening to kill the Earps. Virgil, Wyatt, a third brother, Morgan, and Wyatt's unsavory friend, Doc Holliday, set off to find Ike. Sheriff Behan met them along the road and tried to stop them, saying that he would handle the situation and disarm Ike and anyone with him. Virgil ignored Behan and approached the corral, where he found Ike and Billy Clanton as well as Tom and Frank McLaury. Did Virgil ask his opponents to disarm? Did the Cowboys reply by opening fire? We have no clear answers to these questions. All we know is that the Earps and Holliday began to fire their guns. After "thirty shots in thirty seconds," Virgil and Morgan were badly wounded, and Billy Clanton and Tom and Frank McLaury were dead. Wyatt Earp, Doc Holliday, and Ike Clanton were not injured, Clanton having run out of the corral during the fight.\textsuperscript{102}

After initially learning that Ike had taken to the streets, Wyatt Earp went searching for the people posing the perceived threat, the Clantons.\textsuperscript{103} Did Wyatt act on an imminent threat? Should Wyatt have waited until Ike Clayton attempted to kill him, or was it justifiable for Wyatt to go looking for Ike? Were Wyatt's actions reasonable? Did he act upon reasonable intelligence?

Wyatt Earp acted on what he had been "told." While history is unclear as to the source's identity (and therefore its reliability and viability) Earp's actions are distinguishable from Pat Garrett's. While undoubtedly both Garrett and Earp initiated their respective encounters, Earp responded to a warning he had received through his brother.\textsuperscript{104} Accordingly, the actions of the Earp brothers were anticipatory in nature.

By analogy, Earp's actions would satisfy a strict-scrutiny test—he had a clearly identifiable enemy, a valid threat, and early warning. Sherriff Behan met the Earps on the road and told them that he would take care of the situation.\textsuperscript{105} Yet, the Earps ignored him and acted anyway,\textsuperscript{106} even though they were not required to act. However, in the context of repeated incidents between the involved parties, the Earp brothers' actions—though preventable—are justifiable. Because of the concrete warning Virgil received, self-defense is a particularly valid argument—unlike in Garrett's

\textsuperscript{101}. \textit{id.}
\textsuperscript{102}. \textit{id. at 60-61.}
\textsuperscript{103}. See \textit{id.}
\textsuperscript{104}. \textit{id.}
\textsuperscript{105}. \textit{id. at 60-61.}
\textsuperscript{106}. \textit{id.}
situation. It is important to note at this juncture the qualification that although it is justifiable for Earp—or the executive—to act under these circumstances, the question of whether the executive should act is not within the purview of this proposed model.

III. U.S. Constitutional Law

U.S. constitutional law provides the foundation for an individual’s right to self-defense.107 The strict-scrutiny standard this article proposes addresses when the nation-state’s right to self-defense should begin. The analysis begins with relevant constitutional law principles because the “when” is predicated on the right, and in particular, the right to bear arms.

Analyzing the intent of the Founding Fathers with respect to self-defense is critical to a discussion regarding an individual’s right to self-defense and the limits of power.108 The Founders’ intent, after all, is the basis for determining the constitutionality of the executive’s actions.109 The relevance to self-defense against a non-state actor is by analogy—if the individual has the right to self-defense, then the nation-state has the right to question when the individual may act, based on what intelligence, and against whom.

Scholars have argued that the U.S. Constitution articulates a fundamental right to self-defense.110 In analyzing this right to self-defense from a constitutional perspective, scholars have emphasized the Second Amendment.111 The right to bear arms is directly related to the individual’s right to engage in self-defense.112 Although the Founding Fathers did not specifically discuss self-defense, James Madison’s advocacy of the right to bear arms reflects the viewpoint that self-defense is a fundamental right.113 Justice Holmes’ phrase “detached reflection cannot be demanded in the presence of an uplifted knife” also succinctly summarizes the essence of self-defense.114

In analyzing the concept of a fundamental right, the strict-scrutiny test requires articulating why and when the principle of self-defense may be

107. See infra note 111 and accompanying text.
111. See Johnson, supra note 2, at 188-93; Volokh, supra note 110, at 418.
112. See Michael Steven Green, The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms, 52 DUKE L.J. 113, 162 (2002); Johnson, supra note 2, at 188-89.
113. See Kates, supra note 108, at 228-30 (noting that in The Federalist No. 46 Madison “assured his fellow countrymen that they need never fear their government because of ‘the advantage of being armed, which the Americans possess’”).
114. Johnson, supra note 2, at 205.
made operational. Therefore, it is important to analyze from whom the individual is protecting himself.\textsuperscript{115} That is, why should a person have the right to bear arms, and for what purpose? To that end, one method of interpretative analysis is from the perspective of the Founding Fathers.\textsuperscript{116}

In engaging in that analysis it is necessary to explore in greater depth the significance of the Second Amendment. The fundamental right of self-defense is encapsulated in the Framers' expression of the right to bear arms.\textsuperscript{117} After all, why was the word "bear" used? If a person bears arms to commit a crime, then the Executive branch (law enforcement) will arrest that person according to laws the that legislature has enacted, and the judiciary will determine guilt and punish if necessary. If, however, the person asserts a defense of self, family, or property that requires bearing arms, then the Second Amendment guarantees his right.\textsuperscript{118}

Recently, in District of Columbia v. Heller,\textsuperscript{119} the U.S. Supreme Court held that the Second Amendment confers a fundamental, individual right to possess a firearm for traditional use such as for private self-defense in the home.\textsuperscript{120} This landmark decision was the first concrete statement from the Supreme Court as to the application of the Second Amendment to individuals. Before Heller, in United States v. Gomez\textsuperscript{121} and United States v. Panter,\textsuperscript{122} two U.S. Courts of Appeal upheld that fundamental right. In Gomez, the Ninth Circuit held that the defendant's possession of a firearm was justified because he was under a threat of death after he was named as a government informant in a drug conspiracy.\textsuperscript{123} Similarly, in Panter, the defendant argued that he possessed a firearm only momentarily for self-defense after being attacked by a convicted murderer.\textsuperscript{124} The Fifth Circuit agreed and found that his possession was justified.\textsuperscript{125} While constitutional law provides an individual with the right to self-defense, criminal law governs when and how an individual may exercise that right.

IV. U.S. Criminal Law

The criminal law paradigm is inherent to any discussion regarding self-defense. When may an individual act to protect him or herself? When may an individual act to repel the threat of deadly force? These questions

\textsuperscript{115} See Kates, supra note 108, at 217 n.53 (stating that the right to bear arms had three purposes: defending and securing food for one's family, granting arms to the militia, and law enforcement).
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 229-30.
\textsuperscript{119} 128 S.Ct. 2783 (2008).
\textsuperscript{120} See id. at 2821-22.
\textsuperscript{121} 81 F.3d 846 (9th Cir. 1996).
\textsuperscript{122} 688 F.2d 268 (5th Cir. 1982).
\textsuperscript{123} Gomez, 81 F.3d at 846.
\textsuperscript{124} Panter, 688 F.2d at 270.
\textsuperscript{125} Id. at 272.
are relevant by analogy to international law with respect to the relationship between state and non-state actors.

A. Definition

In defining justifiable self-defense, common law and the Model Penal Code differ regarding when deadly force may be used. At common law, a person is justified in using deadly force against another if he reasonably believes that the force is necessary to repel the imminent use of unlawful deadly force by another sufficient to cause bodily injury.\textsuperscript{126} The Model Penal Code states that "the use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."\textsuperscript{127}

Although the common law requires an imminent threat,\textsuperscript{128} the Model Penal Code does not have an imminence requirement.\textsuperscript{129} The Model Penal Code also places no time constraint on when the actor may act for protection, only that the act be necessary.\textsuperscript{130} While the common law adopts an objective test requiring that the actor have a reasonable belief that force is necessary,\textsuperscript{131} the Model Penal Code requires proof that the actor only subjectively believe force is necessary.\textsuperscript{132}

Imminence and reasonableness are particularly relevant to the limits of self-defense between both state and non-state actors, and more broadly to international law.\textsuperscript{133} When may a nation-state act? Must they react to an immediate threat of harm, or must the force only be necessary to protect them from harm at some point in the future? Based on what level of threat may a nation-state act? How much intelligence and what kind of intelligence must a nation-state have in order to act? Must the threat be objec-


\textsuperscript{127} MODEL PENAL CODE §3.04(2)(b) (2001) (emphasis added).

\textsuperscript{128} Peterson, 483 F.2d at 1230.

\textsuperscript{129} See MODEL PENAL CODE § 3.04(2)(b).

\textsuperscript{130} Id.

\textsuperscript{131} Id.


\textsuperscript{133} See generally Nabati, supra note 10 (discussing how, just as in criminal law, international law could introduce a "reasonable nation standard"); Mark L. Rockefeller, The "Imminent Threat" Requirement for the Use of Preemptive Military Force: Is It Time for a Non-Temporal Standard?, 33 DENV. J. INT'L L. & POL'Y 131 (2004) (discussing replacing "imminence" with "necessity" on the national defense level); Michael Skopets, Comment, Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law, 55 AM. U. L. REV. 753 (2006) (discussing the parallels between preemptive strikes in international law and battered women who attack abusers); John Yoo, Using Force, 71 U. CHI. L. REV. 729, 777 (2004) ("Self-defense in international law is conceptualized . . . in terms of imminence, necessity, and proportionality. The analogy between self-defense in criminal and international law has taken such hold that domestic criminal law scholars sometimes illustrate the doctrine with examples from international law.").
tively reasonable based on a set of criteria, or may the nation-state act on its own subjective belief of a threat?

B. Imminence

Scholars suggest that the central debate surrounding self-defense in criminal law is whether legitimate, justifiable self-defense standards should require an element of imminence. That is, can individuals act only in response to an imminent threat? Much of the debate focuses on Battered Woman Syndrome (BWS). In particular, the question is whether the imminence requirement should be waived for battered women claiming self-defense when they use deadly force against their batterers.

BWS is best illustrated in the case of State v. Norman. John Norman put his wife Judy through constant abuse—he beat her, broke glasses on her, extinguished his cigarettes on her, forced her to prostitute herself, called her a dog, made her eat dog food and sleep on the floor, and threatened to kill her. Judy Norman endured this abuse for over 20 years, eventually shooting her husband in the back of the head while he was sleeping. Although she argued self-defense, the jurisdiction where Mrs. Norman was prosecuted required that the threat be imminent to justify use of deadly force. Because Mr. Norman did not present a threat at the moment he was shot (because he was asleep), Mrs. Norman could not claim self-defense and was convicted of manslaughter.

In response, several scholars argued that self-defense should not include an imminence requirement. Rather, according to this theory,
self-defense requirements can be satisfied if the use of force was necessary in the face of a threat. This proposed standard is similar to the approach of the Model Penal Code.

C. Reasonableness

The other relevant issue is whether justifiable self-defense requires an objective, reasonable belief or just a subjective belief that force was necessary. The objective standard inquires "whether a reasonable person in [the] defendant's circumstances would have perceived self-defense as necessary." Conversely, according to the subjective standard, "all that is relevant to the actor's guilt is that he did honestly believe it necessary to use force in his own defense."

Reasonableness is most effectively discussed by analyzing People v. Goetz. Bernard Goetz sat on a subway car occupied by four youths, none of whom displayed a weapon. One or two of the youths went up to Mr. Goetz and said "give me five dollars." In response, Goetz pulled out a handgun and shot all four youths in succession. Was it self-defense? Goetz was indicted but moved for dismissal arguing that the prosecutor gave the incorrect standard for self-defense to the grand jury. Goetz argued that the prosecutor should have instructed the jury on a subjective standard. The appellate court held that the prosecutor did not err in applying an objective standard of reasonableness, which asks what a reasonable person in Goetz's situation would have done.

Goetz illustrates the complex issues surrounding reasonableness. Should Goetz have been judged on whether a reasonable person would have believed that self-defense was necessary against the four unarmed youths? Or, should the court have judged him on his personal belief that self-defense was necessary against the four unarmed youths?

Some scholars argue that self-defense should be based on an objective, reasonable person standard. For example, Kevin Jon Heller argues that

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143. Rosen, supra note 126, at 380.
144. See supra Part IV.A.
146. Heller, supra note 145, at 8 (internal quotation omitted).
147. Id. at 56 (internal quotation omitted).
148. 68 N.Y.2d 96 (1986).
149. Id. at 100.
150. Id.
151. Id.
152. Id. at 107. The prosecutor gave the grand jury an objective standard of reasonableness. Id.
153. Id. at 110-11.
154. Id. at 116-17.
155. See Lee, supra note 145, at 193.
an objective standard is necessary to "ensure that . . . there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard, notwithstanding their distinctive personality traits and varying capacities to achieve the standard."\textsuperscript{156} Heller thus argues for a standard that accounts for individual differences and articulates criteria by which the rule of law can govern.\textsuperscript{157} Despite this rationale, the Model Penal Code and some states still utilize the subjective standard and require only that the individual believe that force is necessary.\textsuperscript{158}

The issues relevant to self-defense in criminal law—imminence and reasonableness—are the subject of disagreement amongst scholars and practitioners. Scholars question whether imminence should be a requirement or whether an individual need only believe that action is necessary for purposes of self-defense.\textsuperscript{159} Other scholars advocate requiring an objective standard, which asks whether a reasonable person in the actor's situation would believe that force was necessary.\textsuperscript{160}

Although U.S. constitutional law grants an individual the right to self-defense\textsuperscript{161} and criminal law governs when an individual may exercise that right,\textsuperscript{162} the themes and questions may translate by analogy to the rights of nation-states. Do nation-states have a fundamental right to self-defense? If so, when can nation-states act? Must they act only in response to imminent harm, or can they act when it is necessary to protect against future harm? International law seeks to answer these questions.

V. International Law and Self-Defense

International law provides nation-states with the right to self-defense.\textsuperscript{163} How international law seeks to define and limit this right to self-defense has been analyzed at length.\textsuperscript{164} This article will neither revisit prior discussions nor emphasize the ambiguity of the debate. Rather, in seeking to articulate new standards, reflective of contemporary conflict, this article seeks to build on what scholars have already suggested. The

\textsuperscript{156} Heller, supra note 145, at 8 (internal quotation omitted).
\textsuperscript{157} See id.; see also Lee, supra note 145, at 193.
\textsuperscript{159} See supra notes 142-144 and accompanying text.
\textsuperscript{160} See supra notes 155-158 and accompanying text.
\textsuperscript{161} See discussion supra Part III.
\textsuperscript{162} See discussion supra Part IV.
\textsuperscript{163} U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] . . . .").
limitation of what has been previously offered, however, is that it is rele-
vant to yesterday’s paradigm, rather than today’s—much less tomorrow’s.165 The discussion below emphasizes the need to re-articulate how international law defines self-defense. It does not argue the irrele-
vance of the UN Charter,166 but rather proposes the articulation and implemen-
tation of new standards reflecting a new reality. Before address-
ing customary international law, international conventions, and treaties, it is critical to set the stage with respect to what the author refers to as “the new threat.” Although innumerable threats to the nation-state exist,167 this article will focus on terrorist bombings.

Thomas Ricks argues that terrorist bombings are the greatest danger facing American forces in Iraq.168 The daily toll of insurgent bombings against innocent Iraqi civilians169 makes clear the damage caused to life and property alike. The planned bombings in Trafalgar Square170 and Glasgow171 indicate all too clearly the potential danger of terrorist bomb-

165. But see articles focusing on self-defense to fight terrorism, 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 (2002); Emanuel Gross, Thwarting Terrorist Acts by Attack-
ing the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect its Citizens, 15 TEMP. INT’L & COMP. L.J. 195 (2001); Joshua E. Kasienberg, The Use of Conventional International Law in Combating Terrorism: A Magi-
not Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption, 55 A.F. L. Rev. 87 (2004); Shah, supra note 7.


170. On June 29, 2007, two cars were found near Trafalgar Square loaded with nails packed around canisters of propane and gasoline, set to detonate and potentially kill hundreds in the theater and nightclub district. See Paisley Dodds, London Police Foil Major Terror Plot, WASHINGTONPOST.COM, June 29, 2007, http://www.washingtonpost.
com/wp-dyn/content/article/2007/06/29/AR2007062900584_pf.html. This plot was uncovered two days after Gordon Brown, the new prime minister, had taken office. See id.

171. On June 29, 2007, thirty-six hours after the attempted London car bombings, the suspected terrorists traveled to Glasgow where they attempted a failed car bombing at Glasgow Airport. Id.; see also Airport Incident ‘Was Terrorism,’ BBC News, July 1, 2007, http://news.bbc.co.uk/2/hi/uk_news/scotland/6257846.stm. Witnesses saw a car drive through the doors of the main terminal building, then saw the driver and passen-
nings. Moreover, the planned, but foiled, simultaneous attacks on commercial airlines—whether departing from London\textsuperscript{172} or the Philippines\textsuperscript{173}—all highlight the enormous risk to society from terrorist bombings. While other threats are no less significant—and perhaps some more dangerous—terror bombings are the most concrete manifestation of contemporary terrorism.

To explain the critical relationship between terrorist bombings and self-defense, it is necessary to engage in a relatively lengthy discussion regarding the former. Otherwise, the reader may perceive self-defense as only an abstract concept. Therefore, the discussion below addresses self-defense from a practical perspective—how society lawfully protects itself from this threat.

Terror bombing is defined herein by the broadest possible parameters to include the following: dirty bombs, suicide bombings, remote controlled bombings (without terrorists exploding themselves, contrary to suicide bombers), and nuclear weapons. Particular attention will be given to the indiscriminate killing of innocent civilians accomplished by the bombing methods mentioned above. Terror bombings, in the widest possible meaning of the term, represent the greatest threat presently posed by terrorists. Terror bombing is a concern precisely because of its indiscriminate nature, increasingly widespread use, relative ease of production, and the difficulty of perpetrator identification and prevention. Therefore, it is critical to develop effective counterterrorism measures to combat this threat.

The threat of terror bombing differs from other forms of terrorist attacks. To highlight this uniqueness, one may compare terror bombings to airplane hijackings. First, airports already benefit from a security infrastructure.\textsuperscript{174} Although the efficacy of these systems is debatable, in theory, airports could modify or intensify existing resources and procedures to prevent attacks.\textsuperscript{175} Second, in the airline industry, the intelligence community can use the records of flight plans to assess and prioritize the threats posed by terrorists. This information can then be used to develop effective counterterrorism measures.

\textsuperscript{172} On August 10, 2006, the British police arrested twenty-one people in connection with a terrorist plot to blow up an aircraft flying from the United Kingdom to the United States. \textit{British Police: Plot to Blow up Aircraft Foiled}, \textit{Hous. CHRON.}, Aug. 10, 2006, at A14. The plot involved hiding liquid explosives in carry-on luggage, with at least six flights targeted. \textit{Id.}


\textsuperscript{175} See \textit{id.}
risks. There are a finite number of flights to an identifiable number of potential cities (targets). Third, passengers knowingly accept the risk when they choose to fly. Should passengers prefer, they could use another form of transportation.

Terrorist bombings, however, are not as easily preventable. They do not target one geographical area or industry. Any building, bridge, landmark, or gathering place is vulnerable to attack. Intelligence-gathering capabilities to counter terrorist bombings is exponentially more difficult than is responding to other terrorist tactics. Not only is there no current security system to protect all sites, it is impossible to create one. Moreover, there are an unlimited number of potential targets and terrorist actors. Thus, the intelligence assessment becomes much more difficult to prioritize.

A. The Caroline Doctrine

In 1837, U.S. Secretary of State Daniel Webster articulated a definition of self-defense that evolved into customary international law. Webster's definition followed what has come to be known as the Caroline incident. The Caroline was a U.S. steamboat that attempted to transport supplies to Canadian insurgents. A British force interrupted the Caroline's voyage, shot at it, set it on fire, and let it wash over Niagara Falls. Webster said that Britain's act did not qualify as self-defense because self-defense is justified only if "[the] necessity of [that] self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation." Therefore, the Caroline Doctrine limits the right of self-defense to situations where "there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted." Article 51 of the UN Charter narrowed the definition, making self-defense permissible only in the event of an armed attack.

178. See id.
179. See id.
180. See id.
183. See id. at 495.
184. Gross, supra note 165, at 211.
185. Id.
186. See U.N. Charter art. 51.
187. Gross, supra note 165, at 211.
B. UN Charter: Article 51

The UN Charter sought to articulate a world order devoid of military conflict. In an effort to avoid repeating the horrors of World War II the UN Charter calls on nation-states to peacefully resolve their conflicts. The purpose of the United Nations is to “save succeeding generations from the scourge of war.” To satisfy this purpose, the Charter required that “[a]ll Members . . . settle their international disputes by peaceful means . . . [and] refrain in their international relations 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.”

To that end, the UN Charter sought to limit when nation-states could implement self-defense against other nation-states. Article 51 authorizes self-defense only if an armed attack occurs:

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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The UN Charter narrows the Caroline Doctrine, which provided for anticipatory self-defense if the threat to national security is reasonably believed to be imminent. Article 51’s concept of preemption has significantly reduced the Caroline Doctrine in an international setting. The significance of this narrowing cannot be underestimated: Article 51 transformed the Caroline Doctrine from a customary international law principle enabling preemption to a treaty-based definition of self-defense dependent upon the occurrence of an armed attack.

Although Article 51 clearly expresses the obligation of nation-states to prevent war, Professor Jues Lobel has suggested the following:

The United Nations Charter prohibits the use of force except when authorized by the Security Council or when undertaken by individual nations in self-defense and in response to “an armed attack.” Moreover, as a

189. U.N. Charter pmbl.
190. Id. art. 2, paras. 3-4.
191. See id. art. 51.
192. Id.
general matter, the United Nations has sought to limit the Article 51 self-defense exception to prevent its misuse. First, Article 51 permits only those actions taken in self-defense; reprisals and retaliations are proscribed under the U.N. Charter. In other words, a nation can respond to an ongoing attack, including one waged by a terrorist organization, by using force. However, that nation may not forcibly retaliate against another in response to an unlawful act that the latter committed against the former in the past. The reasoning behind this rule is simple: a nation subject to an ongoing attack cannot be expected to wait for the international community’s aid before fighting back. Obviously, when a nation is under attack, immediate action is necessary. On the other hand, a nation whose citizens are no longer being attacked must seek U.N. intervention; to allow military reprisals would be to encourage the renewed use of force. This would result in a spiraling escalation of violence. Thus, the U.S. government, most state actors, the U.N. Security Council, and the International Court of Justice have officially taken the position that armed reprisals are outlawed.\textsuperscript{194}

The fundamental question facing decisionmakers in the context of self-defense is when preemptive actions can be undertaken.\textsuperscript{195} Preemptive action must be predicated on intelligence information that meets the reliability and corroboration standard this article seeks to forcefully advocate. Furthermore, for preemptive action to be legitimate, it must be proportional to the attack it is intended to prevent.\textsuperscript{196} The threat must also be concrete, not vague or based on loosely gathered intelligence that may be more fantasy than fact. In determining proportionality, decisionmakers must determine both the immediacy of the threat and its severity.\textsuperscript{197}

Customary international law permits a nation-state to respond to a threat and infringe upon the territorial sovereignty of another nation when four criteria are met: (1) the nation-state is acting in self-defense; (2) the attack is substantial and military (i.e., not an isolated armed incident); (3) the offending nation is complicit, unwilling, or unable to prevent further attacks; and (4) the attack is widespread and imminent.\textsuperscript{198}

Nation-states, to adequately defend themselves, must be able to fight the terrorists before the terrorists attack. The nation-state must act preemptively to either deter terrorists or, at the very least, prevent terrorism. The question that must be answered—both from a legal and policy

\begin{itemize}
\item \textsuperscript{194} Jues Lobel, \textit{The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan}, 24 \textit{Yale J. Int’l L.} 537, 540 (1999) (citations omitted and emphasis added).
\item \textsuperscript{195} See generally Chris Bordelon, \textit{The Illegality of the U.S. Policy of Preemptive Self-Defense under International Law}, 9 \textit{Chap. L. Rev.} 111 (2005); Reisman & Armstrong, \textit{supra} note 16.
\item \textsuperscript{196} See HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2006] IsrSC 53(4) 8 60 (citing \textit{Targeted Killing}, \textit{supra} note 5).
\item \textsuperscript{197} See Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 167 (Nov. 6); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 513-14 (July 8).
\end{itemize}
perspective—is what tools are necessary for the nation-state to combat terrorist bombings? Active self-defense would appear to be the most effective tool; that is, rather than wait for the actual armed attack to occur,\textsuperscript{199} the nation-state must be able to act anticipatorily\textsuperscript{200} against the non-state actor.

The development of a new body of international law providing legal justification for such actions (active self-defense against a non-state actor) must be consistent with existing principles and obligations of nation-states: proportionality, military necessity, collateral damage, and exhaustion or unavailability of peaceful alternatives.\textsuperscript{201} The concepts of active self-defense and the four customary international law principles previously listed are not in conflict; rather, they are both critical to formulating an international law response to modern warfare—which is clearly very different war from traditional state against state conflict.

Examples of this modern warfare in which a nation-state attacks a non-state actor by violating the host state, include Israel's attack against Syria and the United States' attacks against Sudan. In response to a terrorist attack in Israel, the Israeli air force attacked terrorist bases in Syria.\textsuperscript{202} Although Israel was widely criticized,\textsuperscript{203} the Israeli Government explained that the target was not Syria itself, but rather the Israeli Air Force (IAF) was attacking terrorist bases located in Syria with no intent to violate Syrian sovereignty.\textsuperscript{204} Israel's argument appears disingenuous as the IAF breach of Syrian airspace clearly violated Syrian sovereignty.\textsuperscript{205} Israel's argument is further weakened by events in 2007. In 2007, Israeli fighter planes attacked a "nuclear target" in Syria.\textsuperscript{206} However, this reported IAF attack on a Syrian target(s) is substantially different from the previous raid: the previous raid was on terrorist bases located in Syria whereas the most recent attack (if media reports are accurate) was aimed at specific Syrian

\textsuperscript{199} Such as allowed by the U.N. Charter, art. 51.
\textsuperscript{200} Such as articulated by the Caroline case. See generally Gross, supra note 165.
\textsuperscript{206} See Mark Mazzetti & Helene Cooper, U.S. Confirms Israeli Strikes Hit Syrian Target Last Week, N.Y. Times, Sept. 12, 2007, at A12.
targets.\textsuperscript{207}

Similarly, the United States violated Sudanese and Afghan sovereignty when the U.S. Air Force, in response to the 1998 embassy bombings in Kenya and Tanzania, attacked targets in Sudan and Afghanistan.\textsuperscript{208} The United States fired seventy-nine tomahawk missiles at alleged Bin Laden outposts in Sudan and Afghanistan, including a factory believed to produce chemical weapons.\textsuperscript{209} President Clinton relied on Article 51's self-defense principle in justifying the act,\textsuperscript{210} but added that the strikes "were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities."\textsuperscript{211} Although the attack may be considered retaliatory rather than defensive in nature, the question of anticipatory self-defense is still relevant to this attack.\textsuperscript{212} If, as had been reported, the factory was indeed producing chemical weapons, then an argument could be made that America, and America's allies would potentially be in danger if the factory continued to operate.\textsuperscript{213} Part VI shall discuss this attack further.

\section*{C. UN Security Council Resolutions Post-9/11}

Following the 9/11 attacks, the UN Security Council passed two Resolutions addressing appropriate responses to terrorism: UN Security Council Resolutions 1368\textsuperscript{214} and 1373.\textsuperscript{215} Relevant passages of these resolutions appear below. UN Security Council Resolution 1368 states, in relevant part,

\begin{quote}
The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,
\end{quote}

\textsuperscript{207} See id. Although details of the attack are largely unknown and a matter of speculation, the justification for such a raid would in all likelihood be articulated as self-defense based on the analysis of available intelligence information.


\textsuperscript{209} Martinez, supra note 9, at 143.

\textsuperscript{210} Id.

\textsuperscript{211} Id.


Recognizing the inherent right of individual or collective self-defence in accordance with the Charter, . . .

3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. Calls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations . . . .216

Additionally, UN Security Council Resolution 1373 states that

The Security Council,


Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), . . .

2. Decides also that all States shall: . . .

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; . . .

3. Calls upon all States to: . . .

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts; . . .217

Scholars disagree over the effect of these resolutions on self-defense. Some have suggested that the resolutions made a difference: (1) Both resolutions reaffirmed the inherent right of "individual or collective self-defense" as recognized by the UN Charter, under Article 51; (2) Resolution 1373 emphasized that any further acts would be considered threats to peace and security; (3) Both "implicitly" recognized that the September 11 attacks constituted an attack on the United States, under Article 51; and (4) According to 1373, members are "obligated to create the prescribed legal framework in its national laws and institutions to combat terrorism, and to co-operate fully with other states on a global scale in this effort . . . thereby establishing an international legal framework to combat

217. S.C. Res. 1373, supra note 216, pmbl., ¶¶ 2(b), 3(c) (emphasis added).
Other scholars, however, argue that while the resolutions recognized and reaffirmed the right of self-defense, they ultimately do not facilitate nor articulate a broader reading of self-defense. According to Professor Greg Maggs, Resolution 1368 in particular did not say what the right to self-defense entails. Most particularly, it did not say that al-Qaeda had committed an "armed attack" for the purposes of Article 5 and it did not say that the United States had a right to act in self-defense in response to the attack by al-Qaeda.

Although existing international law grants nation-states a fundamental right to self-defense, the existing limitations—the Caroline Doctrine, UN Charter Article 51, and Security Council Resolutions 1368 and 1373—do not provide sufficiently clear guidance regarding when a nation-state may act. More specifically, the existing law does not address when a nation-state may take preemptive or anticipatory action against a non-state actor, and thus does not provide an actionable guideline for modern-day armed conflict.

VI. Strict-Scrutiny Standard

The solution to this search for an actionable guideline is the strict-scrutiny standard. The strict-scrutiny standard as proposed here would enable nation-states to operationally engage a non-state actor at an earlier time, predicated on intelligence information that would meet admissibility standards akin to a court of law. To rephrase, the strict-scrutiny test seeks to strike a balance enabling the nation-state to act sooner than currently "allowed," but subject to significant restrictions.

The ability to act sooner is limited, however, by the requirement that the intelligence information relied on must be reliable, viable, valid, and corroborated. The strict-scrutiny standard proposes that for nation-states to act as early as possible to prevent a possible terrorist attack, the information must meet admissibility standards similar to the rules of evidence. The intelligence must be reliable, material, and probative.

The implementation of this review—considering no court of law will in reality review the intelligence information that is the basis for the attack—would have to occur in such a way that it has genuine teeth and is

218. See Curtis A. Ward, Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council, 8 J. CONFLICT & SECURITY L. 289, 293–394 (2003) (discussing the effects of UN Resolutions 1368 and 1373); see also Mary Ellen O'Connell, Lawful Self-Defense to Terrorism, 63 U. PIT. L. REV. 889, 892 (2002) (emphasizing that the "operative part of the Resolution mandates economic sanctions to combat terrorism" and that the "attacks were significant enough to trigger the right of self-defense").


enforceable. If such an implementation did not occur, nothing would prevent a nation-state from acting preemptively, whether or not available intelligence met either the three-part test or the strict-scrutiny test this article proposes. In essence, this proposal is predicated on the understanding that while nation-states need to engage in operational counterterrorism, mistakes regarding the correct interpretation and analysis of intelligence information can lead to tragic results. Adopting admissibility standards akin to those utilized in criminal law would seek to minimize operational error. That is this proposal's substantive thesis.

A. A Past Failure

Israel's retributive attack on the Palestine Liberation Organization (PLO) after the 1972 Olympics offers an example of a preventable operational failure. This failure could have been prevented if the available intelligence information had been subject to both the substantive and procedural measures the strict-scrutiny proposal advocates. In the aftermath of the 1972 Olympic Games attack on Israeli athletes, Prime Minister Golda Meir ordered the Mossad to kill the PLO members responsible for the attack. Mossad agents killed a number of individuals known to have participated in the attack. The operation was prematurely terminated, however, after a Moroccan waiter—a victim of mistaken identity—was tragically killed in Lillehammer, Norway. The relevance of this accidental killing to the strict-scrutiny test is the following: if the nation-state adopts an anticipatory self-defense policy, then the decision to “operationalize” depends on intelligence information.

The strict-scrutiny test seeks to achieve a critical balance between the nation-state's need to protect itself (self-defense) and its requirement to protect innocent individuals. The waiter was an innocent victim, killed as a result of an operational error. However, as the nation-state was the initiator, it had the primary responsibility to ensure minimum loss of innocent life. The principle of collateral damage, however, requires only

222. The Mossad is the Israeli foreign intelligence service responsible both for gathering intelligence information and operational counterterrorism. See Bhoumik, supra note 13, at 325-26.
225. Id.
226. This is a term of art that I use to describe the decision to translate intelligence information into operational reality.
228. See Abrahamson, supra note 224.
minimizing loss of innocent life.\textsuperscript{229} Does that mean that the mistaken killing of the waiter was acceptable within the boundaries of operational counterterrorism?

B. The Need to Objectify Counterterrorism

One of the fundamental principles of counterterrorism and international law is the lack of objectification.\textsuperscript{230} To that end, one of the primary goals of the strict-scrutiny test is to objectify operational counterterrorism. Operational decisions are based on numerous considerations\textsuperscript{231} made by commanders and decisionmakers, based on subjectivity no less than objectivity. Objectifying counterterrorism when acting in the name of self-defense, then, suggests minimizing the subjective.

Imminence is, in many ways, the standard term of art when discussing self-defense.\textsuperscript{232} The typical operational dilemma that confronts commanders is “how imminent is imminent?”\textsuperscript{233} By analogy to the school-yard bully, is imminence when a fist is about to come in contact with the nose or when the fist is elevated in the direction of the nose? Is it when the hand is about to be closed into a fist? Perhaps when the nose has reasonable suspicion to believe it is in danger?\textsuperscript{234} Alternatively, is it when the nose

\textsuperscript{229} “Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 57(2), June 8, 1977, 1125 U.N.T.S. 3.


\textsuperscript{231} These considerations include, but are not limited to: who is the intended target, what are the alternatives (if any), what is the risk of collateral damage, and is the proposed action proportional to the risk posed by the targeted individual? Edouard Kujawski & Gregory A. Miller, Quantitative Risk-Based Analysis for Military Counterterrorism Systems, 10 SYS. ENGINEERING 273, 280 (2007).


\textsuperscript{234} See Canon Pence, Comment, Reform in the Rising Sun: Koizumi’s Bid to Revise Japan’s Pacifist Constitution, 32 N.C. J. INT’L L. & COM. REG. 335, 365 (2006) (“Japanese forces are authorized to return fire when an unavoidable and reasonable cause exists for use of weapons to protect lives and bodies of themselves ... or those who are with them ... .” (internal quotation omitted)). But see Martinez, supra note 9, at 167 (arguing that “State A must satisfy each of the elements ... on the basis of clear, unequivocal and convincing evidence, or clear, cogent and convincing evidence, and more than a reasonable suspicion is required.” (internal quotations omitted)).
concludes there is probable cause?235

There are two distinct paradigms at work here: (1) when the nose sees the fist and (2) when the nose believes it is conceivably in danger. The first is physical and immediate—the fist is cocked; the question is how close it is to the nose and what measures the nose can take to minimize the danger.236 The second is based on different factors and considerations: rather than seeing the fist, the nose has gathered intelligence information that the fist intends to strike237—that is, the nose believes it is in danger from the unseen fist.

To fully explain what unseen means, one must consider whether it suggests the possibility of being blindsided or unseen to the extent that if the hand is not closed there are indications that it will be closed. One must consider other factors as well, such as whether there are time-sensitive or event-dependent indications, or whether there is a prior history between the fist and the nose that would affect the requisite decision making. To continue the analogy, to understand the nose’s actions, one must evaluate the justification of action if the nose had not seen the clenched fist, but others had taken it upon themselves to warn the nose that the fist was clenched. If such an event occurred, one would have to consider whether the purveyor of the warning is reliable or whether the information is viable and can be corroborated. In the nose context, the classic paradigm suggests that an internalized threat justifies physical action.238

The Wild West, as most commonly understood, was largely devoid of restraints.239 In applying the Wild West analogy, the Billy the Kid paradigm represents how nation-states should not conduct operational counterterrorism because the “new world order” post-9/11 requires enormous thoughtfulness, sophistication, and creative strategic thinking. Mere


236. Possible measures include moving back (retreat), mollifying the fist (negotiation), getting into a boxers crouch (self-defense), or waiting (passive, non-resistance).

237. Through human sources (HUMINT), intercepted conversations (SIGINT), or open sources such as newspapers. See supra text accompanying notes 57-58.


"lashing out"—either in advance of an assumed attack or in response to an attack—is counterproductive, both in the long and short term.

Conversely, the Wyatt Earp paradigm reflects action predicated on a checklist that reflects a self-defense model more in accordance with how nation-states should conduct operational counterterrorism. Adoption of the Earp model limits state action. Rather than engaging blindly and wildly, the knowledge-based paradigm is predicated on intelligence information. However, it is also the antithesis of acting only when hit. That is not a model that the nation-state can adopt from any perspective.

In response to al-Qaeda's attack on American embassies in Tanzania and Kenya, President Clinton ordered the bombing of what was believed to be a chemical-making factory in the Sudan. President Clinton based his authorization both on the need to have a response to the attack and on intelligence information. Subsequent reports, however, suggested that the intelligence was inaccurate. The building in question was not a chemical-making factory; rather it housed a pharmaceutical company.

Would adoption of the strict-scrutiny test have prevented this intelligence and political failure? Would the strict-scrutiny test have saved the life of the Moroccan waiter? The answer is not necessarily yes, but it would have enabled decisionmakers in both of these situations to ask questions that they were either not considering or not responding to in a satisfactory manner. Those questions were not asked either because relevant decisionmakers did not know or did not want to ask them, or because the relevant intelligence community chose not to fill the gap of knowledge.

C. The Legs

The four legs of the strict-scrutiny test are (1) the United States has a fundamental right to engage in active self-defense; (2) the nation-state's

240. Whether Mr. Earp knowingly and consciously acted in accordance with a "check-list" is not important. Relevant to this discussion is his adoption of what the author refers to as "knowledge-based action" rather than "assumption-based action."


243. See Bennet, supra note 208, at A1.

244. See Eckert & Mofidi, supra note 212, at 142-45 (discussing whether state-based action solely in response to acts of terrorism is a violation of international law).


246. See Johnston, supra note 213, at A2; Risen & Johnston, supra note 213, at A3.

247. See Richard A. Posner, Our Domestic Intelligence Crisis, WASH. POST, Dec. 21, 2005, at A31 ("It is no surprise that gaps in domestic intelligence are being filled by ad hoc initiatives.").

248. The criminal and constitutional law sections were intended to lay the groundwork for a discussion—by analogy and extrapolation—of this right. See supra Parts III, IV. The criminal law cases cited and analyzed and the discussion regarding the Second Amendment addressed the individual's right to engage in self-defense. See supra Part IV. Although the individual is not the state, this discussion is still important because it
primary responsibility is to protect the safety and welfare of its citizens; operational counterterrorism must be predicated on the rule of law, morality in armed conflict, and effective policy; and actionable intelligence must be more than reliable, viable, and corroborated—it must meet a test of admissibility to a court of law.

Let us examine and then apply each leg to operational reality. The ultimate question is when and under what circumstances may the nation-state act in accordance with lawful self-defense. In advocating the strict-scrutiny test, the effort is to objectify the process by establishing clear criteria. To do so, one must examine each leg individually and then jointly. The guiding premise is that according to the so-called “earlier in time” standard, nation-states can protect themselves based on intelligence information—provided the information meets the admissibility test.

The fundamental right to self-defense is inherent to constitutional, criminal, and international law. The Second Amendment confers an individual right to possess a weapon for private self-defense in the home. Criminal law sets the rules for when an individual may act in justifiable self-defense. By extrapolation, the individual’s right to self-defense can be seen as transferable to the state. In any event, international law clearly articulates self-defense criteria—from the Caroline Doctrine, to Article 51, to the UN resolutions ratified in the aftermath of 9/11.

The nation-state’s fundamental responsibility to protect its citizenry provides a foundation for the larger issue of when a nation-state can defend itself. Many of the philosophical underpinnings are therefore similar and highly applicable.

249. See Michael Lacey, Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction, 10 IND. INT’L & COMP. L. REV. 293, 308-14 (2000) (tracing the concept of juris ad vitae—the focus on the “state’s affirmative responsibility to protect its citizens both at home and abroad from lethal force” —through history and applying it to the present day).


252. Effectiveness is a term that policy and decisionmakers prefer avoiding because its use requires a definition. To contribute to the debate, the author suggests the following definition: operational counterterrorism is effective if the terrorist infrastructure suffers serious damage, thereby preventing a particular, planned attack from going forth and postponing or impacting plans for future attacks.

253. See infra Part VI.D for a discussion on admissibility.

254. Operational reality is a term of art that reflects an understanding that decisions (made by either commanders or decisionmakers) affect numerous lives (soldiers and civilians alike) and that death is figuratively around the corner. Cf. William S. Geimer, Law and Reality in the Capital Penalty Trial, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 275 (1991) (discussing “operational reality” in the death penalty context).

255. See supra Parts III, IV, V.


257. See supra Part IV.
goes to the essence of self-defense.\textsuperscript{258} Although that obligation is fundamental, it is not absolute—the potential harm to an additional protected class must be taken into consideration.\textsuperscript{259} That additional, protected class is not a legitimate target and the state must provide it reasonable protections. The operational impact or significance of the obligation regarding a protected class is an inherent limitation on power.\textsuperscript{260} Although the protection of its citizens is the nation-state’s primary obligation, it is not the sole obligation.\textsuperscript{261} How that requisite balance is attained is critical to operational counterterrorism subject to the rule of law and morality in armed conflict.\textsuperscript{262}

The strict-scrutiny test contributes to achieving this balance by requiring objective criteria prior to operational action. In advocating strict scrutiny prior to operationalizing intelligence information, the emphasis is on striking a balance between powerful and legitimate obligations. Ahron Barak’s theory requires that both categories must be equally protected.\textsuperscript{263} That obligation, on the one hand, limits operational counterterrorism and, on the other hand, advocates greater operational counterterrorism.

Strict scrutiny allows a nation-state to act earlier against an unprotected category of legitimate targets, provided the intelligence information meets admissibility standards. In the context of the duality suggested by protected classes, application of the test suggests that greater protection will be offered to both protected classes while more effectively and targeting unprotected, legitimate targets.

Application of the strict-scrutiny test enables the nation-state to meet the four international law principles—collateral damage, proportionality, military assistance, and alternatives—that are the center of the laws of war.\textsuperscript{264} Proper application of these four principles also contributes to, but does not guarantee, that the nation-state will more successfully win the support of its citizens. By enabling the nation-state to act earlier than articulated in the three international law standards—Caroline Doctrine,\textsuperscript{265} Article 51,\textsuperscript{266} and UN Resolutions 1368 and 1373\textsuperscript{267}—but subjecting it to rules governing the admissibility of evidence, the strict-scrutiny test allows nation-states to act in accordance with these four international principles.

Although the four principles are intended to govern the relationship between the state and protected civilians in the context of armed con-

\begin{itemize}
\item \textsuperscript{259} See Barak, supra note 41, at 39.
\item \textsuperscript{260} Aharon Barak’s theory, self-imposed restraint, goes to the essence of this dilemma. See generally id.
\item \textsuperscript{261} See id. at 38–39.
\item \textsuperscript{262} See id. at 39.
\item \textsuperscript{263} See id.
\item \textsuperscript{264} See supra note 201 and accompanying text.
\item \textsuperscript{265} See supra Part V.A.
\item \textsuperscript{266} See supra Part V.B.
\item \textsuperscript{267} See supra Part V.C.
\end{itemize}
flict, they also lay the foundation for the relationship between the state and individuals otherwise unprotected. In laying the foundation for this relationship, these four principles represent the limits of power by confining nation-state action to an unprotected class. That is, the four principles control on how far, and when, the nation-state can protect itself. To that end, the strict-scrutiny test respects that limitation while facilitating broader, yet more precise, state action. Rather than violating those four principles, application of the strict-scrutiny test would ensure greater respect for international law. Perhaps, the factory bombing of the Clinton administration best exemplifies the merits of the strict-scrutiny test. By not subjecting the available intelligence to principles governing admissibility of evidence in a courtroom, a pharmaceutical company rather than chemical-making plant was targeted. Some may argue that operational errors are inevitable; however, while combat inherently involves—if not invites—mistakes and tragedy, the nation-state is obligated to minimize such occurrences.

Decisionmakers must have standards to know if the available intelligence indeed justifies state action. The objectification of counterterrorism predicated on a process seeks to develop standards that will lead directly to more measured, and therefore effective, operational decisions. To develop an appropriate and practical process, the intelligence-operational world must be made clear. That world is comprised of case officers, terrorists, decisionmakers’ legal advisors, and operators who engage the terrorist. It is a complicated community; the stakes are extraordinarily high because wrong decisions result in innocent deaths. Hesitation to “pull the trigger” may simultaneously spare the life of a terrorist while directly contributing to the death of an innocent civilian.Wrong identification also results in the death of innocent individuals. Therefore, the strict-scrutiny approach suggests supremacy of intelligence information and the requirement that intelligence information meet admissibility standards.

To wit, in requesting permission to “shoot to kill,” let us consider the following scenario where the commander is presented these facts: According to the intelligence community, an individual dressed in a certain man-


270. See supra notes 208–211 and accompanying text.

271. See Johnston, supra note 213, at A2.


273. See, e.g., supra text accompanying notes 225–226.
ner and carrying a particular bag would—if not killed—present a grave threat to national security. The operational window of opportunity available to the commander was limited to a few minutes. Troops had been strategically placed in a ready position. The individual in question walked like and carried a bag similar to the presented intelligence information, but uncertainty remained as to whether he was the person in question. That was the dilemma the author faced when called by the commander. In preparation for such a request, the author had developed a checklist of questions for those seeking authorization for such decisions. Those questions consisted of the following prying clarifications:

1) Who was the source of the intelligence information (in an effort to ascertain reliability and viability)?
2) What were the alternatives to killing the individual (why could he not be arrested)?
3) How significant was the risk presented?
4) Would collateral damage be minimized?
5) Did the individual have known prior affiliation with terrorist groups?
6) Was the commander convinced that the individual fit the intelligence profile?
7) Had the commander directly spoken to the case officer or had the information been relayed?
8) What weapons were available to the commander (for example: nighttime vision)?
9) Was the intelligence information corroborated?
10) Did the commander believe the intelligence information?

These questions are similar to those asked when evaluating a nation-state's fundamental right to self-defense and the legitimacy of operational counterterrorism. But, just as importantly, these questions reflect a refusal to allow the killing of an individual solely based on what was reported to the commander regarding the content of a conversation between the source and the case officer. The risks are too great for one to answer these questions affirmatively based only on limited facts or information. In correlating this dilemma to the criminal law process, similar questions can be insightful:

1) When does the prosecutor have enough evidence to submit an indictment?
2) What evidence meets tests of admissibility (substantively and procedurally)?
3) What evidence raises doubt as to guilt?
4) What evidence meets probable cause standards?
5) What evidence justifies conviction?

While the criminal law process relies on a separation of powers, with the prosecutor representing the executive branch and the judge the judici-
ary, operational counterterrorism is on its face devoid of legislative oversight or judicial review. Although the executive prefers to operate in a vacuum, the question of whether that method most effectively ensures effective operational counterterrorism remains open. In discussing operational counterterrorism, it is important to note the advantage of institutionalized, process-based input into executive action prior to implementing a decision.

This institutionalized, process-driven approach is the intellectual backbone of the strict-scrutiny test. Rather than relying on the Executive branch to make decisions in a world devoid of oversight and review, the strict-scrutiny test suggests that although the nation-state can act earlier than presently allowed, the intelligence information justifying the proposed action must be submitted to a court to ascertain the information's admissibility. The discussion before the court would necessarily be conducted ex parte; however, the process of preparing and submitting available intelligence information to a court would significantly contribute to minimizing operational error that otherwise would occur.

D. The Answer: FISA

The logistics of this proposal are far less daunting than it might seem—the court before whom the executive would submit the evidence is the FISA Court. Presently, FISA Court judges weigh the reliability of intelligence information in determining whether to grant government ex parte requests for wiretapping warrants. Under this proposal, judicial approval is necessary before the executive can undertake a counterterrorism operation predicated solely on intelligence information. The standard the court would adopt in determining the information's reliability is the same standard applied in the traditional criminal law paradigm. The intelligence must be reliable, material, and probative. Although the model is different from the traditional criminal law paradigm—i.e. a defense attorney cannot question state witnesses—the court would assume a dual role. The court would both cross-examine the representative of the intelligence community and subsequently rule as to the information's admissibility. Although some may suggest that the FISA Court is largely an exercise in rubber stamping, the importance of the proposal is in requiring the government to present the available information to an independent judiciary as a


276. See Foreign Intelligence Surveillance, supra note 275.

precursor to engaging in operational counterterrorism.278

In ruling on the information’s “admissibility,” the court would be authorized to order the government to provide additional intelligence prior to approving the request.279 While the proposal explicitly calls for changing the nature of the relationship between the Executive and the Judicial branches of the government, it would serve to minimize intelligence-based mistakes in operational counterterrorism. To ensure enforcement, a president that acts in contravention to the FISA court’s ruling could be liable for committing a crime and possibly an impeachable offense.

This proposal does not limit the nation-state’s fundamental right to self-defense. Rather, it creates a process that seeks to objectify counterterrorism by establishing standards for determining whether intelligence information is admissible. By imposing guidelines from the criminal law paradigm, the strict-scrutiny standard imposes process where, by nature and de facto, it does not.

Precisely because terrorism, and therefore counterterrorism, are endemic to future generations, it is necessary to rethink how operational counterterrorism is conducted. The inherent right to self-defense must be tempered with recognition of the limits on power. The strict-scrutiny test, which enables governments to act earlier than envisioned in the three existing paradigms—Caroline Doctrine, Article 51 or post-9/11 Security Council resolutions280—recognizes that fundamental right. To assist decisionmakers to more effectively meet their obligations with respect to two separate protected classes, the strict-scrutiny test proposes imposing process on operational counterterrorism.

Conclusion

This article has sought to both articulate the dissonance between modern-day armed conflict (state against non-state actors) and existing international law and to propose a viable solution. While international law establishes the right to state self-defense, it is inherently lacking in determining when a nation-state may engage in preemptive or anticipatory action. The strict-scrutiny approach to self-defense proposed here would allow a nation-state to act earlier—provided that the Executive branch can present reliable, viable, valid, and corroborated intelligence to a FISA Court prior to undertaking a preemptive operational counterterrorism measure. Although opponents of the proposed paradigm may perceive it as limiting the executive’s discretion, the diametric opposite is the case. The approach promotes institutionalizing preemptive operational counterterrorism by


279. This article does not propose to quantify the amount of intelligence that will be enough for the FISA court to sign off on, because there is no practical answer to that question.

280. See supra notes 265–267 and accompanying text.
expanding when the nation-state may act, subject to judicial authorization. It does so by recommending the adoption of a process necessary to ensure lawful responses to terrorism and thereby legitimizing counterterrorism efforts.