

A GLOBAL SPECIAL PROSECUTOR?

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The Bush Administration ought to thank Yale law professor Harold Koh. In a comment to the New York Times this weekend, the former Clinton official characterized the creation of the International Criminal Court as "an international Marbury versus Madison moment."

Mr. Koh couldn't have given a better reason for Mr. Bush's decision, announced yesterday, to "unsign" the ICC. It was the Marbury v. Madison decision in 1803 that gave a fledgling U.S. Supreme Court authority over the other branches of government. Now Mr. Koh and friends want a world court to have similar power over America's democratic decisions and global leadership.

This would be outrageous enough in normal times. But with the U.S. at war it's a recipe for restraints that could result in military defeat. Defense Secretary Donald Rumsfeld made that point yesterday when he raised the possibility of ICC "politicized prosecutions." Notwithstanding Mr. Bush's unsigning, Mr. Rumsfeld noted that ICC provisions still "claim the authority to detain and try American citizens -- U.S. soldiers, sailors, airmen and Marines, as well as current and future officials."

The ICC grew out of a 1998 U.N. meeting in Rome designed to fill what it says was a hole left in the aftermath of the Nuremberg trials: The absence of a permanent tribunal to bring to justice those guilty of war crimes, genocide and the like. Under the Rome Statute, the court would come into effect after the 60th nation ratified the treaty. That happened last month, meaning that ICC opens for business July 1.

At the time John Bolton argued on these pages that the ICC's mission was too vague and its power too broad. Bill Clinton went ahead and signed the treaty anyway, on his last day in office. In one of those little ironies of politics, it was Mr. Bolton's signature -- as President Bush's Under Secretary of State for Arms Control and International Security -- that was affixed to yesterday's letter informing the U.N. that the U.S. was pulling out.

Mr. Bolton understands that the ICC has little to do with bringing to justice those guilty of atrocities. The U.S. shares that interest, and has been willing to shed blood and treasure to accomplish it, for example in Kosovo.

What we really have here is a battle over how best to achieve such justice.

The Bush Administration thinks that is best achieved by U.S. leadership and military strength.

The ICC's backers, including too many in the State Department, prefer to have that U.S. power checked by a global "judiciary." Note well, for example, that the main critics of Mr. Bush's decision are the same folks who've attacked the war on terror from the very beginning. The head of Human Rights Watch yesterday called Mr. Bush's unsigning "an empty gesture that will further estrange Washington from its allies." Ditto for a consortium of almost two dozen activist organizations from Amnesty International to the Lawyers Committee for Human Rights, which called it a "rash action" that "undermines

American leadership and credibility."

Though described as a "court," the ICC is better thought of as a permanent prosecutor -- one with broad powers to indict, prosecute and rule on almost anything it interprets as a human rights "crime." And in contrast to free societies like the U.S., where the courts are ultimately checked by democratic institutions, the ICC would virtually be a power unto itself.

It's easy to imagine the court becoming a powerful impediment to U.S. interests and intervention around the world. All the more so given European distaste for any exercise of U.S. power, as well as the vagueness of the crime of "aggression" that is among those the ICC is empowered to prosecute. That's one reason the Senate should follow up Mr. Bush's decision by passing the American Service Members' Protection Act; this would require immunity guarantees for U.S. troops on U.N. operations and even authorize action to free Americans detained or handed over to the ICC.

These columns, we should be clear, do not oppose all international tribunals. Nuremberg was not, for example, a permanent body, and neither were the ad hoc committees set up after the ethnic cleansing in the former Yugoslavia or Rwanda. Experience tells us that such tribunals work best when they are narrowly construed to specific circumstances, are temporary and in countries where the courts have ceased to function.

In its enthusiasm for all treaties, the Clinton Administration made many bad commitments. Mr. Bush, to his credit, hasn't been afraid to walk the worst of them back, including Kyoto, the ABM Treaty and now an international special prosecutor. The test shouldn't be whether they were once "signed" but whether they serve U.S. interests.

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