



# America at Risk

## Memo

### Protect America Month: Providing for the Common Defense in the 21st Century

The Heritage Foundation's Protect America Month is a month-long campaign focusing on the need for increased defense spending in the 21st century. America still faces serious threats in the world and now is not the time to weaken our military through defense budget cuts.

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## The Interdependence of National Security and National Sovereignty

Steven Groves

There is a clear difference of opinion between people who believe in a national defense policy directed solely by the protection of U.S. security interests and others—sometimes referred to as “transnational progressives”—who believe that the United Nations Security Council and other elements of the “international community” should have an influence on U.S. decisions regarding war and peace.

Perhaps the most significant action that a nation can take is to wage war against another nation. Such a weighty decision must be made based solely on whether the security of the nation is under threat. In the United States, that judgment is made by the President and Congress, who share responsibility for declar-

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ing, funding, and executing war. The decisions of the President and Congress are ultimately subject to public opinion and the electorate, who exercise their popular sovereignty in judging their elected officials.

Yet some people believe that the determination of whether or not to wage war does not lie solely with the American public and their elected representatives. In a 2004 presidential debate, Senator John Kerry (D-MA)

argued that a preemptive use of armed force must be carried out “in a way...that passes the global test where your countrymen, your people, understand fully why you’re doing what you’re doing, and you can prove to the world that you did it for legitimate reasons.”<sup>1</sup>

### An Unworkable Standard

Going to war with allies by your side is preferable to going to war alone, but allowing the opinions of other nations to set the terms of a “global test” that must be passed before defending the American people is wrongheaded. Being required to “prove to the world” that America is waging war for legitimate reasons is an unachievable standard. To oblige the U.S. to convince all 191 of the world’s foreign nations that a particular use of armed force is justified before undertaking it is simply unworkable.

At least one high-ranking official in the current Administration also believes that the authority to wage war is not held solely by the American people and their elected representatives. Harold Koh, the State Department Legal Adviser, believes that Senator Kerry’s “global test” should be subject to a vote of approval by the 14 foreign countries sitting on the United Nations Security Council.

Specifically, in October 2002, Koh wrote in the *Hartford Courant* that it would be a “mistake” for

U.S. forces to attack Saddam Hussein's Iraq "without explicit United Nations authorization."<sup>2</sup> If adopted by the American people, this position would constitute a revolutionary change in the manner in which the United States makes decisions regarding war and peace. In Koh's view—and no doubt in the view of all "transnational progressives"—no longer would the threat to the United States posed by a foreign nation or a rogue regime be the sole factor in determining whether to use armed force. Instead, the interests and opinions of nations sitting on the Security Council would have to be weighed as part of an effort to seek "authorization" from the Council before ordering air strikes.

Weighed against this standard, many military actions led by the United States would be considered "unauthorized" or even "illegal." The 1999 NATO bombing of Yugoslavia, for instance, was not "authorized" by the Security Council.

When then-U.N. Secretary General Kofi Annan was asked about the 2003 U.S. invasion of Iraq, he stated, "I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal."<sup>3</sup> Harold Koh mirrored Annan's sentiment, stating that without U.N. authorization, "such an attack would violate international law." Koh made that statement despite the fact that Congress—at the request of the President—four days earlier had authorized the use of force against Iraq.

Moreover, any U.S. military action that is "not in conformity with the U.N. charter" will be treated as a "crime of aggression" under the definition proposed for that crime at the upcoming review conference on the Rome Statute of the International Criminal Court. The likelihood is high that future U.S. military actions not "authorized" by the Security Council will be considered "acts of aggression" by the ICC Prosecutor. Even express authorization by the Security Council, as is the case with the ongoing conflict in Afghanistan,

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1. CNN.com, "Kerry Dismisses Criticism of 'Global Test' Remark as 'Pathetic,'" October 5, 2004, at <http://www.cnn.com/2004/ALLPOLITICS/10/04/kerry.global/index.html>.

2. Harold Hongju Koh, "A Better Way to Deal with Iraq," *Hartford Courant*, October 20, 2002, at <http://www.law.yale.edu/news/4407.htm>.

3. BBC News, "Iraq War Illegal, Says Annan," September 16, 2004, at <http://news.bbc.co.uk/2/hi/3661134.stm>.

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might be insufficient in the eyes of some "transnational progressives."

The mere possibility that U.S. officials and military personnel might be charged by the ICC with "aggression" and that U.S. troops might be put in the dock for war crimes creates substantial risks for the use of American military force. Indeed, the ICC has already opened a preliminary investigation regarding war crimes and crimes against humanity allegedly committed by U.S. troops in Afghanistan.<sup>4</sup> One can easily envision U.S. unmanned aerial vehicle (UAV) strikes on Taliban elements in Pakistan being regarded as criminal acts of aggression despite the fact that they are intrinsically linked to the Afghan conflict.<sup>5</sup>

### **A Hallmark of Independence**

National security and national sovereignty are interrelated and interdependent: A nation cannot truly have one without the other. The United States must preserve its ability to act swiftly and decisively to protect its interests, but it cannot do so if, before using military force in its own defense, it first has to pass some "global test," secure "authorization" from the Security Council, or check first with the ICC Prosecutor to ensure that it will not be charged with the "crime of aggression."

Maintaining sovereignty over determinations of national defense is an essential element of national

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4. Joe Lauria, "Court Orders Probe of Afghan Attacks," *The Wall Street Journal*, September 10, 2009, at <http://online.wsj.com/article/SB125253962307797635.html#printMode>.

5. For an example of possible interpretations, see hearing, *The Rise of the Drones II: Examining the Legality of Unmanned Targeting*, Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, U.S. House of Representatives, 111th Cong., 2nd Sess., April 28, 2010, at [http://oversight.house.gov/index.php?option=com\\_content&view=article&id=4903:hearing-on-the-rise-of-the-drones-ii-examining-the-legality-of-unmanned-targeting&catid=72:hearings&Itemid=30](http://oversight.house.gov/index.php?option=com_content&view=article&id=4903:hearing-on-the-rise-of-the-drones-ii-examining-the-legality-of-unmanned-targeting&catid=72:hearings&Itemid=30).

security and a hallmark of any truly independent nation. The United States cannot preserve its sovereignty if it cedes authority—any authority—over its national security decision-making to another nation, a group of nations, the U.N. Security Council, the International Criminal Court, or any other international organization.

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### AMERICAN LEADERSHIP

The freedom and security of Americans depend on America's global leadership.

*This product is part of the Protect America and American Leadership Initiatives, two of 10 transformational initiatives in our Leadership for America campaign.*

### PROTECT AMERICA

The 21st century will be a dangerous place if America fails to protect itself and its allies.

