

NOMINATION

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

APRIL 28, 2009

Printed for the use of the Committee on Foreign Relations



Available via the World Wide Web:
<http://www.fdsys.gpo.gov>

U.S. GOVERNMENT PRINTING OFFICE

65-250 PDF

WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

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NOMINATION

TUESDAY, APRIL 28, 2009

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

Harold H. Koh to be Legal Adviser to the Department of State

The committee met, pursuant to notice, at 2:20 p.m., in room SD-419, Dirksen Senate Office Building, Hon. John F. Kerry (chairman of the committee) presiding.

Members present: Senators Kerry, Dodd, Feingold, Shaheen, Gillibrand, Lugar, Corker, Isakson, Barrasso, and Wicker.

Also present: Senator Lieberman.

OPENING STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

The CHAIRMAN. This hearing will come to order.

We are here today to consider the nomination of Dean Harold Koh to be the legal adviser to the Department of State.

Dean Koh, thank you so much for being willing to take this on and for joining us here today.

We thank our colleague, Senator Lieberman, for being here and I will call on momentarily.

I see you also have a number of members of your family here, and we look forward to your introducing them to the committee in a few moments when you give your opening remarks.

And again, I apologize. I mentioned to Dean Koh before we came in here that I have to go down to the White House for a meeting, and I have asked Senator Lugar to chair during my absence. And I appreciate his willingness to do that and again underscore the good bipartisan way in which the committee works.

Dean Koh is one of the foremost legal scholars in the country, and he is a person of the highest intellect, integrity, and character. Frankly, we are very fortunate to have such an extraordinarily well-qualified candidate for this critical position.

If confirmed, Dean Koh will be the Secretary of State's chief legal counsel and the top adviser within the executive branch on legal matters related to our foreign policy. He will advise on the legal aspects of the most complex and important national security matters facing the country, covering issues from detainee policy to arms control negotiations.

Dean Koh brings a very impressive record of achievement to this post. He received his law degree from Harvard, where he was an

editor of the Law Review; two master's degrees from Oxford University, where he was a Marshall Scholar. And as a young lawyer, he clerked on both the D.C. Circuit Court of Appeals and the U.S. Supreme Court.

He served with distinction in both Democratic and Republican administrations, beginning his career in Government in the Office of Legal Counsel in the Reagan administration.

Dean Koh left government to teach at Yale Law School, where he went on to serve as dean until his nomination to serve in the current administration. And as a renowned scholar and leading expert on international law, he has published or coauthored 8 books and over 150 articles.

In addition to his impressive academic resume, Dean Koh comes to this nomination and to the job with a firsthand understanding of how the State Department works. He served as Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton administration, a post for which he was unanimously confirmed by the Senate in 1998.

Throughout his career, Dean Koh has been a fierce defender of the rule of law and human rights. A letter in support of Dean Koh from former high-ranking military officers was eloquent on this point. They wrote, "Dean Koh understands that it is not a rule of law if it is invoked only when it is convenient, and it is not a human right if it applies only to some people. He knows that our Nation is stronger and safer when our Government adheres to fundamental American values."

Dean Koh understands that the United States benefits as much or more than any country from an international system governed by the rule of law. He also recognizes the United States must play its part by respecting its international obligations.

At the same time, his personal commitment to America's security and to the defense of our Constitution are indisputable. It is no surprise that not everyone will agree with Dean Koh, who often tackles controversial issues. But accusations that his views on international or foreign law would undermine the Constitution, which some have suggested, are simply unjustified.

As Dean Koh explained in response to a question from Senator Lugar on the use of foreign law in constitutional interpretation, "My family settled here in part to escape from oppressive foreign law, and it was America's law and commitment to human rights that drew us here and have given me every privilege in my life that I enjoy. My life's work represents the lessons learned from that experience. Throughout my career, both in and out of Government, I have argued that the U.S. Constitution is the ultimate controlling law in the United States, and the Constitution directs whether and to what extent international law should guide courts and policymakers."

While disagreements on legal theory are perfectly legitimate, frankly, some of the attacks against Dean Koh on the Internet and in some media outlets are beyond the pale. Some have actually alleged that he is against Mothers Day. Now I am sure that Professor Koh's mother, who is here in the front row, will be very, very happy to set the record straight on that. [Laughter.]

Regardless of any policy differences, we should all be able to agree on Dean Koh's obvious competence to serve in the post for which the President has chosen him. In fact, we have received an outpouring of support from this nomination from all over. We have heard from over 600 law professors, over 100 law school deans, over 40 members of the clergy, 7 former State Department legal advisers, the Society of American Law Teachers, the Lawyers Committee for Human Rights, and many others.

Perhaps most remarkable has been the enthusiastic support from those who don't necessarily see eye to eye with Dean Koh but still felt compelled to speak out publicly on his behalf, including former Solicitor General Ted Olson and former White House Chief of Staff Joshua Bolten.

In fact, no less a conservative legal authority than Kenneth Starr wrote that, "The President's nomination of Harold Koh deserves to be honored and respected. For our part, as Americans who love our country, we should be grateful that such an extraordinarily talented lawyer and scholar is willing to leave the deanship at his beloved Yale Law School and take on this important, but sacrificial form of service to our Nation."

I hope we can minimize the sacrificial component of that. [Laughter.]

So while I understand there will be healthy debate on Dean Koh's nomination, it is really clear that Dean Koh is widely respected across the legal and political spectrum. He is unquestionably qualified for this position, and I urge my colleagues to support his nomination.

With that, I turn over to Senator Lugar for his opening statement, and then we will welcome Senator Lieberman. I don't know if Senator Dodd is coming over or not.

And Dean, I hope you will sort of keep your summary—I think it would be best just to give Senators an opportunity to have a question period, and we look forward to hearing from you, too.

Thank you.

Senator Lugar.

**STATEMENT OF HON. RICHARD G. LUGAR,
U.S. SENATOR FROM INDIANA**

Senator LUGAR. Mr. Chairman, today the committee meets to consider the nomination of Harold Koh to be legal adviser to the Department of State.

As you have pointed out, he has had a distinguished career as a scholar, teacher, and advocate. He is dean of one of the Nation's leading law schools. He has written widely on issues of constitutional and international law.

Dean Koh has been a strong advocate on questions of human rights, including representing Haitian and Cuban asylum seekers and filing numerous friend of the court briefs in a range of cases involving human rights issues.

He enjoys support from lawyers he has worked with on these matters, as well as those including former Solicitor General Kenneth Starr, whom he has litigated against in these cases. He has also worked on human rights issues in Government, having served

as Assistant Secretary of State for Democracy, Labor, and Human Rights from 1998 to 2001.

If confirmed, Dean Koh will be the principal source of legal advice for the Secretary of State and other State Department officials. This will involve a different kind of role from that of a professor or an issue advocate.

A legal adviser's primary role is to provide objective advice on legal issues, not to advocate for particular policy outcomes. A legal adviser must be prepared to defend the policies and interests of the U.S. Government even when they may be at odds with his personal preferences or positions he has taken in a private capacity.

In applying laws applicable to the State Department's work, the legal adviser must take account of and respect prior U.S. Government interpretations and practices under those laws rather than considering each such issue as a matter of first impression. A legal adviser must also be a practical problem solver, employing legal tools and methods to assist policymakers in achieving desired policy goals in our national interest.

These considerations are particularly critical in light of the range of important issues that will face the next legal adviser. He will advise on questions of U.S. and international law applicable to ongoing military operations in Iraq and Afghanistan and broader U.S. efforts to combat terrorism.

He will provide guidance to U.S. treaty negotiators involved in efforts to conclude an extension of the START treaty with Russia and a potential multilateral instrument to address global climate change. He will also have a lead role in interpreting and promoting implementation of the broad range of treaties and international agreements to which the United States is already a party.

In the course of these responsibilities, the next legal adviser must work closely with this committee and with other Members of the Senate. On treaty matters in particular, effective cooperation between the administration and this committee is essential to the development, adoption, and implementation of agreements that will advance United States interests.

The power to make treaties is shared between the executive branch and the Senate, and prospects for securing Senate advice and consent to treaties are greatly enhanced when the executive branch consults with the Senate early and often in the treaty process.

The committee also has an important role in overseeing the executive branch's application of treaties to which the Senate has already provided advice and consent, including any proposed changes in the interpretation of such treaties. In all of these areas, the legal adviser must actively engage with the Senate and with this committee to ensure a smooth treaty process.

I have had the opportunity to meet with Dean Koh last week as part of his confirmation process. I have submitted a series of 40 questions for the record that he has answered in advance of this hearing and which has been made available to committee members today.

I appreciate very much his diligence in answering these extensive questions in a timely manner. His responses to these questions were posted on my Web site last Friday and have been made avail-

able to all members of the committee. I hope this material will be helpful to members as they consider Dean Koh's nomination, and I look forward to our discussion with our distinguished nominee today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Lugar.

Senator Lieberman, thanks so much for being here with us. I know you care passionately about the Yale Law School, among other things, and so we welcome your comments of introduction.

**STATEMENT OF HON. JOSEPH I. LIEBERMAN,
U.S. SENATOR FROM CONNECTICUT**

Senator LIEBERMAN. Thanks, Mr. Chairman.

As they said in the Dartmouth College case, it is a small law school, but there are those of us who love it. Or something like that. [Laughter.]

Mr. Chairman, Senator Lugar, members of the committee, I am honored to be before you to introduce Harold Hongju Koh of New Haven, CT.

Mr. Chairman, Senator Lugar, you have spoken so well and made many of the points that I wanted to make, I am going to, with your permission, include my full statement in the record and just speak to you a bit about Harold Koh.

[The prepared statement of Senator Lieberman follows:]

PREPARED STATEMENT OF HON. JOSEPH I. LIEBERMAN,
U.S. SENATOR FROM CONNECTICUT

Mr. Chairman, Senator Lugar, honored members of the Senate Foreign Relations Committee, thank you very much for the opportunity to join my senior colleague, Senator Dodd, today, in introducing Dean Harold Hongju Koh, the President's nominee to be Legal Adviser to the State Department.

I have known Dean Koh as both a friend and a neighbor around New Haven for many years. He is a truly extraordinary individual and a highly qualified choice for this position.

To state the obvious, Dean Koh is a brilliant scholar—one of the great legal minds of his generation—as well as a wonderful teacher, who has inspired countless students to pursue a cause greater than their own self-interest.

He also has a distinguished record of service in our government, having worked in both Democratic and Republican administrations, and consistently won the highest regard from people across the political spectrum for his remarkable intellect and ability. It is a reflection of the bipartisan respect for Dean Koh that, when President Clinton nominated him to be Assistant Secretary of State for Democracy, Human Rights, and Labor 11 years ago, he was unanimously confirmed by a then-Republican-controlled Senate.

Clearly, Dean Koh will bring extraordinary experience and knowledge of international law to the Office of State Department Legal Adviser. But that is not all that he will bring to this position.

Perhaps even more importantly, Dean Koh will bring an extraordinary devotion and dedication to our country and an appreciation of the fundamental values for which we stand, drawn from his own personal experience and the experience of his beloved family.

Dean Koh understands the meaning of freedom and the evil of dictatorship. This is a lesson that he learned from his parents, who grew up under Japanese colonial rule in Korea and then fled from the repressive military government that emerged there to the United States.

It is this experience that helped forge in Dean Koh his lifelong fidelity to democracy and the rule of law, and that inspired him to devote his own life to the cause of equality and justice as a lawyer and a law professor.

In the course of his distinguished career, Dean Koh has authored or coauthored eight books and more than 150 articles. He has also occasionally exercised his right of free speech. And to tell the truth, in the course of my long friendship with Dean

Koh, he and I have occasionally come out on opposite ends of an issue. But this has never interrupted my respect for him, and his intelligence, his honor, his experience, and his good judgment, which will serve him well in the position for which he has been nominated.

And there is absolutely no doubt in my mind that Harold Hongju Koh is profoundly qualified for this position and immensely deserving of confirmation. He is not only a great scholar, he is a great American patriot, who is absolutely devoted to our Nation's security and safety.

Dean Koh is also, as everyone who knows him can attest, a person of surpassing warmth, civility, and good humor.

I think it is worth noting that no one who has ever had the pleasure to work with Dean Koh has offered anything other than praise for him personally and support for his nomination to this position. In fact, he has won the endorsement of a remarkable bipartisan coalition, including such Republican luminaries as Ted Olson, Josh Bolten, and Ken Starr.

These endorsements reflect the fact that, even those who might not always agree with Dean Koh nonetheless recognize and appreciate the integrity, honesty, and graciousness that he will bring to this position.

As the distinguished members of this committee know, we cannot afford to think about the rule of law as a Republican mission or a Democratic mission. It is a quintessentially American mission, and for that reason, I very much hope that you will favorably report on the nomination of Harold Hongju Koh—a great American—to this important post.

I thank you, Mr. Chairman.

Senator LIEBERMAN. I have what I take to be the advantage of having known Harold as a neighbor and a friend in New Haven for a lot of years before he became the famous person at the State Department, the dean of Yale Law School, and now the once more famous and slightly more controversial than I have ever thought of him nominee to be the legal adviser to the State Department.

So I want to say, personally knowing Harold and his family for many years, that this is a person of extraordinary warmth, civility, honor, graciousness—I mean all of the values that we seek in friends and neighbors. And I think while we may not always think of those kinds of personal qualities, to me, they are quite relevant. And knowing members of this committee, I would guess, in the end, they are to you as well.

Second, as the record speaks, he is a brilliant legal scholar, a real authority in the area for which he has been nominated to serve as legal adviser. He is one of the world's foremost experts on international law. Harold may actually be qualified for this position!

Second, on that part, he has a distinguished record of service already in our Government, having worked in both Democratic and Republican administrations and consistently won the highest regard from people who worked with him across the widest political spectrum.

Both of you touched, I believe, on another personal factor about Harold Koh. He is from an immigrant family, and he has the characteristic immigrant family's love for America. He is, to use a word that we don't use enough anymore, a patriotic American, both to the country and the values that the country is based on.

His parents came here, like so many before and since, seeking freedom, running from the evils of dictatorship. They lived under Japanese rule in Korea, which was harsh, and then fled the repressive military Government of Korea for democracy here in America. And I think his life's work, whether you agree or disagree with

him, on everything he has said about rule of law springs from that loyalty and belief in the fundamental values of our country.

Harold has coauthored or authored 8 books and written more than 150 articles. He has also occasionally exercised his right of free speech. And there have been occasions when Harold has said things or written things that I didn't agree with.

I would dare say that—though he is such a gracious man, he hasn't said this to me too often—there have been occasions when I have said or done things that he has not agreed with. But this has never interrupted my respect for him, for his intelligence, for his honor, for his experience, for his good judgment, which will serve him well in this position.

I think anybody who has worked with him, no matter whether they have agreed with him or not, have emerged with those same good feelings about Harold Koh. And any of you who have the opportunity to get to know him will do the same as well. A person of integrity, honesty, and graciousness, couldn't do better in this particular position.

And I think he will remind us always as we understand that there is a lot of partisanship in a lot of different areas that we debate. But there really is no partisanship about the importance of the rule of law to our country, and that is what Harold Koh's service and career has been about. And it is that surpassing priority that he will bring to the position of legal adviser to the State Department.

So I am proud to recommend that you recommend to the full Senate that we confirm the nomination of Harold Hongju Koh.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Lieberman. We really appreciate that.

And Senator Dodd, thanks so much for taking time to be here. And as a longtime member of this committee, nobody understands this task better than you do. So we are delighted to have your words of introduction also.

**STATEMENT OF HON. CHRISTOPHER J. DODD,
U.S. SENATOR FROM CONNECTICUT**

Senator DODD. Well, thank you very much, Mr. Chairman.

This will be very much an echo in a sense. Having listened to my colleague Senator Lieberman speak of Harold Koh, I would just want to add my words to his.

This is an extraordinary opportunity. I think we ought to be deeply grateful to the President and to Harold Koh for his willingness to take this on. Rarely do we have an opportunity to have someone assume this responsibility with as much talent and ability and proven experience in this particular area that Harold Koh brings to this nomination.

As Joe has pointed out, Dean Koh has served in both Democratic and Republican administrations. At Yale Law School, Harold Koh invited people to campus who represented a wide spectrum of views, and this is an indication of the kind of diversity of thought he welcomes. This is something that is critical to the role of legal adviser to the State Department—to be welcoming of the diversity of thought that ought to be brought to the table as we consider the

role of our country in the ever-growing, more complex global environment that we all operate in.

Your nomination is an important one, particularly as we confront the genocide in Darfur or address Iran's nuclear programs, the violence on our southern border, or the issue we are all talking about today, the swine flu issue. All of these issues that the legal adviser's office must be ready for, and have the ability to bring all of those questions together.

It is a major law office in the State Department. This is no small department that requires the kind of leadership and understanding that Harold Koh brings to that job.

As Joe has pointed out so rightfully, Dean Koh has a remarkable family history. There are obviously millions of those stories, but I think you must add that story to what this individual has done with his life and the difference he has made in the lives of others through his service to our country.

Maybe the word "patriotic" gets used too frequently to describe too many people. It appropriately applies to Harold Koh. This is truly an American patriot who has taken his life experience, his family's experience, and then applied those experiences to the public service of our Nation, leading a major academic institution on which we depend in no small measure, and for promoting the diversity of thought that springs from that institution.

And so, it is a remarkable chance for all of us to have someone with as much talent as Harold has to serve our country. Along the way we have gotten to know each other very, very well. I am not purely objective about this.

I have worked with Harold on human rights issues in Connecticut. The institute named for my father at the University of Connecticut, which is dedicated to the human rights discipline, is one example. Harold has been tremendously helpful and influential in shaping that. And so, beyond just a professional awareness of someone, I have gotten to know this man personally and well on these questions.

About 20 years ago, we worked together on issues in Haiti, and I have worked closely with Dean Koh on this and other issues going back many years. So I don't come to this table in support of this nomination based on geography or the fact that we live in the same State. I am here because I believe this is a unique opportunity for us to welcome and to celebrate someone who is willing to help serve our Nation at a critical moment.

And so, I am delighted to join Joe in this endorsement of a nomination and would hope the committee in a resounding voice would support this nomination. It sends a very important signal at a critical moment that we welcome someone of this ability and talent.

It doesn't mean, as Joe has said, you are going to agree with every statement or every word that Harold Koh has written. That would be silly to suggest so. But to respect that kind of thought and that willingness to listen to others and to be a part of shaping that debate is something all of us embrace and want to see in people who would assume the job of being legal adviser to the Secretary of State.

And I thank you for listening.

The CHAIRMAN. Well, we thank you, Senator Dodd and Senator Lieberman, for very personal and important statements of support for the nominee. And I know you are both unbelievably pressed schedule wise. So we will excuse you at this time.

Senator DODD. I didn't introduce your family. Joe, I presume you mentioned the family. Did you?

Mr. KOH. I said a little, but I am going to leave it—

Senator DODD. You are going to leave that to Joe. I apologize. Nice to see you again.

The CHAIRMAN. Thanks so much for being here.

So, Mr. Koh, if you would, we would love to have you introduce your family and have a chance to be able to recognize them here, and then we look forward to your testimony.

Thanks.

Mr. KOH. Thank you, Senator.

My wife, Mary-Christy Fisher, is the deputy director of New Haven Legal Assistance. Senator Dodd was at her office last week.

My daughter, Emily Koh. My mother, Dr. Hesung Chun Koh. My sister, Professor Jean Koh Peters of the Yale Law School. And my nephew, Daniel Koh.

His father, Howard, my brother, is actually nominated to be Assistant Secretary of Health and Human Services. So we are hoping that I will be able to come to his confirmation hearing in due course.

The CHAIRMAN. Wow, that is impressive. [Laughter.]

Well, we look forward to your testimony. Thanks very much.

Welcome, all of you. We are really delighted to have you here. It is a great story, and we are really pleased that you could share in this moment.

Go for it.

STATEMENT OF HON. HAROLD H. KOH, NOMINATED TO BE LEGAL ADVISOR TO THE DEPARTMENT OF STATE

Mr. KOH. Senator, thank you so much for the opportunity to come before you for this hearing.

Thank you to Senators Dodd and Lieberman. I thank President Clinton and—President Obama and Secretary Clinton for entrusting me with this task. And especially my friend of more than 30 years, Senator Feingold, who has given me such friendship in this process.

I have introduced my family, and I can only say that you have recounted my life story. Returning to Government service would help me to repay a debt for a life of opportunity that could only have happened in America.

The moment that most brought this home was the summer of 1974 when President Nixon resigned. I was a college student visiting Seoul. When someone tried to assassinate the President of South Korea, army tanks rolled into the streets. And I called my father, and I marveled that South Korea had never enjoyed a peaceful transition of government, but the world's most powerful government had just changed hands without anyone firing a shot.

And my father said, "Now you see the difference. In a democracy, if you are President, then the troops obey you. But in a dictatorship, if the troops obey you, then you are President." And it was

the first time that I fully understood what John Marshall meant in *Marbury v. Madison*, when he said that the Government of the United States is a government of laws and not men.

Promoting a government of laws and serving the Constitution of the United States has been the subject of my career to this point, which has included four times taking the oath to serve the U.S. Government—twice as a law clerk, as an attorney at the Office of Legal Counsel, and as Assistant Secretary of State for Democracy, Human Rights, and Labor.

My new assignment, I hope, would continue these lifelong commitments. If confirmed, I would seek to provide to the President and to the Secretary the very best legal advice possible and urge both our country and others to uphold the rule of law.

My professor, former legal adviser Abe Chayes once said, “There is nothing wrong with a lawyer holding the United States to its own best standards and principles.” And I believe that as we confront new challenges showing respect for international law and institutions will make us stronger and safer.

President Obama pointed this out in his inaugural address. When Secretary Clinton recently appeared before this committee, she said that U.S. foreign policy should use what she called “smart power, the full range of tools at our disposal,” which includes commitment to the rule of law.

I have spent my career as a scholar and Government lawyer. I understand the difference between those roles. For 30 years, I have worked with talented and dedicated attorneys from the Legal Advisor’s Office, which I consider to be the preeminent international law firm in the world.

And as I have argued in my scholarship, energy in the executive must be accompanied by genuine respect for the constitutional function of advice and consent.

Mr. Chairman, if confirmed, I would be honored once again to take the oath to support and defend the Constitution of the United States. I assure you, Senator, those are not just words. They are my most deeply held convictions. This country gave my family refuge. It gave me the chance to spend my life promoting our commitment to law and to human rights.

I have learned several crucial lessons. These are the ones which have suffused my scholarship. First, that obeying the law is both right and smart for nations as well as individuals. Second, respecting constitutional checks and balances in foreign affairs defends our Constitution and leads to better foreign policy. Third, making and keeping our international promises promotes our sovereignty. It does not surrender our sovereignty. It promotes our sovereignty, and it makes us safer in a global world.

Thank you. I look forward to answering your questions.

[The prepared statement of Mr. Koh follows:]

PREPARED STATEMENT OF HAROLD H. KOH, NOMINATED TO BE LEGAL
ADVISER, U.S. DEPARTMENT OF STATE

Mr. Chairman, Ranking Member Lugar, and members of the committee, I am honored to come before you today as the President’s nominee to serve as Legal Adviser of the United States Department of State. I am deeply grateful to President Obama and Secretary Clinton for entrusting me with this challenging assignment. I would also like to thank Senators Dodd and Lieberman, from my lifelong home

of Connecticut, and my friend of more than 30 years, Senator Russ Feingold of Wisconsin, for their friendship during this confirmation process.

Mr. Chairman, let me introduce my wife, Mary-Christy Fisher, my daughter Emily, my mother Dr. Hesung Chun Koh, my sister Professor Jean Koh Peters of Yale Law School, and my nephew Daniel Koh, who all join me here today. Only my son William could not be here, as he will soon enter exam period at his university. My family's love sustains me in all I do, and strengthens my resolve to do the very best job I can to serve our country.

Returning to Government service would help me repay a debt for a life of opportunity that could only have happened in America. Sixty years ago, my parents, Dr. Kwang Lim Koh and Dr. Hesung Chun Koh, came to this country as students from South Korea. My father, an international lawyer, served South Korea's first freely elected government as its Permanent Representative to the United Nations and chargé d'affaires in Washington. But when a military coup overthrew the South Korean Government, my father refused to swear loyalty to a regime that did not respect human rights, democracy, and the rule of law. We took refuge here, and as we grew, my parents told us daily how lucky we were to live in America, a nation founded on these values. They urged me and my siblings—including my older brother Howard, who has just been nominated to be Assistant Secretary of Health in the Department of Health and Human Services—to serve our Nation by upholding its principles.

During the summer that President Nixon resigned, I was a college student visiting Seoul. After someone tried to assassinate South Korea's President, army tanks rolled in the streets. I called my father and marveled that South Korea had never enjoyed a peaceful transition of government, even while the world's most powerful government had just changed hands without a shot. My father said, "Now you see the difference: In a democracy, if you are President, then the troops obey you. But in a dictatorship, if the troops obey you, then you are President." It was the first time that I fully grasped what Chief Justice John Marshall meant, when he said that the Government of the United States is "emphatically . . . a government of laws, and not of men."

My parents' teaching inspired me toward a career promoting America's commitment to law and human rights. After law school, I served as a law clerk for Justice Harry A. Blackmun and Judge Malcolm Richard Wilkey, and in both Republican and Democratic administrations: As an attorney at the Office of Legal Counsel in President Reagan's Department of Justice, and as Assistant Secretary of State for Democracy, Human Rights, and Labor under President Clinton. When I became a professor at Yale in 1985, the guiding themes of my teaching and scholarship became respecting human rights and the rule of law and preserving checks and balances. Since 1989, these ideas have also inspired the human rights work that I have pursued with my students. And during these past 5 years, these themes have been the driving principles of my time as dean of Yale Law School.

My new assignment would continue these lifelong commitments. If confirmed, I would seek to provide the President and the Secretary of State with the very best legal advice possible and urge both our country and others to uphold the rule of law. As my professor, former Legal Adviser Abe Chayes once said: There is "nothing wrong" with a lawyer "holding the United States to its own best standards and best principles."

As America confronts a new set of global challenges, showing respect for international law and institutions will make us stronger and safer. As President Obama reminded us in his inaugural address, "earlier generations faced down fascism and communism not just with missiles and tanks, but with the sturdy alliances and enduring convictions." When Secretary Clinton recently appeared before this committee, she called on American foreign policy to "use what has been called 'smart power,' the full range of tools at our disposal." To strengthen America's position of global leadership, commitment to the rule of law will be an essential element of American "smart power," and energetic diplomacy must go hand in hand with accomplished lawyering.

Having spent my career as a scholar and a government lawyer, I fully understand the difference between those two roles. For nearly 30 years, I have worked with the talented and dedicated attorneys from the Legal Adviser's Office, which I have always considered one of our Government's very finest law offices, as well as the pre-eminent international law firm in the world. And I firmly believe, as I have argued in my scholarship, that energy in the executive must be accompanied by genuine respect for the constitutional function of advice and consent and executive-legislative partnership in foreign affairs.

Mr. Chairman, if confirmed, I would be honored once again to take the oath to support and defend the Constitution of the United States. To me, those are not just

words, but deeply held convictions. This country gave my family refuge, and gave me the chance to devote my life to promoting America's commitment to law and human rights. From my life experiences, I have learned several crucial lessons that I would bring to this task if confirmed: That obeying the law is both right and smart, for nations as well as individuals; that respecting constitutional checks and balances in foreign affairs defends our Constitution and leads to better foreign policy; and that making and keeping our international promises promotes our sovereignty and makes us safer.

Thank you. I now look forward to answering any questions that you may have.

The CHAIRMAN. Thank you very much, Dean Koh. Appreciate it.

Let me sort of cut right to it, if I can. Obviously, since the President nominated you, there has been some discussion of your views on the interaction of international, foreign, domestic law. And perhaps that includes the theory of transnational legal process, and you have described that as a kind of shorthand description for how state and nonstate actors in Iraq.

Would you just perhaps share with us, maybe you could clarify to the committee right up front here your views? Can you explain how you view the use of international law and foreign law by U.S. courts? What is the proper weight and procedure?

Mr. KOH. Senator, transnational legal process, which is an academic idea, just says what we all know—that we live in an interdependent world that is growing increasingly more interdependent. It is now new, and it is not radical. It is not an ideology. It is a description of a world in which we live, and we see it every day.

We know that our economies are interdependent. We know that our communications are interdependent. And we know that our laws are interdependent. So if President Obama is going to Europe to manage the G20, economic interdependence. If our health officials are working on interdependence of our response to swine flu, it makes sense to have a State Department who has lawyers working to manage the interdependence between the U.S. law and laws around the world.

This is not new. It is from the beginning of the republic. It is the basic views of Thomas Jefferson and Ben Franklin, who called for us to give decent respect to the opinions of mankind.

And most importantly, it is necessary and unavoidable that we be able to understand and manage the relationship between our law and other law. You would not, in this day and age, have a general counsel of Microsoft who did not know anything other than the law of the State of Washington. And in the same way, you need a general counsel at the State Department, if confirmed, who had a similar kind of knowledge.

On the question of foreign law and courts, obviously, I am not being nominated to be a judge. I am being nominated to be the legal counsel of the State Department. And so, knowing foreign law, it seems to me, is absolutely critical. What is the exposure of U.S. entities in different parts of the world? What does foreign law require?

At home, it has been said by many justices going back, and seven justices on our current Supreme Court, that we must look to foreign law. We are not bound by it. It is not controlling on us, but it is something we can look to as a source of instruction. And if we look at law review articles in making decisions, we can look to precedents from other countries as well.

The CHAIRMAN. So when, if ever, would you counsel that an international and/or a foreign law should be binding in our court? Are there circumstances where it would be?

Mr. KOH. They are only binding in our court, international and foreign law, when judges make them so, the President suggests that they should be so, or Congress embodies them into an act of Congress that is signed by the President.

International and foreign law don't become our law unless they are brought into our law by an act of American legal institutions. Now that describes what our Constitution creates as the channels for bringing these bodies of law into our law.

The CHAIRMAN. Could that happen outside of a treaty that is ratified by the U.S. Senate?

Mr. KOH. The treaty is the most obvious way. And as you know, we have an extensive constitutional process for making treaties part of our law and then the supreme law of the land under article 6 of the Constitution.

There is also a body of law known as customary law, customary international law, which is determined by looking at the practice of states followed from a sense of legal obligation. In certain interstitial cases, that can be part of what Federal courts have called Federal common law, and that has been held by repeated Supreme Court decision going back to the 1900s.

The CHAIRMAN. Well, perhaps you could share with us sort of in practical terms how you think the understanding of and recognition of some of this—of the international rules of the road would affect, for instance, dealing with the Somali pirates or swine flu, two current examples?

Mr. KOH. Those are two excellent examples, Senator, of where international law is not the problem. It is the solution. And if we don't have international law, we have no solution.

You do not have a national law that can address the problem of pirates off the coast of Somalia. What we need is an international regime, which has been created. Such a regime now involves U.N. Security Council resolutions, a multinational naval deployment force, a contact group that meets with Europeans and Africans.

Secretary Clinton announced a four-part strategy for addressing this, including private-public partnerships. There have been prosecutions in courts both in Kenya and most recently an indictment brought in the New York Federal court. And so, pirates are an issue. It is a global challenge. And to address it, you need global law.

Swine flu, the same. We have a World Health Assembly. We have international health regulations. We have an executive committee, which is considering the question of whether there is a public health emergency of international concern. And all of these issues can only be addressed by international cooperation within a framework of law. Again, international law is the solution, not the problem.

The CHAIRMAN. Some make the argument that that might challenge, that acceptance of that international law might undermine our sovereignty or our national security. Could you address whether there is any way in which you believe that can occur?

Mr. KOH. If there is a challenge to our sovereignty, it should be protected by the way in which we engage those regimes. Obviously, we can't enter treaties that violate the Constitution. The Constitution is the controlling law. Obviously, we have to agree only to international commitments that we can keep and that protect our foreign policy interests.

It is not a one-size-fits-all. It has to be done on a case-by-case basis. But I think the point that you made, which is so important, Senator, is our sovereignty in an age of interdependence doesn't mean staying out of these regimes. It means engaging with them within a framework of law and making them serve our national interests.

The CHAIRMAN. Thank you very much, Dean Koh. I appreciate it.

And Senator Lugar, I am going to turn the gavel over to you and—I think because both of our Senators have another thing they have to go to after a while.

Thank you very much.

Senator LUGAR. We will do our best.

The CHAIRMAN. Senator, you are a proven act in this city. [Laughter.]

Senator LUGAR [presiding]. Mr. Chairman, I want to start by bringing at least to the attention of our nominee what seems to be the crux of much criticism. This may not be the most specific or dramatic quote, but Time magazine published an article by Massimo Calabresi on Friday, April 24 in which he says, "The battle began in late March when Fox News firestarter Glenn Beck said Harold Koh, Obama's nominee to be the State Department top lawyer, supported Muslim sharia law. 'Sharia law over our Constitution,' Beck said in amazement.

"When that unlikely charge was debunked, Beck switched tacks and asserted that Koh, the outgoing dean of the Yale Law School and a former official under President Reagan and Clinton, wanted to subjugate the U.S. Constitution to foreign law.

"All of which would be fairly standard ratings-chasing melodrama except that the prominent members of the GOP, like Karl Rove and former U.N. Ambassador John Bolton, began signing onto versions of Beck's critique. At that point, conservative heavy hitters, including former Solicitor General Theodore Olson and Clinton tormentor Ken Starr, spoke up in favor of Koh. The dispute soon spread to the blogosphere, and Republicans across the country took sides, calling each other 'fruitcakes' and 'windbags.'

"With a committee vote on Koh's controversial nomination coming Tuesday, both camps are lobbying Senators in what has become a proxy fight for the Republican Party's approach to life in political exile."

Now without going into the problems of the Republican Party any further, there is some substance to this type of atmosphere that has been created not only in the blogosphere, but in Time magazine and elsewhere. And as you are aware, Dean Koh, from our own conversation, while you recognize and are not ultra sensitive to the fact that you are reading unusual criticisms of your record and your outlook, particularly along the lines that Senator Kerry has approached in a much more refined manner than this particular quote, this is a source of concern for many Americans.

There are many Americans, as we have treaties coming before this committee, who are very suspicious of international law, particularly obligations the United States undertakes with regard to other nations. And that usually is the substance of treaties. This is why in my opening statement I suggested, respectfully, that as the President approaches treaties, your consultation with our committee will be of the essence early on and frequently.

We have had such consultation in the past when there have been very substantial treaties. For example, following the problems of our country with the former Soviet Union, President Reagan appointed an arms control observer group of the leadership of the Senate in both Republican and Democratic parties headed by Robert Byrd and Robert Dole, who went with many of us to Geneva, Switzerland, in 1986.

The treaty didn't happen right away. But President Reagan surmised quickly that we had not been through a treaty with the Soviet Union before. And as a matter of fact, when one finally came to the fore about 3 years later, a two-thirds majority was obtained with majorities in both parties who had had sort of a 3-year study period of what this meant in terms of international law.

How do you enforce all of this? What does it mean to Soviets as opposed then to Russians who came along after the Soviets? And these are always problems. We have gone through this with regard to the treaty on nuclear material with India in the past year, a very complex situation for many of us who are in the nonproliferation camp to say why is India gaining leave from certain obligations other countries have had to meet?

And nevertheless, President Bush felt that that relationship was tremendously important politically and strategically. India is a very large country. And whether it signed onto the nonproliferation treaty or some of those aspects or not, he felt was less essential. Whereas, many who are more legalistic about it felt this is very essential, sort of first things first.

I mention these pragmatic situations because this is not the only advice that you will be asked for from colleagues in the State Department, but it really gets to the heart of the matter in terms of essential relations of our country in terms of our strategic security. And so, I mention all of these things because you have been involved in discussions of these in previous roles in the State Department and, I suspect, informally even as dean of the Yale Law School now.

But would you speak again to the problems as you see pragmatically regarding international law, the kind of advice you must give, in this case as a political appointee, as one who is going to be dealing with Republicans and Democrats, who is going to need two-thirds majorities for significant changes in international law which we are debating?

Mr. KOH. Senator, that is a very thoughtful question. Thank you for reviewing the cultural history of my nomination, which has been interesting for me to observe myself.

I would say that the key point which you make is that we cannot engage global challenges without global commitments. Someone who is in the business world might want to avoid making contracts because you would be then utterly self-sufficient. But if you didn't

make contracts in which you have traded something for something else, you couldn't accomplish much in this world.

And the same goes for making agreements. And you yourself, Senator, have been a great leader in this area, and in the nuclear area in particular, these tremendously important agreements and some more of which are coming before this committee have posed these issues.

The only solution, which I have written about in my own academic writing, is a partnership between the Congress and the President. You use the word "a power shared" in your opening remarks. It was actually the first title of my book, the National Security Constitution. Then they forced me to change it away from that to "A Power Shared," which now allows you to use that title.

But I think that is the basic idea, that our Constitution requires that the foreign affairs power be a power shared. You can't get a two-thirds vote for a treaty without a significant number of members of the opposing party supporting the activity.

So that requires any—what is required in any good partnership—consultation, respect, honesty, and close working together. And then the partnership extends not just between the executive and the legislative branch, but the partnership between the United States and our treaty partner to make sure that we are on the same page.

And the basic theme of all of my writing is that a partnership between the President and Congress protects our foreign policy and supports our Constitution and that a partnership with our allies done well, correctly, within the law protects our sovereignty and makes us safer.

Senator LUGAR. I thank you very much. And I thank you again for your response to the 40 questions that I submitted to you, which I felt comprised some of the most controversial questions that could be asked.

Mr. KOH. They were helpful, Senator. It was like a test—

Senator LUGAR. I asked you to put them in writing before we came to this hearing.

Mr. KOH. I am used to taking exams in May, Senator. So it came a little earlier this year.

Senator LUGAR. Very well.

Senator Dodd.

Senator DODD. Thank you very much, Senator Lugar.

It is possible that the question I will ask may have been one that was submitted by Senator Lugar, and I should have looked at your questions and answers before asking this. So maybe it has already been addressed, but let me raise the issue of the International Criminal Court with you, if I can, Dean Koh.

We currently have, as you know, I think the first case where a head of state has been indicted by the ICC in the case of Omar al-Bashir of Sudan. We in this country have taken a very—at least historically a position of nonparticipation in the ICC. And certainly while the previous administration had very strong feelings about the head of state in the Sudan—I don't want to suggest that they in any way were not deeply concerned about the atrocities committed under the leadership of the Sudan—but were very opposed

to the idea of United States participation in the International Criminal Court.

And I wonder if you might share with us your views on whether or not we should, as a nation, become a more active member? And if so, what conditions should we, as a nation, place on our participation in the court in the coming years?

And again, I know, because we have talked about this a great deal, and I know you know, that in 1945 and 1946, my father was the associate executive counsel under Robert Jackson at the Nuremberg trials. And that experience was a life-altering experience for him and set in many ways the moral tone for about 60 years or more in terms of our nation being the only nation to really actively participate or at least actually support, I should say, that tribunal.

While the Soviets and the British and the French, obviously, were very engaged, it was the leadership of the United States, more so than anything else. The greatest advocate of the trial was Henry Stimson, the only Republican in Roosevelt's Cabinet, the Secretary of War, I might point out. It was rather ironic in a way, but nonetheless, he was very, very supportive of the Nuremberg trials.

So I wonder if you might share with us your views on the ICC?
Mr. KOH. Thank you, Senator.

As you know from my work at the Dodd Center, the Dodd Center at the University of Connecticut on Human Rights is in some sense a tribute to a man, your father, but more fundamentally, the review of a history of an idea with which the United States has tried to engage, which is international justice as a basis for supporting peace and security.

Indeed, President Clinton, Bill Clinton went to the Dodd Center in 1995 and called for an international criminal court, if it could be designed in a way that would serve our national interests.

At the Rome conference in 1998, the United States decided to not sign the treaty because of concerns about whether American servicemembers would be subjected to the jurisdiction of the court unfairly. But by the end of the Clinton administration, December 2000, the Clinton administration had worked back to the notion of signing the treaty with ratification in the future, it was hoped at the time, because, ultimately, international justice could be used to serve our interests.

The last 8 years have really led to two policies. An announced policy of hostility to the court, but then a de facto policy which, as you have described, could be described as coexistence with the court. And indeed, the previous legal adviser to the State Department under President Bush, John Bellinger, said that the United States has accepted the reality of the court. And so, we permitted the Darfur referral to go forward.

Now there are a set of issues facing the new administration how to reengage with the court at a time in which the prosecutor, Luis Moreno-Ocampo, has gotten approval to proceed against the sitting head of state of Sudan, Mr. Bashir. It is a complicated situation in which international justice, I believe, could play an important role in bringing a better outcome in Sudan than we have now.

On the other hand, I don't think that we should reengage without fully protecting American interests. So in my answer to Senator Lugar's question on this issue, I identified a series of issues that would need to be examined. Whether the so-called unsigning of the treaty in 2002 should be reexamined. How to make sure we stay within the framework of the American Service Members Protection Act. Do we engage with the 2010 conference on the definition of the crime of aggression? Are there ways to support the prosecutor without running afoul of various restrictions? All of these need to be addressed.

If I am confirmed, I would be delighted to participate in these conversations. There are many others in the administration who have lots of knowledge, particularly those in the military. I would very much look forward to engaging with them and hopefully having another chance to come back before this committee to discuss the next steps and to consult with all the members of this committee about your particular concerns.

Senator DODD. Thank you very much.

Thank you, Mr. Chairman.

Senator LUGAR. Thank you very much, Senator Dodd.

Senator CORKER.

Senator CORKER. Thank you.

Welcome. I have heard from numbers of people that I respect regarding their respect for you, and I know of your tremendous accomplishments. As I have mentioned to you in our office, it is pretty incredible the background that you have and the many things that you have done.

That, combined with my sort of presense that elections have consequences and that a President ought to have the ability to appoint mostly people that they wish, I expected the meeting that we had in our office to go quite well. And to be candid, I left there somewhat disappointed, and I think you sensed that when you were in the office.

And I told you I would not blindside you, but I would like to—and I am not going to do that. But I would like to just sort of go back over a few questions. And again, I ask these questions out of respect for both your life story, which I find to be pretty incredible, and also the many accomplishments that you have been able to achieve in your life.

And I will just start with the first question we asked. Do you believe that the President has the power to invoke customary international law to preempt State law?

Mr. KOH. I don't know of an occasion in which the President has done that. But I do think that the President has, on occasion, invoked customary international law to declare a uniform rule. For example, the 12-mile limit was declared by President Reagan offshore.

Now there was no contrary State law there. And so, I don't know of a case in which the State law was preempted.

Senator CORKER. I quoted a press statement that I think all of us have probably read, and they quoted you—maybe fairly or unfairly, I don't know—regarding some remarks you made in Berkeley in 2004, and I will just read this so that I can get the quote just right.

You said, "Several nations whose disobedience of international law has attracted global attention after 9/11, most prominently North Korea, Iraq, and our own country, the United States of America. And for shorthand purposes, I will call these countries the axis of disobedience."

I am just wondering if you might explain to us exactly what you were thinking?

Mr. KOH. Well, Senator, I am delighted to, and I am grateful to you for having this conversation.

As you know from my life story, there is no way that I would consider the United States and North Korea in some way to be morally equivalent. I have visited North Korea. I was appalled by the conditions there. I spoke out about the human rights abuses, and I consider them to be one of the great international law violators in the world.

Nevertheless, I believe that if we can bring them into the community of nations and engage them in international law, we could be safer. The point I made in the article was a simple one. It is harder for the United States to encourage countries that are lawless to obey if it can itself be accused of being lawless.

They can turn around and charge us with being part of their same axis of disobedience, and that is not the kind of company that we want to keep. And I was encouraging us to see ways in which the United States could be on the right side of the law so that it could exert the kind of moral leverage on other nations who are so radically out of compliance with international law as North Korea.

Senator CORKER. And in which areas would you refer to us being lawless as a country?

Mr. KOH. Well, what I was referring to is ways in which the United States I said I felt had fallen below international legal standards, for example, with regard to torture of detainees, with regard to treatment of detainees on Guantanamo.

Senator CORKER. Was torture of detainees in the public sphere in 2004?

Mr. KOH. It very much was, Senator.

Senator CORKER. OK. OK, so in the areas of torture and what other areas did you deem us to be at that time lawless?

Mr. KOH. A failure to respect the Geneva Conventions, which I thought was damaging and dangerous to our own troops, who need the protections of the Geneva Conventions.

Senator CORKER. OK. As I was watching the body language when Senator Kerry was asking you questions, I noticed that in his first question, which had to do with the rub between international law and U.S. law, it appeared to me that you were reading the answer. And I am just wondering if that is an area that you have tenuously had to walk down because of previous comments that you have made publicly?

You know, you are the dean of Yale Law School and probably one of the most knowledgeable people to ever come before this group as it relates to law. But it did appear to me that you were reading that answer, and I am just wondering if you might speak to that?

Because typically when people do that, they are sort of tight-ropeing down an issue that they are concerned there may be some baggage on. Maybe I saw wrong?

Mr. KOH. Senator, I respect you so much I wanted you to hear it exactly as I could put it most cogently. But I am happy to reply again now. My view—

Senator CORKER. Well, is that an area then that you have felt some degree of liability as it relates to taking on this position?

Mr. KOH. Not at all, Senator. I stand by everything I have written. I have exercised my free speech rights. I am an academic. The job of an academic is to put ideas into the marketplace of ideas.

But I have also been a Government official, and when I am a Government official, I act in a role. I play the role of counselor to a client. The counselor to the client looks to the client to give direction and to try to get that person to serve the law and the best interests of the country.

So that is exactly what I would say the question that Senator Kerry asked me was about the role of a judge applying foreign law. I am not nominated to be a judge. What I am being nominated to be is the general counsel of the State Department.

And in that job, Senator, you have to know foreign law. It is not controlling, but you need to understand it. It would be malpractice for me to be general counsel of the State Department and not have a firm understanding of foreign law and how it affects American interests.

Senator CORKER. Well, just for the record then as we close out, I have actually sensed among nominees that the area that we need to be most concerned about are those that are in the legal areas because, especially in your case, you are giving advice to someone that would be otherwise a layman in the areas that you would be advising them. And your point of view is very important, and the way you direct the law staff.

I was talking to you about a similar type thing in our office that there is no use getting into today. So I have actually sensed that, actually, if an administrator can sort of function OK, that is of lesser concern than some of the judiciary and some of the areas of legal where you are giving advice to someone in an area that they really don't know much about. And certainly, international law is something that most people are not experts in. You certainly are, and I respect that.

But I guess I would ask just a final question for the record, and that is that do you have the ability—because I know you have shared some personal thoughts that might not fully line up with everybody here. And certainly, no one could do that. But can you separate those personal views that you have from just giving absolutely neutral advice as it relates to the law to the Secretary of State and those involved?

Mr. KOH. Senator, I have been very inspired by the words of Herman Phleger, who was the legal adviser for John Foster Dulles. He said the job of the legal adviser is to speak law to power.

And I should say that the President of the United States, President Obama, is an outstanding lawyer. The Secretary of State Hillary Clinton is an outstanding lawyer. The Deputy Secretary of State Jim Steinberg is an outstanding lawyer, both from our law school.

They will challenge the legal views that would be offered by the person in my position, if confirmed, and the lawyers in the office,

as they should, for the purpose of getting the best possible legal advice. This is the greatest country in the world. You need the greatest legal, the best legal advice that could be given. And if confirmed, I would intend to give that advice.

Can I separate my role? I have in the past. That is the job for which I have been nominated, and that is what I would intend to do.

Senator CORKER. Thank you.

Senator LUGAR. Thank you very much, Senator Corker.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

I am also, of course, very pleased to be here in support of my old friend, Harold Koh, nominee to be legal adviser to the State Department. I have known Dean Koh for more than 30 years, dating back to our time together at Oxford University.

So, of course, it gives me a great pleasure to see him here and nominated. But I assure you, Dean Koh is an excellent choice for this position, regardless of how long I have known him. Harold is one of the most ethical and hard-working individuals I have ever met. He also happens to be one of the brightest legal minds in the country.

Dean Koh has dedicated his life to upholding the rule of law and strengthening American values because, as he said in his testimony, he believes that obeying the law is both right and smart. So I have only the greatest respect for Dean Koh and, of course, want to reiterate what the chairman said—the incredible number of letters of support that have poured into my office over the last few weeks from a wide range of people that includes Ken Starr and Rabbi David Saperstein, these letters are a critical testament not only to how qualified Dean Koh is for this position, but to his ability to work in a nonpartisan manner in defense of the Constitution and to promote the rule of law and human rights.

And these are some of the core values on which this country was founded, and they have been an important source of our country's power. Our ability to influence other countries to achieve our international and national security priorities actually depends on a principled approach to foreign policy, which includes a commitment to these principles.

And so, as I listen to some of the certainly appropriate questioning already, I want to just observe—especially with regard to Senator Corker's question—first of all, listen to the way Harold Koh responded to the question about customary law. He gave a crisp answer. He gave a specific example of where President Reagan actually invoked customary law, and I want to note for the record there was no rejoinder. There was no followup question because the answer was typical Harold Koh—precise, to the point, and effective.

Second, when the issue came up of the question of comments made with regard to the so-called axis of disobedience, the notion that somehow Harold Koh would cite these examples as a way to denigrate the United States is, frankly, absurd. What he was doing is a great service to us, to say that when we somehow get in a category that allows people in other countries to compare us to those countries that are such bad actors, it is at that moment that we

pay a real price. And we have paid that price, Mr. Chairman. We have paid that price in this world.

So Harold Koh is warning us in a patriotic way that we cannot allow ourselves to even have the perception of that, let alone the reality, and I think that is a service. And, frankly, a distortion of his words to suggest that he really believes that we belong in that category.

And finally, the notion that somehow that Harold Koh presumably reading an answer regarding the sharia law issue—you know, I just read part of my statement. That doesn't mean I didn't mean it. That doesn't mean I don't get it. And I had Harold Koh respond to me several times without any notes, eloquently indicating that, of course, he doesn't believe that sharia law could control in our country.

So, frankly, I am pleased that some of these things are coming up because they show the weakness of the criticisms that have been leveled toward this excellent nominee.

Mr. Koh, what is your position on the appropriate relationship between the executive and legislative branches when it comes to foreign affairs decisionmaking?

Mr. KOH. Well, as I said in discussing this issue with Senator Lugar, the Constitution's framework while defining the powers of Congress in article 1 and the President in article 2, creates a framework in which the foreign affairs power is a power shared. Checks and balances don't stop at the water's edge.

It is both constitutionally required, and it is also smart in the sense that the President makes better decisions when Congress is involved. If they are in at the takeoff, they tend to be more supportive all the way through the exercise.

Senator FEINGOLD. And could you say a little more, Dean Koh, about the main themes of your scholarly writings and your thoughts on the main differences between what it is to be a scholar versus a lawyer?

Mr. KOH. My scholarly work is extensive. I have said many things. The thing about sharia law, as you pointed out, is not something that I said. So I guess that if you are looking for something to disagree with, you need to look to something that I didn't say.

What I did say is very simple. Obeying the law is right and smart, both domestically and internationally. It is smart in the sense that it gives you the kind of moral legitimacy, the soft power that you need to influence and lead on a multilateral basis.

So this means that with regard to domestic affairs, the more the President can work with Congress, consult and get the value of Congress's experience, the more likely that that outcome will be sustainable over time. A war that is begun with congressional support will maintain that support longer than one that is started without congressional approval.

At the international level, the arguments I have made are the same. That working with other countries, agreeing on how we ought to operate within a framework and then acting within that framework of law protects our sovereignty in the sense of allowing us to assert our interests within an international framework and can make us safer.

There are so many global challenges, Senator. Every day there is a new global challenge, whether piracy or swine flu or economic crisis. On each of those, the United States cannot address that problem alone. It needs to cooperate. And in cooperating, it needs to cooperate within a framework of international law. If we don't have that framework, we are going to be less safe, and we won't be able to protect our sovereignty.

Senator FEINGOLD. Thank you, Dean.

Thank you, Mr. Chairman.

Senator LUGAR. Thank you very much, Senator Feingold.

Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman.

Again, it is a pleasure to meet you and your lovely family.

Mr. KOH. Thank you.

Senator ISAKSON. After we met the other day in my office, I remember telling my wife over the phone that night that I may have talked to the most skillful attorney I had ever talked to.

And then I read an April 27 article in Newsweek, which described you as the following. "A tweedy, brainy legal scholar who writes brilliant law review articles that are carefully reasoned, if more or less impenetrable to nonlawyers." [Laughter.]

I then realized why I was so impressed. I am a nonlawyer. And so, I thought that was a good description.

But there are some hard questions I want answered. Because of the hard questions that are out there, our advice and consent is our responsibility not only to the Constitution, but to the constituents that we represent.

In that same article, it says that, "Koh has campaigned to expand some rights guaranteed by the U.S. Constitution and perhaps shrink some others, including the first amendment's guarantee of free speech, to better conform to the laws of other nations. He has, for instance, pushed for a more expansive view of what constitutes cruel and unusual punishment under the eighth amendment."

Would you address those two questions?

Mr. KOH. Senator, first, for the record, let me say I don't own any tweed jackets. [Laughter.]

But again, that article that you mentioned is one in which I had trouble recognizing myself. I believe that the Constitution is controlling law. I am not on a campaign. My job is to try to understand how the Constitution should be interpreted.

There is certainly no campaign to shrink any provision of the Constitution. The claim that was being made was that where the United States has a free speech tradition that is different from the free speech tradition of another country, how do we enter a treaty in which that free speech might be implicated?

The answer is quite simple. When the United States ratified the genocide convention, there was a provision about incitement to genocide being a crime. Then Assistant Attorney General William Rehnquist, later Chief Justice, recommended a reservation to protect America's first amendment interests. So we entered the treaty, and our first amendment rights were unaffected.

On cruel and unusual punishment, as I gave citations in a specific question asked by Senator Lugar, since 1958, the U.S. Supreme Court has, in a case called *Trop v. Dulles*, said that you de-

cide what is unusual, for the cruel and unusual punishments clause, by looking at evolving standards of human decency, not just standards within a particular part of the United States.

In a case called *Atkins v. Virginia*, the case raised the question whether the State of Virginia could execute a person who had mental retardation, and the brief that I filed on behalf of a group of distinguished diplomats, including Tom Pickering and Madeleine Albright, simply said the United States is the only country in the world that engages in this practice. A minority of States within the United States engage in this practice. And that is unusual.

If we are on the only nation to do it, it is unusual. And the words of the Constitution say cruel and unusual punishments should be averted. So I don't consider that a campaign. I think that was a following the precedents of the U.S. Supreme Court and following the words of the Constitution itself.

Senator ISAKSON. This is a hard question, but I think it is one that needs to be answered because I listened closely to your answers, and you referred to your role and your job as an adviser to the Secretary of State, a legal adviser to the Secretary of State and the fact that you are going to be asked to opine on what your opinion is based on your beliefs of the law and your beliefs.

There has been a lot of controversy in the Senate in the past 2 weeks over the opinions that were given by advisers to the last administration with regard to torture, including some who have called for the prosecution of those lawyers who were asked to opine on various treatments that ended up in interrogation.

Do you think a lawyer hired by the Government, confirmed by the Senate, asked for his or her opinion to advise the administration in their role should subsequently be held legally prosecutable for having given their very best opinion and judgment on that question?

Mr. KOH. Well, Senator, as you know, the decisions about prosecution are made by the Attorney General, not by the Secretary of State. As you also know, as someone who is seeking confirmation to be a lawyer for the Government and to seek confirmation to supervise an office of almost 200 lawyers, I have to be extremely concerned about whether someone who gives legal advice in a certain circumstance will be prosecuted.

If by taking this job, I am buying myself lawsuits and prosecutions, obviously, that wasn't part of the original plan.

Senator ISAKSON. You didn't sign up for that.

Mr. KOH. That having been said, there is a process unfolding which I am not a part of. If confirmed, I might be a voice, but one of many voices.

The lead voice obviously is that of the President. The President has indicated that these decisions are in the hands of the Attorney General. The Secretary of State repeated in testimony last week before the House Foreign Affairs Committee that the President has laid out some basic guidelines, and I assume that those will evolve.

Senator ISAKSON. One last question, and again it is a question that has been written about your opinion regarding President Bush's decision to go into Iraq, which I have not read precisely. So I don't know, do you think that President Bush violated the law or violated his authority in doing that?

Mr. KOH. Well, I wrote about two decisions by two different President Bushes to go into Iraq. In 1990, I said that President Bush 41's decision to do Desert Storm was lawful under domestic law and was lawful under international law because it was approved by a resolution of—a joint resolution of the Congress and by a U.N. Security Council resolution.

The other intervention in Iraq, which happened in 2003, I had no challenge to the domestic legal basis of it. But in looking closely at the U.N. Security Council resolutions that were invoked, I found that the wording of those resolutions didn't give the necessary support under international law.

I think the consequence of that was that the intervention into Iraq in 2002 did not have the kind of broad support that we would have preferred, and that is the only point that I made in that article.

Senator ISAKSON. Thank you for your time and attention.

Mr. KOH. Thank you, Senator.

Senator LUGAR. Thank you very much, Senator Isakson.

Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman.

Dean Koh, thank you very much for being here and for your willingness to consider public service again.

Mr. KOH. Thank you.

Senator SHAHEEN. And I very much appreciate your pointing out the distinction between being an academic and being a public servant, having worked in academia for a while—sadly, at Yale's rival institution, Harvard. I do appreciate that they are very different roles and am reassured by your pointing out that if you are serving in a public position, you would treat that as such.

The State Department has turned to private security contractors in Iraq and Afghanistan because of insufficient numbers of State Department security personnel in some cases. Is it your understanding that foreign governments have legal jurisdiction over contractors that operate in those countries?

Mr. KOH. Well, Senator, first let me thank you for your comments about the role of an academic. As an academic, you speak in your own voice. When you are in the Government, you are one of many voices working as part of a team. And what you may personally think may be factored into the equation, but the outcome maybe quite different.

With regard to the security contractor issue, Senator, the issue has obviously arisen in Iraq, where there has now been a change of legal status so that at this moment, security contractors are under the jurisdiction, civil and criminal, of Iraq. There has been, of course, the famous case about Nissour Square, which was a great tragedy. There has been a prosecution brought against employees of Blackwater there under the so-called MEJA, Military Extraterritorial Jurisdiction Act.

That case is currently before a court, and there has been a challenge made there to jurisdiction. But the district judge has allowed that case to go forward.

So I think that you are absolutely right about the overall problem, which is that an effort like Afghanistan and Iraq involves many, many, many people. And to ensure that those individuals

are bound by the same rules of law that govern U.S. Government officials in those circumstances is a complicated jurisdictional issue.

And that is precisely why knowledge of foreign law and international law is necessary for us to try to sort these issues out. And if I am confirmed, I look forward to working with you on that issue.

Senator SHAHEEN. Thank you.

Some have argued that the Geneva Conventions, which set the standards for treatment of prisoners of war and noncombatants, don't apply to members of the Taliban or al Qaeda. Do you share that view? And if not, would you assume that the conventions apply to both groups?

Mr. KOH. Well, it depends, Senator, very much on the context in which the issue is being addressed. The Supreme Court held in the *Hamdan* case that common article 3 of the Geneva Conventions sets minimum standards for those who are being detained on Guantanamo, and that is now controlling law of the United States.

On other issues—for example, general treatment questions—on 2 days after he took office, President Obama issued an Executive order, which called for a 30-day review of conditions on Guantanamo to ensure compliance with the Geneva Conventions, and the other Executive orders issued on that day incorporated compliance with the Geneva Convention into the Executive order.

This, by the way, is an example of what I was calling transnationalism. These are rules of U.S. law as embodied in an Executive order. So it is a description of something that has been happening and will continue to happen.

Senator SHAHEEN. Thank you.

Senator LUGAR. Thank you very much, Senator Shaheen.

Senator BARRASSO.

Senator BARRASSO. Thank you very much, Mr. Chairman.

Dean Koh, thank you for taking the time to visit with me. I congratulate your mother on having two sons—that is a remarkable accomplishment—two sons nominated at the same time to serve our Nation. So thank you for your commitment and your service.

I want to thank your family and congratulate all of them who have been so instrumental in your success.

Senator Isakson talked about constitutional issues. Mr. Koh, in your opening statement, you talked about defending our Constitution. I would like to switch from what Senator Isakson discussed regarding the first amendment. I want to talk about second amendment constitutional issues.

You had argued that the United States could support global gun control without committing itself to a regime that would affront legitimate second amendment concerns. I wanted to talk to you about these concerns in the context of multilateral gun control treaties. Please explain your views on what are legitimate second amendment concerns and what concerns you might consider illegitimate second amendment concerns.

Mr. KOH. Well, thank you, Senator. And thank especially your kind words about my mother. As you know, she is hoping that if both of her sons get confirmed, that will be her Mothers Day present.

The point you raise has to do with the international effort to regulate gun transfers, firearm transfers across borders. It is an effort

which is at a very early stage, and let me make clear the goal is to prevent child soldiers in places like Somalia and Uganda from having AK-47s transferred from the former Soviet Union. It is not to in some way interfere with a legitimate hunter's right to use a hunting rifle in a national or State park.

At the time that the issue first arose, some second amendment concerns were raised that it might interfere with the right to bear arms. In an article I wrote, I pointed out that exports of arms have always been subject to regulation, the Arms Export Control Act. But it did not interfere with domestic possession of these arms, which is obviously a domestic concern.

Subsequently, the Supreme Court, in a case called *Heller*, reaffirmed and strengthened the second amendment position. That was before—that came after I wrote the article. I have not redone the analysis of the article in light of the *Heller* decision.

But I would say again that a regime that is designed to regulate illegal and illicit transfers of certain kinds of assault weapons to foreign countries, which are already regulated, is very distinct from the kinds of concerns that animate the second amendment, and I do not see that there would be a conflict. If there were, obviously, the Constitution would control. And obviously, if confirmed, I would be consulting with members of this committee on how the core interests of the United States should be protected.

Senator BARRASSO. Well, you raised the *Heller* case and the decision by the Supreme Court because in a 2003 Fordham Law Review article you wrote that “revisionist” readings of the second amendment give greater weight to the individual's right to bear arms. Could you discuss that a little bit?

Mr. KOH. Yes, I was referring to writings by my colleague Akhil Amar of Yale University and Professor Laurence Tribe of Harvard.

The question that I was asking was whether they are finding more protection, constitutional protection for individual right to bear arms gave the second amendment a different meaning than it had been given in the case of *United States v. Miller*, which was the prior Supreme Court interpretation of the issue. I think that the Supreme Court's decision last term went even beyond the statements of those scholars with regard to the second amendment.

Nevertheless, I don't think that the issue will affect the treaties that are under discussion. There are two treaties. There is a Latin American treaty, which last week the President announced that he would support. There has been discussion of an arms trade treaty, but there is no text. And so, it is obviously premature to analyze whether it is constitutional or not until we see a text.

Senator BARRASSO. The Latin American treaty, which was signed by President Clinton in 1997, has not been ratified by the United States Senate. It would take 67 votes for ratification. The President described it as a high priority item for him.

When you closely read the treaty, I know there are some issues that are very concerning to people that own guns in the United States, people that participate in gun shows, and people who reload their own ammunition. So I know that there are still significant concerns related to that specific treaty.

So I would just like to ask you do you believe the second amendment protects the individual right of ordinary Americans to keep

and bear arms? I mean, forget about the hunting part. Just to keep and bear arms unrelated to militia service?

Mr. KOH. The decision of the Supreme Court in *Heller* is the law of the land. Obviously, I respect that. And to the extent to which those ideas are captured in that decision, yes, I do completely agree.

Senator BARRASSO. Will you commit to working with the Senate to ensure that any international agreement that the administration considers will not subvert our second amendment right to bear arms?

Mr. KOH. I will go further than that, Senator. Any treaty that comes before this committee that raises a constitutional question, I will work with members of the committee, if confirmed, to ensure that those constitutional interests are protected, whether it is first amendment, second amendment, eighth amendment, or anything else.

Senator BARRASSO. Thank you, Dean Koh.

Thank you very much, Mr. Chairman.

Senator LUGAR. Thank you, Senator Barrasso.

Senator WICKER.

Senator WICKER. Thank you.

Dean Koh, I very much enjoyed our informal chat the other day. And like so many other members of the committee, I would observe that although I haven't known you, you and I do have a lot of mutual friends. And many of them have called with great endorsements of your candidacy and great admiration. And I respect that and consider that.

Let me also just observe that I don't think you want to abolish Mothers Day. I don't think you want to impose sharia law in the United States. By the same token, I don't think there is anyone within the sound of my voice who believes that the United States can act unilaterally without some sort of international agreements and cooperations.

And then, finally, before I get to my question, I would observe in response to Senator Kerry's statement about why your family left Korea, it seems to me that actually they left North Korea to escape an oppressive domestic law that didn't appreciate the rights of individuals there.

Having said that, let me get to the question about the axis of disobedience. Surely you must have realized that that would be a provocative statement. And based on my conversation with you earlier, it is clear to me that that is your legal opinion. So the disobedience would be disobedience to international law. Is that correct?

Mr. KOH. Yes, Senator. What I was saying there was that it is harder for us to get other nations to obey international law if we are ourselves perceived as disobeying international law.

Senator WICKER. OK. Well, let me then follow up on Senator Isakson's point because he asked you about the United States decision to invade Iraq, and you answered in the context of an article that you wrote. But you and I had a conversation also in which we discussed this a little further.

Clearly, your article suggested that President Bush 41 did better than President Bush 43, and I think that is a debate that certainly we can have. But I did understand your answer to my question in

our private conversation to be, when pressed, that indeed our invasion of Iraq was a violation of international law. Is that a correct characterization of your answer to me last week when we visited?

Mr. KOH. Senator, I did not quibble with the domestic legal basis for the intervention in Iraq in 2003, which was supported by a resolution of this Congress. What I did say was that the necessary legal authorization by the Security Council had not been secured and that, therefore, it put us in the awkward position of an intervention which was lawful domestically and unlawful internationally. That has, I think, created a problem in our gaining the support of other nations subsequently and in our efforts in Iraq.

Senator WICKER. So, in your opinion, our invasion of Iraq was unlawful internationally?

Mr. KOH. Yes.

Senator WICKER. And so, let me then ask you this. You stated with regard to piracy, which we are going to have to deal with in this committee and in this Congress and in this administration, that there is no solution to piracy short of international law. Was that your testimony today?

Mr. KOH. By its nature, piracy is an act that cuts across borders. Even if almost every country acts effectively against pirates, if one country does not, they can seek safe haven there. So it is a problem, a global problem that requires a global solution.

Senator WICKER. Well, there is no question about it. But the troubling part of your answer, which I do believe was that there is no solution to piracy short of international law, does that mean that absent some international agreement, which we might or might not be able to obtain, that the United States, of its own volition as a matter of national defense, is powerless to take action against piracy? The only solution is to rely on the agreement of other countries?

Mr. KOH. That wasn't my point, Senator. My point was that there are limits to how effectively we can act against pirates in the absence of the international legal framework. With the international legal framework, we are on the strongest basis, and that was the same point I made with regard to Iraq.

Understand, Senator, the servicemembers in Iraq, the effort that is going on there is something which is of major concern to every American. There are many, many legal issues that would arise, if I were confirmed, that I would need to address, and my goal would be to act in the best interests of our country, our soldiers, and our interests in Iraq.

That having been said, I do believe that the absence of the international law justification that I would have hoped to see in 2003 has left us in a weaker position, which is why I believe that with regard to pirates, it is very important to get an international legal framework organized so that we could marshal the most effective and acting using the maximum of what Secretary Clinton has called our smart power in this circumstance.

There is no problem with doing it alone. It is just that it is not nearly as effective. If there are 193 countries in the world, one country can't stop all pirates.

Senator WICKER. Let me ask you this. You remember when the nation of Israel attacked the Iraqi nuclear installation?

Mr. KOH. At Osirak. Yes, Senator.

Senator WICKER. Was that a violation of international law?

Mr. KOH. Senator, that has often been cited as an example of a preemptive act of self-defense. In fact, it is often cited as the quintessential example of extending the basic principle of self-defense to one in which you are heading off a future attack. This is one of the items that I addressed in Senator Lugar's question for the record on this subject.

Senator WICKER. In your legal opinion, Israel's action against the Iraqi sites was not a violation of international law?

Mr. KOH. Senator, my view is that unilateral uses of force, when they are not in self-defense, should be avoided. Sometimes there may be no alternative. Sometimes a multilateral use of force can be organized in a way that puts our response on the strongest possible basis.

I think that scholars can debate and do debate the lawfulness of the Israeli attack on the Iraqi nuclear reactor. Does it fit within the test put forward, which is that an attack be imminent, that the response be necessary and proportional? And people debate—

Senator WICKER. And you are not prepared to give a definitive answer to that at this juncture?

Mr. KOH. I don't have the information, Senator, that the Israeli officials had about what was the likelihood of an imminent attack before they made their decision. If I were confirmed, I would be in a position where I could ask for information, particularly in the context of being asked to give legal advice to the Secretary and to the President.

Senator WICKER. One last thing, Mr. Chairman, if I might? Having an effective solution based on international cooperation is one thing. It seems to me a violation of international law is another thing.

Is there a remedy out there for people in other countries to the alleged violation that the United States engaged in, in your legal opinion, of international law in invading Iraq? Do we need to be fearful of a remedy at law in some court because we violated international law, which in your opinion we did?

Mr. KOH. Well, I don't mean to go to Latin in this circumstance, but the great Myres McDougal of Mississippi, who was a professor of international law at our law school, talked about the difference between *jus ad bellum*, which the law of going to war, and *jus in bello*, which is the law in war. So whatever may have been the defects of the lawfulness of the original intervention, if we conduct the war in a lawful fashion, those are the incidents for which there would be exposure.

I don't know, Senator, of any exposure that we have for the original intervention. I will say that some of the difficulties the United States has had in obtaining cooperation in bringing about the Iraq intervention and the subsequent efforts to make Iraq an independent and democratic nation have been ways in which other nations have been responding to what they perceive to be our failure to cooperate within the framework of international law.

Senator WICKER. Thank you very much, Mr. Chairman.

Senator LUGAR. Thank you very much, Senator Wicker.

Let me ask if Senators have additional questions?

Senator FEINGOLD. Mr. Chairman, just briefly, if I may?

Senator LUGAR. Yes, Senator Feingold.

Senator FEINGOLD. I just want to review a couple of the items that have been discussed by my colleagues on the other side of the aisle because each of them highlights Dean Koh's commitment to law and following the law as opposed to a political view.

First is the one that Senator Wicker just brought up. The issue of whether the Iraqi invasion in 2003 was lawful or unlawful under international law. Dean Koh clearly stated as a legal matter that under the international regime that had acted on this matter through the Security Council and otherwise, that this certainly appeared to be illegal under that regime.

However, the dean has highlighted that there are situations—correct me if I am wrong. You are the dean. I am not. But I think under article 51 of the United Nations charter, there is the opportunity to act in cases of self-defense.

So his answer, when he talks about the regime that had been put forward by the Security Council, spoke to that regime. It did not preclude the possibility that in certain situations, such as the one you raised—the Israeli decision to take out the Iraqi nuclear plant—may well have been, as I understand the dean, within article 51.

So I assume the analysis would be the situation in 2003 is one that could legitimately be put under article 51? My view, obviously, is that it could not. I take it that would be a fair statement of your view as well?

Mr. KOH. My impression was that the conditions that existed at the time that led the Israelis to attack the Iraqi nuclear reactor were different from the conditions that existed which led the United States to engage in its international intervention in Iraq in 2003.

There were Security Council resolutions. My reading of those resolutions were they authorized us to contain Saddam Hussein, not to go in and remove him. And it was after Security Council Resolution 1441, where some were pressing for an additional resolution and others were satisfied to go forward on the resolution that existed, and that disagreement has lived with us to the present day.

Senator FEINGOLD. Now going back to another subject that I think you and I and our friends started debating about 1975. There was one guy in the room who was asserting, a guy from Wisconsin, that the second amendment was an individual right. And not all of my friends agreed with me, but we debated it back and forth.

And the dean here has acknowledged that for the first time, the U.S. Supreme Court finally ruled what I thought was right. In a close decision, where I filed an amicus brief with many from the other side of the aisle saying I believe it is an individual right.

But I believe I heard you say that you have no doubt in your mind, despite the criticism that has been raised with regard to the *Heller* decision, that it is, in fact, the law of the land. Is that correct, Dean?

Mr. KOH. Well, Senator, in 1975, you called this one better than I did. [Laughter.]

Senator Lugar, you may not know that Senator Feingold's undergraduate dissertation was about the second amendment, and I think it was 400 pages long.

Senator FEINGOLD. Only 300. [Laughter.]

With footnotes.

Mr. KOH. He forced me to read it, which I did. And frankly—

Senator FEINGOLD. And fell asleep.

Mr. KOH. No. I had no idea at the time that there was such an extensive basis. And over the years, I have watched as this particular approach to the second amendment has gained various academic adherence and then was adopted in good measure by the Supreme Court's opinion in *Heller*. So I think that it is a constitutional analysis which has carried the day.

Senator FEINGOLD. Finally, with regard to the death penalty in the cruel and unusual standard, obviously, many of us have our own views. And frankly, I have been very disappointed that the Supreme Court moved away from what I thought was a trend to declare the death penalty inherently unconstitutional. It was a great disappointment to me and something I wish would change.

But I asked you in my office whether you believe that the death penalty as a general matter is permitted under the eighth amendment, and I believe you said that is clearly the law of the land. Is that correct, Dean?

Mr. KOH. That is correct, Senator.

Whatever my personal views about the death penalty might be, if confirmed, and if I took an oath to uphold the Constitution and laws of the United States of America, that would include the administration of the death penalty.

Senator FEINGOLD. Mr. Chairman, thank you for the additional time. I think what the dean, of course, has demonstrated here is he clearly understands his role as legal counsel is very different from that as an academic and would be a true adherent to our Constitution and our laws.

Thank you, Mr. Chairman.

Senator LUGAR. Well, these additional questions gave the dean an opportunity to mention 1975 and your thesis. And so, that has embellished our hearing. [Laughter.]

Senator WICKER, do you have additional questions?

Senator WICKER. Well, I am tempted to ask that that dissertation be attached to the record, but I think I will withhold on that.

Mr. KOH. Senator, then three of us would have read it. [Laughter.]

Senator FEINGOLD. You know, I thought I was for your nomination, Dean Koh.

Senator LUGAR. Perhaps we better end the hearing before there are further—

Senator Shaheen.

Senator SHAHEEN. No.

Senator LUGAR. Well, I thank the Senators. I thank you very much, Dean Koh, for your testimony, and for your response to our questions both before the hearing and during the hearing.

I would just observe that simply as a general editorial opinion that, as you have noted, this comes before the Judiciary Committee much more frequently than before this committee. But there are

enormous debates in the Senate as well as the American people about various legal principles, even discussion of various constitutional amendments and their meaning for each one of us.

And as a rule, thank goodness the Judiciary Committee deals with this and witnesses who are hoping to become judges and at various levels, and these are serious issues in which many Americans believe the judiciary is often making law as opposed to interpreting and judging it.

However, the dilemma obviously for us today is that the State Department does require a legal counsel—not a judge, as you pointed out, but a counsel—and hopefully, someone of experience and wisdom who has seen a great deal of American foreign policy as well as judicial principles. So we appreciate very much your preparation for the hearing.

Let me just indicate, as Senator Kerry has requested, that it would be helpful that the record remain open until the end of the day tomorrow—and that would be Wednesday—for members to submit additional questions for the record. And we would ask you, Dean, to respond as rapidly as possible to those questions so the record can be completed.

Then our chairman, Senator Kerry, at some appropriate moment will call for a business meeting of the committee to consider your nomination at that point.

We thank you again, and we thank all who have come to support you today. And the hearing is adjourned.

Mr. KOH. Thank you so much, Senator.

[Whereupon, at 4:00 p.m., the hearing was adjourned.]

Responses to Additional Questions Submitted for the Record by Members of the Committee

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD
TO HAROLD KOH BY SENATOR LUGAR

Question No. 1. The United States has historically taken the position that the International Covenant on Civil and Political Rights does not apply to U.S. actions outside the territory of the United States, including extraterritorial actions undertaken during the course of armed conflict. If confirmed as Legal Adviser, do you intend to recommend any change in this position? If so, please explain the changes you intend to propose and the reasons for them.

Answer. I recognize that the question of the extraterritorial scope of the International Covenant on Civil and Political Rights has received particular attention during the last several years. But it would be premature for me to suggest what interpretation I would recommend until I have had the opportunity to review fully the U.S. Government's rationale of its position and to engage in full discussions of this issue with all relevant U.S. Government legal offices. If confirmed, I would look forward to doing so, as well as to consulting further with members of this committee and other interested Members of Congress on this important issue.

Question No. 2. In a 2007 article in the *Journal of International Economic Law*, you criticized positions taken by the Bush administration in litigation under the Alien Tort Statute and stated, *inter alia*, that "there has been no change in the wording of either the Alien Tort Statute (ATS) or the Torture Victim Protection Act (TVPA), and thus, no apparent legal reason why the United States should suddenly depart from the positions of the Carter and Clinton administrations supporting the use of U.S. courts for Filartiga-type recovery under these two statutes."

- Under what circumstances do you believe the executive branch may appropriately change its interpretation of treaties or statutes from those taken under prior administrations?

Answer. I firmly believe in the value of continuity in legal interpretation of treaties and other legal obligations. Our legal system is based on a deep respect for legal precedent, although it does allow for evolution of the law to address new issues and challenges. My view is that the executive branch should seek to offer consistent interpretations of treaties and statutes and, to promote this continuity, should give significant weight to the legal judgments and precedents of prior administrations. This is particularly true of statutes such as the Alien Tort Claims Act and the Torture Victims Protection Act, where Congress assigned a task not to the executive, but to the courts. In all cases, I would apply a presumption that an existing interpretation of the executive branch should stand, unless a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinced me that a change to the prior interpretation was warranted.

Question No. 3. If confirmed as Legal Adviser, to what extent will you consider yourself bound in providing advice to the Department of State on questions of statutory or treaty interpretation by prior executive branch interpretations of the statute or treaty in question?

Answer. If confirmed as Legal Adviser, on statutory and treaty matters, as with all legal standards, I would begin by undertaking a full and careful review of the views of previous administrations. I would give significant weight to legal judgments and precedents of prior administrations. I would look first to prior judicial and executive branch interpretations of the treaty or statute in question, with the presumption that the existing executive branch interpretation should stand, unless a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinced me that a change to the prior interpretation was warranted.

Question No. 4. In a 1994 article in the Yale Law Journal discussing the U.S. Supreme Court's decision in *Sale v. Haitian Centers Council* you wrote that "*Haitian Centers Council* takes its place atop a line of recent Supreme Court precedent misconstruing international treaties. In the past few years, the Court has sanctioned the emasculatation of a range of treaties governing service of process, taking of evidence, bilateral extradition, and now nonrefoulement."

- Under what circumstances, if any, do you believe the executive branch may adopt a different interpretation of the legal effect of a treaty than that adopted by the U.S. Supreme Court in a case interpreting the treaty?

Answer. Under our Constitution, the Supreme Court has the final duty to interpret a particular treaty and to say what it requires as a matter of domestic law. Where the Supreme Court has spoken definitively on the legal effect of a treaty, its rulings are obviously controlling. Where the Court has not spoken definitively, the executive branch should provide its best interpretation of the legal effect of the treaty by looking to the Court's and lower courts' rulings and prior executive branch interpretations of the treaty in question, as well as to the text, structure, negotiating history, object and purpose, and practice under the treaty, as well as any reservations, understandings and declarations that accompany the advice and consent of the Senate.

Question No. 5. If confirmed as Legal Adviser, to what extent will you consider yourself bound in providing advice to the Department of State on questions of treaty interpretation by interpretations of the treaty in question adopted by the U.S. Supreme Court?

Answer. As my writings reflect, my long-held view is that a Supreme Court ruling on a matter of treaty interpretation is authoritative as U.S. law and binds the political branches of the Federal Government, lower courts, and the states. If confirmed, when advising the Department of State on questions of treaty interpretation, I would defer to the Supreme Court's interpretation whenever the Court has spoken definitively on the particular question of treaty interpretation at issue.

Question No. 6. In testimony before this committee in 2002 on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) you stated that "The United States can and should accept virtually all of CEDAW's obligations and undertakings without qualification Although past administrations have proposed that ratification be accompanied by certain reservations, declarations, and understandings, only one of those understandings, relating to limitations of free speech, expression, and association, seems to me advisable to protect the integrity of our national law."

- Under what circumstances, if any, do you believe the executive branch may adopt a different interpretation or application of a treaty's provisions than those

reflected in reservations, understandings, and declarations accompanying the Senate's advice and consent to the treaty?

Answer. My long-held view is that the executive branch is bound to comply with the reservations, understandings, and declarations that accompany the Senate's advice and consent to ratification of a treaty. As I have noted in my writings, it is clear that the Senate may give its consent to treaty ratification subject to conditions ranging from reservations to declarations to understandings of what particular treaty terms mean. If the President and our treaty partner choose to make a treaty by exchanging instruments of ratification, they can only make the treaty to which the Senate has advised and consented. Accordingly, under U.S. law, the President is bound, not only at the time of ratification but after, to honor the conditions on which the Senate has based its consent.

Question No. 7. If confirmed as Legal Adviser, to what extent will you consider yourself bound in providing advice to the Department of State on questions of treaty interpretation and application by reservations, understandings, and declarations accompanying the Senate's advice and consent to the treaty in question?

Answer. Should I be confirmed as Legal Adviser, I would consider myself bound to honor the reservations, understandings, and declarations that accompany the Senate's advice and consent to a treaty. I have expressed in my writings my belief that the President is bound to honor the conditions upon which the Senate has based its consent. Under such circumstances, it follows that the President's subordinates, including the Legal Adviser to the Secretary of State, would be bound to honor those conditions as well.

Question No. 8. You have been Counsel of Record in amicus briefs filed in the U.S. Supreme Court urging the Court to consider the law and practice of foreign jurisdictions when interpreting rights-bearing provisions of the U.S. Constitution. If confirmed as Legal Adviser, what role, if any, do you expect to have in the Obama administration's decisions on the interpretation of rights-bearing provisions of the U.S. Constitution, and on positions the Obama administration takes on such issues in litigation?

Answer. Since the President nominated me, much has been said about my views on this question. If confirmed, I would be taking the oath to support and defend the Constitution of the United States. My family settled here in part to escape from oppressive foreign law, and it was America's law and commitment to human rights that drew us here and have given me every privilege in my life that I enjoy. My life's work represents the lessons learned from that experience. Throughout my career, both in and out of government, I have argued that the U.S. Constitution is the ultimate controlling law in the United States and that the Constitution directs whether and to what extent international law should guide courts and policymakers.

Within the executive branch, the Department of Justice has been assigned the primary responsibility for interpreting the rights-bearing provisions of the U.S. Constitution. It is my understanding that the Department of Justice consults with the Department of State on the interpretation of a rights-bearing provision of the U.S. Constitution in cases where that interpretation implicates the foreign relations of the United States. If confirmed, I would expect, as prior Legal Advisers have done, to participate in such discussions with the Department of Justice and other relevant agencies in the U.S. Government when those cases arise.

Question No. 9. A December 12, 2008, Memorandum of Understanding between the William J. Clinton Foundation and the Obama Presidential Transition Foundation governs certain fundraising activities of the Clinton Foundation during the period of Hillary Rodham Clinton's service as Secretary of State. The Memorandum of Understanding provides, inter alia, for the State Department's designated agency ethics official to review and advise on ethics issues potentially raised by certain proposed contributions to the Clinton Foundation.

- The State Department's designated agency ethics official is employed within the Department's Bureau of Legal Affairs, over which you will have management responsibility if confirmed as Legal Adviser. If confirmed, what role, if any, do you expect to play with respect to the functions performed and the advice provided by the designated ethics official on issues addressed by the Memorandum of Understanding?

Answer. Under the December 12, 2008, Memorandum of Understanding between the William J. Clinton Foundation and the Obama Presidential Transition Foundation, the Department of State's Designated Ethics Official, who also serves as a Deputy Legal Adviser in the Office of the Legal Adviser, has been given specified ethics duties with respect to reviewing and advising on certain foreign government con-

tributions. I believe that this official as well as other career government attorneys must be allowed to provide their considered, independent judgments on ethics matters to senior Department officials. If confirmed as Legal Adviser, I would take all necessary steps to support that goal.

Question No. 10. In a number of law review articles, you have developed a theory of “transnational legal process” in which you seek to explain ways in which states comply with rules of international law through the internalization of such rules into domestic law and processes. In a 2004 law article in the *Berkeley Journal of International Law* addressing this theory you wrote: “Some have asked me, ‘Is your notion of transnational legal process an academic theory? Is it an activist strategy? Or is it a blueprint for policymakers?’ Over time, my answer has become, ‘It is all three.’”

- In what sense do you consider your theory of transnational legal process a blueprint for policymakers?

Answer. U.S. policymakers frequently use transnational legal process as a tool to urge other nations to obey international law. As I explain in the 2004 article, “transnational legal process” is a shorthand description for how state and nonstate actors interact in a variety of domestic and international fora to encourage nations to obey international norms as a matter of domestic law. For example, U.S. policymakers encouraged China to join the World Trade Organization and then to modify Chinese domestic law to conform with international rules on intellectual property, an objective that is important to U.S. economic and other interests. When designing legal rules, U.S. policymakers may take into account all available enforcement mechanisms, with an eye toward furthering U.S. foreign policy objectives.

Question No. 11. What aspects of your theory of transnational legal process do you believe are relevant to the role of the Legal Adviser to the Department of State and, if confirmed, what guidance do you expect to draw from this theory in performing the functions of the Legal Adviser?

Answer. My approach to transnational legal process assumes that U.S. Government officials, including those in the State Department, must first and foremost uphold the Constitution and laws of the United States of America. When U.S. foreign policy decisions are supported by the law, they enjoy the legitimacy that comes from compliance with the law and reflect America’s commitment to the rule of law as a guiding value. Government lawyers enable policymakers to achieve policy objectives within the confines of the law and urge policymakers to reexamine any policy objective that cannot be achieved lawfully. Thus, when the Legal Adviser helps to negotiate a treaty, for example, he helps to guide policy choices by both our government and its treaty partner into a lawful channel that promotes the rule of law.

Question No. 12. In a 2007 comment in Michael Doyle’s book “Striking First,” you wrote “[I]f you look at some of the yielding lawyers with whom the current President has surrounded himself, at the White House counsel’s office, as attorney general, and as general counsel of the Defense Department, you quickly conclude that, sadly, these are not the kind of strong-willed, independent-minded attorneys who, in a unilateral situation, are likely to impose restraints upon the President’s will, based on the rule of law.”

- In the context of these comments, please discuss the general approach you would intend to take, if confirmed, in providing legal advice to the Secretary of State and other Department officials, and the role you believe the Legal Adviser should play in assisting policymakers to achieve desired policy objectives.

Answer. If confirmed as Legal Adviser, my highest priority would be to provide the best possible legal advice to the Secretary of State and other State Department officials that is consistent with the Constitution and laws of the United States. Legal advisers should give policymakers honest and accurate advice about what obligations and opportunities the United States faces under international law, what room exists for good faith interpretation of legal terms, and what consequences the United States might expect from taking positions that are inconsistent with its international obligations. If confirmed, I would work to help client officials achieve desired policy objectives, but only so long as those objectives are consistent with the Constitution and our laws.

During nearly 30 years of working alongside government lawyers—including my own time working in the Reagan administration as an attorney-adviser at the Office of Legal Counsel and in the Clinton administration as Assistant Secretary of State for Democracy, Human Rights and Labor—I have found that the best government legal counsel do not either “just say yes” or “just say no.” The first approach too

easily lends itself to lawyers bending the law to allow the administration to do whatever it wants to do; the second approach, without more, too easily lends itself to lawyers who do not present policymakers with all available lawful options. A third approach, which I favor, involves the legal counsel working closely with policymakers throughout the policy process to develop alternative, lawful means of obtaining smart, sensible policy objectives. In all cases, though, a government lawyer must be prepared to hold policymakers to their oaths to support and defend the Constitution of the United States. If confirmed, that is what I would intend to do.

Question No. 13. In a 2004 law article in the Berkeley Journal of International Law you wrote the following: “Turning to the United States, the final member of the ‘axis of disobedience,’ our greatest surprise should be how quickly after September 11 we turned the story from the noncompliance of others with international law, to our own noncompliance. Examples abound: First and most obviously, the U.S. unsigned of the International Criminal Court Treaty; second, the U.S. attitude toward the Geneva Conventions—including its actions in Abu Ghraib, its decision to create zones in Guantanamo in which people are being held without Geneva Convention rights as well as to designate certain U.S. citizens within the United States as enemy combatants; and third, the death penalty, which has become a growing irritant in the relationship between the United States and the European Union, even in the war against terrorism.”

- Please explain in what sense you believe the so-called “unsigned” of the Rome Statute of the International Criminal Court amounts to noncompliance with international law. Do you believe that international law requires states to become parties to particular treaties or precludes states from expressing an intention not to become parties to treaties they have previously signed but not ratified?

Answer. Unfortunately, aspects of the article cited have been misunderstood by some commentators. I do not believe that international law precludes states from expressing an intention not to become parties to treaties they have previously signed but not ratified. However, I do believe that America’s reputation for respect for international law, and its capacity to secure the compliance of other nations, can be harmed by actions that withdraw from or undermine international legal obligations that have been previously undertaken. The specific point I was making in the article is that when we are perceived by the world to be noncompliant with international norms and obligations, we may encourage other countries to do the same.

Question No. 14. Please explain in what sense you believe that U.S. practice with respect to the death penalty amounts to noncompliance with international law.

Answer. The specific point I was making in the article was that the continuing U.S. use of the death penalty can pose an obstacle to international cooperation to achieve compelling national objectives, for example, to the extent that the possibility of the death penalty may complicate the extradition of terrorist suspects from the European Union. The Supreme Court has also recently found that particular U.S. death penalty practices do not comply with constitutional standards, invalidating the practice of executing offenders with mental retardation and offenders below the age of 18. *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002); *Roper v. Simmons*, 543 U.S. 551, 577 (2005). In neither case did the Court apply international law directly. But in both cases, the majority did find that the challenged practice violated the “cruel and unusual punishments” clause of the eighth amendment of the United States Constitution, first by looking to the practice of domestic legislatures and juries, and then confirming the “unusual” nature of the practice by examining whether those practices had also become “unusual” internationally, contrary to the “evolving standards of [human] decency” long applied to construe the eighth amendment. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Question No. 15. In November 2001 you delivered the Edward L. Barrett, Jr. Lecture on Constitutional Law at the University of California, Davis School of Law. In that lecture, you discussed your tenure as Assistant Secretary of State for Democracy, Labor and Human Rights between 1998 and 2001, and stated “While I recognized that the United States stood increasingly among the minority of nations in its adherence to the practice [of capital punishment], I did not believe that a customary norm of international law had yet formed condemning the practice.”

- Do you believe that a customary norm of international law currently exists condemning the practice of capital punishment? If so, what consequences do you believe flow from the existence of such a norm? If confirmed as Legal Adviser, what steps would you recommend that the United States take in light of any such norm?

Answer. While I recognize that the United States stands increasingly among the minority of nations in its adherence to the practice of capital punishment, I do not believe that a customary norm of international law has formed prohibiting the general practice of capital punishment.

Question No. 16. In the same lecture, you stated that prior to accepting the position as Assistant Secretary for Democracy, Labor, and Human Rights, “I wondered whether I could publicly defend the legality of the death penalty. My initial view was that, whatever my moral beliefs, as an official sworn to uphold the Constitution and laws of the United States, I could defend the legality of the death penalty, so long as it was, in fact, administered as Gregg and Furman required according to exacting constitutional procedures.” Later in the same lecture, you stated that “One day during my time in government, while being challenged on the death penalty, I could no longer find it in my heart to defend the practice. I found myself morally convinced that its continuing use is not only utterly wrong, but also unconstitutional.”

In recent years, legal advisers to the State Department have been called upon to address and defend aspects of U.S. practice with respect to the death penalty, including in litigation before the International Court of Justice and in connection with periodic reports of the United States to human rights treaty bodies monitoring the implementation of the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination.

- In light of the development you have described in your views on capital punishment as practiced in the United States, do you believe you will be able to represent the United States on issues related to capital punishment if you are confirmed as Legal Adviser? Please explain the approach you would intend to take on such issues.

Answer. If confirmed as Legal Adviser, I would take an oath to support and defend the Constitution of the United States. In carrying out my governmental duties, I would stand in much the same position as a judge in a state that administers the death penalty who personally opposes the death penalty, but still must administer that penalty because it is the law of his or her state and because he or she has taken an oath to uphold that law. Because I acknowledge that no norm of customary international law has formed condemning the general practice of capital punishment, I would have no difficulty making such an assertion to an international body.

Question No. 17. In testimony before the Senate Judiciary Committee in September 2008, you stated that the next U.S. administration “should reengage diplomatically with the Contracting Parties to the International Criminal Court to seek resolution of outstanding U.S. concerns and pave the way for eventual U.S. ratification of the Rome Treaty.”

- Please indicate what specific concerns you believe would need to be addressed before it would be advisable for the United States to consider becoming a party to the Rome Statute.

Answer. The recent bipartisan American Society of International Law Task Force on the International Criminal Court—which was cochaired by former Legal Adviser William H. Taft IV and Judge Patricia Wald and included former Supreme Court Justice Sandra Day O’Connor—recommended that the United States could announce a policy of “positive engagement” with the International Criminal Court. Such a policy would allow the United States to help shape the development of the Court and could facilitate future consideration of whether the United States should join the Court. See “American Society of International Law Task Force, U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement iii” (2009), <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>.

In considering such a recommendation, among the many questions would be: Whether to announce a new policy toward the Court; whether and how to respond to the 2002 “unsigned” of the Rome Statute; whether and how to support the ICC’s Prosecutor in particular cases; whether to participate in some capacity in the 2010 conference that will address the definition of the crime of aggression; whether to propose amendment or waiver of particular provisions of the American Servicemembers’ Protection Act; and whether ultimately to seek ratification of the Rome Treaty, a step that would require the Senate’s advice and consent. All of these issues would require extensive interagency discussions, in which I would hope to participate if confirmed.

In particular, the U.S. Government has long expressed concern about the authority of the ICC Prosecutor to initiate investigations of U.S. soldiers and government officials stationed around the world. Particularly because the United States has the largest foreign military presence in the world, this is an important issue on which

we would need further discussion and clarification within the government. If confirmed, I would also wish to consult extensively with military commanders and other experts, and members of this committee, before I would deem it advisable to recommend to the Secretary of State and the President that the United States take any steps with regard to the Rome Statute.

Question No. 18. In the same testimony, you urged that “at the earliest opportunity, the new Secretary of State should withdraw the Bush administration’s May 2002 letter to the United Nations ‘unsigned’ the U.S. signature on the Rome Treaty creating the ICC, restoring the status quo ante that existed at the end of the Clinton administration.”

- What do you believe the legal effect of such an action would be? What obligations, if any, would the United States incur in relation to the Rome Statute if it took this step?

Answer. As a matter of international law, the May 2002 letter did not actually result in the United States “unsigned” the Rome Statute, as the United States signature remains on the operative legal instruments. The stated intent of the May 2002 letter was instead to relieve the United States of any current obligation to refrain from acts that would defeat the Rome Statute’s object and purpose. A withdrawal of the May 2002 letter would neither bind the United States to become a party to the Rome Statute, nor increase the risk of prosecution posed to U.S. citizens, such as soldiers stationed abroad. If confirmed, in considering whether to make any recommendations to the Secretary of State and the President with regard to the Rome Statute, I would consult fully within the executive branch, including with the military, as well as with members of this committee.

Question No. 19. The Bush administration’s May 2002 letter stated, in pertinent part, that “the United States does not intend to become a party” to the Rome Statute. Is it the position of the Obama administration that the United States does intend to become a party to the Rome Statute?

Answer. With respect to the position of the Obama administration, I would refer you to the answer that Secretary Clinton provided to this committee during her confirmation hearing in response to a written question concerning the administration’s position on becoming a party to the Rome Statute. If confirmed, I would hope to participate in discussions with the Secretary of State, other officials within the State Department and other agencies, and members of the Senate Foreign Relations Committee and other interested Members of Congress on this important issue.

Question No. 20. The Assembly of States Parties to the Rome Statute is in the process of considering whether to adopt a definition of a crime of aggression over which the International Criminal Court would exercise jurisdiction. What interests do you believe the United States has with respect to whether, and in what form, the Assembly of States Parties adopts a crime of aggression? What steps do you believe the United States should take to advance and protect its interests in connection with this process?

Answer. The crime of aggression was included, but not defined, as a potentially prosecutable offense in the 1998 International Criminal Court negotiations. A review conference will be held next year at which parties to the Rome Statute and observers are expected to discuss both the definition, and the circumstances under which the crime of aggression could be investigated and prosecuted. The United States has substantial interests in whether, and in what form, the Assembly of States Parties adopts a definition of the crime of aggression as part of the Rome Statute. In particular, the United States has a strong interest in avoiding baseless charges of aggression against its own officials, soldiers, or allies. This concern would need to be addressed before I would recommend that the United States become a party to the Rome Statute. If confirmed, I would be interested in participating in deliberations both within the executive branch and with members of this committee and other interested Members of Congress about how the United States could participate in discussions, without becoming a party, to advance and protect U.S. interests in this process.

Question No. 21. On March 29, the New York Times reported that a Spanish court was considering opening a criminal investigation into actions of former U.S. officials involved in decisions about detention and interrogation policy during the Bush administration. What U.S. interests do you believe are implicated by efforts of foreign courts to assert criminal jurisdiction over sitting or former U.S. officials for acts undertaken in the course of their official duties? What do you believe is the appropriate role of the U.S. Government in responding to such cases?

Answer. There can be no doubt that very important U.S. interests are implicated by efforts of foreign courts to assert criminal jurisdiction over sitting or former U.S. officials for acts undertaken in the course of their official duties. The appropriate role of the U.S. Government in responding to such cases should be first to understand the procedural posture of the case, precisely how it arose, the nature of the allegations raised against the former U.S. Government officials, the shared aspects, if any, between the foreign prosecution and any other investigations or inquiries that may be pending or forthcoming in the United States, and the nature of any defenses that might be available in such proceedings. If confirmed, I would intend to follow such cases closely in coordination with the Department of Justice and other U.S. Government agencies, and to work actively with our foreign counterparts through legal and diplomatic channels, as appropriate to the particular case. In so doing, I would seek the advice of members of this committee and other interested Members of Congress and keep them fully informed.

Question No. 22. Successive U.S. administrations have from time to time filed briefs in cases in U.S. courts under the Alien Tort Statute in which the United States itself was not a party. Under what circumstances do you believe it is appropriate for the United States to submit views in such cases? What principles do you believe should govern any positions to be taken by the United States in such cases?

Answer. It is appropriate for the United States to submit its views in Alien Tort Claims Act cases when a court asks it to do so. The United States might also proactively file such a brief when it deems it necessary, for example, to ensure consistency with the views of the United States on the content of international law; to guarantee respect for the separation of powers, including the authority of Congress and the courts; and to protect important foreign policy interests of the United States. Key decisions about when to file and what position to take in any such amicus filings will depend upon multiple factors, including the facts and circumstances of each case, the importance of the legal principles at stake and the likelihood that they will be furthered by such a filing, and the U.S. Government's assessment of whether adjudication of the Alien Tort claims at issue at that time would or would not prejudice or impede the conduct of U.S. foreign policy interests.

Question No. 23. In a 2005 article in the Indiana Law Journal, discussing the Alien Tort Statute, you wrote that "Under U.S. law, the President may not, on his own, violate a jus cogens norm such [as] those against torture or slavery or genocide. In the event that the President does, he as well as his subordinates may be sued under the [Alien Tort Claims Act]."

- Is it the position of the Obama administration that the Alien Tort Statute provides for civil damage remedies against individual U.S. officials, including the President, in connection with actions taken in the course of their official duties?

Answer. My understanding is that the Obama administration has continued to argue in court that, in cases asserting claims for civil damages under the Alien Tort Claims Act against U.S. officials in connection with actions taken in the course of their official duties, the United States should be substituted for the officials pursuant to the Westfall Act, 28 U.S.C. § 2679, and the case against the United States should then be governed by the Federal Tort Claims Act. In the article referred to, I was only pointing out that the Supreme Court has decided that the Alien Tort Claims Act is potentially available as a basis for Federal jurisdiction in certain cases dealing with torture allegations. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). In so saying, I did not address many of the other questions raised by such an action, including the application of the Westfall Act, domestic law immunities (including Presidential immunity), or other defenses that might be available to the official defendants.

Question No. 24. On February 28, 2005, President Bush determined that the United States would comply with the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*. To achieve such compliance, President Bush issued a memorandum directing state courts to review and reconsider the convictions and sentences of the Mexican nationals at issue in the case, who were not advised in a timely fashion of their rights under the Vienna Convention on Consular Relations to have Mexican consular officials notified of their arrests in the United States on State criminal charges. In March, 2008 the U.S. Supreme Court held in *Medellin v. Texas* that President Bush lacked the authority to compel the States to take such actions.

- What further actions, if any, do you believe the Federal and/or state governments should take to give effect to the ICJ's *Avena* judgment? If confirmed as

Legal Adviser, what steps would you recommend that the United States take with respect to this issue?

Answer. If confirmed as Legal Adviser, I would strive to ensure that the United States lives up to its international obligation to comply with decisions of the International Court of Justice (ICJ). With respect to the Court's decision in *Avena*, I know that the State Department is committed to training Federal, State and local officials on our consular notification and access obligations under the Vienna Convention on Consular Relations. I understand that the Department's efforts have been well received by these officials and that the United States is now doing a substantially better job of complying with these obligations than in the past. If confirmed, I would intend to review thoroughly what additional efforts can and should be taken to comply with the ICJ's judgment.

Question No. 25. Last term in *Medellin v. Texas*, the Supreme Court held that the President could not direct State officials to give effect to treaty obligations of the United States at issue in the case because the relevant treaties were not self-executing and the President did not have other sources of authority on which he could rely to direct such actions.

- In light of this decision, what further steps, if any, do you believe the executive branch and Congress should take in order to ensure that the United States will be able to fulfill its obligations under treaties to which it is currently party?

Answer. Upon close analysis, I would not expect the ruling to create broader problems for overall U.S. treaty compliance with existing treaties. The Court emphasized that it was not suggesting that other "treaties can never afford binding domestic effect to international tribunal judgments." *Medellin v. Texas*, 128 S.Ct. 1346, 1365 (2008). To the extent that the Court's judgment applies more broadly to ratified treaty provisions outside of the context of international dispute resolution, the Court was careful to mention with approval the direct enforcement of a number of self-executing treaties. While the executive branch does rely in certain contexts on direct judicial enforceability of treaty provisions to ensure U.S. compliance, more frequently, the executive branch seeks implementing legislation or relies upon existing legislation or executive branch action or restraint to ensure that U.S. treaty obligations are fulfilled.

While, for these reasons, I do not believe that the Court's decision in *Medellin* poses a serious broader threat to future U.S. treaty compliance, I do think that there is room for improvement during the treaty ratification process, including, among other things, the need to provide greater clarity regarding the domestic legal effect of treaty provisions, as the Senate has recently been doing. Should I be confirmed as Legal Adviser, I would of course welcome further dialogue on this issue with this committee and other interested Members of Congress, in search of ways to continue improvement of that process.

Question No. 26. What steps do you believe the executive branch and Congress should take during the process of considering future treaties to which the United States may become party to ensure that the United States will be able to fulfill obligations it would undertake under such treaties?

Answer. Should I be confirmed as Legal Adviser, I would support the recent practice of this committee to include, where appropriate, in resolutions of advice and consent a joint Executive and Senate view regarding the self-executing nature of specific provisions of new treaties, which will undoubtedly give helpful guidance to U.S. courts that are considering the direct enforceability of a particular treaty provision. As I noted in my answer to Question 7, I have long maintained that the President is bound, under U.S. law, to honor the conditions upon which the Senate has based its consent. I would also take steps to promote clarity in appropriate documents regarding the proposed domestic implementation of a treaty, including its domestic legal status, both before and during the process of seeking advice and consent.

Question No. 27. During the last Congress, the Bush administration submitted to the Senate for advice-and-consent treaties on defense cooperation with the United Kingdom and with Australia. Without any prior consultation with the Senate, the Bush administration took the extraordinary step of specifying in the text of each of these treaties that their provisions would be self-executing in the United States.

- Do you believe the Senate has a coequal role with the executive branch in deciding whether treaties to which the United States may become party will be treated as self-executing for the purposes of U.S. law?

Answer. The Senate has played an important historical role in the determination of the domestic legal effect of treaties, and if confirmed, I would expect to respect

that role by consulting with the Senate on this and other aspects of proposed treaties. In my writings, I have long argued that article II of the Constitution mandates that the Senate and President act as partners in the treaty process. I believe the executive branch should respect the long historical tradition of prior executive branch consultation with the Senate regarding treaties, a tradition that also enables the Senate more effectively to fulfill its own constitutional function of advice and consent.

Question No. 28. If confirmed, will you consult with the Senate on arrangements for implementing obligations the United States would assume under treaties submitted to the Senate for its advice and consent?

Answer. Yes. As my writings make clear, I believe the Senate has an essential role to play in the implementation of treaties. If confirmed, I would consult fully with the Senate on arrangements for implementing obligations the United States would assume under treaties submitted to the Senate for its advice and consent. I would also urge other agencies with the lead on particular implementing legislation to do the same.

Question No. 29. What legal instruments and rules do you believe govern the detention of individuals captured in connection with U.S. military operations in Iraq and Afghanistan?

Answer. As a general matter, the Obama administration is currently conducting an ongoing policy review of its detention authorities. I have not participated in that review, and therefore am not in a position to comment on what recommendations, if any, are being developed by the detention policy task force that may affect the bases for and scope of U.S. detentions in armed conflicts and counterterrorism operations.

Detentions of individuals captured in connection with U.S. military operations in Iraq and Afghanistan are governed by the law of armed conflict and in some cases by rules of local law, although the specific international law rules applicable to a particular detainee will depend upon both the nature of the conflict at a particular point in time, and the status of the individual within the context of that conflict. The legal framework governing the treatment of all detainees in U.S. custody in Iraq and Afghanistan includes, among other provisions of law, the baseline treatment rules found in Common Article 3 of the 1949 Geneva Conventions; the Detainee Treatment Act of 2005 and the Federal Torture Statute; Executive Order 13,491; and various Department of Defense rules and regulations (including the Army Field Manual).

In Iraq, additional rules applicable to detainees as a matter of law have changed as the legal framework governing the U.S. presence in Iraq has changed. U.S. forces currently operate in Iraq pursuant to the "Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq" ("Security Agreement"). Article 22 of the Security Agreement addresses both the disposition of the security detention population in U.S. custody as of the entry into force of the Agreement, and new detainees whom U.S. forces may arrest or capture in the course of their ongoing mission in Iraq.

In Afghanistan, U.S. forces taking part in the International Security Assistance Force ("ISAF") are operating in Afghanistan under (most recently) U.N. Security Council Resolution 1833 (2008), a chapter VII resolution that authorizes Member States participating in ISAF to "take all necessary measures to fulfill its mandate," which includes detention. The United States also continues to lead the coalition called "Operation Enduring Freedom," and to detain individuals under legal authorities that include the Authorization for Use of Military Force of September 18, 2001 (Public Law 107-40), as confirmed by the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004). In addition to the legal requirements noted above, the Department of Defense periodically reviews the status of the detainees it holds in its custody in Afghanistan. Questions relating to whether certain detainees at the Bagram Air Field enjoy constitutionally protected habeas corpus rights are the subject of ongoing litigation.

Question No. 30. What legal instruments and rules do you believe govern the detention of members of al Qaeda captured by the United States outside Iraq and Afghanistan in operations undertaken pursuant to authorization for the use of military force contained in S.J. Res. 23 of September 18, 2001?

Answer. As a general matter, the Obama administration is currently conducting an ongoing policy review of its detention authorities. I have not participated in that review, and therefore am not in a position to comment on what recommendations, if any, are being developed by the detention policy task force that may affect the

bases for and scope of U.S. detentions in armed conflicts and counterterrorism operations.

With regard to detentions undertaken pursuant to the Authorization for Use of Military Force of September 18, 2001 (Public Law 107–40), the Supreme Court held in *Hamdan v. Rumsfeld* that Common Article 3 of the 1949 Geneva Conventions governs the treatment of al Qaeda detainees, 548 U.S. 557, 629–31 (2006). In addition to baseline treatment rules found in Common Article 3, the legal framework governing the treatment of al Qaeda detainees in U.S. custody includes, among other provisions of law, the Detainee Treatment Act of 2005 and the Federal Torture Statute; Executive Order 13,491; and various Department of Defense rules and regulations (including the Army Field Manual).

With regard to detainees held at the Guantanamo Bay Detention Camp, Executive Order 13,492 created a review process whereby participating agencies are required to consolidate information pertaining to Guantanamo detainees and, through a case-by-case status review, to determine whether they can be released or transferred, whether they can be prosecuted, or whether to select another lawful option with respect to their disposition. Executive Order 13,492 additionally ordered the Secretary of Defense to undertake a 30-day review of the conditions of confinement at Guantanamo Bay Detention Camp to ensure their compliance with all applicable laws, including Common Article 3 of the 1949 Geneva Conventions, and the Department of Defense has completed that review and made it public. Beyond these processes, the Supreme Court has confirmed in *Boumediene v. Bush* that Guantanamo detainees have a constitutionally protected right to seek the writ of habeas corpus in U.S. courts. Detainees held at the Bagram Air Field are currently being governed by the legal framework described in my response to Question 29. Questions relating to whether certain detainees at Bagram Air Field enjoy constitutionally protected habeas corpus rights are the subject of ongoing litigation.

Question No. 31. In a 2007 article in the Cornell International Law Journal, you urged the United States to renounce the practice of extraordinary rendition. Under what circumstances, if any, do you believe the United States has the authority to transfer an individual to the custody of foreign law enforcement authorities in the absence of an extradition treaty?

Answer. Under certain circumstances, as some senior administration officials have said, transfers of individuals outside extradition channels may be appropriate and lawful—such as when an individual is subject to deportation proceedings, with any necessary diplomatic assurances, or is transferred with the consent of the sending state to face legal process in the receiving state.

In the article cited, when referring to the practice of “extraordinary rendition,” I was referring in particular to rendition of suspects to conditions of torture. I do not believe that rendition is lawful or permissible where the goal of the rendition is to transfer an individual to a foreign government so that he can be tortured. President Obama’s Executive Order 13,491 on “Ensuring Lawful Interrogations” created a task force specifically to examine the U.S. practice of transferring individuals to foreign nations. One goal of this task force is to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture. I understand that the State Department and its attorneys are playing an important role in that task force.

Question No. 32. In a 2007 comment in Michael Doyle’s book “Striking First,” you discuss international law rules governing the use of force. You propose “that we move to a per se ban on unilateral anticipatory warmaking, with any post hoc justification of such anticipatory actions being asserted as a defense and not in the form of prior permission.”

- Under what circumstances, if any, do you believe a state may legitimately use force in response to threats that have not resulted in an attack on the state?

Answer. I agree with the longstanding U.S. Government view that a state may use military force to defend itself if an armed attack occurs, or in the event that such an attack is imminent. Any action taken in response to such an imminent threat must be necessary and proportional; as Daniel Webster said in 1837 in his famous statement in the *Caroline* case, “the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.” Determining whether the traditional tests of imminence, necessity, and proportionality are satisfied in any particular case can present exceedingly difficult questions that would need to be evaluated in the context of the particular circumstances existing at the time and the precise nature of the threat being faced. In the comment quoted, I was observing the dangers of a doctrine that would reach well beyond these established

principles of self-defense to provide advance authority to an individual state such as North Korea to engage in “unilateral anticipatory warmaking” based on its own subjective balancing of four factors (lethality, likelihood, legitimacy, and legality).

Question No. 33. A 2004 report by a high-level panel convened by then-U.N. Secretary General Kofi Annan stated that “a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.” Do you agree with this statement?

Answer. Yes. As noted above, the quoted statement follows “long established international law.”

Question Nos. 34 and 35. In 2005, the United Nations World Summit endorsed the concept of a responsibility of states to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The concept as endorsed by the United Nations provides that where states manifestly fail to protect their populations from such atrocities, the international community, acting through the U.N. Security Council, is prepared to take collective action in a timely and effective manner to provide such protection. Some commentators have asserted that this doctrine provides a basis on which states, individually or collectively, may use force to protect populations in other states from atrocities.

- Do you believe that international law recognizes a right of individual states to use force without U.N. Security Council authorization to protect populations from atrocities?
- If you believe in such a right, what principles govern such interventions? What impact would such a doctrine have on the general prohibition in international law against the use of force between states except in cases of self-defense?

Answer. As in any case where the use of force is being contemplated, this situation presents some of the most difficult and fact-specific questions with which international law has had to deal. As U.N. Secretary General Kofi Annan said in 1999:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask . . . in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

Address to General Assembly, Sept. 20, 1999, http://www.un.org/News/press/docs/1999/statements_search_full.asp?statID=28.

In any such case, I believe it would be important for the Legal Adviser to examine the case presented with extreme care and thoroughness, taking into account all relevant factors and circumstances, before advising the Secretary of State and the President on how to proceed. In addition to international legal considerations, it would also be important to build as broad support as possible among the American people and the Congress for any decision to use force in such circumstances, including working as closely as possible with the members of this committee.

Question Nos. 36 and 37. On January 26, U.S. Permanent Representative to the United Nations Susan Rice stated that the administration remains “very deeply concerned about the ongoing genocide in Darfur.” Similarly on March 23, Acting State Department Spokesman Robert Wood stated “certainly what’s going on in Darfur is genocide.” Other observers have declined to characterize past and present events in Darfur as constituting genocide.

- Do you believe that events currently taking place in Darfur meet the legal definition of genocide contained in article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide? Please indicate the reasons for your conclusion.
- When then-Secretary of State Colin Powell announced the Bush administration’s position in September 2004 that events then occurring in Darfur met the legal definition of genocide, he based his conclusion on a contemporaneous study conducted by the State Department documenting atrocities in Darfur, including field interviews with over 1,100 Darfur refugees. Has the Obama administration conducted a similar study of events currently taking place in Darfur? If not, does the administration intend to conduct such a study to inform future judgments it may make about the legal character of events in Darfur?

Answer. As reflected in Secretary of State Colin Powell’s September 9, 2004, statement before the Senate Foreign Relations Committee, the Department of State’s

comprehensive review of the situation in Darfur provided the basis for the conclusion that the events on the ground met the requirements for genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. That statement appeared to me to be well-reasoned, as Secretary Powell pointed to, among other things, a consistent and widespread pattern of killings, rapes, burning of villages and other acts that indicated the specific intent to destroy in whole or in part non-Arab groups in Darfur. I am not aware of what recent information may be available within the U.S. Government on this subject or what the Department's plans might be for conducting a study on the subject. However, if confirmed, I would work closely with Secretary Clinton, others at the State Department, and the members of this committee to determine how best to address the situation in Darfur.

Question No. 38. Some have criticized the U.N. Security Council's targeted sanctions regime for failing to provide sufficient due process rights for individuals who are targeted for sanctions. In September, the European Court of Justice in the *Kadi* case invalidated European Community regulations implementing UNSC sanctions against al Qaeda and the Taliban as applied to two individuals on the ground that the process for adopting the sanctions failed to respect the individuals' fundamental due process rights.

- Do you believe the U.N. Security Council's existing sanctions regimes fail to provide adequate protections for the due process rights of targeted individuals?

Answer. Targeted sanctions are an important and effective tool for the Security Council. They are a valuable alternative to the use of force and to comprehensive economic sanctions that affect entire populations. At the same time, I understand why concerns have been raised that targeted sanctions operate unfairly and can be imposed on the wrong people. It is important that the sanctions process not only work, but also be perceived to work in a way that is fundamentally fair. With the support of the United States, the Security Council has taken recent steps to enhance fairness and transparency in the implementation of targeted sanctions. Additional steps to address due process concerns may well be necessary, and if confirmed I would devote considerable attention to working with our partner states to identify and implement those steps.

Question No. 39. If confirmed as Legal Adviser, what steps would you recommend the United States take to respond to such challenges and to ensure that the Security Council retains the authority to implement effective targeted sanctions regimes?

Answer. The United States has a strong interest in ensuring that targeted sanctions, which can be effective foreign policy tools, are imposed and implemented by the Security Council in a manner that is as fair and transparent as possible. For this reason, and because of our own fundamental sense of fairness and due process, I believe that the United States should continue to work with partner states to identify further improvements that could be made to United Nations targeted sanctions regimes.

Question No. 40. In 2007, the U.N. General Assembly failed to elect a U.S. national to the International Law Commission for the first time since the ILC's inception. The next elections to the ILC occur in 2011. What priority do you attach to electing a U.S. national to the ILC in these elections? If confirmed as Legal Adviser, what steps would you plan to take to ensure the election of a U.S. national to the ILC?

Answer. Since its inception in 1947 until the last election in 2007, the International Law Commission (ILC) had always had a U.S. member. Although the members of the ILC serve in their personal capacities, not as representatives of their countries of nationality, I believe that the presence of a U.S. member is good both for the United States, in helping to ensure that U.S. perspectives are taken into account as the ILC undertakes its work, and for the Commission itself, which benefits from the perspective that a U.S. member can bring to bear. I was disappointed that the U.S. candidate in the last ILC election, Professor Michael Matheson, who had served with distinction on the Commission for several years, was not elected. I believe that electing a U.S. national to the ILC in 2011 should be an important priority for the United States.

If confirmed as Legal Adviser, I would seek to identify the strongest possible U.S. candidate, and would welcome counsel from interested members of this committee and other U.S. communities knowledgeable about international law. I would then work within the State Department to make sure that efforts to support the election of the U.S. candidate are treated as a high priority. I think it could be particularly useful to work within the Western European and Others Group (WEOG), including in the early stages, to assure support within the group for the U.S. candidate, and

to impress upon others the benefits to all concerned of once again having a U.S. member of the Commission.

Question No. 41. On April 13, U.S. Permanent Representative to the United Nations Susan Rice, in discussing the Security Council's Presidential Statement on North Korea, stated "First of all, the United States views Presidential statements, broadly speaking, as binding." Do you believe that Presidential statements of the U.N. Security Council generally create legally binding obligations on U.N. Member States under the U.N. Charter?

Answer. As a nominee, I have not participated in discussions around this particular matter. As a general matter, however, I would note that under article 25 of the United Nations Charter, U.N. Member States are legally required "to accept and carry out the decisions of the Security Council in accordance with the [U.N. Charter]." There is nothing in the Charter that specifies the form in which the Council's decisions must be recorded.

Question 42. In response to Question No. 1 of my prehearing questions for the record, you declined to indicate whether you would recommend any changes in the historical U.S. position that the International Covenant on Civil and Political rights does not apply to U.S. actions outside the territory of the United States. While you indicated that it would be premature to suggest what interpretation you would recommend until you have had the opportunity to review fully the U.S. Government's rationale for its position, you are likely generally familiar with the issue from your prior service as Assistant Secretary of State for Democracy, Human Rights, and Labor.

In response to Question No. 2 of my prehearing questions for the record about when it might be appropriate for the executive branch to change its interpretation of a treaty, you indicated that, "In all cases, I would apply a presumption that an existing interpretation of the executive branch should stand, unless a considered examination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinced me that a change to the prior interpretation was warranted."

- In light of this standard and your general familiarity with the issue, are you aware of any present circumstances that you believe would warrant a reexamination of the historical U.S. position that the International Covenant on Civil and Political rights does not apply to U.S. actions outside the territory of the United States? If so, please indicate what circumstances you believe would warrant such a reexamination.

Answer. It is true that I am generally familiar with the issue discussed in this question, including the views expressed by former Legal Advisers Conrad Harper and John Bellinger, both from my academic work and from my prior service as Assistant Secretary of State for Democracy, Human Rights, and Labor. That said, I have not yet had the occasion to conduct the kind of considered examination of the text, structure, negotiating history, purpose and practice under the treaty that I believe a legal adviser should give to an issue before reaching a conclusion on a question of this importance, nor have I had the opportunity to review fully the U.S. Government's rationale for its existing position. For those reasons, I believe that it would be premature to suggest what interpretation I would recommend. If confirmed, I would seek to review thoroughly all of the past legal memoranda by the Legal Adviser's Office and other government law offices on this issue, to examine the various fact patterns to which this interpretation might apply, and to consult with policymakers, other government attorneys, and members of this committee and other interested Members of Congress on this question.

Question No. 43. If confirmed, would you intend to conduct any such reexamination of the U.S. interpretation of the ICCPR?

Answer. For a number of reasons, I believe it is advisable for the Legal Adviser's Office to avoid giving its legal advice in the abstract, but rather, to provide that advice when asked a real-life question, based on a concrete set of facts and an anticipated policy choice. If I were confirmed, and asked to apply the existing U.S. interpretation of the ICCPR, I would determine at that time whether such a decision posed an occasion to conduct the kind of considered legal examination discussed in my prior answer.

Question No. 44. In Question No. 21 of my prehearing questions for the record, I asked what U.S. interests you believe are implicated by efforts of foreign courts to assert criminal jurisdiction over sitting or former U.S. officials for acts undertaken in the course of their official duties. In your response to this portion of the question, you indicated that "There can be no doubt that very important U.S. inter-

ests are implicated by such efforts,” but you did not specify what you believe these interests to be. Please indicate what U.S. interests you believe are implicated by efforts of foreign courts to assert criminal jurisdiction over sitting or former U.S. officials for acts undertaken in the course of their official duties.

Answer. As I suggested in some of my answers to your prehearing questions, prosecutions against U.S. officials in foreign tribunals for acts undertaken in their official duties raise a number of issues that are of very serious concern to U.S. interests. Of course, the United States has a vital and pressing interest not just in enforcing its own laws, but also in protecting U.S. officials and soldiers from baseless or unwarranted charges and prosecutions, and from the chilling effect that possible foreign charges and prosecutions might cast over daily decisionmaking. Such actions may implicate doctrines relating to immunity, overly expansive assertions of foreign criminal jurisdiction, and efforts by political opponents of particular U.S. policies to seek leverage by invoking foreign jurisdictional provisions to initiate criminal complaints against U.S. officials. If confirmed, I would become a U.S. Government official working closely with other U.S. officials who must daily make difficult and sensitive decisions. I, therefore, intend to follow such cases very closely, in coordination with the Department of Justice and other U.S. agencies, and to work with our foreign counterparts to determine how best to deal with these cases.

Question No. 45. You have raised questions about the legality under international law of the 2003 invasion of Iraq, largely on the ground that the U.N. Security Council did not pass a resolution specifically authorizing the use of force in advance. In responses to Question No. 34 and No. 35 of my prehearing questions for the record on the separate issue of whether states may use force without Security Council authorization to protect populations from atrocities, you appear to suggest that there may be some appropriate scope for such action.

- Against this background, please discuss your views on when states may use force without specific prior authorization from the U.N. Security Council. Are the considerations different when states seek to use force to address threats such as terrorism or weapons of mass destruction than they are when force is proposed as a means to address wide-scale atrocities?

Answer. Under article 2(4) of the Charter of the United Nations, all U.N. Member States have agreed to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. However under article 51 states are permitted to use force without prior Security Council authorization when exercising their inherent right of individual or collective self-defense if an armed attack occurs, including to use force to protect their own nationals. As I noted in my answer to Senator Lugar’s prehearing Question No. 33, I agree with the 2004 report by a high-level panel convened by then-U.N. Secretary General Kofi Annan that states that “a threatened state, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.” Cases involving the possible use of force as a means to address widespread atrocities present a different set of issues insofar as the rationale for using force in such cases is not based on the right of self-defense. There are, in fact, widely differing views regarding whether using force for humanitarian purposes is permissible under international law.

As I state in my answer to a question from Senator DeMint, I believe that the U.S. use of force in Kosovo was both lawful and the right thing to have done. The Kosovo intervention was expressly premised on humanitarian intervention grounds and had broad multilateral support. There was no reasonable alternative to the use of force. As Assistant Secretary of State for Democracy, Human Rights and Labor during that period, I read extensive reports indicating that forces from the Federal Republic of Yugoslavia and Serbia were engaged in massive and sustained repression against the Kosovar Albanian population, they had acted in flagrant contravention of resolutions that the U.N. Security Council had adopted under chapter VII, and a humanitarian catastrophe was unfolding that threatened not only the people of Kosovo but the security and stability of the entire region. The intervention was supported by a multilateral NATO decision, and significantly, shortly after NATO commenced military operations, a resolution introduced in the Security Council would have called NATO’s use of force unlawful, but that resolution was soundly defeated by a 12 to 3 vote.

If confirmed as Legal Adviser, I would similarly want to look carefully at the specific facts and circumstances of any particular proposed use of military force involving such humanitarian considerations before rendering a legal opinion regarding its permissibility under international law.

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD
TO HAROLD KOH BY SENATOR DEMINT

Transnational Law

Question. In your article *Why Transnational Law Matters* (24 Penn.State International Law Review 745-753 (2006)), you describe the difference between nationalists and transnationalists, specifically saying that:

The transnationalists view domestic courts as having a critical role to play in domesticating international law into US law, while nationalists argue instead that only the political branches can internalize international law. The transnationalists believe that US courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that the US courts should limit their attention to the development of a national system.' (p 749).

Which faction do you place yourself in?

Answer. The purpose of this article was to argue, as a legal educator, that the world is growing increasingly interdependent; that transnational law is gaining public visibility; and that law schools therefore need to tackle the difficult job of making sure that 21st century law students are trained and knowledgeable about international law and policy. In the passage quoted, I explained that "the Supreme Court has now divided into transnationalist and nationalist factions," with the terms "transnationalist" and "nationalist" describing different judicial philosophies, and with several members of the Court in each camp. As someone who is not a judge and who is not being nominated to a judicial position, I would not presume to place myself into either of these two judicial camps. I do believe, as I have stated in my writings, that the former position, which has strong historical roots in the Framers' vision of the Constitution, is more persuasive. As I noted in my hearing and in response to Senator Lugar's Pre-Hearing Question 10, if confirmed as Legal Adviser, I would see the primary value of transnational legal process as a means to persuade other nations to obey international law.

Question. You have written that transnational legal processes can and should be used to develop and eventually "bring international law home" to have binding force within the U.S. legal system. Do you think it is appropriate as Legal Advisor to support such efforts to use litigation to incorporate international legal norms within U.S. law?

Answer. The question of whether the Legal Adviser should support the incorporation of international legal norms in a particular case will depend on the legal issues and facts of the case as well as a range of other factors, many of which I discussed in the specific context of the Alien Tort Claims Act in my answer to Senator Lugar's Pre-Hearing Question #22. The factors include an assessment of whether adjudication of the claims at issue at that time would protect or impede the conduct of U.S. foreign policy interests, and whether the filing would be necessary to ensure consistency with the U.S.'s views on the content of international law and guarantee respect for the separation of powers, including the authority of Congress and the courts.

Question. I'm concerned by the use of so-called "human rights" treaties to bypass the ordinary processes of representative government on matters of social and economic policy. You've been an ardent champion of this use of treaties.

As a government that was founded on the consent of the governed, how do you see the voice of the American people in the process of "domesticating" international law?

Do you see any limit in law on the use of treaties to adopt domestic policies?

Answer. As I have explained in my writings, the American people, through our Constitution and elected representatives, can determine whether and when international law applies in the United States in a number of ways. To provide only a few examples, a Congress elected by the people can ratify a treaty or incorporate international law into a statute; a President elected by the people can incorporate or exclude international law from domestic law in an executive order; and a judge who has been appointed by elected officials and confirmed by elected officials can interpret a treaty or international law when required to do so by statute. Also, if Congress objects to the way in which the courts have applied international law, Congress is always free to act. My view is that the domestic impact of treaties can be limited in a variety of circumstances, including when such treaties are non-self-executing, or when giving domestic effect to the treaty would violate the constitutional separation of powers, the Bill of Rights (particularly the Tenth Amendment), or another provision of the U.S. Constitution.

Question. This committee may consider three important treaties in the near future: The UN Convention on the Law of the Sea, the Convention for the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child.

Do you believe it is legal and appropriate for the U.S. government to attach statements of “non-self-execution” to these treaties such as those that were attached to the International Convention on Civil and Political Rights?

What do you believe are the legal limits on the Senate’s ability to condition its consent to a treaty on a declaration that the treaty is non self-executing?

Answer. Each provision of a treaty must be considered on a case-by-case basis when it comes to the issue of domestic legal effect. For example, in the case of the Law of the Sea Convention, the Committee’s proposed resolution of advice and consent (which has been approved twice by this Committee) provides that the Convention is not self-executing, except for certain provisions regarding privileges and immunities. I would consider it legal and appropriate for the United States to accede to the Convention on that basis. At such time as this Committee and the Senate might choose to consider other treaties, such as the Convention for the Elimination of Discrimination Against Women or the Convention on the Rights of the Child, I would, if confirmed, expect to consult with the Senate regarding the domestic legal effect of those treaties’ provisions. As I noted in my oral testimony and in my answers to Senator Lugar’s prehearing Questions for the Record 6 and 27, in my writings, I have long argued that Article II of the Constitution mandates that the President and the Senate act as partners in the treaty process. If confirmed, I would respect the Senate’s role in determining the domestic effect of treaties by consulting with the Senate on this and other aspects of proposed treaties.

Question. In a Supreme Court brief on the *Medellin* case, you argued a treaty should be regarded as self-executing solely because the State Department legal adviser testified that it was self-executing. However, the Supreme Court instead ruled that a treaty is not self-executing unless “the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on those terms.”

If you are confirmed as legal adviser, would you take the position that a treaty is self-executing when the actual text of the treaty doesn’t make that clear?

Answer. Under our Constitution, the Supreme Court has the final duty to interpret a particular treaty and to say what it requires as a matter of domestic law, and I would, of course, uphold the Supreme Court’s decision in the *Medellin* case and apply its holding to other treaties. As noted in the majority opinion, the Court’s approach does not “require that a treaty provide for self-execution in so many talismanic words Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.” *Medellin v. Texas*, 128 S. Ct. 1346, 1366 (2008).

Convention for the Elimination of Discrimination Against Women (CEDAW)

Question. In 2002, you testified before this committee that it’s “flatly untrue” that “CEDAW supports abortion rights” and you stated that “several countries in which abortion is illegal—among them Ireland, Rwanda, and Burkina Faso have ratified CEDAW.”

Were you aware that the CEDAW committee issued several reports opposing restrictions on abortion, before the date of your testimony?

Further, were you aware that one of those reports expressed concerns about the restrictive abortion laws of Ireland and—one of the countries whose ratification of CEDAW you cited as support for your claim that CEDAW doesn’t support abortion rights?

In your testimony, you also stated that it was false that CEDAW would require decriminalization of prostitution.

Were you aware that the CEDAW committee report on prostitution included its recommendation that China decriminalize prostitution?

In light of these reports do you still stand by the testimony that you offered to the committee in 2002?

Answer. Yes. When I testified as a private citizen regarding my understanding of the CEDAW treaty in 2002, I provided my views based on my best reading of the treaty in keeping with longstanding canons of treaty interpretation under international law. Article 17 of the Convention states that the Committee’s purpose is to consider “the progress made in the implementation of the ... Convention” and Article 21 provides that the Committee “may make suggestions and general recommendations ... “Neither of these provisions, nor any other provision of the Convention, vests the CEDAW Committee with legally binding authority over a State Party.

Over the years, I have read many of the CEDAW Committee reports, but I have never considered the views of the CEDAW Committee—as opposed to the text of the treaty—which is the only legal instrument that the United States might ratify—to be legally binding on the States parties, or upon other States who might eventually ratify the treaty. The Committee was and is free to offer its interpretation of particular issues as applied to particular countries, just as the U.S. Government would be free to disagree with the CEDAW Committee were the United States to become party to the treaty and to reach different conclusions on its meaning and scope. Accordingly, I would not alter any of my conclusions in the 2002 testimony simply because they might differ from the recommendations or views of the CEDAW Committee.

U.S. Use of Force

Question. One of your predecessors, William Taft, argued that the 2003 invasion of Iraq was legal under international law and offered a number of legal opinions to that effect during his tenure. Do you agree with his interpretation of international law governing the use of force in Iraq?

Answer. Mr. Taft was an outstanding State Department Legal Adviser, whom I hold in the highest regard. Mr. Taft's view, with which I am in agreement, was that the question whether the Iraq invasion conformed with international law turned on the proper interpretation of the relevant resolutions that had been adopted by the UN Security Council in the dozen years before the invasion, leading ultimately to the adoption of UN Security Council resolution 1441 in November 2002. However, as I indicated in my response to Senator Isakson's question in the Committee's hearing on April 28, in looking closely at those resolutions, my conclusion was that their wording did not provide the necessary support under international law. Thus, while Mr. Taft and I approached our analysis with a similar methodology, we ultimately came to different legal conclusions. This was an issue about which reasonable lawyers could differ, and which in fact generated a significant amount of disagreement, within both the United States and foreign legal communities. I believe that one consequence of this lack of consensus as to whether the resolutions provided the necessary support was that it hindered U.S. efforts to attract as broad political support for our military actions in Iraq as we would have liked. We have since needed the help of the United Nations and the international community to rebuild Iraq after the war, and in doing so, we have had to overcome the absence of the broadest possible level of initial support for the 2003 military action.

Question. In your testimony, you claim that the war in Iraq violated international law but not domestic law. However, you have also made the statement that "international law is federal law." If the war in Iraq violated international law, then, didn't it also violate domestic law?

Answer. No. As I indicated in my testimony, the 2003 war in Iraq was authorized by a joint resolution of Congress. I have never argued that any violation of international law automatically constitutes a violation of U.S. federal law. Rather, the statement referenced came from an article in which I argued that the proper reading of existing U.S. judicial doctrine is that federal courts retain legitimate authority selectively to incorporate bona fide rules of customary international law into federal common law on a case-by-case basis.

Question. According to newspaper reports, the U.S. government has been engaged in the use of covert military attacks in at least seven different countries, as part of the "global war on terrorism." Including missile attacks in Yemen and Pakistan. Do you believe these attacks are lawful under U.S. and international law?

Answer. I am not privy to all of the facts regarding the situations mentioned in the question, and therefore I am not in a position to express a firm legal opinion on these particular actions. More generally, however, I note that in the Authorization for Use of Military Force (AUMF) of September 18, 2001 (public Law 107-40), Congress authorized the President to "use all necessary and appropriate force" against al Qaeda, the Taliban, and associated forces. The language of the AUMF was not geographically limited. As stated in the October 2001 letter from the United States notifying the Security Council pursuant to Article 51 of the UN Charter: "We may find that our self-defense requires further actions with respect to other organizations and other States." In any case, as I have noted in my answer to Senator Lugar's prehearing Question 32, whenever the United States uses force in self-defense, it must do so in a manner that is consistent with the principles of necessity and proportionality.

Question. Do you believe the United States acted lawfully when it attacked Serbia during the 1999 Kosovo conflict despite the lack of any Congressional authorization or authorization from the United Nations?

Answer. I fully supported the 1999 NATO military campaign. I am of course aware that some have criticized the decision to use force in that case, but I continue to believe today that it was both lawful and the right thing to have done. As Kofi Annan said in 1999: "To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask ... in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Security Council authorization, should such a coalition have stood aside and allowed the horror to unfold. The Kosovo intervention was expressly premised on humanitarian intervention grounds and had broad multilateral support. In the specific case of Kosovo, there was no reasonable alternative to the use of force. As Assistant Secretary of State for Democracy, Human Rights and Labor during that period, I read extensive reports indicating that forces from the Federal Republic of Yugoslavia and Serbia were engaged in massive and sustained repression against the Kosovar Albanian population, they had acted in flagrant contravention of resolutions that the UN Security Council had adopted under Chapter VII, and a humanitarian catastrophe was unfolding that threatened not only the people of Kosovo but the security and stability of the entire region. The intervention was supported by a multilateral NATO decision. In addition, shortly after NATO commenced military operations, a resolution was introduced in the Security Council that would have called NATO's use of force unlawful, but that resolution was soundly defeated by a 12 to 3 vote.

Legal Protections

Question. Do you support Senate Ratification of the International Criminal Court?

Answer. In my academic writings, I have argued that the United States should pursue a strategy of "constructive engagement" with the International Criminal Court—that is, work with the Court to make its functioning more fair. As I explained in my answers to Senator Lugar's Pre-Hearing Questions, a recent bipartisan task force of the American Society of International Law has similarly recommended that the United States announce a policy of "positive engagement" with the International Criminal Court. If confirmed, I would wish to engage in extensive discussion with officials across the U.S. Government, including military commanders and experts and members of this Committee, before I would deem it advisable to recommend that the Secretary of State and the President that the United States take any specific step with regard to the international Criminal Court. Among other things, the U. S. Government has long expressed concern about the authority of the ICC Prosecutor under the Rome Statute to initiate investigations of U.S. soldiers and government officials stationed around the world. Particularly because the United States has the largest foreign military presence in the world, this is an important issue on which we would need further discussion and clarification within the government before taking any particular action regarding the International Criminal Court.

Question. Article 17 of the International Criminal Court states that the Court will not pursue an investigation or prosecution when 1) a nation is investigating or prosecuting a case or 2) an investigation has been completed.

Given President Obama's statements not to pursue legal action against CIA agents who may have participated in torture, do you believe this leaves them open for potential prosecution by the International Criminal Court?

Answer. No. The United States, in both the Clinton and the Bush Administration, has made clear its view that the International Criminal Court should not have jurisdiction over U.S. personnel under a treaty to which the United States is not a party.

Question. To the extent that U.S. forces detain members of al Qaeda, in Guantanamo or Afghanistan, do you believe these people are protected by international human rights law or by the laws of armed conflict?

Answer. The laws of armed conflict and international human rights law have at their roots certain overlapping principles. The specific application of each of these bodies of law to a particular set of facts raises a range of complex issues, many of which are the subject of ongoing litigation or the topic of one of the ongoing Executive Branch task forces, and thus would not be prudent for me to address them in this setting.

As a general matter, there will be circumstances in which the two bodies of law are mutually exclusive, as in peacetime (when the law of war is inapplicable) and

circumstances in which they may not be (as in a non-international armed conflict occurring in a state's own territory). The question is particularly complicated as to many of these detainees, whose specific situation may not be squarely addressed by existing bodies of law. It is, however, clear from the Supreme Court's decision in *Hamdan v. Rumsfeld*, that detention of alleged Al Qaeda forces at Guantanamo is governed by Common Article 3 of the 1949 Geneva Conventions, which mandates that such detainees be afforded certain specified baseline humane treatment protections. More generally, however, the U.S. government has noted in briefs arguing that its detention authority as to detainees at Guantanamo is premised on the Authorization for the Use of Military Force "as informed by the laws of war," but has also noted that the laws of war are "less well-codified with respect to our current, novel type of armed conflict against armed groups such as al Qaeda and the Taliban." If confirmed, I would look forward to consulting with members of this Committee and working on these Issues.

Question. Recently, "universal jurisdiction" has been invoked in Spain to potentially prosecute six officials from the Bush administration for giving legal advice that allegedly sanctioned torture. Universal jurisdiction has also been the basis for or potential prosecutions of Israeli officials involved in military operations in the Gaza Strip.

Given your past advocacy of transnational legal processes and the invocation of universal jurisdiction in the United States under the Alien Tort Statute, do you believe it is appropriate for Spain to open that investigation into U.S. officials? At what point would it be appropriate for the United States to protest such an investigation?

Answer. Prosecutions against U.S. officials in foreign tribunals for acts undertaken in their official duties raise a number of issues that are of very serious concern to U.S. interests. As a nominee, I have not been involved in any interagency discussions that may have occurred regarding the Spanish cases. I do have deep faith, however, in the United States' vigorous democratic tradition, independent judiciary, and well established commitment to the rule of law. I therefore believe that the United States, as the nation with the predominant interest in this matter, is in the best position to decide whether to take any action against former U.S. officials for allegedly improper or illegal conduct that occurred in course of their official duties. If confirmed, I would work with my colleagues at the Department of Justice and other agencies to determine how best to deal with such ongoing foreign cases.

Alien Tort Statute Litigation

Question. You have clearly expressed the view that U.S. companies may be sued in U.S. courts for violations of international human rights laws for conducting business with governments that are later deemed to have committed harm against their own citizens under the Alien Tort Statute (ATS).

Do you believe it is appropriate to sue companies retroactively for conduct that U.S. laws did not prohibit at the time of their activities? Is it not the role of Congress and the President to determine when sanctions on businesses and relations with foreign governments should be placed?

Aren't lawsuits like the South African apartheid case, currently pending in the Southern District of New York, fundamentally unfair because they are brought after activities occur and when there is no actual controlling legal guidance on when a company must refrain from conducting business or selling a product to a particular government?

In light of your public views, would you consider recusing yourself from cases regarding the ATS?

Answer. A defendant in an Alien Tort Claims suit can only be held liable if, at the time of the alleged misconduct, the tort was committed in violation of a well established international law norm. In addition, the Alien Tort Statute itself is U.S., not international law; and while international law provides a frame of reference for limiting the category of tort claims over which the courts have Alien Tort Statute jurisdiction, the decision to allow claims of this nature to be raised in federal courts was made by U.S. statute, not imposed by any external legal system. The specific question about the South African apartheid case relates to a matter of pending litigation in which the United States has participated on which I do not believe it would be prudent for me to comment.

If confirmed as Legal Adviser, I would uphold the highest ethical standards, and avoid not only actual impropriety, but also endeavor to avoid even the appearance of impropriety. I have indicated my general plans regarding recusal in my Ethics Undertaking Letter of February 18, 2009 to James H. Thessin, Deputy Legal Adviser and Designated Agency Ethics Official of the U.S. Department of State, and in my

answers to Senator Lugar's prehearing Counsel Questions 2-4. As an academic who has written and spoken widely, I have expressed my public views on a broad array of legal issues, and nominees could not serve effectively were they to recuse themselves on every matter raising an issue on which they had previously expressed an opinion. If confirmed, I would make specific recusal decisions when presented with a concrete set of facts, after full consultation with State Department ethics officials, and with the goal of upholding the highest ethical standards.

The Supreme Court and the Constitution

Question. When you write that the Supreme Court "must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international" (Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l. L. 43, 53-54 (2004)), isn't it true that the only way for the Supreme Court to do that "coordinating" is by adjusting its interpretations of the Constitution to more closely comport with rules of foreign and international law?

Do you agree that the Supreme Court cannot alter the rules of foreign and international law?

This means that the only way the Supreme Court can "coordinate" is by changing its interpretations of the Constitution.

Answer. The Supreme Court can affect rules of foreign and international law through its rulings in a number of ways. The manner in which the U.S. Supreme Court construes a treaty to which the United States is a party can influence the way in which other countries or foreign or international courts choose to construe the same treaty. Likewise, the Supreme Court's interpretation of customary international law can affect how foreign courts choose to construe the same rules. And in the same way as a federal court sitting in diversity jurisdiction may construe the law of the state in which it sits in a way that proves instructive to the highest court of that state, the U.S. Supreme Court can construe a principle of international law in a way that influences the way a foreign court chooses to construe that same principle.

Likewise, the U.S. Supreme Court need not change its interpretation of the U.S. Constitution in order to take international law into account. The Court can look to international law when resolving open questions of constitutional law, as it did when it held that the Warrant Clause of the Fourth Amendment does not apply to a search of nonresident aliens' property abroad, citing the international law rule that a U.S. magistrate cannot validate a search within the territory of a foreign sovereign. Or, as I discussed with Senator Corker at my confirmation hearing, the Supreme Court can interpret a domestic act that incorporates international law, for example when the President issues a proclamation acknowledging a customary international law rule or Congress enacts a statute that references international law.

General Philosophy

Question. In our meeting and your other answers before this committee, you have often commented that you believe as an academic you believe it is your role to inject ideas into the "marketplace" of idea, but you draw a distinction that when in government positions your job is to follow the law. However, as a legal advisor your job will be to interpret laws on behalf of the State Department. Are we to believe that you will discard all of your personal thoughts and opinions from your interpretations of the law when you advise the State Department?

Answer. No, I certainly will not discard all of my personal thoughts and opinions if confirmed as Legal Adviser. But having spent my career as a scholar and a government lawyer, I fully understand the differences between those two roles. As I explained in my answer to Senator Lugar's prehearing Question for the Record 16 and in my colloquy at the hearing with Senator Feingold, if confirmed as a government official, I would uphold and defend the laws of the United States, even if I had personal objections to those laws. And as I noted to Senator Shaheen at my confirmation hearing, "As an academic, you speak in your own voice. When you are in the government, you are one of many voices working as part of a team."

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD
TO HAROLD KOH BY SENATOR WICKER

Question. In your testimony during your April 28, 2009, nomination hearing, you stated that, in your professional opinion, the Bush Administration's 2003 decision to invade Iraq was, in the context of international law, illegal. In your professional legal opinion, outside of cases in which an imminent threat is present, is a legally binding United Nations Security Council Resolution required before the U.S. can

make the decision to go to war? In your legal opinion, do the other permanent members of the United Nations Security Council (Russia, China, the United Kingdom, and France) therefore exercise a veto over the U.S. decision to go to war? Since the 1999 NATO bombing of Yugoslavia did not have the benefit of a United Nations Security Council Resolution authorizing military operations, was it therefore illegal?

Answer. The permanent members do not have any veto over a United States decision to use military force for any permissible purposes. Under Article 51 of the UN Charter, states are permitted to use force without prior Security Council authorization when exercising their inherent right of individual or collective self defense if an armed attack occurs, including to use force to protect their own nationals without Security Council authorization. As I noted in my answer to Senator Lugar's pre-hearing Question 33, I agree with the 2004 report by a high level panel convened by then U.N. Secretary General Kofi Annan that states that "a threatened State, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportional." Cases involving the possible use of force as a means to address widespread atrocities present a different set of issues insofar as the rationale for using force in such cases is not based on the right of self-defense.

There are in fact widely differing views whether using force for humanitarian purposes is permissible under international law. I believe that the U.S. use of force in Kosovo was both lawful and the right thing to have done. The Kosovo intervention was expressly premised on humanitarian intervention grounds and had broad multilateral support. There was no reasonable alternative to the use of force. As Assistant Secretary of State for Democracy, Human Rights and Labor during that period, I read extensive reports indicating that forces from the Federal Republic of Yugoslavia and Serbia were engaged in massive and sustained repression against the Kosovar Albanian population, they had acted in flagrant contravention of resolutions that the UN Security Council had adopted under Chapter VII, and a humanitarian catastrophe was unfolding that threatened not only the people of Kosovo but the security and stability of the entire region. The intervention was supported by a multilateral NATO decision, and significantly, shortly after NATO commenced military operations, a resolution introduced in the Security Council would have called NATO's use of force unlawful, but that resolution was soundly defeated by a 12 to 3 vote.

If confirmed as Legal Adviser, I would similarly want to look carefully at the specific facts and circumstances of any particular proposed use of military force involving such humanitarian considerations before rendering a legal opinion regarding their permissibility under international law.

Question. In your testimony during your April 28, 2009, nomination hearing, you stated that, in your professional opinion, the Bush Administration's 2003 decision to invade Iraq was, in the context of international law, illegal. You also stated that you were not able to determine the legality of Israel's 1981 bombing of Iraq's Osirak nuclear reactor because you were not in the Israeli Government at the time of the bombing. You explained you were not privy to any information that the Israeli Government may have held that the Osirak nuclear reactor presented an imminent threat to Israel. As a result, you stated you believed the Israeli Government's bombing of the Osirak reactor may have been legally protected under the right to self-defense granted to members of the United Nations under the United Nations Charter. In light of the fact that you were not been a member of the United States Government in 2003 or the following years, what is substantively different between the two incidents that allows you to pronounce definitively on the United States' 2003 invasion of Iraq without being able to on Israel's 1981 bombing of Osirak?

Answer. The Bush administration's justification for the use of force in Iraq in 2003 relied on the interpretation of publicly available facts and legal instruments that were not similarly available in the 1981 Osirak case. Specifically, the Bush administration set out its justification for the Iraq invasion in a March 20, 2003, letter from the U.S. Permanent Representative to the United Nations to the President of the Security Council, and this view was elaborated in a law review article co-authored by former State Department Legal Adviser William Taft in 2003 (97 A.J.I.L. 557 (2003)). That legal rationale turned on a particular interpretation of publicly available documents: the relevant resolutions that had been adopted by the Security Council in the dozen years before the invasion, leading ultimately to the adoption of UN Security Council resolution 1441 in November 2002. As an international lawyer, I undertook my own analysis of these resolutions, but came to a different legal conclusion about how they should be interpreted.

Mr. Taft was an outstanding State Department Legal Adviser, whom I hold in highest regard, and this was an issue about which reasonable international lawyers

could differ, and which in fact generated a significant amount of disagreement, within both the United States and foreign legal communities. As an international lawyer, I undertook my own analysis of these resolutions, but came to a different legal conclusion about how they should be interpreted. Mr. Taft and I both used the same methodology: we agreed that the question whether the Iraq invasion conformed with international law turned on the proper interpretation of the relevant resolutions that had been adopted by the UN Security Council in the dozen years before the invasion. As I indicated in my response to Senator Isakson's question in the Committee's hearing on April 28, in looking closely at those resolutions, my conclusion was that their wording did not provide the necessary support under international law.

In the *Osirak* case, Israel's justification was not based on UN Security Council resolutions, but on the inherent right of self-defense. As I have noted in my answer to Senator Lugar's prehearing Question 32, determining whether the requirements of such a justification are satisfied in any particular case can present exceedingly difficult questions that would need to be evaluated in the context of the particular circumstances existing at the time and the precise nature of the threat being faced.

Question. In your professional legal opinion, are all treaties, signed by the Executive Branch and ratified by the Senate, that implicate domestic law self-executing? Are such treaties enforceable by a court-of-law without Congress and the Executive Branch first enacting implementing statutes and regulations? If such treaties are self-executing, please list which treaties the Government or the United States has heretofore not considered self-executing that it ought to have considered self-executing. Following Senate ratification of treaties that implicate domestic law, who has standing to sue using those treaties as a controlling legal authority? If you are confirmed as Department of State Legal Advisor, will you advise the President, the Secretary of State, the Attorney General, and the Solicitor General of the United States to defend the self-executing nature of treaties that implicate domestic law in a court-of-law?

Answer. I do not consider that all treaties or treaty Provisions are self-executing. The Supreme Court has made this clear, beginning in *Foster v. Neilson*, 27 U.S. 253 (1829), and recently in *Medellin v. Texas*, 128 S.Ct. 1346 (2008). A self-executing treaty may not be directly enforceable in a U.S. court in all respects. For example, a self-executing treaty does not necessarily create private rights of action in U.S. courts, and the same treaty may have both self-executing and non self-executing provisions. I respect the Senate's role in determining the domestic effect of treaties and, if confirmed, I would expect to consult with the Senate regarding the domestic legal effect of new treaties being considered by the Senate. With respect to any particular treaty, I can assure you that I would be committed to providing the best possible legal advice to the Secretary of State and other State Department officials, consistent with the Constitution and laws of the United States.

Question. In your testimony before the U.S. Senate Committee on Foreign Relations on June 13, 2002, in support of Senate advice and consent of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), you testified that it is 'flatly untrue' that 'CEDAW supports abortion rights' and that 'on its face, the CEDAW treaty itself is neutral on abortion'. Article 17 of the CEDAW treaty establishes a Committee under United Nations auspices charged with implementing CEDAW. That Committee has on several occasions advised CEDAW states-parties that it is inconsistent with their treaty obligations to prohibit or place limitations on abortion access. Please address this topic in light of your 2002 testimony.

Answer. Article 17 of the Convention states that the Committee's purpose is to consider "the progress made in the implementation of the ... Convention" and Article 21 provides that the Committee "may make suggestions and general recommendations." Neither of these provisions, nor any other provision of the Convention, vests the CEDAW Committee with legally binding authority over a State Party. I have never considered the views of the CEDAW Committee—as opposed to the text of the treaty, which is the only legal instrument that the United States might ratify—to be legally binding on the States parties, or upon other States who might eventually ratify the treaty. The Committee was and is free to offer its interpretation of particular issues as applied to particular countries, just as the U.S. Government would be free to disagree with the CEDAW Committee were the United States to become party to the treaty and to reach different conclusions on its meaning and scope.

Question. Despite the Senate's declining to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) heretofore, is the

United States nevertheless legally-bound by CEDAW as a result of its widespread international acceptance? Is CEDAW self-executing? If the United States is ever legally-bound by CEDAW, would it correspondingly be legally-bound by the decisions of the United Nations CEDAW Committee?

Answer. No, the United States is not legally bound by CEDAW. As Assistant Secretary of State for Democracy, Human Rights and Labor, and as an academic, I argued that the United States should ratify the treaty precisely because it was not yet legally bound to its provisions, and my view is that remains true today as well. With respect to whether CEDAW is self-executing for purposes of United States law, I note that the 1980 letter of submittal from then-Secretary of State Muskie, which accompanied President Carter's letter transmitting the Convention to the United States Senate, stated that: "Virtually all of the articles of the Convention are, in our judgment, not self executing and would probably not be construed as such as they appear to contemplate that legislative or other implementing action be taken by the parties (beyond ratification) in order to carry out the Convention's provisions."

If the Senate were to consider giving its advice and consent to the treaty, it would need to decide whether it agreed with that assessment. As a general matter, as I noted in my oral testimony and in my answers to Senator Lugar's prehearing Questions for the Record 6 and 27, I have long argued in my writings that Article II of the Constitution mandates that the Senate and the President act as partners in the treaty process. If confirmed, I would respect the Senate's role in determining the domestic effect of this treaty by consulting with the Senate on this and other aspects of the proposed treaty.

Finally, as noted in greater detail in my answer to Senator Wicker's Question 4, were the United States to become a State Party to the Convention, it would not be legally bound by decisions of the CEDAW Committee, which do not form part of the text of the treaty.

Question. During your April 28, 2009 nomination hearing, you testified that the United States' 2003 invasion of Iraq was illegal in the context of international law. I inquired whether, in your professional legal opinion, Iraq was entitled to a remedy at-law as a result of its being the subject of an unjust war. You responded by invoking the *Jus in bello*/*Jus ad bellum* distinction. Please clarify how the distinction applies.

Are countries that are attacked in violation of international law, but wherein the war is waged justly, entitled to a remedy-at-law?

Are countries that are legally attacked, but wherein the war against them are unjustly waged, entitled to a remedy-at-law? If so, is it therefore the case that, in your professional legal opinion, Iraq is not entitled to a remedy-at-law despite having been subject to what is in your view an illegal invasion?

Answer. My point at the hearing was that any international legal violation in the way the United States may have decided to use force in Iraq (which is governed by the law *Jus ad bellum*) would not automatically call into question the legality of any of the various actions taken by the United States in the course of conducting that war (which is governed by the law of *Jus in bello*). If a foreign government believed that the United States had illegally used force against it and chose to pursue such a remedy before either a domestic or international court, it would encounter severe—and in my view, preclusive—obstacles related to jurisdiction, standing, justifiability, admissibility and enforcement.

RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD TO HAROLD KOH BY SENATOR CASEY

Private Security Contractors

Question. Because of insufficient numbers of U.S. government diplomatic security personnel at the State Department, the Department has turned to the use of private security contractors such as Blackwater Worldwide (now XE) and Triple Canopy to provide personal protective services in areas such as Iraq and Afghanistan. Today the State Department has contracts with private security contractors providing about 1,400 armed personnel in Iraq, and about 75 armed contractors in Afghanistan.

I have expressed my strong concern over the excessive use of PSCs, especially in Iraq, in the aftermath of the incident at Mansoor Square in the fall of 2007 when Iraqi civilians were gunned down after Blackwater guards opened fire in a crowded public square with no apparent provocation. It left a stain on the reputation of all U.S. military forces operating in Iraq, even though only private security contractors were involved. I have worked with Chairman Kerry in encouraging the State

Department to reduce the role of PSCs as we draw down our combat troop levels in Iraq.

I have also been concerned about a potential gap in our law that prevents the United States from prosecuting criminal offenses committed by U.S. contractors assigned to federal agencies other than the Defense Department overseas. Accordingly, the Blackwater contractors involved in the September 2007 incident may be able to walk away because they were working for the State Department.

Question. How would you draw the distinctions between functions that private security contractors can serve and those reserved for U.S. federal employees under the “inherently governmental” restrictions?

Answer. My understanding is that the State Department’s private security contractors who protect U.S. Government officials in Iraq and Afghanistan are not authorized to engage in law enforcement duties (such as arresting or detaining suspects) or offensive combat operations. The contractors’ exclusion from these functions are two of the factors that contribute to the Department’s determination that their functions are not “inherently governmental”

The determination of whether certain functions are inherently governmental is guided by laws and regulations that leave most specific cases to the judgment of the relevant department or agency. If confirmed, I will work with other senior officials to ensure that the State Department continues to act in full compliance with all applicable laws and regulations with regard to the use of contractors, including the “inherently governmental” restriction.

Question. What is your understanding as to whether the United States or Iraq exercise primary criminal and civil jurisdiction over those contractors not under contract to DOD who operate in Iraq? What implications does this have for continuing U.S. operations in Iraq?

Answer. My understanding is that since the entry into force of the U.S.-Iraqi Security Agreement and the Iraqi Parliament’s suspension of Coalition Provisional Authority (CPA) Order 17, all U.S.-affiliated contractors operating in Iraq are now subject to the criminal and civil jurisdiction of Iraqi courts. U.S. law also provides a basis for the United States to exercise jurisdiction over crimes that contractors commit in Iraq in a number of circumstances.

With regard to the impact of these legal rules on U.S. operations, my understanding is that the immunity from Iraqi legal process for contractual acts granted by CPA Order 17 was unusual, and that the situation today in Iraq is now in line with most other countries around the world where our contractors operate. For example, U.S. contractors in Afghanistan have never possessed blanket immunity from Afghan legal process. In this period of transition in Iraq, there are numerous and significant issues to resolve to ensure that U.S. operations are able to continue safely, while respecting Iraqi law. I also understand that several joint U.S.-Iraqi committees have been established to address these complex issues, including the rules governing contractor operations. If confirmed, I look forward to participating in discussions in this area and consulting with you and other interested members of the Committee and the Senate regarding these important questions.

Question. In your opinion, are U.S. laws sufficient to hold private security contractors and their employees liable for any actions in overseas contingency operations in Iraq and Afghanistan if those actions are not in support of military operations? Would the protection of State Department, USAID, and other U.S. government officials in those countries be considered in support of military operations?

Answer. As Secretary Clinton has said, the Department of State needs to take a hard look at the issue of security contractors abroad and how they are used and held accountable, while at the same time recognizing that we need to provide security for our diplomats if they are to perform their vital mission in Iraq and other dangerous places. If confirmed, I will ensure that my office has reviewed the full range of legal issues that the Department’s use of private security contractors generates and whether additional legislation might be beneficial. As an unconfirmed State Department nominee, I would need to defer to the Department of Justice on the specific question of whether any given U.S. contractor is acting “in support of the DOD mission overseas within the meaning of the Military Extraterritorial Jurisdiction Act, a question that is at issue in an ongoing criminal proceeding.