Questions for the Record Submitted to
Legal Adviser-Designate Harold Hongju Koh by
Senator Jim DeMint (#1)
Senate Foreign Relations Committee
April 28, 2009

Question:

Transnational Law

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#2)
Senate Foreign Relations Committee
April 28, 2009

Question:

Transnational Law

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#3)
Senate Foreign Relations Committee
April 28, 2009

Question:

Transnational Law

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#4)
Senate Foreign Relations Committee
April 28, 2009

Question:

Treaties

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#5)
Senate Foreign Relations Committee
April 28, 2009

Question:

Treaties

- 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 *Medellín* 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).

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#6)
Senate Foreign Relations Committee
April 28, 2009

Question:

Convention for the Elimination of Discrimination Against Women

- 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—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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#7)
Senate Foreign Relations Committee
April 28, 2009

Question:

U.S. Use of Force

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#8)
Senate Foreign Relations Committee
April 28, 2009

Question:

U.S. Use of Force

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#9)
Senate Foreign Relations Committee
April 28, 2009

Question:

U.S. Use of Force

- 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-defen[s]e 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#10)
Senate Foreign Relations Committee
April 28, 2009

Question:

U.S. Use of Force

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#11)
Senate Foreign Relations Committee
April 28, 2009

Question:

Legal Protections

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#12)
Senate Foreign Relations Committee
April 28, 2009

Question:

Legal Protections

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#13)
Senate Foreign Relations Committee
April 28, 2009

Question:

Legal Protections

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#14)
Senate Foreign Relations Committee
April 28, 2009

Question:

Legal Protections

- 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#15)
Senate Foreign Relations Committee
April 28, 2009

Question:

Alien Tort Statute Litigation

- 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 Pre-hearing 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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#16)
Senate Foreign Relations Committee
April 28, 2009

Question:

The Supreme Court and the Constitution

- 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 law*" (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.

Questions for the Record Submitted to
Legal Adviser – Designate Harold Hongju Koh by
Senator Jim DeMint (#17)
Senate Foreign Relations Committee
April 28, 2009

Question:

General Philosophy

- 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."