

# WebMemo



Published by The Heritage Foundation

No. 2414  
April 27, 2009

## State Department Legal Adviser Nominee Harold Koh: Questions on the Role of International Law in the U.S. Legal System

*Steven Groves and Ted R. Bromund, Ph.D.*

On March 23, President Obama nominated Harold Koh to be the next Legal Adviser, which is the top legal position at the U.S. Department of State.

While Koh has had a distinguished career in government service and legal academia,<sup>1</sup> his views raise serious national security and constitutional questions. Koh's opinions regarding the role that international law and the rulings of foreign courts should play within the U.S. legal system should be explored during his Senate confirmation hearing before the Committee on Foreign Relations, currently scheduled for April 28.

**Transnationalism v. American Sovereignty.** A trend that runs through Koh's scholarship and public statements is the great weight that he gives to the authority of international courts and organizations. Koh should be questioned during his confirmation hearing regarding his views on crucial matters of national security, sovereignty, and the U.S. Constitution.

Such inquiries should include:

*U.N. Security Council "Authorization" for Use of Force.* In October 2002, you wrote that U.S. forces should not attack Saddam Hussein's Iraq "without explicit United Nations authorization" and that without U.N. authorization, "such an attack would violate international law."<sup>2</sup> These statements were made despite the fact that the U.S. Congress had already authorized the use of force against Iraq.

- *Would you please describe under what circumstances you believe that the U.S. must receive authorization from the U.N. Security Council prior to using*

*military force while remaining in compliance with international law?*

- *Was the NATO bombing of Yugoslavia in 1999—an attack that was not "authorized" by the U.N. Security Council—a violation of international law?*

*The International Criminal Court (ICC).* In November 2005, an ambush of a U.S. Marine convoy in Haditha, Iraq, resulted in tragic civilian deaths—deaths that many in the international community called a war crime. If, as you have advocated,<sup>3</sup> the U.S. were to ratify the Rome Statute of the ICC, the ICC prosecutor would have the power to bring war crimes indictments against those Marines if, in the prosecutor's opinion, the U.S. was "unwilling" to do so.

- *Since the U.S. ultimately dropped all charges against most of the Marines involved in the Haditha incident, would they not be exposed to prosecution at the ICC if the U.S. were to ratify the Rome Statute?*

*Second Amendment Rights.* In 2002, you argued that one of the most pressing issues facing the world is the need for "the global regulation of small arms" and that you support a "global gun control

This paper, in its entirety, can be found at:  
[www.heritage.org/Research/LegalIssues/wm2406.cfm](http://www.heritage.org/Research/LegalIssues/wm2406.cfm)

Produced by The Margaret Thatcher Center for Freedom

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

regime.”<sup>4</sup> You also praised the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials as “the best model” for the control of illicit manufacturing and trafficking. You stated that the convention requires states “to standardize national laws,” that “the only meaningful mechanism to regulate illicit transfers is stronger domestic regulation,” and that “supply-side control measures within the United States” were essential.

In this context, you proclaimed references to the constitutional right to bear arms as “needlessly provocative.” Finally, you argued that the U.S. could support global gun control “without committing itself to a regime that would affront legitimate Second Amendment concerns.” The convention explicitly recognizes that, because “states have developed different cultural and historical uses for firearms,” a standardized model is unacceptable.

- *In the context of a multilateral gun control treaty, please explain your views as to what are “legitimate Second Amendment concerns” and what concerns are illegitimate.*
- *Given your support for what you describe as “global gun control,” “supply-side control” within the United States, the development of “legal and policy arguments” for gun control, and your beliefs that the convention would require the U.S. to standardize its national laws and that “stronger domestic regulation” is essential, what is your position on the U.N. Arms Trade Treaty, which is essentially a global version of the Inter-American Convention?*
- *Do you believe the Second Amendment protects an individual right of ordinary Americans to keep and bear arms unrelated to militia service?*

- *What regulations of private gun ownership do you think are unreasonable?*

**The International Court of Justice and the Medellin Case.** In 2003, the government of Mexico sued the U.S. at the International Court of Justice (ICJ) regarding 51 Mexican nationals—including one Jose Ernesto Medellin, the ring-leader in a brutal gang rape and murder of two teenage girls in Texas—who had been convicted of crimes in the U.S. The ICJ ultimately “ordered” the U.S. to provide additional legal proceedings to the Mexican nationals because they had not been informed that a treaty entitled them to assistance from the Mexican consulate. You filed amicus briefs in support of Medellin both in Texas and in the U.S. Supreme Court.<sup>5</sup>

- *Why is it that you supported the intervention of an international court into a purely domestic criminal matter?*
- *Did the U.S. Supreme Court’s rejection of your position change your mind, or do you think the Court made the wrong decision?*
- *Do you believe that the Vienna Convention on Consular Relations and its Optional Protocol create a personal cause of action for convicted criminals such as Jose Medellin?*
- *Should not this issue have been resolved through diplomacy between the U.S. and Mexico rather than through transnational litigation?*

**Use of Foreign Jurisprudence in U.S. Courts.** In 2004 you wrote that in “an interdependent world, United States courts should not decide cases without paying ‘a decent respect to the opinions of mankind.’” The phrase “a decent respect to the opinions

1. Curriculum vitae, Harold Hongju Koh, Yale Law School, <http://www.law.yale.edu/HKoh.htm> (April 27, 2009).
2. Harold Honhju Koh, “A Better Way to Deal with Iraq,” *The Hartford Courant*, October 20, 2002, at <http://www.law.yale.edu/news/4407.htm> (April 27, 2009).
3. Statement of Harold Hongju Koh before the Senate Judiciary Committee, Subcommittee on the Constitution, September 16, 2008, 110th Cong., 2nd Sess. (“In addition, the Administration should reengage diplomatically with the Contracting Parties to the ICC to seek resolution of outstanding U.S. concerns and pave the way for eventual U.S. ratification of the Rome Treaty.”)
4. Harold Hongju Koh, “A World Drowning in Guns,” *Fordham Law Review*, Vol. 71 (2003), pp. 2333–2361.
5. See, e.g., Harold Hongju Koh *et al.*, Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner Jose Ernesto Medellin, Court of Criminal Appeals of Texas, July 29, 2005, and Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner, U.S. Supreme Court, June 28, 2007.

of mankind”<sup>6</sup> comes from the Declaration of Independence: “When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”

- Are you saying that your interpretation of the document in which America’s Founding Fathers cut all legal and political ties from Great Britain supports the citation of and reliance upon the legal opinions of foreign courts?
- Do you believe that U.S. courts at all levels should factor in foreign legal opinions when deciding domestic law issues? When should a U.S. court factor in such opinions, and when should they not do so?

**The Legal Adviser Position Is Crucial.** Koh’s legal opinions must be closely scrutinized because, due to its international scope, the position for which he has been nominated is unlike any other legal position in the federal government. According to the State Department’s Web site, the Legal Adviser “furnishes advice on all legal issues, domestic and international, arising in the course of the Department’s work,” including “formulating and implementing the foreign policies of the United States, and promoting the development of international law and its institutions as a fundamental element of those policies.”<sup>7</sup>

If confirmed, Koh will travel worldwide for the next four years to “negotiate, draft and interpret international agreements involving...peace initiatives, arms control discussions...and private law conventions on subjects such as judicial cooperation and recognition of foreign judgments.”<sup>8</sup> He would also represent the U.S. at treaty negotiations and international legal conferences and be involved in drafting U.N. Security Council resolutions.

The Legal Adviser must therefore be motivated to:

- Protect and defend the rights of American citizens and soldiers from interference from international organizations;
- Promote policies that preserve U.S. national security prerogatives and self-governance; and
- Defend American sovereignty from encroachment by transnational actors.

Critical determinations regarding international law will be made during the next four years regarding, among other matters, threats to U.S. national security. In a world where the Iranian nuclear program is advancing unabated and missile launches from North Korea are reaching ever closer to U.S. coastlines, America needs a Legal Adviser who will not subordinate U.S. national interests to the will or whim of the international community.

—Steven Groves is Bernard and Barbara Lomas Fellow, and Ted R. Bromund, Ph.D., is Senior Research Fellow, in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

6. Harold Hongju Koh, “Agora: The United States Constitution and International Law: International Law as Part of Our Law,” *American Journal of International Law*, vol. 98 (January 2004), p. 43.

7. Office of the Legal Adviser, U.S. Department of State, at <http://www.state.gov/s/l> (April 27, 2009).

8. Office of the Legal Adviser, U.S. Department of State, “Practicing Law in the Office of the Legal Adviser,” February 11, 2009, at <http://www.state.gov/s/l/3190.htm> (April 27, 2009).