

trying to take their country back, if I could say that. We all stand with those demonstrators. We will not forget what they have gone through in their struggle.

I ask unanimous consent that when I am done, Senator KERRY finish this time on global warming, followed by Senator COBURN if he would like to be recognized at that time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. BOXER. Good.

So what Thomas Friedman—again, writing his great column, as he does—says is that Iran would not be such a formidable power in the world if oil was not so sought after in the world.

We do not buy any Iranian oil for obvious reasons, but the rest of the world does. The fact is, if we can create these clean alternatives, it is going to make every difference—every difference—in the world.

So in closing—and I am so pleased Senator KERRY is here—let me say this: My ranking member, JIM INHOFE, made a comment. I just want to say we are good friends, and anything I say here I say to him, and vice versa. My ranking member said in the press—and I do not know if Senator KERRY saw this—my ranking member, Senator INHOFE, said to me in the press I should get a life—get a life—and stop trying to pass global warming legislation because it is not going to happen.

I want to say to him very clearly today, I have a life, and I am spending it getting the votes I need to make sure we take advantage of this momentous opportunity. I want to thank those over in the House who seem to understand this golden moment of opportunity for our economy, for our foreign policy, for the creation of millions of new jobs, for energy independence—that is what they are fighting for over there—and for great opportunities for our agricultural sector, our manufacturing sector.

This is an opportunity we should not lose. I am very pleased at the progress we are making over here, and I want to send that signal: We are making great progress.

Mr. President, I thank you very much.

I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, what is the parliamentary situation?

The PRESIDING OFFICER. The Senate is operating under cloture on the nomination of Harold Koh.

Mr. KERRY. Mr. President, has the time for a vote been set at this point?

The PRESIDING OFFICER. It has not.

Mr. KERRY. It is not set. I thank the Chair.

With that in mind, I think the leadership is hopeful of trying to get that vote somewhere in the near term.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. REID. Mr. President, could I ask the distinguished Senator from Massa-

chusetts if he would yield for a unanimous consent request or two?

Mr. KERRY. Of course, I will yield, Mr. President.

Mr. REID. As usual, I appreciate the courtesy of my friend from Massachusetts.

Mr. President, I ask unanimous consent that all postcloture time be yielded back except for 30 minutes and that time be divided as follows: 10 minutes for Senator KERRY—and we can count the time he has already used. Does the Senator need more time? OK—10 minutes for Senator KERRY, 10 minutes for Senator CORNYN, 10 minutes for Senator COBURN, or their designees; that upon the use or yielding back of time, the Senate proceed to vote on the confirmation of the nomination; that upon confirmation, the President be immediately notified of the Senate's action, and the Senate then resume legislative session.

The PRESIDING OFFICER. Is there objection?

Mr. KERRY. Mr. President, reserving the right to object.

Mr. REID. Mr. President, I would ask to modify the consent request that instead of 10, 10, and 10, Senator KERRY be given 15 minutes and Senator CORNYN be given 15 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

UNANIMOUS CONSENT AGREEMENT—H.R. 2918

Mr. REID. Mr. President, I ask unanimous consent that upon disposition of the Koh nomination, and the Senate resuming legislative session, the Senate then move to proceed to the consideration of Calendar No. 84, H.R. 2918, the Legislative Branch Appropriations Act; that the motion be agreed to, and once the bill is reported, a Nelson of Nebraska substitute amendment, which is at the desk, be called up for consideration; further that the following be the only first-degree amendments and motion in order: McCain, Nebraska photo exhibit; Coburn, online disclosure of Senate spending; DeMint, Visitor Center inscription: "In God We Trust"; Vitter, motion to commit, 2009 levels; DeMint, audit reform Federal Reserve; that upon disposition of the amendments and motion, the substitute amendment, as amended, if amended, be agreed to, and the motion to reconsider be laid upon the table; that the bill, as amended, be read a third time, and the Senate then proceed to vote on passage of the bill; that upon passage, the Senate insist on its amendment, request a conference with the House on the disagreeing votes of the two Houses, and that the Chair be authorized to appoint conferees on the part of the Senate; provided further that if a point of order is raised against the substitute amendment, then it be in order for another substitute amendment to be offered minus the offending provisions but including any amendments which had been agreed to; and that no further amendments be in order; and that the substitute amend-

ment, as amended, if amended, be agreed to, and the remaining provisions beyond adoption of the substitute amendment remain in effect.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Massachusetts.

Mr. KERRY. Mr. President, could I have a 5-minute notice from the Parliamentarian?

The PRESIDING OFFICER. The Senator will be notified.

GLOBAL CLIMATE CHANGE

Mr. KERRY. Mr. President, I want to make some closing comments with respect to the nomination of Dean Koh. But before I do that, I want to have a chance to share a few thoughts with the distinguished chairman of the Environment and Public Works Committee, who has been an extraordinary leader on this subject of global climate change.

Let me be the first to affirm that I rather think the Senator has a terrific life, and I am proud of what she is doing with respect to this issue. It is really interesting. I think it is important for us to talk about a few of the issues.

The Senator from Oklahoma, Mr. INHOFE, has made some comments on the floor of the Senate that are either wrong on the facts or wrong in terms of the judgment politically.

I want to say upfront, as my colleague has said, I enjoy my conversations and my relationship with the Senator enormously. We are both pilots. He flies often, much more frequently than I do these days, but we both share a passion for flight and for aerobatics, and for different kinds of airplanes, and I love talking to him about them.

I wish he were up to state of the art with respect to the science on global climate change. He made a number of comments on the floor of the Senate which Senator BOXER and I just have to set the record straight on: No. 1, suggesting that the science is somehow divided. That is myth. It is wishful thinking, perhaps, on the part of some people. I suppose if your definition of divided is that you have 5,000 people over here and 2 people over here—who want to put together a point of view that is usually encouraged and, in fact, paid for by a particular industry or something—you can claim it is divided.

But by any peer review standard, by any judgment of the broadest array of scientists in the world—not just the United States, across the planet—the science is not divided. The fact is, Presidents of countries are committing their countries to major initiatives on global climate change.

The science is clearly not divided with respect to global climate change. In fact, every major scientist in the United States whose life has been devoted to this effort, such as Jim Hansen at NASA, or John Holdren, the

President's Science Adviser—formerly at Harvard—these people will tell you in private warnings that are even far more urgent than the warnings they give in public. The reason is, the science is coming back at a faster rate and to a greater degree in terms of the damage that was predicted than any of these people had predicted.

The fact is, there is a recent study about the melting of the permafrost lid of the planet. It shows in the Arctic—this is the Siberian Shelf Study, which I would ask my colleague from Oklahoma to read—columns of methane rising up out of the sea level, and if you light a match where those columns break out into the open air, it will ignite. Those columns of methane represent a gas that is 20 times more damaging and dangerous than carbon dioxide, and it is now—as the permafrost melts—uncontrollably being released into the atmosphere.

In addition to that, there is an ice shelf, the Wilkins Ice Shelf, down in Antarctica. A 25-mile ice bridge connected the Wilkins Ice Shelf to the mainland of Antarctica. That shattered. It just broke apart months ago. Now we have an ice shelf that for centuries—thousands of years—was connected to the continent that is no longer connected.

We have sea ice which is melting at a rate where the Arctic Ocean is increasingly exposed. In 5 years, scientists predict we will have the first ice-free Arctic summer. That exposes more ocean to sunlight. The ocean is dark. It consumes more of the heat from the sunlight, which then accelerates the rate of the melting and warming, rather than the ice sheet and the snow that used to reflect it back into the atmosphere.

There are countless examples of evidence of what global climate change is already doing across the planet. In Newtok, AK, they just voted to move their village 9 miles inland because of what is happening with the sea ice melt and the melting of the permafrost. We will spend millions of dollars mitigating and adapting to these changes as they come at us.

The Audubon Society has reported a 100-mile wide swath of land in the United States where their gardeners—who do not record themselves as Democrats or Republicans, ideologues, conservatives, or liberals; they are people who like to go out and garden; they are part of the Audubon Society as a result of that—are reporting plants they can no longer plant that used to be able to be planted.

We have millions of acres of forests in Alaska and in Canada that have been lost: spruce and pine to the spruce beetle that used to die, but because it is warmer, now it no longer dies. You can run down a long list.

Mr. President, I am not going to go through all of it here now, but suffice it to say, he is wrong about China. I just came back from a week in China where I met with their leaders. I went

out to see what they are doing in wind power. I went to see their energy conservation efforts. They are ahead of us in some respects with respect to those efforts. They have a higher standard of automobile emissions reduction that they are putting in place sooner than we are. They are tripling their level of wind power that they are trying to target. They have a 20-percent energy intensity reduction level that they are now exceeding in several sectors of their economy, which they did not think they would be able to do. In 2 or 3 years, we are going to be chasing China if we do not recognize what has happened and do this.

So the Senator from California, the chairperson of the Environment and Public Works Committee, completely understands, as do many others, this can be done without great cost to our electric production facilities, without our companies losing business and losing jobs. On the contrary, the jobs of the future are going to be in alternative and renewable energy and in the energy future of this country.

There is barely a person I know who does not think we would not be better off in America not sending \$700 billion a year to the Middle East to pay for oil so we can blow it up in the sky and pollute and turn around and try to figure out how we are going to spend billions to undo it. Why not spend those \$700 billion in the United States creating that energy in the first place, with jobs that do not get sent abroad, and which pay people good value for the job they are doing? It liberates America for our energy security. It provides a better environment. We are a healthier nation, and we increase our economy. So you get all those pluses. What are they offering? What is the alternative that Senator INHOFE and others are offering? If they are wrong in their predictions, we have catastrophe for the planet.

So I think we are on the right track. China is going to reduce emissions. China will be on a different schedule because that is what the international agreements set up years ago. But as a developing country with 800 million people living on less than \$2 a day, it is understandable that they would fight to say: We can't quite meet the same schedule now, but we will get to the same schedule. What is important is that, globally, all countries come together to reduce emissions. That will happen in Copenhagen. It is much more likely to happen in Copenhagen if the United States of America leads here at home. If we undertake these efforts and pass legislation here, I guarantee my colleagues that Copenhagen will be a success and China and other countries will all agree to reductions that are measurable, that are verifiable, and that are reportable.

So we need to get our facts straight as we come at this debate. The Senator from California and I are thirsty and waiting for this debate because we will show how we can reduce emissions,

how we can transition our economy with minimal—minimal—costs. In fact, for the first few years, it pays for itself to undertake many of these transformations.

I wish to reemphasize some thoughts in the time I have left about Dean Koh. Dean Koh has been chosen to be legal counsel for the State Department. I have already spoken about his remarkable academic career, his leadership in the legal profession, the respect and glowing praise he has received from colleagues within the legal profession. We have heard a lot about him. I wish to address some of the points that have been raised in opposition to his nomination, some of which I believe are just plain disrespectful and indecent. It is hard to find the rationale for where they come from, frankly—maybe a mean-spiritedness or something—but it is hard, and I am grateful, as I think we all ought to be, that nominees are willing to subject themselves to some of these kinds of arguments. Also, there are some misunderstandings and mischaracterizations.

It is no surprise that not everybody is going to agree with him and every decision or opinion he has made, but the fact is that a lot of the arguments that have been made aren't grounded in reality. First, there have been allegations that his views on foreign law would somehow undermine the Constitution of the United States. Well, please, that is baseless beyond any kind of evidence I have ever seen or any statement he has ever made. Let me repeat what Dean Koh, himself, has said about the primacy of our Constitution. I quote:

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 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.

That is definitive. No one should insert any other interpretation into it other than the Constitution is primary.

Some have also argued that Dean Koh's views on international law, particularly on something called "the transnational legal process," would somehow undermine our sovereignty and our security. Again, this represents a fundamental misunderstanding of his views. Dean Koh understands that international law and institutions are simply part of life in a globalized world. Engagement with the international community is inevitable. He believes it is best to engage constructively. Here is what he said at his confirmation hearing:

Transnational legal process . . . says what we all know—that we live in an interdependent world that is growing increasingly more interdependent. It is not new, and . . . [it] is not an ideology. It is a description of

a world in which we live . . . 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.

Those aren't the words of an ideologue. They aren't the words of a radical. It is the broad perspective of a deeply knowledgeable and pragmatic and committed advocate for our Nation's interests. It reflects how we represent our interests. It reflects our real challenge, which is how we best use international law and institutions to advance national security interests and promote our core values. That is exactly what Dean Koh has spent his career working on. As one of the world's leading experts on international law, there is nobody better qualified to meet this challenge.

Yesterday, my colleague from Texas suggested that Dean Koh somehow created a moral equivalence between the United States and Iran's brutal and deadly crackdown after the recent election. This is what our colleague said:

Koh appears to draw moral equivalence between the Iranian regime's political suppression and human rights abuses that we've been watching play out on television and America's counterterrorism policies on the other hand. In 2007, he wrote: The United States cannot stand on strong footing attacking Iran for illegal detentions when similar charges can and have been lodged against our own government.

Well, common sense—in one sentence, the Senator accuses Dean Koh of equating our treatment of detainees with Iran's actions and violently suppressing protests this week—right now—and in the next sentence he cites as evidence for that comments that Dean Koh made a couple years ago on an unrelated issue of Iran's treatment of detainees. I have heard of people trying to make "six degrees of separation" connections and somehow make it mean something, but this is to the extreme.

The broader point is, Dean Koh was not suggesting there is a moral equivalence between Iran and the United States. He was arguing that we are safer if we can convince countries such as Iran and North Korea to respect global norms and standards. It is harder for the United States to run around the world enlisting allies and marshaling pressure when we are simultaneously forced to fend off accusations of lawless activity by ourselves. So Guantanamos and other things work to deplete our ability to be able to maintain the highest moral ground. That is not moral equivalence. That is a practical reality about how the world works and how you protect the interests of the United States.

We have heard the argument that Dean Koh's position in supporting the regulation of global arms trade is somehow going to infringe on the rights of Americans under the second amendment. Please. I mean, please.

Nothing could be further from the truth. The fact is that Dean Koh supports efforts to regulate the transfer of guns across borders, which does nothing to interfere with the domestic possession of firearms. As he said at his confirmation hearing:

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 the legitimate hunter's right to use a hunting rifle in a national or State park.

Dean Koh went on to unequivocally state that he respects the Supreme Court's decision in Heller, which affirmed the right to bear arms under the second amendment as the law of the land.

There are other criticisms that have been made. I don't have time to go into all of them now, but the bottom line is whether it is the CEDAW—the Convention on the Elimination of Discrimination Against Women—or questions about his beliefs about the war in Iraq, the fact is that Dean Koh has also been questioned for allegedly supporting suits against the Bush administration's involvement in abusive interrogation techniques. Well, first of all, Dean Koh had no personal involvement in the lawsuit against John Yoo that has been mentioned, none whatsoever. Let's be clear. The State Department Legal Adviser is not charged with defending U.S. officials from legal suit or investigation of allegations of war crimes. That is the job of the Justice Department and the Defense Department.

Finally, we have heard questions about Dean Koh's respect for the role that Congress has played in crafting legislation relating to our national security. Dean Koh said at his confirmation hearing, and his words should stand:

[T]he 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.

That is just the type of approach that we here in Congress should welcome.

While disagreements on legal and policy issues are entirely legitimate, I regret that there have been some accusations and insinuations against Dean Koh in the media that would be laughable if they weren't impugning the reputation of such a devoted public servant. Some have alleged that Dean Koh supports the imposition of Islamic Shariah law here in America. Others have actually claimed that he is against Mother's Day. Does anyone really think this President and this Secretary of State would seek legal advice from a man trying to impose Islamic law on America? Or abolish Mother's Day? That type of allegation has no place in this debate.

Fortunately, there is a chorus of voices across party lines and across

American life that know the truth about Dean's Koh's record. That's why he has the support of such a long and impressive list of law professors, deans, clergy, former State Department Legal Advisers, and legal organizations.

I was heartened to see that eight Republicans voted for cloture. This sends an important message that his nomination has real bipartisan support. The words of Senator LUGAR on Dean Koh bear repeating: "Given Dean Koh's record of service and accomplishment, his personal character, his understanding of his role as Legal Adviser, and his commitment to work closely with Congress, I support his nomination and believe he is well deserving of confirmation by the Senate."

Senator LIEBERMAN, one of this body's strongest supporters of the war in Iraq and of Professor Koh's nomination, also put it well: "[T]here 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."

In closing, I believe Dean Koh's own words best sum up the case for his confirmation: As he has written, "I love this country with all my heart, not just because of what it has given me and my family, but because of what it stands for in the world: democracy, human rights, fair play, the rule of law."

There is no stronger bipartisan voice for foreign policy or for the Constitution in the Senate than Senator DICK LUGAR of Indiana, and I hope my colleagues will follow his example.

I thank our Chair.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I rise to speak, once again, on the nomination of Harold Koh, whom the President has nominated to be Legal Adviser for the State Department. To put this in context, as the Senator from Massachusetts has addressed, the Legal Adviser is a very important job at the State Department. He is responsible for providing guidance on important legal questions, including treaty interpretation and other international obligations of the United States. He gives the Secretary of State legal advice during negotiations with other nations. So the Legal Adviser can be a very influential voice in diplomatic circles, especially if he or she has particularly strong views on America's obligations to other nations and multilateral organizations.

Based on my review of Dean Koh's record, I don't believe he is the right man for this job. His views are in tension with what I believe are core Democratic values, in that he would subordinate America's sovereignty to the opinions of the so-called international common law, including treaty obligations that the Senate has never ratified. Indeed, they are not obligations,

but he nevertheless would impose them on the United States. When the Senator from Massachusetts says he believes the U.S. Constitution is primary, I would have felt much better if he had said it was the exclusive source of American law, together with the laws that we ourselves pass as representatives of the people; not just a consideration but the consideration when it comes to determining the obligations and rights of America's citizens, rather than subjecting those to international opinion and vague international norms which I heard the Senator refer to.

It is true Professor Koh is an advocate of what he calls transnational jurisprudence. He believes Federal judges—these are U.S. judges—should use their power to “vertically enforce” or “domesticate” American law with international norms and foreign law. As I mentioned, this means judges using treaties and “customary international law” to override a wide variety of American laws, whether they be State or Federal. Of course, we understand treaties that have been ratified by the Senate are the law of the land, but Professor Koh believes that even treaties that the United States has not ratified can be evidence of customary international law and given legal effect as such.

The Legal Adviser to the State Department has an important role, as I mentioned, in drafting, negotiating, and enforcing treaties. That is why it is so crucial he understands that no treaty has the force of law in the United States until it has been ratified, pursuant to the Constitution, by the Senate. Do we want a top legal advisor at the State Department who believes that norms that he and other international scholars make should become the law, even if they are rejected or not otherwise embraced by the Congress? That can't be within the mainstream. That is outside the mainstream; indeed, I believe a radical view of our obligations in the international community.

In 2002, Professor Koh delivered a lecture on the matter of gun control. He argued for a “global gun control regime.”

I don't know exactly what he means by that, but if he means that the second amendment rights under the U.S. Constitution of an individual American citizen to keep and bear arms are somehow affected by global gun control regimes, then I disagree with him very strongly. Our rights as Americans depend on the American Constitution and American law, not on some global gun control regime or unratified treaties because of some legal theory of customary international law.

On the matter of habeas corpus rights for terrorists, in 2007, Professor Koh argued that foreign detainees held by the U.S. Armed Forces anywhere in the world—not just enemy combatants at Guantanamo Bay—are entitled to habeas corpus review in U.S. Federal courts. Those are the rights reserved to

American citizens under our Constitution and laws, not to foreign terrorists detained by our military in farflung battlefields around the world.

If Professor Koh were correct—and he is not—this would mean that even foreign enemy combatants captured on the battlefield fighting against our troops in Afghanistan and held at Bagram Air Force Base would be able to sue in the U.S. courts seeking their release.

On this issue, fortunately, Dean Koh's radical views are not shared by the Obama administration, which filed a brief recently arguing that habeas corpus relief doesn't extend to detainees held at Bagram Air Force base in Afghanistan.

Do we want a top legal adviser in the State Department working to grant terrorists and enemy combatants even more rights than they have now?

There is the issue of military commissions, something Congress has spoken on at some length after lengthy debate. Professor Koh's views of military commissions also deserve our attention.

Military commissions, it turns out, have been authorized since the beginning of this country—by George Washington during the Revolutionary War, by Abraham Lincoln during the Civil War, and by Franklin Roosevelt during World War II. Yes, military commissions have been authorized both by our 43rd and 44th President of the United States in the context of the war on terror.

President Obama has said that “military commissions . . . are an appropriate venue for trying detainees for violations of the laws of war.” I agree with him.

Of course, military commissions, as I alluded to a moment ago, have had bipartisan support and have been authorized by the Congress. But somehow Professor Koh takes a more radical view. He believes military commissions would “create the impression of kangaroo courts.” He said they “provide ad hoc justice.” He said they do not and cannot provide “credible justice.”

Do we want the top legal adviser at the State Department undermining both the will of Congress and the President regarding the time-tested practice of military commissions during wartime?

Again, here is another example of Professor Koh's views that are radical views—certainly outside of the legal mainstream. Senators should also take a look at Professor Koh's views on suing or prosecuting lawyers for providing professional legal advice in the service of their country.

My position is clear: Government lawyers—and I don't care whether they are working in a Democratic administration or a Republican one—should not be prosecuted or sued for doing their jobs in good faith. They should not be punished for giving their best legal advice under difficult and novel situations, even if it turns out that

some lawyer somewhere later disagrees with that advice.

As dean of the Yale Law School, Professor Koh has enabled and empowered the leftwing attempt to sue one of its own alumni, John Yoo, who worked at the Office of Legal Counsel in the Bush administration.

The Yale Law School's Lowenstein International Human Rights Law Clinic has filed suit against John Yoo for the legal advice he provided to policymakers during his service on behalf of the American people.

I wonder if Professor Koh is willing to hold himself to the same standard and agree that individuals can sue him for his official acts if he is confirmed as Legal Adviser to the State Department—if later on lawyers, and perhaps prosecutors, disagree with that legal advice and say it was wrong.

Suppose Professor Koh gives legal advice that certain GTMO detainees should be released. If they return to the battlefield, as many have, and end up killing Americans, or our allies, should the victims' families be allowed to hold Professor Koh legally responsible in a court of law? Or suppose Professor Koh gives legal advice that authorizes military actions in Afghanistan or Pakistan. If those operations result in collateral damage, or civilian casualties, would the victims have standing in Federal Court to sue Professor Koh?

Do we want a top Legal Adviser at the State Department who is so compromised by the fear of being sued or prosecuted that he could not be trusted to give honest, good-faith legal advice to the Secretary of State or the President of the United States?

Perhaps most timely, given the civil unrest in Iran—and the Senator from Massachusetts was critical of the fact that I quoted a 2007 writing of Professor Koh, but it is true from this writing, and I will read it in a moment—Professor Koh appears to draw a moral equivalence between Iran's regime's political suppression and human rights abuses, on one hand, and America's counterterrorism policies on the other.

In 2007 he wrote:

The United States cannot stand on strong footing attacking Iran for “illegal detention” when similar charges can be and have been lodged against our own government.

He goes on to say that U.S. Government criticism of Iranian “security forces who monitored the social activities of citizens, entered homes and offices, monitored telephone conversations, and opened mail without court authorization,” was “hard to square” with our own National Security Agency's surveillance programs.

Do we want to confirm a top Legal Adviser at the State Department who can't see the difference between counterterrorism policies approved by the Federal courts and the Congress and the brutal repression practiced by a theocratic regime?

We have heard enough moral equivalence about Iran over the last week,

and we have heard enough apologies for the actions of the United States, and enough soft-peddling of the actions of the Iranian theocracy, which is a brutal police state. We don't need another voice in the administration whose first instinct is to blame America and whose long-term objective is to transform this country into something it is not.

For these reasons, I urge my colleagues to oppose the nomination of Harold Koh as the top Legal Adviser to the State Department.

I yield the floor and reserve the remainder of my time.

Mr. WARNER. Mr. President, I rise today in support of the nomination of Dean Harold Hongju Koh to serve as Legal Adviser to the Department of State. Dean Koh is a close friend of mine, whom I have known and respected for many years. His distinguished career reflects a long history of public service and bipartisanship. For example, Dean Koh served in both Republican and Democratic administrations, beginning his career in government in the Office of Legal Counsel during the Reagan administration and at the Department of Justice and as Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton administration.

Dean Koh also has strong academic and professional credentials. He was the editor of the Harvard Law Review, a Marshall scholar and a law clerk for the Honorable Harry A. Blackmun of the U.S. Supreme Court. He has been awarded with several honorary degrees and more than 30 human rights awards.

Dean Koh's established expertise in international law makes him a strong candidate for the position. I am certain that he will protect the U.S. Constitution and execute the job with extraordinary professionalism. I strongly support his nomination.

Mr. DODD. Mr. President, I rise in support of the nomination of Harold Koh to serve as Legal Adviser to the Department of State.

My one and only regret in offering my enthusiastic support for this nomination is that it will take from my State of Connecticut a pillar of our academic community and a mentor to countless young legal minds at the Yale Law School, where Harold Koh has served as a member of the faculty since 1985 and dean since 2004.

Dean Koh is a man of extraordinary intellect, unquestioned patriotism, and great accomplishment. He is a former Marshall Scholar, a graduate of Harvard Law School, the recipient of 11 honorary degrees, and the author of 8 books.

He has appeared before appellate courts and the Congress on countless occasions, won many awards and accolades as a human rights advocate, and served his country under Presidents of both parties. In his most recent service, he was unanimously approved by this body to serve as Assistant Secretary of State for Democracy, Human Rights, and Labor, where he served

with tremendous distinction for 3 years.

In short, Dean Koh is exactly the sort of public servant we need at the State Department at a time when our Nation is seeking to restore its standing in the world by renewing our commitment to traditional American values like respect for all people and adherence to the rule of law.

After all, we confront global challenges as complex as they are numerous. Nuclear proliferation and international terrorism threaten our national security, and issues like genocide and human trafficking test our leadership on the world stage. Our foreign policy must be rooted in an understanding of American and international law, as well as a firm commitment to not only our Constitution, but also the underlying moral values from which it was created.

No one understands these issues better than Harold Koh. He is the child of parents born in South Korea who grew up under Japanese colonial rule. They lived through dictatorship and unrest before coming to America. Their son Harold chose to study law because he understood that, as he once stated in an essay, "freedom is contagious."

Dean Koh wrote movingly of his time with the State Department:

Everywhere I went—Haiti, Indonesia, China, Sierra Leone, Kosovo—I saw in the eyes of thousands the same fire for freedom I had first seen in my father's eyes. Once, an Asian dictator told us to stop imposing our Western values on his people. He said, "We Asians don't feel the same way as Americans do about human rights" I pointed to my own face and told him he was wrong.

Our Nation will be safer and stronger, and the world will be freer, with Harold Koh at the State Department once again.

I suspect that many of my colleagues who have raised concerns about this nomination understand fully just how qualified Dean Koh is for this position. Unfortunately, some are too willing to play politics with our foreign policy.

Let's be clear. To suggest that Dean Koh does not understand or appreciate American sovereignty or the supremacy of our Constitution is an insult. Dean Koh has done important and valuable work exploring the tenets of international law and comparisons between the legal systems of different countries, work I hope he will continue when his nomination is approved. He does not wish to subjugate our legal system to that of any other nation, or to international law, and claims to the contrary are simply inaccurate and unfair.

Indeed, while some have been tempted by the prospect of opposing a talented legal scholar nominated by a President of the opposing party, Dean Koh's nomination has been endorsed by serious legal minds on both sides of the ideological spectrum.

John Bellinger, who served in this position under President George W. Bush, wrote: "I do think Harold Koh is well qualified and should be confirmed."

Kenneth Starr, the well-known Republican attorney who has opposed Dean Koh in court on many occasions, calls him "not only a great lawyer, but a truly great man of irreproachable integrity."

Conservative legal legend Ted Olson agrees, calling Dean Koh a "brilliant scholar and a man of great integrity." He also makes the very salient point that "the President and the Secretary of State are entitled to have who they want as their legal adviser."

Serious people, people who understand the importance of this position to our foreign policy and the nature of the man President Obama has nominated to fill it, have been able to look past political considerations and judge Dean Koh fairly.

They support him. I support him. I urge my colleagues to support him. And I look forward to his confirmation, his service, and his continued friendship.

Mr. CORNYN. We yield back the remainder of our time.

I ask for the yeas and nays.

The PRESIDING OFFICER (Mrs. SHAHEEN). Is there a sufficient second?

There is a sufficient second.

The question is, shall the Senate advise and consent to the nomination of Harold Koh, of Connecticut, to be Legal Adviser of the Department of State.

The clerk will call the roll.

The bill clerk called the roll.

Mr. DURBIN. I announce that the Senator from West Virginia (Mr. BYRD) and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 62, nays 35, as follows:

[Rollcall Vote No. 213 Ex.]

YEAS—62

| | | |
|------------|------------|-------------|
| Akaka | Hagan | Nelson (NE) |
| Baucus | Harkin | Nelson (FL) |
| Bayh | Inouye | Pryor |
| Begin | Johnson | Reed |
| Bennet | Kaufman | Reid |
| Bingaman | Kerry | Rockefeller |
| Boxer | Klobuchar | Sanders |
| Brown | Kohl | Schumer |
| Burris | Landrieu | Shaheen |
| Cantwell | Lautenberg | Snowe |
| Cardin | Leahy | Specter |
| Carper | Levin | Stabenow |
| Casey | Lieberman | Tester |
| Collins | Lincoln | Udall (CO) |
| Conrad | Lugar | Udall (NM) |
| Dodd | Martinez | Voinovich |
| Dorgan | McCaskill | Warner |
| Durbin | Menendez | Webb |
| Feingold | Merkley | Whitehouse |
| Feinstein | Mikulski | Wyden |
| Gillibrand | Murray | |

NAYS—35

| | | |
|-----------|-----------|-----------|
| Alexander | Crapo | Kyl |
| Barrasso | DeMint | McCain |
| Bennett | Ensign | McConnell |
| Bond | Enzi | Murkowski |
| Brownback | Graham | Risch |
| Bunning | Grassley | Roberts |
| Burr | Gregg | Sessions |
| Chambliss | Hatch | Shelby |
| Coburn | Hutchison | Thune |
| Cochran | Inhofe | Vitter |
| Corker | Isakson | Wicker |
| Cornyn | Johanns | |

NOT VOTING—2

Byrd Kennedy

The nomination was confirmed.

Mr. KERRY. Madam President, I move to reconsider the vote.

Mr. WARNER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KYL. Madam President, today the Senate confirmed Harold Koh to the position of Legal Adviser to the State Department by a vote of 62 to 35. I voted against his confirmation for reasons I explained on the floor yesterday. Chiefly, I am concerned about his support for a transnational legal process. The National Review recently published an article that explores the inherent conflict between transnational legal structures built on “global norms” and the constitutionally defined role of the American judiciary. I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

KOH FAILS THE DEMOCRACY TEST

(By John Fonte)

Advocates of global governance advance their agenda through the “transnational legal process.” Harold Koh, former dean of the Yale Law School, who has been nominated by President Obama to be the legal adviser to the State Department, is a leading advocate of this “transnational legal process.” His confirmation hearing is today, Tuesday, April 28.

Dean Koh has written extensively—sometimes clearly, sometimes obtusely—on transnational law and the “transnational legal process.” In a rather clear paragraph in *The American Prospect* (September 20, 2004), Koh explains how the system works: Transnational legal process encompasses the interactions of public and private actors—nation states, corporations, international organizations, and non-governmental organizations—in a variety of forums, to make, interpret, enforce, and ultimately internalize rules of international law. In my view, it is the key to understanding why nations obey international law. Under this view, those seeking to create and embed certain human rights principles into international and domestic law should trigger transnational interactions, which generate legal interpretations, which can in turn be internalized into the domestic law of even resistant nation-states.

Koh says much the same thing in the Penn State International Law Journal (2006)—more abstractly, to be sure, but it is worth listening to his voice to begin to appreciate the tone of the global-governance debate in legal circles: To understand how transnational law works, one must understand “Transnational Legal Process,” the transubstantive process in each of these issues areas [business, crime, immigration, refugees, human rights, environment, trade, terrorism] whereby [nation] states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law. As I have argued elsewhere, key agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities. In this story, one of these agents triggers an interaction at the inter-

national level, works together with other agents of internalization to force an interpretation of the international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law.

Koh notes that the crucial mechanism for incorporating these global norms that are “created” and “interpreted” in transnational forums into American constitutional law is the American judiciary. As Koh declares, “domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law.”

The global norms that are to be “internalized” into American law cover a wide range of policy areas, including matters of foreign policy, terrorism, internal security, commerce, environment, human rights, free speech, and social issues such as feminism, abortion, gay rights, and the status of children.

To ask the crucial questions of democratic theory: Who governs? Who decides?

For the advocates of global governance, the policy issues listed above are typically global problems that require global solutions. In this view, international judges, NGO activists, international lawyers, and the like operating in transnational forums such as the International Court of Justice, the International Criminal Court, and various U.N. agencies are the appropriate decision-makers.

For the advocates of liberal democracy, these issues should be decided through the democratic political process. In the United States, this would mean the elected representatives of the people: the Congress and president at the national level, state legislatures and governors at the state level, and city councils and mayors at the local level.

To be sure, the American judiciary should perform its constitutional role of interpreting the laws made by the political branches of American democracy. However, it is not appropriate for American courts to impose or “internalize” global norms, rules, or laws “created” at transnational forums by transnational actors who have no direct accountability to “We the People of the United States”; actors who not only are not elected by the American people, but who are, for the most part, not even citizens of the United States. It is not appropriate, that is, if one believes in liberal democracy.

But, of course, the “transnational legal process” articulated by Harold Koh and the politics of transnationalism generally are not democratic. They represent a new form of governance that I call “post-democratic.” To “make, interpret, [and] enforce” international law, “which can in turn be internalized into the domestic law of even resistant nation-states” (as Koh describes it), is to exercise governance. But do these transnational governors have the consent of the governed?

The transnational legal process fails the “government by the consent of the governed” test in two ways. First, the democratic branches of government, the elected representatives of the people, have no direct input either in writing the global laws in the first place, or even in consenting to their domestic internalization, as, for example, happens when the Senate ratifies a treaty or the Congress passes enabling legislation for a non-self-executing treaty.

Second, there is no democratic mechanism to repeal or change these international rules that are incorporated into U.S. law by this process. What if the American people decide that they object to these global norms and transnational laws that were imposed upon them without their consent (on, for example,

the death penalty, internal security, immigration, family law, etc.)? What if the American people at first approved, but later changed their minds on, some of these rules: How can these global norms, now part of international law and U.S. constitutional law, be repealed? Legislation to repeal the global norms could be deemed “unconstitutional.” In short, there are no democratic answers to these questions consistent with the transnational legal process, because it is not a democratic process.

At the end of the day, the argument over the transnational legal process is one part of a larger argument that will come to dominate the 21st century: Who governs?

Will Americans continue to decide for themselves public policies related to national security, human rights, immigration, free speech, terrorism, the environment, trade, commercial regulation, abortion, gay rights, and family issues—or will questions be decided by “transnational issue networks” working with “transnational norm entrepreneurs,” “governmental norm sponsors,” and “interpretive communities,” with the complicity of American judges?

The PRESIDING OFFICER. Under the previous order, the President shall be notified of the Senate’s action.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

LEGISLATIVE BRANCH
APPROPRIATIONS ACT, 2010

The PRESIDING OFFICER. Under the previous order, the clerk will report H.R. 2918.

The legislative clerk read as follows:

A bill (H.R. 2918) making appropriations for the Legislative Branch for the fiscal year ending September 30, 2010, and for other purposes.

The PRESIDING OFFICER. The majority leader.

Mr. REID. Madam President, there will be at least one more vote today.

Senator NELSON should be here momentarily to start managing the Legislative Branch appropriations bill.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. NELSON of Nebraska. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1365

(Purpose: In the nature of a substitute.)

Mr. NELSON of Nebraska. Madam President, it is my understanding that there is an amendment already at the desk.

The PRESIDING OFFICER. That is correct. The clerk will report.

The legislative clerk read as follows:

The Senator from Nebraska [Mr. NELSON] proposes an amendment numbered 1365.

(The amendment is printed in today’s RECORD under “Text of Amendments.”)