SALZBURG GLOBAL SEMINAR

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1730 Pennsylvania Avenue, N.W.

Suite 250

Washington, D.C. 20006

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THE SECOND ANNUAL LLOYD N. CUTLER LECTURE

ON THE RULE OF LAW:

AN AMERICAN INTERNATIONAL LAW?

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MONDAY

MARCH 28, 2011

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THE SUPREME COURT OF THE UNITED STATES

ONE FIRST STREET, NORTHEAST

WASHINGTON, D.C. 20543

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PRESENTATION

OF

HAROLD HONGJU KOH

Legal Adviser of the

U.S. Department of State

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P R O C E E D I N G S

JUSTICE O'CONNOR: Good evening. It's nice to see you here. We had kind of a full house today in this room for some oral arguments at the Court and I think they'll have a full house tomorrow. I think we're having the Walmart Stores case argued. So you're lucky to have a seat tonight.

(Laughter.)

JUSTICE O'CONNOR: And I want to welcome you for the Salzburg Global Seminar's Lloyd Cutler Memorial Lecture. This is an annual event and we're just delighted to have it here at the Supreme Court.

Lloyd Cutler was a great lawyer, and a great man, and I think it's appropriate that the lecture be named in his honor. And the Salzburg Global Seminar is one that I'll bet most of you have attended at some time during the years. I have. And it's had a really distinguished career in connection with education and the law.

It started, as you all know, in 1947, as a Marshall Plan for the mind. Now, I like that, you know. And it's done that. It's done exactly that. It's been so stimulating.

And it's succeeded in bringing people from all ages, from old to young, from around the world, to talk about issues that matter to all of us, no matter where we live. And it's just been a great thing. We've been very lucky.

And Lloyd Cutler was very active in that. As you know, he came from New York and graduated from Yale and Yale Law School. He couldn't leave it alone. And our speaker tonight is Harold Koh, who knows a little bit about Yale, so I'll leave that to him.

And during World War II, Lloyd Cutler served in the Army and worked in military intelligence. Those of you who knew him probably remember that he helped prosecute the eight German spies who entered the United States during the war by submarine. Remember that?

And Lloyd Cutler was a prosecutor in connection with that. And he was White House Counsel, both to Presidents Carter and Clinton. And he had a global vision of the importance of law in solving the world's problems, and he brought judges from around the world to come to the Salzburg Seminar, and he brought many promising young lawyers for those incredible meetings.

And that tradition continues, and I think it's very appropriate that this lecture be named for him. And it's also appropriate that we have a speaker who knows a little bit about Yale, and you're going to hear more about him in a minute. But we're glad you're here.

Thank you.

(Applause.)

MR. MANSBACH: Good evening, ladies and gentlemen. My name is Tom Mansbach, and I am the Chair of the Advisory Board of the Lloyd N. Cutler Center for the Rule of Law at the Salzburg Global Seminar. And in that capacity, I'd like to welcome you all this evening.

I think we're most fortunate to be in this historic courtroom, and it's because of the kind sponsorship of Justice O'Connor that we're here, and for that, we deeply thank her.

I would also like to take a moment to acknowledge a couple of our advisory board members who are here tonight, Bailey Morris-Eck, who is the co-chair of the Advisory Board, Whayne Quin, and J.T. Smith.

And as Justice O'Connor has just noted, Lloyd was known in the city not only as one of our outstanding lawyers, but also as a counselor to presidents. And for more than three decades, Lloyd was involved with the operation of our Seminar, and for the last ten years of that period, he was the chairman of our Board.

As a lasting tribute to the Cutler legacy, the Salzburg Global Seminar has established the Lloyd N. Cutler Center for the Rule of Law. And one of the featured programs of the Cutler Center is, of course, the Cutler lecture held annually here in Washington, which features a distinguished speaker on vital legal issues of international interest, and a person who has made significant contributions to promoting the rule of law in the international community. That is a lecture that will be delivered tonight by Harold Koh.

The second major Cutler program is our international seminar on the Rule of Law, and before we move on to tonight's Cutler Lecture, I would like to mention that from August 23rd to 28th of this year, the first Cutler Law Symposium will take place at our beautiful, historic, Baroque Schloss in Salzburg, Austria, and we hope that many of you all will be able to join us there.

The subject matter of the five-day program will be why the rule of law matters, and we'll deal with both theoretical and practical issues of international law.

And without further ado, I would like to turn the podium over to Stephen Salzburg -- not Stephen Salzburg, Stephen Salyer, who is our President and CEO, and who will introduce tonight's speaker.

Stephen.

MR. SALYER: Thank you, Tom.

I'm quite happy to change my name if it will lend to the success of the seminar.

But good evening, and thanks for joining us at this year's Cutler Lecture on the International Rule of Law.

I want to echo Tom's thanks to Justice O'Connor for graciously hosting us this evening, and for her warm remarks.

We're also grateful to Tom for his steady and effective leadership to the Cutler Center Advisory Board, and for guiding the formation of this very exciting and still-developing program of the Cutler Center.

I also want to express a special welcome to Polly Cutler Kraft, Lloyd's widow, and to members of Lloyd's family, and to all the Cutler Center Advisory Board members who are here.

Literally every week, my colleagues and I encounter men and women from all parts of the world who tell us about their Salzburg experience as being a really pivotal moment in their career, and as the source of a lifelong network of others who they count as colleagues and collaborators and friends.

And tonight, as has been mentioned, this lecture is part of a broader program to make sure that that commitment remains robust to the development of those connections and to the careers of people who can make a difference across the world, men and women who understand and who will stand behind law's essential principles.

The Cutler Lecture is given each year by a leading figure who has made a significant contribution to promoting the rule of law in his own country and internationally. And tonight's speaker certainly meets that standard.

A leading expert on public and private international law, national security, and human rights, Harold Hongju Koh has argued before the United States Supreme Court in this room, and has testified across the street at the US Capitol more than 20 times.

He has served both Republican and Democratic administrations, serving on the Secretary of State's Advisory Committee on Public International Law at the Office of Legal Counsel at the Department of Justice, and currently as Legal Advisor to the United States Department of State.

He has been awarded 11 honorary degrees, three law school medals, and has received more than 30 awards for his human rights work.

In 1998, President Clinton nominated Dean Koh to become Assistant Secretary of State for Democracy, Human Rights, and Labor. He was unanimously confirmed by the Senate, and served in that role until the end of the Clinton presidency in 2001.

In 2004, he re-joined Yale Law School, where he had begun teaching in 1985 as its 15th dean.

Dean Koh has sought in many ways to bring American and international law closer together, arguing that, and I quote, “concepts like liberty, equality, and privacy are not exclusively American constitutional ideas, but rather part and parcel of the global human rights movement.” In more than 150 articles, he has traced the influence of decisions from international courts on the American court system.

The Salzburg Global Seminar is also very proud to call Dean Koh a Salzburg Fellow. He spent three weeks at Schloss Leopoldskron in 1991 as a faculty member in our 293rd session as a faculty member, and led discussions on distribution of national powers over international economic affairs and extraterritorial applications of US law. I'm sure you remember that vividly.

The in-house report, and we always take private notes during these meetings and have inside reports on who performs well and not-so-well, and who you want to invite again, and all of that sort of thing, the inside report, and I quote from it, details how, quote, “the best performances were made by the younger American academics, William Fletcher, professor of law at the University of California, Berkeley, and now a 9th Circuit Judge in the US Court of Appeals, and Harold Hongju Koh, professor of law at Yale University School of Law..”

The report goes on to say, “Harold is a person to invite back.”

(Laughter.)

Dean Koh, I'm so pleased that only 20 years later, we found an opportunity to invite you back to the Salzburg Global Seminar. The Cutler Center Advisory Committee was unanimous in nominating you to be this year's speaker, and I can think of no one better equipped to address your chosen subject for this evening on American international law.

Please join me in welcoming Dean Koh back to the Salzburg Seminar.

(Applause.)

MR. KOH: Justice O'Connor, Chairman Mansbach, President Salyer, thank you so much for inviting my wife Christie and me back to the Salzburg Seminar. We were there, as you said, 20 years ago. I was 16 going on 17.

(Laughter.)

It was a thrill of a lifetime to be in this incredible Schloss, participating in a dialogue about law and globalization with a group of young, brilliant scholars and lawyers with whom I've actually stayed in touch.

And in fact, just the other week, I was in Brussels at the EU, and a number of the leading career lawyers of the DG4, the legal director were there, and we had all met in Salzburg and had walked around the lake singing "These are a Few Of My Favorite Things."

(Laughter.)

It is also remarkable to be here in this august setting, surrounded by so many people who I've heard of long before I had heard of myself.

I had a dream last night which was that I was standing in the courtroom at the Supreme Court, with my back to the bench.

(Laughter.)

And you have to realize that when I was here clerking, now almost 30 years ago, it was, to me, just the thrill of a lifetime to even be in this courtroom. Every chair I look at, I see Justice Blackman as he was in those days. It was Justice O'Connor's first year on the bench. Since then, I've had the great pleasure of getting to know Justice Breyer, about whom I'll say more in a moment.

And in this dream, I was surrounded by people to whom I owe so many things, Senator Sarbanes, who had spoken so kindly of me at my confirmation, J.T. Smith, whose father, Gerard C., and mother, Bernice Latrobe Smith, named the chair which I was lucky to hold at Yale Law School for many years, past and present colleagues from the State Department, Undersecretary Judith McHale, Assistant Secretary Esther Brimmer, and so many others, not to mention, illustrious members of the Yale Law School community of many generations, including colleagues, former alumni, and students, many of whom are clerking here at the Supreme Court this year, and incredibly, incredibly, took time out to be here. I'm sure they're going to go back to work afterwards.

(Laughter.)

There aren't that many receptions here, and I remember when we were clerks, anytime you could get a free drink, you would.

(Laughter.)

Any time you weren't eating out of a vending machine, you would take the time to listen to lecture as well.

But the most stirring part of this dream, which I had, and which I've just woken up to realize is actually true, was to be giving a lecture in the name of Lloyd Cutler, who was such an extraordinary figure in the law, a lawyer/statesman, a super-lawyer, White House Counsel twice, founding partner of the Wilmer Cutler firm.

And it seemed so fitting to me when I learned of his role in the Salzburg Seminar, because it so fit the grace and global vision he had demonstrated over the years.

I became lucky enough to know Lloyd as a devoted graduate of the Yale Law School, and I have two very powerful personal memories of him, one I'll tell now, and the other with which I'll close the lecture.

In 1994, shortly after I published a book called “The National Security Constitution,” Yale Law School, in a vain effort to sell copies of the book, asked me to speak on a breakfast panel here in Washington, and asked Lloyd if he would be the discussant. And he very graciously accepted.

And then on the very day before I came down to give the breakfast talk, President Clinton summoned Lloyd back to the White House to become White House Counsel again.

And it is characteristic of the man that he didn't cancel. Even though it was his first day or second day of work at the White House, he appeared for the panel, made remarkably astute and intelligent comments. There was huge press coverage, because of course everybody wanted to hear about my book.

(Laughter.)

And when the lecture ended, I said to Lloyd, “Mr. Cutler,” -- I never actually could bring myself to call him Lloyd -- ”I want to thank you for coming today and honoring me by commenting on my book.”

And I said, “I'd like to give me a copy of my book,” which I, of course, had inscribed to give to him.

And he said -- I wish I could do his voice. It was kind of graveling. He said, "You know, I just came over to the Counsel's Office, I didn't have time to move -- I didn't bring anything with me. I don't have a book on the shelf. So I'm just going to put it right up there."

(Laughter.)

And I said, "Thank you, it's a great honor."

Well, a week later, what happened, Justice Blackman retired to be succeeded by none other than my friend Steve Breyer, and it was a very moving day.

Justice Blackman went to the White House, had a press conference. I was watching with tears in my eyes, and at the end of the day, I called Justice Blackman.

And I said, "Mr. Justice, I wanted to congratulate you for a fitting end to your time on the Court."

And he said to me, "Harold, did you know that the only book that Lloyd Cutler has is your book?"

(Laughter.)

Mr. Justice, wherever you are, I could not bring myself to tell you why that was the case.

And Lloyd, I am eternally grateful to you wherever you are, for raising my image in the estimation of my ex-boss.

Well, since those halcyon days of youth, as Steve described, I spent 30 years teaching international, national security, and human rights law at Yale Law School, and I've gained three basic perspectives on this topic: one as an academic, the second as a human rights lawyer and policy-maker, and third, as a government official now in three different administrations as a justice department official in the Reagan Administration, Office of Legal Counsel, as a human rights official in the Clinton State Department, and now as the Legal Advisor in the Obama State Department.

And as Steve described, I've been the legal advisor of the Department of State, the 22nd to hold that position, which I consider to be the most interesting job in the US Government.

The reason is quite simple. Unlike the White House Counsel, for example, who has one extraordinarily important client, I have many clients. Unlike the solicitor general, who gets to argue before one incredibly important court, I get to argue before many courts.

And I have the lucky opportunity to play four different and discrete roles. First, what I'd called a counselor, General Counsel of the department. Second, conscience. A designated role as the conscience of the United States with respect to international law. Third, defender of our interests in various fora, and so I've been lucky enough to appear at the International Court of Justice in the Kosovo Case, before and after tribunals in the Grand River Case. We're discussing now what appearance, if any, we might make before the European Court of Justice to have engaged with the international Criminal Court and the various criminal tribunals. And fourth, and finally, as a spokesperson for the US Government on these matters, which is why I was delighted to accept this invitation to be here today.

In each of these three roles, professor, human rights advocate, and government lawyer, there has been one question that has occupied my thoughts, and that is this: Is there an American international law?

As you know, in the Declaration of Independence, our country was founded on a decent respect to the opinions of mankind. At the same time, Americans, including myself, ranging from Barack Obama to John Boehner, from Sarah Palin to Hillary Clinton, have a very strong belief in American exceptionalism, the exceptional role that America plays in the world.

Ambassador Prosl is laughing.

And the question is, how can these two be reconciled, this commitment to follow international law, and at the same time, a belief in American exceptionalism?

Is there an approach to international law that is, on the one hand, distinctively American, in that it reflects American sensibilities, is true to our values of constitution, democracy, limited government, but at the same time is consistent with global understandings, within what the Europeans would call the margin of appreciation, in the sense that the concepts are recognizable to any international lawyer, even if the details are peculiar to an American approach?

In other words, how do we reconcile America's vision of international law with the vision of international law held by the rest of the world? This, I think, is an extraordinarily important challenge, and one that has gripped my career in all of its phases.

And this issue arises everywhere I go. Last week, I was in Geneva at the UN Human Rights Council, the body where Assistant Secretary Esther Brimmer, Mike Posner, our Assistant Secretary for Human Rights, and I appeared to present our first report to the Universal Periodic Review. We present our human rights record to other nations of the world.

And the first and most obvious reaction to our presentation is, it was exceptional. The average number of recommendations made is somewhere between 10 and 20. Our report got 228, twice as many as the last controversial country that had appeared, Sweden.

So, people were expecting more of us, and our record was given a microscopic examination, because we were viewed as exceptional.

On the other hand, the recommendations highlighted to me differences in a European and American approach to international law, and just let me mention a few.

The first, treaties. A lot of the recommendations were that we ratify treaties, and what occurred to me was that we have a tradition of compliance before ratification, where many other countries have a tradition of ratification before compliance.

So, for example, we are not a party to the UN Convention on the Rights of the Child. The only country that also is not is Somalia. Their excuse is that they have no organized government. Our excuse, I'm not sure exactly what it would be, in light of that.

However, we do obey the norms of the Convention on the Rights of the Child in virtually all major respects, whereas many of the countries which have ratified do not. So, contrast number one, ratification before compliance versus compliance before ratification.

Example two, the death penalty. Many of the recommendations were critical of the US approach to the death penalty. And here, I would say that while I personally am opposed to the death penalty, I do not believe that it is unlawful under international law. In fact, the international covenant on civil and political right envisions that there will be a death penalty. The question is, how can it be fairly administered?

A third difference, economic, social, and cultural rights. It is 70 years since the famous speech by Franklin Roosevelt calling for freedom from want, yet the United States has not embraced economic, social, and cultural rights in the way that other countries of the world that pursue social democracy have done.

Another difference, our approach to domestic implementation of human rights. Many European countries adopt an administrative approach with national commissions. We tend to leave human rights enforcement in a system of constitutional separation of powers.

Another difference, just to make it clear that these differences do exist, our approach to freedom of expression. We have a much more tolerant approach to critical and sometimes even hateful comments about other people, where Europeans tend to have a much more restrictive approach to hate speech, or are much more inclined to urge principles regarding defamation of religions.

And there are two other topics well-known to those in this courtroom. One is attitudes towards foreign law. As you may have seen, there's some state ballot measures now that would forbid the courts of particular states from applying Sharia law, and an approach to national security and the use of force. It is no secret that the attitudes of many nations of the world turned against the United States over the last decade because of America's reaction to 9/11 or its uses of force in Iraq or Afghanistan.

So, given these differences, how do we reconcile America's view of international law with the rest of the world? Can these competing views be reconciled without doing undue violence, either to international law or American values? Or is a distinctively American international law simply irreconcilable with the body of international law that's developing out there?

I think this is an incredibly important question. If they can be reconciled, the United States can be part of the system. If they cannot be reconciled, our exceptionalism will lead us into a path in which we are in a regular state of conflict. It was one thing to be part of this international legal system as a small nation. It's another thing when we are a global superpower.

And I should say that there are professors and academics on both sides of the legal spectrum. Jed Rubenfeld, my Yale colleague on the left, Jack Goldsmith, Eric Posner, on the right, who believe that an American international law cannot be reconciled with perspectives on international law, that somehow international legal approaches are inconsistent with basic principles of American democracy, constitution, and limited government.

It is the thesis of this lecture that I disagree. I believe there is an American international law that can be reconciled with core principles of international law, but also core American values. And I do believe that American exceptionalism is possible without being destructive of an international legal framework.

Now, a number of years ago, I wrote an article called “On American Exceptionalism,” where I suggested that all American exceptionalism is not the same. There is bad exceptionalism and good exceptionalism. It's a little bit like cholesterol.

(Laughter.)

So, for example, Americans don't use the term torture in our legal discourse. We use terms like police brutality. But we are speaking about the same concept. It's simply different labels.

In the same way, we use terms like feet and inches rather than meters. These are differences, but they're not differences that drive us out of the system.

I also think we are exceptional in our commitment to human rights and human rights leadership. But, where we have a tendency to define a different standard, a double standard, that is what I would call bad exceptionalism. And if there's anything we've learned over the last decade, it's that our tendency to engage or to apply double standards will inhibit or limit our ability to exercise exceptional leadership. In other words, our bad exceptionalism will limit our capacity for good exceptionalism.

So, how, then, to develop, and this is the focus of this lecture, an approach to international law that's American, distinctly American, but consistent with international understandings?

And a good legal process perspective would suggest that you'd look to intermediating institutions that can help to build bridges between US approaches to international law and foreign approaches. What are those intermediating institutions?

Well, let's name number one, the courts. The courts. And here we're in the presence of two justices, Justice Sandra Day O'Connor, Justice Stephen Breyer, who have heroically, it seems to me, thought of ways to do exactly what their predecessors on the court, like John Marshall and John Jay did, which is to try to understand how our domestic legal understandings can be reconciled with international understandings.

Now, this has become a controversial doctrine. There are well-known justices and debates on the opposite side. Those have been massively well-rehearsed. Let me just add two thoughts to the mix.

The first is, the next time you hear foreign law cannot be applied in the Supreme Court, I would have two works for you: look up.

(Laughter.)

The law-givers, the law-givers, on the frieze there, are 18 law-givers from the non-Christian and the Christian era. Every single one of those over there is a foreigner. Do you notice Confucius? That's the one that I like to point out.

(Laughter.)

But even on this side, the Christians, Napoleon Bonaparte, John Marshall, William Blackstone, then the Rights of Man, then, my God, Hugo Grotius, the father of international law, a Dutch scholar.

And what the architects of this building were saying is, those who are giving the law, which in our common law process and our common law process of constitutional decision-

making, we are applying, are, in fact, foreign law-givers, and that to incorporate those notions is not antithetical to what judges should do. It's a description of what judges here do do.

So John Marshall, for example, the great Chief Justice, before he was Chief Justice, what was he? He was Secretary of State, and in fact, my guess, I haven't actually counted all of the opinions, is he wrote many, many more opinions construing the law of nations than American constitutional law for the simple reason that there was not much American constitutional law.

Now, as you know, there has become a trope developed, which is a trope often used in judicial nominations, we should not look out over a crowd and pick out our friends.

I think the best response to that was by Aharon Barak, the President of the Israeli Supreme Court, who, along with justices of many other courts, the European Court of Human Rights, the European Court of Justice, the Canadian Supreme Court, the South African Constitutional Court, which Richard Goldstone, who gave this lecture last year sits on, all of them apply foreign law in their jurisprudence.

And once I asked Aharon Barack, what would you say to those who say you are looking out over the crowd and picking out your friends?

And he said, “What would you have me do? Look out over the crowd and pick out my enemies?”

His view is that there is a process of reasoned elaboration of universal human rights concepts like equality, privacy, that require judges to look outside their jurisprudential systems to find how other smart judges have grappled with these experiences.

These are not binding. But he said, if you can read a law review article, why can't you read an opinion by Steve Breyer or Justice O'Connor?

Who else can be bridges in this process? Professors, as I've suggested. How about NGOs, like the Salzburg Seminar? What did the Salzburg Seminar do for so many years but form a bridge between east and western Europe, between people of differing ideological, political, and religious persuasions?

As the Cold War came to an end, the Salzburg Seminar became global, precisely for the purpose of trying to create fora in which people could preserve their distinctive national identity or regional identity, but nevertheless engage in a universal dialogue about common issues like the rule of law. And one of those who pioneered that was none other than the great Lloyd Cutler.

Who else can play this mediating role? And this is what brings me to the balance of my lecture. The Executive Branch, Congress, if Congress is willing, because after all, it is Congress that under the Constitution has the power to define and punish offenses against the law of nations.

But if Congress is not reconciling, it can be the job of the Executive Branch, particularly an administration led by someone whose father was a Kenyan, who lived his life in Indonesia, who studied law at a great law school, and who believes that multilateral approaches in a framework of international law are an important element of US foreign policy.

Now, to read the blogosphere, you would conclude that the slogan of the Obama administration, "Change You Can Believe In," actually does not apply to international law. Those on the right would say, in the blogosphere, there has been no change, and while we believe in the policies, it is continuity, not change.

Those on the left often argue they see no change, and because they don't see change, they don't believe in it.

Let me posit that when the entire blogosphere agrees for ideologically opposite reasons, they're wrong. What I've concluded instead is that we can never eliminate all differences of views. We can share common beliefs and have a reasonable discourse.

I would argue that this administration, in an effort to bridge between an American international law and universal concepts, has brought about change that we can believe in and must keep working for, and that the fruits of our labor can be a distinctively American international law that nevertheless has legitimacy at home and acceptability abroad, and that this calmer discussion can reduce two kinds of polarization. First, the polarization that often develops between US and foreign attitudes toward international law,. And second, polarization that develops between the right and the left wing of the American political spectrum on these issues.

Now, I play a very unusual role as a government lawyer, because to be honest, the major thing I've learned in this job is role, role, the difference in role.

For example, it may well be that my job as a defender of international legal positions makes me argue in favor of human rights positions I disfavor. For example, as I mentioned, I don't like the death penalty, but I think it's lawful. So those who would say, on the one hand, you say this, on the other hand, you say this, the answer is, it's a difference in role.

For example number two, there is a difference between being a government lawyer for a client and being a professor where you're a client for your own views. When you're

a professor, you state what you think the best view of the law is. When you're acting for a client, you have to explain to the client what legally available positions are and they can choose. You can try to talk them out of it, but if they choose something that you don't favor, but it's legally available, you then defend that position.

And third, what we may state as our pre-existing legal view has to be reconciled with a principle of stare decisis in the Executive Branch, so if I have an attitude toward some legal issue, but the long tradition of the Executive Branch has been a somewhat different view, my lawyers operate within the Executive Branch tradition. They don't look to what I said at a law professor's conference 20 years ago. So the role of government lawyers is complex in this bridging exercise in what I call reducing polarization.

Now, if this is a challenge, let me just ask three questions. First, does the Obama Administration have a coherent position on international law? Has it brought about change? And how does that explain our approach to a number of specific issues that you're all thinking about: Libya, 9/11, international legal institutions, treaties, and engagement?

And I would argue, without preempting one of my clients who's speaking at 7:30, that the answer to all three questions is yes, we do have a coherent position, it has brought about change, and it does explain our approach in these various areas.

So what is the big picture? Different administrations have doctrines. I think there's an emerging Obama/Clinton doctrine that focuses on four aspects: principled engagement, diplomacy as a critical element of smart power, strategic multilateralism, and living our values on the theory that it makes us safer and stronger, which means following rules of law and following universal standards, not double standards.

These are themes expressed in every statement that you read of Secretary Clinton. They are themes of the President's speeches in Cairo, in Krakow, in Prague, in Berlin before he became President, and at his Nobel acceptance speech in Oslo.

So let me demonstrate this, and I'll do it quite quickly, so that we can get to questions in three areas, Libya, 9/11, and the war against Al Qaeda, and broader issues of legal engagement, the International Criminal Court, the Human Rights Council, and other treaty affairs.

The President's actions in Libya, which began eight days ago, have been criticized by some for policy reasons but also for legal reasons. And as the President explained in his weekly address and as the Secretary has explained, we believe they are lawful under domestic and international law.

> US forces are conducting a limited and well-defined mission in an effort to support the terms of a UN Security Council Resolution that was authorized by the Security Council, undertaken with the support of European allies and Arab partners for the purpose of preventing a humanitarian catastrophe and addressing the threat posed to international peace and security by the crisis in Libya.

This is, to our minds, something which Chapter 7 of the United Nations Charter envisions, and Resolution 1973 concluded that the situation in Libya is a threat to international peace and security, and then authorized the creation of a no-fly zone for member states to take all necessary measures to protect civilians and civilian-populated areas, and authorized member states to use measures commensurate to the specific circumstances to carry out inspections aimed at the enforcement of an arms embargo.

This sent a message to Gaddafi that a cease fire must be implemented. The President made clear Gaddafi was to stop his forces from advancing on Benghazi and to pull them back from Ajdibiya, Misrata, and Zawiya, and to allow humanitarian assistance to reach the people.

As you recall, the Libyan foreign minister first announced a cease-fire, but Gaddafi and his forces proceeded their attacks on Misrata and advanced on Benghazi.

And Gaddafi said, quote, “We will come, house by house, room by room. We will find you in your closets. We will have no mercy and no pity.”

As the President said in his weekly address, “I firmly believe that when innocent people are being brutalized, when someone like Gaddafi threatens a bloodbath that could destabilize an entire region, and when the international community is prepared to come together to save thousands of lives, then it's in our national interest to act, and it's our responsibility. This is one of those times.”

Now, notice that this is not just an effort to avert a humanitarian disaster, but prevent a threat to the region, which would be intensely destabilizing. 375,000, by latest count, refugees have fled. Gaddafi has forfeited his responsibility to protect his own citizens.

Left unaddressed, growing instability could ignite wider instability in the Middle East in which both countries adjacent to Libya, Tunisia and Egypt, have experienced intense disruption in the last period.

Now, many have said, okay, we have no problem with the international legal argument, but what about the domestic argument?

And here, the obvious question is, is a mission of this kind, which is time-limited, well-defined, discrete, aimed at preventing an imminent humanitarian disaster, and that directly implicates the national security and foreign policy interests of the United States, which the Senate called for by unanimous consent in urging a no-fly zone, which is consistent with the reporting requirements of the War Powers Resolution, supporting an international effort for limited activity in four areas, an arms embargo, no-fly zone, protection of civilians, and humanitarian assistance, and where the United States has not deployed ground forces and will not do so, and where after eight days, the transition to NATO command and control has already happened, is that a war?

Now, I would argue, and many scholars, including myself in all of my academic work, would agree that this is not the kind of issue on which the President has sought Congressional approval in advance in the past. It is consistent with his constitutional authorities and well-recognized authorities to authorize a mission of this kind.

I have given a fuller explication of this in a speech I gave to the American Society of International Law on Saturday. I urge you to look at it, both on the American Society website and on the State Department website.

But the short headline is, the United States actions in Libya are lawful.

Now the same, moving to a second area, can be said about our actions with regard to 9/11 and its aftermath. We are committed to complying with applicable laws of war, in all aspects of ongoing armed conflicts, with regard to detention, humane treatment, detainability, and with regard to the question of how individuals can be punished for their crimes.

The President stated in the archive speech a five-part plan that he said was consistent with our values. When feasible, try those who have violated American criminal law in federal court. If necessary, use revised and constitutional military commissions. Third, transfer those who can be safely transferred. Fourth, when there is no other option, detain Guantanamo detainees under the laws of war consistent with principles of due process. And in all cases, pursue humane treatment.

Now, we will be the first to say that we have not yet closed Guantanamo, and it's certainly not for lack of trying, but we need help from our allies. We need help from Congress, which has imposed, in fact, numerous legislative restrictions on this effort. And the courts are consumed with legislation on this question.

But we continue to believe closing Guantanamo is an important step as a symbol of closing a legal black hole that would improve our standing the international community.

And we believe that terrorism prosecutions in Article 3 courts are succeeding, whether the Richard Reed case, the al-Marri case, the Padilla case, the Zazi case, the Shahzad case, or the Gailani case.

Now, what happened on March 7th? This has been reported in various ways, but the basic point is that the President reaffirmed all five planks of the archives framework.

If you read those statements, there is a continued commitment to civilian trials, a resumption of military commissions on Guantanamo, but for now and on the mainland later, a continued commitment to transfer of eligible detainees, the declaration of an executive order given periodic review to detainees, and a commitment to humane treatment, announcing that we would support the ratification of additional protocol to the Geneva Conventions, and follow additional protocol 1 Article 75. This is the successor to Common Article 3 of the Geneva Conventions, out of a sense of legal obligation.

The courts have largely upheld the detainability of Guantanamo detainees under international law, and have similarly held with regard to those being held in Afghanistan.

The irony is this. In a case called al-Bihani, the DC Circuit initially held that international law did not need to apply to our analysis under the relevant statute, the authorization of use of military force, on an on bank review, that dicta was not relied upon.

What is the short message? Is this the same, or has it changed? There are six important ways in what we have done in this area differs from our predecessor.

First, humane treatment and a renewed commitment to humane treatment.

Second, under domestic law, reliance on domestic authority, statutory authority, the authorization of use of military force resolution, not a general reference to constitutional, un-enumerated powers.

Third, that these domestic authorities should be informed by international law. In the last Administration, the Executive Branch departed from international law. The courts asked them to comply. In this Administration, we are trying to comply, and some courts are asking us to move away.

Fourth, we do not rely on a law of war framework. In all circumstances, we apply an approach to law of war and law enforcement.

Fifth, we do not speak of a global war on terror. We speak of an armed conflict with Al Qaeda and its associated forces.

And finally, we apply a fact-based analysis to particular individuals, not based on labels like enemy combatant.

These are important differences. They are subtle differences, if you're not paying attention. But my message is, you should pay attention.

Now, some would say, what about the use of force with regard to targeting of persons such as high-level Al Qaeda leaders who are planning attacks?

In a well-publicized speech that I gave at the American Society of International Law last year, I made the argument as to why targeting even with unmanned aerial vehicles is consistent with all applicable law, including the laws of war. And I'm happy to discuss those with you further.

The fact of the matter is, I think that that speech has been widely read, and at the end of the day, very few have actually quarreled with it. And I can go through chapter and verse.

Now, let me turn quickly, and this concludes the lecture, to other areas, to show that these are not isolated events. The International Criminal Court, you know our tangled history. The United States prosecuted war criminals in Tokyo and Nuremberg. In 1995, President Clinton favored the concept of an International Criminal Court, but the US did not sign the Rome Treaty in 1998.

By the end of the Clinton Administration, the US had signed that statute, but early in the Bush administration, John Bolton un-signed it. But by the end of the Bush Administration, the Bush Administration had abstained from the referral of the Darfur case.

At the beginning of this Administration, we went to the International Criminal Court Conference in Kampala. I was co-chair of the delegation. And we shifted the default, without changing any laws, from hostility to engagement.

And as you may have noticed, two weeks ago, the United States was one of the countries that unanimously joined the referral of the Libyan matter to the International Criminal Court.

Or the Human Rights Council, with which I've worked very closely with my colleague, Esther Brimmer, the United States was not a member of that Council. Many believed it to be a destructive activity.

We rejoined more than a year ago, and while very few were paying attention, we just completed the most successful session ever. Secretary Clinton went to the Council and spoke. We completed successfully our first Universal Periodic Review. Libya was removed from the Council. A commission in inquiry on Libya was created.

We shifted the focus from the defamation of religions to a topic which was one that could unite Muslim and Western countries. We have created a special rapporteur position on freedom of association, working groups on discrimination, independent experts on Sudan, Haiti, Cambodia, and Somalia.

We have required that the High Commissioner for Human Rights and the Special Rapporteur for Sexual Violence in Conflicts meet to discuss recent mass rapes in the Democratic Republic of the Congo and -- can I mention this, Esther? Have we announced?

And our hope, our hope -- just checking with my boss here -- my hope is that this engagement will continue, because again, there has been a change, change you can believe in.

What about other areas of international law, the law of foreign official immunity, inspired by this court's decision in the Samantar case? Treaty interpretation consistent with international practice. This court's decision in the Abbott case, our continuing efforts through legislative means to enforce and comply with the International Court of Justice's judgment in the Avena case, which was addressed in this court's decision in Medellin vs. Texas, new attitudes to other bodies. Or how about our international legal appointments? And I'm coming to the end here.

What will live on beyond this Administration is the quality of individuals appointed to these bodies. Joan Donoghue, the new Judge of US Nationality in the International Court of Justice, Gerald Neuman of Harvard Law School on the Human Rights Committee, James Brudney of Ohio State on the International Legal Organization's Committee of Experts, Sarah Cleveland of Columbia Law School at the Venice Commission, Tim Feighery, the new chair of the Foreign Claims Settlement Commission, and we've nominated Professor Sean Murphy of George Washington University to resume a position, we hope, on the International Law Commission.

These are, I believe, genuine commitments to international law and institutions, and they are changed.

Now, there's a story that's told about two guys from Galway, and one of them says to the other, how do you get to Dublin?

And the other says, you know, I wouldn't start from here.

(Laughter.)

If you were trying to bring about a change in our attitude toward international law and institutions, would you begin with conflicts in Iraq, Afghanistan, against Al Qaeda, a crisis in Libya, the breakup of so many institutions in the Middle East, the worst recession since the

Depression, tackling challenges that won't go away like piracy and diplomatic immunity, as well as all of the changes of the 21st century, shifts in the Arctic, cyber-crime, food security and global health?

And then just to make it real, throw in, say, an earthquake in Haiti, in Chile, the largest earthquake in the history of Japan, a tsunami, a nuclear crisis in Japan, oh, did I mention a massive oil spill in the Gulf of Mexico, a release of volcanic ash from Iceland, and when you look at it all, you're not going to say, you know, I just might not start from here.

(Laughter.)

Nevertheless, and I would defend this proposition, what we have done in these different areas, use of force, 9/11, humane treatment, detainability, detention, engagement with international law and institutions, is to make changes. And I would say it has not been easy, but neither are these small accomplishments.

Piece by piece, we are developing a distinctively American approach to international law that falls within the margin of appreciation that is understandable to our foreign partners, that is consistent with our global understandings, and that is consistent with American traditions and values, as well as the Constitution, democracy, and our tradition of limited government.

Let me close with my second story about Lloyd Cutler. It was April of 1984, early in the Reagan Administration. Nicaragua had just sued the United States at the International Court of Justice for mining the harbors at the Port of Corinto.

I was a young lawyer at the Justice Department. There was an emergency meeting of the American Society of International Law at the Mayflower Hotel. The mood was wild and revolutionary.

We had a meeting before the gathering. When we heard that who was coming to speak but Lloyd Cutler, the White House Counsel for Jimmy Carter who Ronald Reagan had defeated, and there was a series of efforts to try to develop talking points to address what we thought would be a political attack on the Administration by a Democratic lawyer.

Lloyd Cutler appeared, and this is, I think, what he said. I don't know if you were there, or whether he even mentioned it to you afterwards.

He said, “Whatever our political affiliation, it's time to come together. We owe our President our best advice, because for whatever reason our country is in some difficulty. It is our duty to defend it, even, maybe especially, when the lawfulness of its acts are being challenged in the international arena. And by standing with our country, and trying to bring its

actions into dialogue with international law, we are serving the best traditions of American lawyers."

What he was saying was, it is possible to be lawyers for the government, to be loyal Americans, and to reduce the polarization. What Lloyd Cutler was saying, it is possible to believe in a system of international law and institutions and nevertheless believe in a distinctively American international law.

Thank you.

(Applause.)

MR. SALYER: Thank you very much indeed, Dean Koh, for that extremely thoughtful and thought-provoking speech.

I'm very pleased to welcome now up to the front of the room Judy Woodruff of the PBS *NewsHour* who is going to get us started with a conversation, and I think we have a couple of stools that we're going to bring up for the two of you.

MR. KOH: Big fan. Big fan.

(Laughter.)

MS. WOODRUFF: So, all right.

MR. KOH: What would Justice Blackman say about this? I'm in a bar stool.

(Laughter.)

MS. WOODRUFF: Well, I'm delighted to be here. I'm honored to be here with you, and with all of you.

And we're going to -- I'm going to ask you questions for a few minutes, and then we're going to open it up to all of you in the audience for your comments and questions.

I want to start, because we happen to be talking in the same hour that the President's giving a speech to the nation on Libya, about Libya, and I've been reading in the last few days the comments of constitutional lawyers and others who -- I should say, professors of constitutional law who questioned from several different perspectives what the President is doing.

And one comment I saw in particular, Michael Duff who is at Cornell, said, in effect, the military action is in violation of the Constitution, because even though the President wasn't required to seek a formal declaration of war, he said, quote, “The assignment of powers in the Constitution suggests that some form of legislative consent was necessary.”

In other words, you know very well what the War Powers Act says -- except in cases of an attack on the US or its armed forces, the President must seek prior approval for military action from Congress -- he's saying that applies here.

Why is that wrong?

MR. KOH: Well, this is a debate I've engaged in as a professor going back to 1985.

There are two views. There's an absolutist position, which suggests that before any military action, we must get prior Congressional approval. And then there is an approach which actually accords with the practice of the Executive Branch over the years, which is, when the action is of a nature, duration, and scope that rises to the level of war, Congressional approval is required. That's certainly, I thought, the case in Iraq in 1991, when we were talking about half a million troops prepared for an offensive attack.

The question I would ask everyone to ask yourselves, which is the one I just put you, is when the mission, as defined by the President, is limited in nature, duration, and scope, when the purpose is to support an international effort requested by our European allies and our Arab partners, when the mission, as defined in that statute, is a no-fly zone, an arms embargo, and humanitarian assistance for protection of civilians, when there is a commitment that there will be no use of ground troops, when a transition has already been made eight days after the fact to a multi-lateral force, is that war?

If it is not, then, I mean, that's not to say that these engagements might rise. The current prediction, you all heard it when Secretary Gates discussed a no-fly zone, is that there must be attacks to establish a no-fly zone, and there are many less attacks envisioned or hoped for going forward.

So my view is that when the level of engagement is clearly defined and ramping down, now, compare this with other cases by various Presidents - Kosovo, Haiti, Somalia - in which Congressional approval was not sought, as Justice Breyer and Justice O'Connor know, it's very unlikely that these matters are justiciable. The question is, are these a correct interpretation of the Constitution?

But I do believe that if you're an absolutist, or shall we say, an originalist, calling for an interpretation of the Constitution that probably was not even applied in the early days of the Constitution, then, it's easy to make that pronouncement.

If you are in fact someone who has studied the history and practice of the Executive Branch in which Congress has been aware, my first case that I watched here at the Supreme Court was the Dames and Moore case where Chief Justice Rehnquist said an unbroken record of Executive practice acknowledged by Congress can create a gloss on the Executive power which is like custom, it informs the way it's interpreted.

So, to me, having worked in this area as a government lawyer and as a professor, I don't think it's a closed question.

MS. WOODRUFF: So, it's not that there's a sliding definition, that war, military action is in the eye of the beholder. If you ask Muammar Gaddafi, not that anyone maybe in this

room would care what he thinks, he would say, it's military action that is -- could be determinative, and if that's not war, what is it?

MR. KOH: Well, the scope of the -- I'm very excited to call you Judy, because I talk to you -- good question, Judy.

(Laughter.)

But to me, it's pretty straightforward. The scope of the President's actions here are defined by Security Council Resolution 1973, which authorizes all necessary means for four purposes, the establishment and maintenance of a no-fly zone, an arms embargo, humanitarian assistance, and protection of civilians in civilian-populated areas.

We're not talking about an authorization of some kind of all-out attack and we're not talking about an offensive war. And the President, I think, will make it clear, and has made it clear, that the mission is limited in nature, duration, and scope, and that, to me, is a relevant test.

By the way, if the President in the next 45 minutes says something different from what I say, he's right.

(Laughter.)

Listen to him. Listen to him. What I was trying to do is anticipate his comments, but I'm quite confident that what I've said is completely consistent.

MS. WOODRUFF: I don't know if this is a legal question, but I listened to Senator Lugar yesterday, Richard Lugar, who has been supportive of this Administration in much if not most of its foreign policy over the last two years, question whether, I mean, he was raising the question of whether what we're really doing, we say we're in there to prevent a humanitarian disaster, but what we're really doing is siding with one -- we're taking sides in a civil war.

Why isn't that what we've done, what the United States has done?

MR. KOH: I'm a huge admirer of Senator Lugar, who supported my nomination when some others did not, and obviously, I consider him to be a great figure.

I think there are legitimate policy debates. I do not think this is a debate about what the Constitution permits, and I, you know, yesterday he raised a set of policy concerns.

Look at some of the individuals who are engaging in this action, a President, who as a Senator, was someone who called for limits in our military actions, a Vice President, Joe Biden, who as Senator Sarbanes knows, was one of the leading figures in the effort to modify

and apply the War Powers Resolution, Secretary of State Hillary Clinton, who is deeply respectful of the authorities of the Senate, and as you noticed yesterday in the Sunday shows, the Secretary pointed out repeatedly that on March 1st, the Senate, by unanimous consent, called for a no-fly zone, and it took 16 days for the UN to follow suit, and it was at that point that we responded, Senator Kerry, Chairman of the Senate Foreign Relations Committee, I think his first statement on the floor, this is not a war.

MS. WOODRUFF: But there's the Senate one day, and the Senate another day. We could pick up on that -- here's another question that's been raised.

MR. KOH: Well, Judy, I just say it back again, if you have an absolutist position which ignores a long tradition of Executive practice, you can make that argument, and then the question is, how is that argument to be determined?

If you have a position which relies on a long tradition of practice, and constitutional custom, I think you end up in a different place.

MS. WOODRUFF: All right. The handoff to NATO, when the Administration talks about this, some have commented that this -- it seems a curious distinction, because, you know, we viewed NATO as led from its founding, led by the United States, and so to say that we're turning it over to NATO, what does that really mean?

What is the legal, what are the practical implications or the significance of this hand-off, as opposed to a US-led, multilateral force assembled outside the NATO framework? I mean, what's the distinction of what's happened here?

MR. KOH: Well, I think this is what multilateralism looks like, and particularly multilateralism in an age of limited resources. We've engaged in an armed conflict in Afghanistan for ten years which was led by the United States and supported by NATO allies and partners in ISAF who were not themselves attacked on September 11th. They were subsequently attacked. So, in that effort, we led and they supported us.

In this case, as everybody knows, it was the urgings of NATO to take the actions. They were the ones who pressed the hardest for Resolution 1973. And the question is, should the United States support those actions?

And what the President did in his framing of it was supporting the four missions, and suggesting that those be handed off as soon as they could be done. And all four have now in fact been handed off. And that's mindful of some of the constraints that have been pointed out on our resources by Secretary Gates and others.

Again --

MS. WOODRUFF: So, this is not just dancing around about a definition or -- I mean, that there really is a distinction between what it was and what it is.

MR. KOH: Judy, I'm just a country lawyer.

(Laughter.)

MS. WOODRUFF: Where have I heard that before?

MR. KOH: We can have a lot of debates about a policy, but I think the question is, is this in some way in violation of international law to structure a multi-lateral mission this way? Clearly not. It's not a violation of international law. It's fully compliant with international law.

And then, is that in some way inconsistent with the domestic law? I would argue, based on my life's experience and understanding of the doctrines in this area, it's also not.

MS. WOODRUFF: Changing subjects, another -- there are so many parts of that region of the world we could talk about. Let's talk about Pakistan for a moment, and Afghanistan for that matter.

You've argued tonight, among other things, that the US targeting practices for unmanned weapons are legal under US law and under international law toward high-level Al Qaeda leaders quote “who are planning attacks against the United States.”

But given the new territory and the inherent difficulties of warfare against non-state organizations that are involved in the war on terror, how do you -- how do you know that -- I mean, to what extent can you justify these attacks?

I mean, how much evidence does there have to be for someone who's looking at the legal justification? How much evidence does there have to be for it to be clearly on one side of the line and not on the other?

MR. KOH: Well, I don't think anybody takes these decisions lightly. I would put it this way. All killing is regrettable. Not all killing is unlawful.

It is the very basis of the UN charter that certain kinds of uses of force are lawful, and it's also the basis of the laws of war that certain kinds of military actions conducted in the scope of armed conflict are lawful.

Indeed, the purpose of the laws of war is to police the line between lawful and unlawful uses of force and lawful and unlawful forms of detention.

Now, you know, there's been a lot of outcry about unmanned aerial vehicles, called in the press sometimes drones, and the speech that I gave was designed to unpack that.

One, is it wrong to target a high-level military leader who is trying to attack you? That's what we did in World War II against the Japanese general who did -- he was pursued, and an armed conflict attack was brought against him. That is permissible within the laws of war.

Question two, is it unlawful to use a modern technology? I think going back to the development of the crossbow or the cruise missile, modern technologies have been used.

Third, is this extrajudicial killing, which is somehow unlawful? We have not published target lists in warfare in any war in American history. There must be, as you say, a basis for believing that the people who are being targeted are those who are leading the opposing force.

And if there has been a revelation to me as a professor, and I talked about a fact-based examination, the United States has an extremely detailed understanding of Al Qaeda, its organizational structures, the roles individuals play, and the threat level that they pose, in the same way as you would do if the opposing army were the Nazis or anybody else.

And then finally, you know, there's an assassination ban under domestic law, but that only addresses unlawful killings that are conducted without sufficient rationale or justification, and extremely careful analysis has been done of this.

So if you have a tool that doesn't violate the laws of war, that's consistent with the laws of war, that doesn't violate human rights law, and doesn't violate domestic law, then it's lawful. Whether it's a good policy to use it is up to policy makers, and there may be times when you argue that something is lawful, but awful.

But again, I would not let policy debates and legal debates get confused, because this seems to me, and this is why I gave the speech, you know, people asked me after I gave the speech, do you really agree with this?

And I'd say, I'd have tenure.

(Laughter.)

I do. I'll go back to teach at Yale, and I have life tenure. I'm not going to say something I don't believe in if I think it's lawful. And if I think something is unlawful, I won't hesitate to say it's unlawful either.

But again, these -- you can have debates over what is good policy, but there's a different line over what is lawful or unlawful. And my job in my current position is to make sure

that everything we do is on the lawful side of the line, and then let the policy-makers choose from the legally available options.

MS. WOODRUFF: Another -- I'm not going to follow up on that, but maybe somebody else, somebody in the audience will want to. Another Pakistan-related question, this recent case of the American held on charges of murder and then released after reportedly blood money was paid to the families of the men who were killed raises questions over the reach of what we mean by diplomatic immunity, not to mention American credibility in operating in these politically volatile and yet sovereign environments.

Does it matter in this case, or theoretically in another case that could come up, whether the individual involved is or is not actually a diplomat?

MR. KOH: Well, the -- I know the *NewsHour* and other very sophisticated news shows applied that rubric. The question is actually, are they a person with privileges and immunities under the Vienna Convention on Diplomatic Relations? And there's a category in the Vienna Convention on Diplomatic Relations called "Administrative and Technical Staff."

Administrative and technical staff do not have all the immunities of diplomats, but they do have immunity from criminal jurisdiction, and they do have immunity from arrest.

The person in question was notified to the government of Pakistan as a member of administrative and technical staff well over a year before he was arrested.

We follow these rules absolutely, and that's the whole point of diplomatic immunity, that you don't look behind these labels if someone's been properly notified.

The one time that this was a major fight was one we all remember, and Lloyd Cutler remembers, which was the Iranian hostage crisis. So I have consulted with, as you can imagine, legal advisors of virtually every country in the world on this with whom we deal regularly on these questions. Every single one of them thought this was a slam-dunk.

Someone is a member of the administrative and technical staff. He is notified. Once notified, his treaty-based privileges and immunities kick in. Those involve immunity from criminal jurisdiction. We have asserted those immunities, and they should be respected. And I'm happy to say he was released.

MS. WOODRUFF: I'm just curious. Who were some of the folks you might consult on something like that?

MR. KOH: Well, the British legal advisor, the Canadian legal advisor, the Danish legal advisor, the German legal advisor, the Japanese legal advisor, the Chinese legal advisor, the Russian legal advisor. With all of them, we're in regular communication.

Last week, I was in Strasbourg, and I met with 44 other legal advisors, and we discussed these cases. And I can't go into the substance of our conversations, but there are many issues on which there are legal differences.

On something like this, every country in the world has an incentive that when someone is properly accredited under the Vienna Convention, and entitled to have privileges and immunities, that those be respected.

MS. WOODRUFF: Including the Pakistani legal advisor?

MR. KOH: Well, the Pakistanis had a different view of his immunities, but on the other hand, they released him.

MS. WOODRUFF: Well, that raises, and I want to come to the audience after I ask this question, in a way that raises another question in my mind.

And that is, there are several ways to come at this, but there's a lot of conversation one hears from one end of the political spectrum in this country in particular, the conservative end of the spectrum, and that is, it has to do with American exceptionalism.

And part of that argument that is made that this is such an exceptional country that in no way, for no reason, should the United States be consulting with any other government about its legal attitudes or legal system, and that the United States, I mean, to come back to the principal part of the argument you made tonight, that the United States shouldn't be worrying at all about international law, that that's something that should follow whatever the interests of this country are.

How do you -- how do you see that argument, and I know it's a big question, so come at it any way you want to. But how do you see that, and what do you say to it?

MR. KOH: Well, I'll come at it three ways. One is historically the people you describe are originalists, isn't that right? They believe that we should follow how the Constitution was applied at the beginning of the Republic, when the Secretaries of State were people like John Marshall, John Jay, Oliver Ellsworth, who were later on Supreme Court, when the Declaration of Independence said we would pay decent respect to the opinions of mankind.

Just think about it. In 1789, we were a little country with little power. Our primary claim of international legitimacy was the extent to which we would obey the rules of the international system.

If you look today at the constitution of Kosovo or East Timor, they do the exact same thing, because a new nation needs to be -- prove itself by its willingness to obey these international norms.

So true originalists, true originalists, it seems to me, have to accept these interpretations.

At the beginning of the US Republic, there was no US law. There was state law. There was almost no constitutional law. But what there was, was the law of nations. How did we pursue piracy cases in 1789? The answer is we applied international law.

Now, when you become a great power, I don't think you should simply engage in a kind of historical amnesia.

A second point is just a simple one of what I've been calling strategic multilateralism. If, and you've just given a terrific group of examples, if we're looking for the support of other countries on questions of international law like diplomatic immunity, then it might help to be following and working with them in a NATO mission that they very much want, which is authorized by international law under a Security Council resolution that was collectively negotiated.

And it also works when you're trying to do a division of labor. You could go a unilateralist route and then you're left holding the bag. But if you pursue a multilateralist strategy, you can engage the world on matters of principle.

So my perspective is that following international law is both right and smart. And one of the things I say to my students is, if you don't think -- people are concerned that international law is a constraint on our sovereignty. It's restrictive.

I say, it frees us. International law frees us. If you leave this building, go to Dulles, take out your passport, get on a plane in which you are protected by the Warsaw Convention in terms of what can happen to your luggage, and when you arrive at the other side, take money out of an ATM machine without changing money and then travel across the countries of Europe on a Schengen visa, you say, the thing that has changed in terms of our capacity to function is the progressive development of international law.

And this is where the Salzburg Global Seminar came in, in the wake of the Cold War. Was there a common language that could be spoken between the countries of the east and the west? And it was rule of law, and that was an idea that Lloyd Cutler saw early, pioneered, and I think it was the basis for the Seminar.

I'm thrilled to see Bob Herzstein. He was the one who invited me to Salzburg in 1991, so he's been at my two appearances at the Salzburg Seminar 20 years apart.

MS. WOODRUFF: All right. It's now up to all of you to ask that question that's been burning in the front or the back of your mind.

Raise your hand, stand up, don't be shy.

Yes. And we're going to ask you to stand up and give us your name. Hi.

MR. ONEK: Joe Onek. On the question of use of foreign law, conservatives have complained a lot, particularly its use in death penalty cases, but this hypothetical to pose to you, suppose, unfortunately, the United States passed a pre-trial detention act.

Do you think conservatives would really be reluctant or deem it inappropriate to cite the experience of England and Israel and other countries that also have preventive detention?

MR. KOH: Well, as the great Joe Onek, former deputy White House Counsel under Lloyd Cutler knows, government lawyers don't answer hypothetical questions.

(Laughter.)

But let me go to two issues, which I think bear on what you asked. The first is the death penalty. You know, in this courthouse, the question arose whether you could execute someone with mental retardation, namely an IQ below a certain number.

When I was a law professor, my students and I wrote an amicus brief in which we discovered that the only countries in the world that executed persons with these IQ levels were the United States, Japan, and Kyrgyzstan. The other 191 countries did not.

Then it turned out, through further research, we found that the case in Japan was a mistaken case, so it was the United States and Kyrgyzstan.

We filed the amicus brief, and the next day, the ambassador to Kyrgyzstan wrote a letter to the New York Times in which he said, we have a moratorium on the death penalty for the simple reason that they would like to be part of the European Union, and the European Union has a rule against the death penalty.

And then we did further examination, and we discovered that the number of states of the union that have a law permitting the execution of persons with mental retardation is -- was something like 23, and the number that had actually executed someone with mental retardation was something like three in the previous ten years.

It came to this court, and then the question became, what does this have to do with American constitutional law?

Well, the eighth amendment forbids cruel and unusual punishment, and I would posit that when there is a punishment which is pursued by only three states in one country in the world, and there are 194 countries, it is unusual. It may not have been unusual in 1789, but if

you don't think the constitution is frozen in time, that is a relevant factor for justices to look through.

Now, whether to look, how to look, has been a subject of great debate within this court. Joe is smiling because he thinks I've answered his question.

Is it relevant to American practice what other countries think is an appropriate limitation? It certainly is, if you look to the Executive Order on periodic review, it was an Executive Order that was drafted very mindful of practices and precedents in other countries because we would like to see them as supporting this consistent with what they perceive to be universal values.

We could go it alone, but the question is, will we have to pay the price down the road?

MS. WOODRUFF: Joe Onek, does that answer your question?

All right. Yes, sir. Hello. Stand up, please.

MR. HASSOUNA: Thank you. Hussein Hassouna, Ambassador with the Arab League.

Well, we were on a panel the other day at the American Society of International Law. I have two questions to ask you.

First, you said that the approach of the United States has often been towards treaties, compliance before ratification. Is this on the basis that many of these treaties, in fact, codified rules of customary international law? And what is the US approach to customary international law is my first question.

The second --

MS. WOODRUFF: Let him answer that one, then we'll move on to the second one.

MR. KOH: Well, we have a constitutional system, which as you know, requires 67 senators to advise and consent to a treaty, which means that 33, 34 senators can block a treaty.

We have a system where if the Chairman of the Foreign Relations Committee is unwilling to bring the case or the treaty to the Committee, it does not get consideration. So, in fact, one senator can block.

So, this is why often when a principle has very strong support in the country, we are still not able to get ratification, although it could well be that there is very substantial compliance with the norms of that treaty.

Is it permitted for the Executive Branch to follow rules as a matter of customary international law? Abe Chayes, who was a Legal Advisor, used to say, do you believe in total immersion baptism? And he said, believe in it? I've seen it done.

(Laughter.)

Do I believe that the United States can adopt rules by customary international law? Well, guess what, we follow the Vienna Convention on the Law of Treaties. We have not ratified it. We follow it as a matter of customary international law.

In 1982, the United States did not ratify the Law of the Sea Convention, but President Reagan said he would follow a 12-mile limit as a matter of customary international law.

Last, on March 7th, President Obama said that he would follow the customary -- I'm sorry, the Humane Treatment Provisions of Additional Protocol, one of the Geneva Convention, Article 75, out of a sense of legal obligation, the implication being, it's not a policy decision, it won't change. It's because we accept it as a norm.

The International Court of Justice Statue says a consistent state practice followed out of a sense of legal obligation is customary international law. And the United States follows it.

And our Constitution makes specific reference to the Law of Nations as a source of law. I'll give you an example. In Virginia, the Eastern District of Virginia, some pirates from Somalia, the Gulf of Aden, were just brought there. They were indicted under a criminal statute which criminalizes piracy in violation of the Law of Nations. That's what the statute of the United States says.

So the question is, were their acts in the Gulf of Aden in the year 2011 in violation of customary international law? Believe in it, I've seen it done.

MS. WOODRUFF: Okay, we only have a couple of minutes left. Did you have a second question? Or is there somebody else with a burning question?

You get your second question.

MR. HASSOUNA: The Libyan crisis has raised the issue of humanitarian intervention, and the doctrine of a duty to protect when civilians are subject to killing and war crimes or crimes against humanity and so on.

But in spite of this, this is still a very controversial doctrine among United Nations members. So, what is your view on this? Is this -- has this been now established as a doctrine accepted in international law, or is it still emerging as a new doctrine?

MR. KOH: Well, if you look up at Hugo Grotius, he is the person who, in the late 1500s, first spoke of a concept of humanitarian intervention as a customary international law doctrine, but it was limited to protection of one's nationals where the territorial state will not protect them.

So, take for example, the raid at Entebbe, where Israeli forces went to Uganda to release their prisoners, their own citizens, who were not under the protection of Idi Amin. It was the same theory under which the Carter Administration proposed to send troops to Iran to obtain the release of the Iranian hostages that did not succeed.

The question then becomes, what if you cannot simply rescue your citizens, or what if those citizens are being threatened by their own country? The obvious question, you know, could there have been an intervention to prevent Hitler from the Holocaust?

And that question was posed in the `90s in the Kosovo intervention, and also in Rwanda, the intervention that did not happen, and that led, then, to a debate in the UN under Kofi Annan of the notion of responsibility to protect and a series of commissions that studied that subject.

The Libya action I should point out is an action that takes place under a Security Council resolution which authorizes all necessary means, so its lawfulness is established by Chapter 7 of the UN Charter without ever saying the words responsibility to protect.

However, if you look in both resolution 1970 and 1973, they say, Libya has forfeited or failed to exercise its responsibility to protect its own citizens.

If Muammar al-Gaddafi says to the 700,000 citizens of Benghazi, “We will show you no mercy, we will show you no pity, we will find you in your houses, we will find you in your closets,” he is not exercising the territorial state's duty to protect.

And as Secretary Clinton said yesterday on the various morning shows, how would we feel if, with necessary international legal authority, we did not act? If we do act and the Arab League played a critical role in urging this action, and avert this humanitarian disaster, which is a better state of affairs?

Now, what happens from here is a whole new set of challenges. I'm sure we'll hear the President speak about that tonight. But on the question of whether we could act under a Security Council resolution to take all necessary measures to pursue four limited missions and then turn those missions over to NATO, I think the answer is clearly, we can, and clearly, we did, without ever having to go back and reference the broader jurisprudential debate.

Finally, in the President's Nobel lecture, which many praised but few read, or, Mr. President, fewer than should have, he references this concept, that when a state is threatening its own citizens, this may, in his view, prompt uses of force even in circumstances where we do not desire to use force.

The theme of that Nobel Peace Prize lecture was, I am a man of peace who has become a leader of a polity. One of the tools available to me is the use of force. I am committed to use it lawfully, and consistent with our values.

And then he gives a series of explanations, how he will do this under the laws of war, how he will seek to pursue a nuclear-free world, and how he will seek to follow the basic principles I have described here today.

MS. WOODRUFF: Well, it's a subject that we could go on at greater length about. It raises all sorts of interesting questions about other countries in the region, and what governments have done to those citizens, but we won't get into those now. We can talk about that in the reception afterwards.

Dean Koh, thank you very much, on behalf of everyone here.

(Applause.)

MR. SALYER: Well, I want to again thank Dean Koh for his remarks, both in the lecture and in the Q & A.

And to Judy Woodruff, our sincere thanks for leading this conversation for a second year, and doing it so skillfully.

I want to just thank all of you for coming tonight and being part of this Salzburg Seminar, abbreviated, but here in Washington. I know many of you have been a part of these discussions before, but we are delighted to bring a little slice of what we do in Salzburg here to Washington, and I hope there will be more opportunities in the years to come.

I did want to mention that there's one member of our Cutler Center Advisory Board who passed away this year, and that is Ted Sorenson. AndI know Ted would have very much enjoyed being here tonight, and we miss him a lot.

So I will now just urge that all who can move next door. We've got a very nice reception organized, and a chance, I hope, to visit among ourselves a bit longer before we head off into the night.

So thank you again, very much, and thanks to our speaker and to Judy.

(Applause.)

(Whereupon, the above-entitled matter was concluded.)