



Legally Speaking

Dilemmas of State:

A conversation with Harold Koh



AS THE STATE DEPARTMENT'S LEGAL adviser since 2009, Harold Hongju Koh has played a key role in shaping this country's foreign policy. A renowned scholar of international law, Koh's résumé includes stints with both the Reagan and Clinton administrations. He is also a professor at the Yale Law School, where for five years he served as dean. Yet even with these lofty credentials, Koh did not land his present job without a tough confirmation battle in the Senate. One oft-repeated charge from conservatives was that as a liberal "transnationalist" he would champion international law at the cost of undermining our national sovereignty and restricting our actions abroad. But if Koh's three years at State have proved anything, it's that he's not so easy to pigeonhole. This became clear at the start of his tenure when he began signing off on the killing of suspected terrorists in places such as Yemen and Pakistan using unmanned drones. On August 30 Koh sat down with *California Lawyer* editor Martin Lasden for an in-depth interview. Here are edited excerpts from that videotaped discussion.

Q: As a matter of international law, what is the essential difference between attaching sticky bombs to the cars of nuclear scientists in Iran—which Israeli agents are strongly suspected of doing—and dropping Hellfire missiles from 30,000 feet on suspected terrorists in places far removed from established battlefields, in countries we are not at war with?

Well, number one, we are in an armed conflict with Al Qaeda, which is

a non-state actor. Al Qaeda is an organized force and it has senior leaders, and many of those senior leaders have long and documented histories of attacking U.S. citizens on U.S. soil—including involvement in 9/11 and other similar attacks. That is the frame. And let me make it clear I did not come to government because I wanted to work on

killing people. On the other hand, all killing is regrettable, but not all killing is illegal, and in the context of the law of war it is the laws of war that draw the line between lawful and unlawful killing. So with regard to the example you gave, Israel is not in a state of war with Iran, as far as I know.

In Daniel Klaidman's recently published book *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, there's a passage that I'd like to read to you. He writes: "At Yale Law, Koh had memorized the names and faces of his students, bright-eyed idealists who wanted to use the law to improve the world. Now he was studying government hit lists, memorizing the profiles of young, vacant-eyed militants, and helping determine which ones could be put to death. 'How did I go

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from being a law professor to someone involved in killing?' he wondered." Did Klaidman accurately describe what you were thinking and feeling?

Well, clearly he's inferred stuff about my thought processes. But put yourself in my shoes. I'm the lawyer for the State Department. My job is to ensure that U.S. activity complies with international law. The way you can determine that is to determine whether persons are lawful targets, and these people are not going to receive a trial because target lists are not subject to judicial review; they've never been. The due process they're going to get is from me, and whether [or not] that should be the way it is, that's my job. So I have to be absolutely sure before I participate in some decision that the person poses a genuine threat to U.S. interests, and that requires I know every bit as much about that person as I knew about students I was trying to teach and help.

There was a suspect, for example, who we were following who was born on the exact same day as my daughter. I read this person's dossier, and I remembered what my daughter was doing when she was 10 years old, and that was the day this guy was recruited, and on the day she celebrated another birthday he killed his first child soldier. I mean, this just tells you about the tragedy of our lives. ...

But what would people want? I would be delighted if this was not something that I was asked to do in these settings, but on the other hand, if this is the job that somebody has to do, it might as well be me. And I should do it to the very best of my ability.

Of all the targeted killings we've read about, the one that's generated the most controversy was the killing of Anwar al-Aulaqi—an American citizen living in Yemen. Well before al-Aulaqi was killed, though, his father—also an American citizen—went into court demanding that this administration present a rationale for why his son was on a hit list. And the administration's response, in essence, was that this was none of the court's business. Would you have been comfortable making

that argument?

If Admiral Yamamoto, who launched the Pearl Harbor attack, were an American dual national, would he be allowed to go into a U.S. court and get a restraining order that would allow him to keep attacking the United States? By the way, the court ruled against the plaintiff [al-Aulaqi's father], and it was a very good judge and both sides were well represented.

In the mid-1990s you wrote a law review article in which you argued that the opinions of the Justice Department's Office of Legal Counsel should be made public. Do you still believe that?

Most of them are public. And if you go to the Department of Justice website, there they are. And many of the most controversial ones have been declassified. So I believe that, and I think it's actually happened.

But when the administration says we can't confirm or deny that we have an OLC opinion on this al-Aulaqi thing, isn't that a little silly?

I could ask you, "How did you come to write the *California Lawyer* story about X, Y, or Z, or who were your sources?" Every organization will come to a point where they say: "That is a confidential process, and we need that confidentiality to do our work." And in much of what I do those rules of classification are both mandated by legislation and enforced by criminal penalties. I'm not free to waive them on my own. I mean, I'd be delighted if you could join the government and then make a bunch of commitments and then just ignore them to make yourself look good. But unfortunately that's not the case.

In your 1990 book *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, you warned against the dangers of an imperial presidency, especially when it comes to launching military action without congressional approval. Since joining this administration as legal adviser, have your views on this changed?

No, because I think that the executive branch can still overreach. On the

other hand, I think there's a robust system of internal checks and balances. My view is not the legal view of the U.S. government; these matters are reviewed and evaluated by lawyers from across the executive branch. And by the way, one question that nobody asks is why the legal adviser is so deeply engaged in these drone issues that you're asking about. I'm supposed to be the diplomat. You can imagine some environments in which I would be excluded. But that's not the case.

Let me ask about the legal implications of our ongoing standoff with Iran. Suppose for a moment that over the next few months Iran comes close to violating the nuclear nonproliferation treaty, but is very careful not to actually cross that line. Would Israel, with the coordination of the United States, be on the right side of international law if it were to launch a preemptive strike?

Well, that's a lot of hypotheticals. But the truth is that this issue is being addressed through a combination of multilateral sanctions ... [in] which the United Nations is participating, and those processes are going to continue. The thing I'm struck by, though, is how many people assume that the solution of choice is always military, when in fact what we've done here is almost entirely diplomatic—what [Secretary of State] Hillary Clinton calls smart power. There is no proof that a smart-power approach has failed. In fact, it seems from my perspective it has kept things exactly in the kind of constrained circumstances they ought to be.

You've spent a good part of your career in academia, and you've spent a good part of your career in government. Which would you say is the more surreal place to work?

They're equally surreal. But look, I'm a lucky guy. If you told me back when I was a law student that I would do any of the things I've done—any of them—I would have said, come on. Yet I've had the chance to do all of them. ☺

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