

HAROLD KOH RELITIGATES THE ARGUMENT HE ALREADY LOST

The NYT thinks the takeaway “news” of Harold Koh’s speech on Forever War is his call for more transparency on drone killing. Yet that Koh supports more transparency on drones is not news. Daniel Klaidman has been reporting that since January 2012.

What’s newsworthy about this call for transparency, though, is how shrill it is.

But since then, to be candid, this Administration has not done enough to be transparent about legal standards and the decisionmaking process that it has been applying. It had not been sufficiently transparent to the media, to Congress, and to our allies. **Because the Administration has been so opaque, a left-right coalition running from Code Pink to Rand Paul has now spoken out against the drone program, fostering a growing perception that the program is not lawful and necessary, but illegal, unnecessary and out of control.** The Administration must take responsibility for this failure, because **its persistent and counterproductive lack of transparency** has led to the release of necessary pieces of its public legal defense too little and too late.

As a result, the public has increasingly lost track of the real issue, which is not drone *technology per se*, but the need for transparent, agreedupon domestic and international legal process and standards.

Perhaps this shrillness is why Koh ends the

speech with a grandiose invocation of our
“better angels.”

Because I am an American who loves his country, I have served it for ten years of my professional career. My former professor and former Legal Adviser Abram Chayes once said, after he had sued the United States government from the academy, “I have always thought there is nothing wrong with an American lawyer holding the United States to its own best standards.” It is in that spirit that tonight, from this important podium, I call my country to its own best values and principles. As President Lincoln famously said, there is still time—indeed, it is high time— for Americans once again to answer to the “better angels” of our national nature.

Though it should be noted that Attorney Abe Lincoln appealed for us to answer to our better angels at the beginning of his service in the Executive Branch, not after he had left that position of influence (something John Wilkes Booth prevented in any case). Why is Harold Koh saying this now?

After all, this battle, the battles for transparency, for “discipline” in the drone program, and for closing Gitmo, are all battles he fought and lost while he was still in government.

It’s how Koh relitigates the last of those battles, closing Gitmo, I find most interesting. He calls for the appointment of a Greg Craig type to implement the plan Craig tried to implement himself in the first year of the Obama Administration.

First, and foremost, he must appoint a senior White House official with the clout and commitment to actually make Guantanamo closure happen. There has not been such a person at the White House

since Greg Craig left as White House Counsel in early 2010. There must be someone close to the President, with a broad enough mandate and directly answerable to him, who wakes up each morning thinking about how to shrink the Guantanamo population and close the camp.

Second, this White House Envoy need not develop a new paradigm for closing Guantanamo. He or she merely needs to implement the National Archives framework that the President announced three years ago. The White House Envoy should lead the Administration's efforts to implement the three-part framework for closure of the Guantanamo detention facility specified in the President's 2010 speech at the National Archives. That speech described a framework for how this closure could happen: through diplomatic transfers of those individuals who could be safely transferred, prosecution of those who can be tried before civilian courts when possible and military commissions where that is the only option, and third, by commencing the long-overdue legally mandated periodic review of so-called Law of War Detainees to see if any can be released, because of changes either in their attitude or in the conditions of the country to which they could be transferred.

Now, I'm all in favor of closing Gitmo and this might be one way to do it. Koh actually improves on the prior plan by admitting the indefinite detainees will have to be released as the war is over, which is legally correct but misapprehends why they're not being released and why we have to have a Forever War to justify keeping them silent and imprisoned forever.

But Koh's map for closing Gitmo also misrepresents why appointing Greg Craig himself

to carry out the Gitmo task didn't work. As I traced in real time (see, here, here, and here), to get Obama's ear, Craig had to fight through Rahm Emanuel. And Rahm preferred to sell out Obama's human rights promises in exchange for an eventually failed attempt to appease Lindsey Graham. Rahm won that fight. After Rahm won that battle, he scapegoated Craig. Ultimately, when asked why he left, Craig pointed to Rahm.

It wasn't enough to appoint Greg Craig. Closing Gitmo either required appointing someone with the bureaucratic chops to beat Rahm or someone like him in battle, or someone whom Obama actually entrusts such a battle with. And Holder's fate – where Obama continues to have trust in him even while he ultimately reversed his decision to try Khalid Sheikh Mohammed in NYC – shows that's not enough. Heck, Koh stayed on for almost four years, but even battles he presumably thought he had won, like drone rules, he now appears to have lost. Ultimately, then, it's going to take a really shrewd fighter or ... it's going to take the President wanting to invest political capital in these things more than he did three years ago.

Sure, things may be different now, as 100 detainees continue their months-long hunger strike, as Obama starts thinking more and more about his legacy. Maybe Koh's shrill words will resonate (though I suspect he used equally shrill language in arguments in the Situation Room, and that seems not to have worked).

So it's all a nice sentiment, and it's useful to remind people there was once a plan, and I'm sure delivering this speech makes Koh feel better about having apparently sacrificed his values in sanctioning drone killing that – he all but admits here – lacks the discipline to make it legal or at least defensible.

But ultimately, we would do well to remember that these are all battles Koh already lost. And unless we can change the underlying reasons Koh

lost them, invoking our better angels will not
be enough to accomplish these goals.