

HAROLD KOH AND THE FIRST OFFICE OF LEGAL COUNSEL MEMO

When I compared what appeared in Eric Holder's March 2012 targeted killing speech and the targeted killing white paper, I discovered two sections that appear in Holder but not the white paper: a section on leaders as targets.

Furthermore, it is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto – the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway – and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

And a section asserting that the technology of drones doesn't change the legal principles behind the use of lethal force.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether.

But that language was not new to the Holder speech; it appears as two of the main bullet points in Harold Koh's March 2010 speech addressing, in part, our use of drones.

First, some have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged the very use of advanced weapons systems, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict— such as pilotless aircraft or so-called smart bombs— so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

In addition to situating drone strikes within law of war principles, Koh also addressed two other issues that show up in the white paper (and Holder's speech): due process and assassinations.

Third, some have argued that the use of lethal force against specific

individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate domestic law, in particular, the long-standing domestic ban on assassinations. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

I raise all this because Koh’s speech comes between the reported date of the first targeted killing memo – February 2010 – and the date of the second one. (h/t to Snoopdido for pointing this out)

Mind you, Koh’s speech is not the only statement of drone authority that may fall in that period. There are also Dennis Blair’s comments from February 3, 2010 (so probably, but not definitely, before the first memo).

“We take direct actions against

terrorists in the intelligence community," he said. "If we think that direct action will involve killing an American, we get specific permission to do that."

[snip]

"We don't target people for free speech. We target them for taking action that threatens Americans or has resulted in it."

He added, "The reason I went this far in open session is I just don't want other Americans who are watching to think that we are careless about endangering ... lives at all. But we especially are not careless about endangering American lives, as we try to carry out the policies to protect most of the country and I think we ought to go into details in closed session."

But Blair's comments – especially the "we target them for taking actions that have resulted in threats to America whether the actions themselves were a threat" one, as well as the specific Presidential approval one – don't appear in the white paper or Holder's speech (except as incorporated into the very broad imminence standard). Koh's do (they also appear in Jeh Johnson's speech, and the technology part appears in John Brennan's speech).

Now, it could be that Blair's comments reflect the content of that first memo, in which case the June-July memo may be an effort to shore up pretty startling claims (which ultimately would permit the killing of someone for incitement). Or it could be that Koh's comments reflect the first memo, in which case the memos may be additive, with the general principles introduced by Koh fleshed out in the June-July memo.

But it seems worth noting that Holder's speech incorporates Koh's plus the white paper.