Amanda,

I hope you are well in all regards and having a good year at NYU. I tried to call you a couple of times to discuss my concern about the controversy about Harold Koh at NYU. Sorry that you got calls from that strange number. I just texted you that it was me, but in case we don’t catch up, I’ll share a few thoughts in this e-mail. I realize that a lot of water has gone over the bridge by now, but I wanted to let you know what I know about Harold and urge you to reconsider being a part of the campaign against him. Some of the things that have been said are simply not accurate. And if Harold’s role in the Obama administration disqualifies him from teaching or speaking at NYU, then just about every member of the administration from President Obama on down is also disqualified.

The accusations that Harold directly facilitated the killing of Anwar al-Aulaqi is simply not true, regardless of a few quotes pulled from a book. The key architects and advocates for the drone program were President Obama and his national security advisor, John Brennan, among others. Obama inherited two wars and the drone program from the previous administration when he became president. It was Obama himself who greatly expanded the drone program and even selected the targets to be taken out by drones. Any lawyer who joined the Obama administration – particularly departments like State, Defense, Homeland Security, Justice and the White House – joined an administration committed to drone strikes and would be expected to provide legal advice regarding them. Obama was not interested in ending the program so there was no point in recommending that. It is well known that Obama and his national security advisers, particularly Brennan, were determined to get Al-Aulaqi after he was involved in the efforts of the “underwear bomber” to blow up an airliner as it approached Detroit on Christmas, 2009. Obama called Al-Aulaqi the leader of external operations for Al Qaeda in the Arabian Peninsula. After the killings, Obama defended them in a speech at National Defense University in May 2013 saying Al-Aulaqi had been waging war against Americans. The legal basis for the killing was developed in two memos by David Barron and Martin Lederman, lawyers in the Office of
Legal Counsel, who concluded that it would be legal to kill Al-Aulaqi if he could not be captured because he was an enemy leader in a war against the US and the killing would be in national self-defense. Barron is now a judge on the First Circuit Court of Appeals. Lederman is a professor at Georgetown Law. Their memos were very controversial – at least among lawyers – as is often the case with legal documents, particularly on subjects like this. One may strongly disagree with their legal opinions and with Harold’s legal opinions, but that does not make them unethical and unprincipled. That is simply an accusation by those who are so certain of their position that they can’t see that there could be a different one. But the issue is subject to debate, and it continues to be debated today and will be debated for years to come. And ethical, principled people can reach different opinions on it.

I have known Harold Koh since the first year I taught at Yale, 1993. I have the greatest respect for him based on the work he has done over a lifetime. When I got to Yale, he was representing Haitian refugees and coordinating the work of a large number of students on issues involved Haitians and other immigration issues. Our offices were not far apart and we worked late into the night every night. He inspired many students to do immigration work upon graduation from law school. Some have devoted their lives to it. He was down at SCHR once when he had an argument in the Eleventh Circuit on an issue regarding giving legal assistance to people who were trying to flee Haiti, but were being caught and returned by the coast guard. He did that and other human rights work for years and undoubtedly saved the lives of many people. Thanks to Harold, Yale’s largest clinic represents workers and immigrants. When he was dean, he started a criminal justice clinic in which students represent people accused of crimes. He supported my presence at the law school and the capital punishment clinic. These are things I have seen from being at the law school. He has, of course, been one of the leading human rights lawyers in the country.

Many of my friends and former students went into positions in the federal government after Obama was elected. Some were quite disillusioned and left after a short time. I understand that. But I have great admiration for the people who stayed and tried to move things in the right direction as best
they could. Harold was one of those people. His record at State went far beyond legal opinions on drones and included things such as going to China to meet with a dissident who had taken asylum in the US embassy, calling John Sexton and getting the person admitted to NYU, and then flying him back to the US. That was the sort of thing he was doing all the time, and I doubt if anyone there has any since of it. He was no functionary and it is insulting that some have suggested that he was.

I would also note, as Teddy Roosevelt did, that it is easy to be the critic and point out the shortcomings of those who are “in the arena,” actually dealing with enormously difficult issues in all their complexity. I have no doubt about the sincerity of anyone who expressed no confidence in Harold, but I doubt that they are well informed beyond the few passages quoted in the statement. And, with all due respect, I doubt if many, if any, of them will devote their careers to human rights in the way that Harold Koh has. Does someone who is going to a firm to make hundreds of thousands of dollars a year representing corporations in any position to express a lack of confidence in Harold Koh?

The people who have long labored in the trenches fighting for human rights all over the world have the utmost respect for Harold. Why attack him? Aren’t there more constructive things to do? Wouldn’t it do more good to help some of the many people with desperate needs for legal assistance than tearing down a good man who has lived a good life and helped more people than most of us will be able to help in our lives? It’s not fair and it’s not right, and I hope that you and others will reconsider whether this is really the battle you want to fight.

Feel free to call if you would like to discuss.

Best,

Steve