

# An Uncommon Lawyer

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Harold Hongju Koh\*

Abe Chayes was an uncommon lawyer. As much as any lawyer of his time, he understood and inhabited the twin worlds of thought and action in the global realm. When I first heard that Abe had died, I walked directly from my office at the State Department, down one flight, to the conference room of his old domain, the Office of the Legal Adviser. There, amid a gallery of Legal Advisers, hangs a picture of Abe as he looked during the Kennedy Administration: impossibly young and dashing, with that insouciant smile and those penetrating eyes.

Seeing Abe again, so vibrantly alive, brought the memories flooding back: as a college student, reading his book about the Cuban Missile Crisis, and starting to understand for the first time how and why legal arguments matter in the shaping of United States foreign policy;<sup>1</sup> sitting on the floor of the Harvard Law Library stacks, poring over *The Role of the Judge in Public Law Litigation*.<sup>2</sup> To a beginning civil procedure student, it was stunning to think of law not as black-letter doctrine, but as living process; to look at litigation not just as dispute resolution, but as the making of public policy. My first real lesson about human rights litigation was understanding the model of Abe's public law judge. His law review article, one of the first I ever read, made me realize that courts are not oracles, but political actors that wield the "power to persuade, with the formal powers of legal office serving as leverage points and bargaining chips in a discursive, norm-creating process."<sup>3</sup>

By second semester, I had begun to realize that Abe's message extended well beyond the domestic realm. When he first called on me in his class on International Legal Process,<sup>4</sup> I nervously gave what I hoped might be a passable answer. But gently, humorously, he kept pressing for more: "And if the Secretary didn't follow your advice, how about that, Mr. Koh? How about

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1. See Abram Chayes, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974).

2. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

3. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2638 (1997) [hereinafter Koh, *Why Do Nations Obey?*]. For elaboration of this theme, see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2398-409 (1994); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347-48 (1991).

4. See ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* (1968-69). For a discussion of the history and influence of the International Legal Process school in international legal theory, see Koh, *Why Do Nations Obey?*, *supra* note 3, at 2618-27.

that?" Abe experienced teaching like law itself: as a joyous process of endless dialogue, of constant questioning, of pressing for better, more convincing answers.

To his students, what made Abe so compelling was that we knew that he had lived outside the ivory tower. He had actually been there, in the arena. He knew what questions real policymakers asked. And that is why his answer so impressed us. For even during crisis situations, Abe taught us, international lawyers are not just potted plants. Like public law judges, public international lawyers are political players, not just policymakers' tools. Properly deployed, they can identify otherwise invisible legal constraints and fathom available legal channels through which policy decisions can flow. By so doing, they help shape policy decisions, which in turn shape legal instruments, which in time become internalized into bureaucratic decision-making processes. And thus, Abe taught us, the word can become flesh. Law influences policy, which in turn makes law: a thumbnail description of "transnational legal process," what I later came to see as the key to understanding why nations obey international law.<sup>5</sup>

As a law clerk, I watched Abe argue forcefully before the United States Supreme Court.<sup>6</sup> Two years later, as a new government attorney, I read his pleadings before the International Court of Justice in the *Nicaragua* case.<sup>7</sup> With a sinking feeling, I realized that I was on the wrong side. For although Abe was no longer Legal Adviser, as a private attorney he was making the same, simple demand: that the country he loved honor international law. There is "nothing wrong," Abe said at the time, with a lawyer "holding the United States to its own best standards and best principles."<sup>8</sup> And as always, Abe understood the *realpolitik* of legal remedies in United States foreign policy. When, shortly thereafter, Congress passed a law conditioning aid to the Contras on the United States' compliance with key provisions of the World Court's provisional measures ruling, it was Abe—the father of inter-

5. With respect to the Cuban Missile Crisis, for example, Abe later recalled:

[I]t was very important for both the validity of the [American political] decision, the subsequent justification, and the mobilization of support that the legal considerations were taken fully into account during the decision-making process. Somebody did not just make the decision and then call the lawyer in and ask the lawyer to cook up some sort of legal theory to defend it . . . The most immediate consequence, and the thing we were proudest of, was the Limited Test Ban Treaty, which was clearly a follow-up of the Missile Crisis. The Crisis set up a serious arms control dialogue with the Soviet Union for the first time."

Abram Chayes, *Living History Interview*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 459, 480 (1997). For fuller explication of transnational legal process, see Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998); Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); Koh, *Why Do Nations Obey?*, *supra* note 3.

6. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

7. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). See also Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 *COLUM. L. REV.* 1445 (1985). Abe had previously argued before the World Court in *Certain Expenses of the United Nations (Advisory Opinion)*, 1962 I.C.J. 151 (July 20).

8. David E. Rosenbaum, *Abram Chayes, John Kennedy Aide, Dies at 77*, *N.Y. TIMES*, Apr. 18, 2000, at B8.

national legal process—who reportedly told friends that he “had just won his provisional measures from Congress.”

By the end of Abe’s life, we had become comrades-in-arms. We wrote *amicus* briefs together.<sup>9</sup> We criticized each other’s work. In many ways, his last work was his most illuminating. Written with his beloved Toni, Abe’s last book, *The New Sovereignty*, brilliantly summed up a lifetime’s investigation of the role of international law in international relations.<sup>10</sup> Fittingly, the last time we spoke, he was calling to lobby me for the United States Government’s support for a lawsuit he had just brought on behalf of Kosovar Albanians against Slobodan Milosević. “How about that, Harold? How about that?” That same, unmistakable voice pressed me over the phone, and suddenly, the decades slipped away.

When I reached him in his garden in western Massachusetts to ask him whether I should accept the human rights job in the State Department, as always, Abe came right to the point. “Do it,” he said simply. “It’s time. For you, like me, working there will be the best job you ever have.” Looking at his picture months later, I realized that Abe Chayes had taught me about much more than just legal process. He had taught me, more fundamentally, what it means to be a lawyer committed to the rule of law in international affairs. For if international relations are to be more than just power politics, Abe showed us, international lawyers must be moral actors. Our job is not simply to do as we are told. We must fuse our training and skill with moral courage, and guide the evolution of legal process with the application of fundamental values. By having the courage to argue with our clients, to invoke illegality, to bring lawsuits, to negotiate treaties, international lawyers guide difficult policy choices into lawful channels and thereby stand up for the rule of law.<sup>11</sup> Just after he left the State Department, Abe wrote a small gem called *A Common Lawyer Looks at International Law*.<sup>12</sup> “If we seek to strengthen the role of law in the relations among states,” he wrote, “it follows that we should devote our energies to disclosing and articulating the common values and interests among them, of which law is an expression.”<sup>13</sup>

That was the lesson Abe learned in the crucible and that he taught us daily by example. For international lawyers, Abe Chayes was an uncommon lawyer. Everywhere he went, he influenced and persuaded. And nowhere does he live on now more powerfully than in the minds and souls of his students.

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9. See, e.g., Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors’ Memorandum in Dellums v. Bush*, 27 STAN. J. INT’L L. 247 (1991).

10. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (reviewed in Koh, *Why Do Nations Obey?*, *supra* note 3).

11. See generally Antonio Cassese, *The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards*, 14 MICH. J. INT’L L. 139 (1992).

12. Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396 (1965).

13. *Id.* at 1413.