

## BOOK REVIEW

REVIEWING MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE*  
DEPARTMENT LEGAL ADVISER. CAMBRIDGE, ENGLAND, CAMBRIDGE  
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By  
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*Shaping Foreign Policy* draws attention to the critical, yet little chronicled, role that the U.S. State Department Legal Advisor plays in U.S. foreign policy, with a succinct account that, despite its limited perspective and occasional lack of analytical depth, is quite informative, particularly for readers interested in how law and policy intersect.

The past decade has witnessed a notable retreat by the U.S. from matters of international law. One observes this trend in the U.S. withdrawal from the Kyoto climate talks and the International Criminal Court treaty, the Abu Ghraib prison controversy, the highly-publicized torture memoranda, and most notably, the operation of the U.S. military detention center at Guantánamo Bay. These developments have frustrated U.S. foreign policy, damaged the country's image abroad, and undermined the positive effects adherence to international law may have for U.S. interests. Indeed, the negative domestic and international backlash to these developments highlights the important and growing role international law plays in shaping foreign relations and constraining state behavior. *Shaping Foreign Policy* underscores this reality, which is often neglected by U.S. decision-makers, and, indeed, the American public.

The authors of *Shaping Foreign Policy* are former U.S. State Department attorney-advisers who are now prominent scholars of international law. Through a chronological review of the role successive State Department Legal Advisers played in pivotal U.S. foreign policy decisions dating back to the Carter Administration, Scharf and Williams implicitly advocate for a more robust and

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respectful U.S. engagement with international law. Explicitly, they argue that international law plays a central role in influencing foreign policy decisions. The authors conclude that international law “plays a real role in shaping the conduct of States even in times of crises implicating essential national security concerns.”<sup>1</sup>

*Shaping Foreign Policy* is the distillation of three important discussions on the role of the State Department Legal Adviser. The authors first chronicle the views of all living former U.S. Department of State Legal Advisers and their role in addressing the key issues that defined their tenures. The discussants include five Republican and four Democratic appointees to Legal Adviser and a senior attorney who served as acting Legal Adviser, all of whom retained their positions for substantial periods. Moderated by the then-president of the American Society of International Law (ASIL), Anne-Marie Slaughter, who until recently served as Director of Policy Planning at the State Department, the authors organized a day-long panel with the ten former U.S. Legal Advisers at the 2004 annual meeting of the ASIL. During this panel, the discussants reflected upon topics such as their role as Legal Advisors, the duties of the office in which they served, the evolution of international law, and the use of force. The authors contrast the observations of the panelists with the views of former Foreign Ministry legal advisers from the U.K., Russia, India, China, and Ethiopia.

Written by former Yale Law School Dean and current Legal Adviser Harold Koh, the foreword to the book previews its underlying message. Koh posits that the Legal Adviser should “act not just as a counselor but also as a conscience to the U.S. Government with respect to international law.”<sup>2</sup> He argues that “respect for law is an essential element of American “smart power,” and that international law *is* in America’s interest.”<sup>3</sup> Indeed, Koh writes that if the U.S. does not “obey international law, we squander our moral authority and shrink our capacity to lead.”<sup>4</sup>

The first chapter examines the unsettled debate over when the State Department should comply with international law by providing a useful review of relevant legal theories. In doing so, the authors compare modern (post-WWII) and contemporary (post-9/11) schools of thought regarding compliance with international law. The authors examine the evolution of Western legal discourse under the fear of Communist expansion, the proliferation of international institutions and transnational actors, the post-Cold War preeminence of the U.S.,

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1. MICHAEL P. SCHARF AND PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* 215 (2010).

2. Harold Koh, *Foreword* to *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER*, *supra* note 1, at xiv.

3. *Id.*

4. *Id.* at xv.

and the post-9/11 war on terror.

Next, the book provides a cursory review of the history and makeup of the Office of the Legal Adviser –known as “L” in U.S. Government vernacular–with a particular focus on the role recent Legal Advisers have played in developing the institution. The chapter notes the evolving role of the office, which has largely depended upon each particular Adviser’s personality and their relationship with the Secretary of State and other senior administration officials. The authors posit that, “the Legal Adviser inevitably acts as both judge and advisor – interpreting international law as applied to a particular set of circumstances and advising on whether proposed actions would be consistent with the law.”<sup>5</sup>

The remaining chapters supply the substance of the authors’ analysis and record the observations of the ten Legal Advisers interviewed. The participants begin by discussing how they came to be appointed Legal Adviser. Expectedly, most point to their close relationship with the incumbent Legal Adviser, the Secretary of State or Deputy Secretary–or their advisors–as the main reason for their appointment. Interestingly, most had little, if any, prior exposure to international law, and, indeed, one of the participants cites this lack of exposure as a reason for initially rejecting the offer. All agree, however, that they succeeded in great part because of the “highly talented L staff” who offered a “rapid education and strong support.”<sup>6</sup> Nonetheless, many point to their prior private sector legal experience as helpful to addressing the challenges they confronted throughout their tenure as Legal Adviser.

The participants differ on their views of the proper role of the Legal Adviser within the State Department. Some viewed themselves as “just being a lawyer,” hired “to offer my best judgment,” while others insisted it was their job to also get “into policy issues.”<sup>7</sup> One participant perhaps best defined the role of the Legal Adviser as one who not only gives legal advice before decisions are made and provides the best possible legal defense for the decision once it has been made, but also one who helps solve practical problems with his lawyering skills and who aptly delegates responsibilities to personnel.<sup>8</sup>

Next, in discussing the role of the Legal Adviser, in making key foreign policy decisions, the discussants were asked to reflect upon five key questions:

- (1) Whether they perceived international law to be binding and able to constrain options available to the U.S. Government during foreign policy crises?
- (2) Whether international law relevant to a particular crisis was clear enough to significantly shape U.S. Government policy options?

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5. SCHARF AND WILLIAMS, *supra* note 1, at 17.

6. *Id.* at 20.

7. *Id.* at 26, 150.

8. *Id.* at 157.

(3) Whether they believed they had a duty to oppose policies or actions that conflicted with international law?

(4) Whether the positions they recommended were seen as influential in cases when they advised against an action that violated international law?

(5) Whether international law hindered or promoted U.S. interests in times of crisis?

The former Legal Advisers considered these questions in light of the key foreign policy issues that marked their tenure and in light of the views of their “principals” or “clients” –namely the Secretary of State and the President. The book includes accounts of varying length, approach, and detail, from the following former Legal Advisers on the following key U.S. foreign policy decisions. Noteworthy is the fact that there has never been a female State Department Legal Adviser, as is often reflected in the participants’ recurrent use of the masculine pronoun, and the fact that only one female former Legal Adviser (from China) was interviewed for the book.

Below is a list of former Legal Advisers interviewed in the book, as well as the foreign policy challenges they faced during their tenure:

1. Herbert J. Hansell (1977-79): establishment of diplomatic relations with China; the Egyptian-Israeli Peace Treaty; and Panama Canal Treaties.
2. Robert B. Owens (1979-81): Iranian hostage crisis.
3. Davis R. Robinson (1981-85): role of lawyers in formulating U.S. foreign policy; invasion of Grenada compared to the mining of the harbors in Nicaragua; and peaceful resolution of various disputes by international adjudication.
4. Abraham D. Sofaer (1985-90): withdrawal from the International Court of Justice’s compulsory jurisdiction; negotiating the settlement of disputes with Chile, Iran, Iraq, and between Egypt and Israel; confronting the Soviet Union; countering Central American insurgencies; U.S. Anti-Ballistic Missile Defense; the Daniloff spy affair; U.S. counter-terrorism policy; hijacking of TWA Flight 847; seizure of the *Achille Lauro*; responding to Libyan-supported terrorism; the Iran-Contra affair; bombing of Pan Am Flight 103; legality of the use of force; and the U.S. intervention in Panama.
5. Edmund D. Williamson (1990-93): Persian Gulf War; and the dissolution of the Soviet Union.
6. Michael J. Matheson (acting Legal Adviser in various other administrations, but namely during the Administration of George H. W. Bush): post-Persian Gulf War legal regimes; creation of the Yugoslavia Tribunal; and the negotiation of the Landmines

Protocol.

7. Conrad K. Harper (1993-96): implementing the Yugoslavia Tribunal; shoot-down of an Iranian airliner by the USS *Vincennes*; and the ICJ advisory opinion on the legality of nuclear weapons.
8. David Andrews (1997-2000): negotiating the Pan Am 103 trial; and the bombing of the Chinese Embassy in Belgrade during the 1999 NATO intervention in Kosovo.
9. William Howard Taft IV (2001-05): use of force against Afghanistan; treatment of detainees in the War on Terrorism; and military operations in Iraq.
10. John B. Bellinger III (2005-09): the International Criminal Court; ICJ's *Avena* case on Mexican nationals on death row in the U.S.; and the treatment of detainees in the War on Terrorism.

In recounting their experiences at the forefront of these pivotal decisions, the discussants explore associated legal and policy complexities, the influence of international law, inter-agency tensions (namely between “L” and the Justice Department), and their role—and that of the Office—in the resolution of an issue. All but the last two responses are followed by a discussion section, which offers the reader varying perspectives from the other interviewees on the issues considered.

The participants’ accounts highlight the key but difficult role that “L” plays in “assuring compliance with many of the increasingly complex U.S. statutes and regulations.”<sup>9</sup> One Legal Adviser points to the difficulty of upholding “the dictates of customary international law[.]” at a time when the U.S. Government and the international legal community are continually debating the scope of international law and whether such law is binding on the Executive Branch.<sup>10</sup>

It is clear from the participants’ narratives that the Legal Advisers were often unable to define their tenure based on their own initiatives; rather, each of their tenures was consumed by unforeseen crises (e.g., the Iranian hostage crisis) or issues remaining from their predecessors (e.g., the Yugoslav Tribunal). The participants’ narratives nevertheless illustrate the important role international law played in formulating, implementing, and defending U.S. foreign policy. Although U.S. foreign policy interests often dictated the discussants’ decisions on whether to use force as a course of action, it is worth noting that international law often provides and shapes options available to decision-makers. For example, Edmund Williamson and William Taft recall how United Nations Security Council Resolutions allowed for but confined decisions leading to the 1990 Persian Gulf War and subsequently the 2003 Iraq War.

Importantly, the accounts illustrate how international law can be creatively

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9. *Id.* at 56.

10. *Id.*

employed in resolving seemingly intractable challenges. For example, Herbert Hansell recounts how international and domestic laws were reconciled under the Taiwan Relations Act to permit the establishment of diplomatic relations with China without foregoing political ties to, and defensive assurances with, Taiwan. Likewise, Michael Matheson and Conrad Harper recall the pivotal role “L” played in establishing and implementing the Yugoslav Tribunal under the premise of UN Chapter VII, which created an important precedent for future war crimes tribunals. Such creative solutions succeeded because, as Conrad Harper posits, “L” made it appear “that something quite revolutionary was actually a standard practice.”<sup>11</sup>

The participants and the authors draw attention, however, to the diminishing role “L” now plays in decision-making processes, in great part because, after 9/11, American foreign policy decisions have largely been made by other agencies, namely the Departments of Defense and Justice.<sup>12</sup> The authors, however, do not sufficiently examine the role “L” can play in reversing this trend, and indeed, how the Legal Adviser can use international law to reassert its role as the legal and moral conscious of the U.S. Government. In doing so, the Legal Adviser may assert “L’s” established expertise in international law, draw attention to the consequences of marginalizing “L,” and highlight “L’s” role as the principle interlocutor with foreign counterparts on international law. The Legal Adviser may also point to the positive effects of greater deference to international law, including improved U.S. reputation and foreign relations, strengthened international legal regimes, and perhaps most importantly, long-term reciprocity expectations.

A valuable lesson drawn from the participants’ narrative is that, if the U.S. Government is to maximize the benefits of international law and avoid a foreign policy debacle, “L” must be involved in decisions from the beginning, particularly when the issue implicates the use of force.<sup>13</sup> Indeed, two interviewees compare the central role “L” played in the successful justification of U.S. overt action in Grenada with the covert and highly criticized Iran-Contra Affair and the decision to mine Nicaragua’s harbors—in both of which “L” was absent from the initial decision-making process.

Although the final two interviewees only cursorily discuss the most controversial issues of their tenure, namely U.S. treatment of detainees in the War on Terrorism and the CIA’s interrogation program, their narratives are not followed by an open discussion with the other participants. The authors perhaps considered those issues too contentious for present debate, subject instead to the judgment of history. The authors follow with a chapter that aptly examines the legality of the U.S. conduct of the War on Terror in light of international law and highlight the adverse impact that such practices have had for the U.S. In

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11. *Id.* at 161.

12. *Id.* at 158-59.

13. *Id.* at 55.

doing so, the authors also examine how senior Pentagon and Bush Administration officials purposefully excluded “L” from the decision-making process for fear that international law would constrain or not allow for the Bush Administration’s sweeping conception of Executive powers.

This insightful chapter on the War on Terror is peppered with lessons about the continuing struggle between international law and U.S. foreign policy. For example, the authors argue that “the new paradigm of the ‘war’ against terrorism ‘places a high premium on factors such as the ability to quickly obtain information from captured terrorists and their sponsors,’ and thus the Geneva Conventions’ strict limitations on questioning of enemy prisoners were ‘obsolete’ and even ‘quaint’. . . . [This] laid the foundation for the creation of a law-free zone at Guantánamo Bay.”<sup>14</sup> Underscoring the national sentiment of the time, the authors quote a high-level Bush Administration insider as saying: “if you favored international law, you were in danger of being called ‘soft on terrorism.’”<sup>15</sup> The chapter ends by noting the adverse repercussions of U.S. noncompliance with international law, including possible prosecutions, damaged relations, reputational concerns, and an erosion of relevant international legal regimes, in part because of long-term reciprocity.

The authors conclude *Shaping Foreign Policy* by reflecting upon the participants’ narratives. The Legal Advisers commonly perceived international law as “real law that is binding on their governments and that operates as a constraint on policymakers, even when important national security interests are at stake.”<sup>16</sup> Recognizing that those whom they advised were often leery of international law, the participants agreed that U.S.’s long-term interests were best advanced when they counseled on paths that upheld the integrity and stability of international law, even if in the short term it hindered foreign policy goals.<sup>17</sup> For example, Robert Owens, in his discussion on the Iran Hostage Crisis, recalls that many in the Carter Administration called for U.S. Marines to lock up the Iranian diplomats at the Iranian Embassy in Washington, D.C. as a reprisal action to end the U.S. Embassy hostage crisis in Tehran. However, the State Department essentially advised that “Iran’s wrongdoing would not justify wrongdoing by the United States,” and that “effectively ended the debate.”<sup>18</sup>

The Legal Advisers acknowledged, however, that they often favored “the interpretation [of international law] most consonant with the course of action advocated by policymakers,” and sought to “find a solution for every difficulty,” for fear of otherwise losing clout within the government.<sup>19</sup> For example, in discussing the 1990 Persian Gulf War, Edwin Williamson recalls how “L”

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14. *Id.* at 184, 187.

15. *Id.* at 182.

16. *Id.* at 201.

17. *Id.* at 202.

18. *Id.* at 50-51.

19. *Id.* at 205.

provided legal support to assert President Bush's position that he did not have to obtain further international or Congressional authorization to go to war per the longstanding Executive Branch's authority under the War Powers Resolution to use armed forces to defend vital U.S. international interests.<sup>20</sup>

*Shaping Foreign Policy* may be criticized, however, for overlooking the more menial issues that concern the Office of the Legal Adviser on a day-to-day basis. Indeed, the participants' brief anecdotes leave much out, including an array of other important international issues where international law and international lawyers play a key role. This is perhaps because crises represent unusual situations where the boundaries of international law are truly "put to the test," and when senior decision-makers are most tempted to subordinate international law to what they perceive as overwhelming national security interests.

The role of international law in U.S. foreign policy is hardly settled. Indeed, it is likely that we are to see an enduring tension between state prerogatives and international law, particularly as global challenges evolve and international legal regimes develop. As one former Legal Adviser notes, "We're living with old rules and with new threats."<sup>21</sup> *Shaping Foreign Policy* draws attention not only to how international law shapes U.S. foreign policy but to how international law serves as a valuable framework in which to understand the important role the Office of the Legal Adviser will play in creatively developing and implementing new legal regimes for confronting evolving threats.

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20. *Id.* at 89-90.

21. *Id.* at 159.