REMARKS

The State Department Legal Adviser's Office: Eight Decades in Peace and War

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* The Legal Adviser, U.S. Department of State; Martin R. Flug '55 Professor of International Law, Yale Law School (on leave). This is a footnoted and lightly edited version of remarks originally delivered on March 3, 2011, as the keynote address at the Georgetown University Law Center conference on "Law & U.S. Foreign Policy: Perspectives on 80 Years of the Office of the Legal Adviser." I am deeply grateful to Dean William M. Treanor, a great law dean and an exceptional lawyer, public servant, and human being, for joining with President David Caron and Executive Director Betsy Andersen of the American Society of International Law to make this historic conference possible. Let me also thank Professor Jane Stromseth and Jessica Schau of Georgetown, as well as my State Department colleagues Counselor on International Law Sarah Cleveland, Assistant Legal Advisers Todd Buchwald and Stephen Pomper, and my special assistants Kimberly Gahan, David Pozen, Aaron Zelinsky, and David Zionts for the time and energy they devoted to making this day possible. Finally, I dedicate this lecture to the lawyers of L, including future L attorney (and perhaps someday Legal Adviser) Samuel Bulman Pozen. Sam was born on the very day that I delivered these remarks and so will himself turn 80 on L's 160th birthday—which is an event I very much hope to see in person.

INTRODUCTION

Today we commemorate the 80th birthday of the State Department's Office of the Legal Adviser. This event marks both a personal and professional celebration for so many of us who have been associated with this remarkable office over the years. The conference has generated a fascinating and diverse set of comparative, historical, and intragovernmental insights into the office's unique contributions to the shaping and interpreting of international law. The last time I addressed an audience from the American Society of International Law (ASIL), during my first year in this job, I spoke about the role of the Legal Adviser and some of the current challenges we face.[1] At this birthday gathering, let me focus on what has made the Office of the Legal Adviser—or "L," as it is affectionately known in the State Department—such a critical and respected part of the U.S. government. Put another way, who are the distinctive people, and what are the distinctive traditions, norms, and practices, that have made L the distinctive legal institution it has become?

This event marks a particularly auspicious moment to consider this question, given the recent publication of a book by Michael Scharf and Paul Williams that shines welcome light on the history of the office and its unique role at the intersection of international law and U.S. foreign policy.[2] The book offers a fascinating read and includes interviews with all of the living Legal Advisers, seven of whom (not counting myself) have joined us at this conference: John Bellinger, Will Taft, David Andrews, Conrad Harper, Davis Robinson, Roberts Owen, and Herb Hansell.

At any anniversary party, you review the past, assess the present, and toast the future. So let me share some reflections on "L Past, L Present, and L Future."

I. "L PAST": OFFICE CANONS

I am the 22nd American to serve as Legal Adviser at the Department of State, a list that includes leading figures in the worlds of international law and policy.[3]

1. Harold Hongju Koh, Legal Adviser, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

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

3. For the complete list, see Appendix 1.

The first Legal Adviser, Green Haywood Hackworth, went on to serve as the judge of U.S. nationality on the International Court of Justice (ICJ), a position later held by two other members of our office, former Deputy Legal Advisers Stephen Schwebel and Joan Donoghue, both of whom are also present here.

That fact alone should tell you that over the years, the Legal Adviser's Office has been so much more than the Legal Adviser. The heart and soul of the office has never been the politically appointed lawyers who have served at the Secretary of State's right hand (a group I will call "Political L"). Rather, the heart of L has been the dedicated career lawyers who have served as Deputy Legal Advisers, Assistant Legal Advisers, and Attorney-Advisers, supported by an extraordinary career staff (a group I will collectively call "Career L"). One measure of the relative importance of these two sets of positions is that Green Hackworth, the longest-serving Legal Adviser, served fifteen years under Presidents Hoover, Roosevelt, and Truman, a record no Legal Adviser will likely ever match. But many career attorneys—including all four of our current deputies, Principal Deputy Mary McLeod, Jim Thessin, Jonathan Schwartz, and Sue Biniaz—have served in L for years longer than that.[4] And there is a third face of L, which I will call "Scholarly L," that includes our many alumni who have gone on to become professors and scholars of international law, as well as our attorneys who make time to teach on top of their heavy workloads.[5] At any given time, the Counselor on International Law, a position currently held by Professor Sarah Cleveland of Columbia Law School, is the living embodiment of Scholarly L.[6] L is one of the only components of the U.S. government that has, in the position of the Counselor, a resident scholar in the field who is fully integrated into the office's work.

My thesis today will be that what has helped make L the renowned institution it has become is the unique creative synergy among these three faces of the Legal Adviser's Office—Political L, Career L, and Scholarly L—with Career L being a particularly dominant force. The interaction among these three lawyerly groups and instincts has, in turn, generated a rich set of traditions, customs, expectations, and norms that together ensure L's quality, integrity, and relevance.

With that background, let me quickly tour L's early years before turning to the current period. To start with a surprise, we have brought you here on something of a pretext. Strictly speaking, this is not our 80th birthday at all. In fact, this is our 163rd year! For it was in 1848 that William Hunter, Jr. was

4. Since this speech was delivered, Jim Thessin was sworn in as the U.S. Ambassador to the Republic of Paraguay. Taking over his Deputy Legal Adviser position is Richard Visek, an L veteran of more than a decade.

5. For a partial list of L alumni now in teaching, see Appendix 2. For a list of L attorneys who teach part-time, see Appendix 3.

6. For a list of Counselors on International Law, see Appendix 4. Since this speech was delivered, Sarah Cleveland has returned to teaching at Columbia, and was succeeded as Counselor by Professor William Dodge of the UC Hastings College of the Law.

reportedly first appointed to the position of Claims Clerk to give legal advice to the State Department. Before then, as we understand it, the early Secretaries of State—Thomas Jefferson, James Monroe, James Madison—did their own international legal work, which is what one might expect from people so well versed in the law of nations.[7] But by the mid-19th century, what we now call "citizen-to-state claims"—claims by U.S. citizens against foreign states and vice versa—had proliferated to the point that they threatened to overwhelm the Secretary and his small staff. And so in 1848 the position of Claims Clerk was created, only to be superseded, some twenty years later, by the position of Examiner of Claims.[8] The Examiner of Claims was placed under the Attorney General's supervision when the Department of Justice was established in 1870,[9] and the Examiner's work soon extended to legal issues ranging far beyond simple claims, to broader questions of private and public law, citizenship, the laws of war and the laws of prize, as well as boundary disputes and treaty interpretation. In 1891, the Examiner of Claims became the Solicitor, still a Department of Justice employee, and the Solicitor functioned as "the law officer" of the State Department until 1931.[10] But even with the loftier title of Solicitor, giving legal advice to the State Department was not a full-time job. As proof, one of the early Solicitors, Fred Nielsen, held the Solicitor's post even while simultaneously leading Georgetown's football team to back-to-back conference titles!

Finally, eighty years ago, on February 23, 1931, an Act of Congress—Public Law 71-715, or the Moses-Linthicum Act, as every schoolchild knows—abolished the Office of the Solicitor and created today's Office of the Legal Adviser.[11] The statute pointedly spelled "Adviser" with an "e," in homage to our ancestral cousin "The Legal Adviser" of the Foreign and Commonwealth Office (FCO) of Her Majesty's Government, a position currently held by our dear friend and colleague Sir Daniel Bethlehem.[12] Like his British counterpart, the American Legal Adviser, supported initially by a staff of twenty or so,[13] was intended to provide legal advice on all problems, domestic and international, that might arise in the course of the Department's activities.

The first Legal Adviser, Green Hackworth, made clear that the Legal Advis-

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7. Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 634 (1962).

8. Robert E. Dalton, The Office of the Legal Adviser 2 (undated) (unpublished manuscript) (on file with author). As my footnotes reflect, the history in this section draws heavily on the above-cited internal paper prepared for another purpose by longtime Assistant Legal Adviser for Treaty Affairs, former Counselor, and L legend Bob Dalton, to whom I am indebted for his priceless research and analysis.

9. Bilder, *supra* note 7.

10. Dalton, *supra* note 8.

11. An Act for the Grading and Classification of Clerks in the Foreign Service of the United States of America, and Providing Compensation Therefor, Pub. L. No. 71-715, § 30, 46 Stat. 1207, 1214 (1931).

12. Since this speech was delivered, Sir Daniel Bethlehem has stepped down as FCO Legal Adviser and been replaced by Iain Macleod.

13. Dalton, *supra* note 8, at 3.

er's Office would not only serve as a general counsel to the Department but would also act as a government-wide contributor to and defender of international law. In his pioneering tenure, Hackworth established important and enduring foundational traditions of the office. Hackworth was known as (1) an *independent* (2) *expert on and scholar of international law*, publishing a celebrated series of *Digests of International Law* in the early 1940s.[14] Hackworth was also (3) *nonpartisan*, serving in both Republican and Democratic administrations; had a (4) *wide-ranging remit* across the Department's entire workload;[15] gave (5) *legal advice that was sensitive to the clients' policy objectives*; and took (6) *the long view*, always seeking to advance the best long-term interests of the State Department as an institution rather than the interests of any particular individual or administration. "It is our aim," Hackworth wrote, "that the Department of State should be uninfluenced by considerations of momentary expediency or by doctrines that are not calculated to stand the test of good conscience, fair dealing, and sound principle of law and practice."[16] Finally, Hackworth set the basic contours of the position by being politically savvy without politicizing, that is, by (7) *balancing the concerns of politics and the law*. During his tenure, on the one hand, Hackworth clearly and firmly identified legal constraints and respected *stare decisis*, while on the other hand, he remained ready to look for other legally available options if Department principals sought to change course.

Thus, in his very person, the founding Legal Adviser combined and captured the political, career, and scholarly faces of L that I have mentioned. By the time Hackworth handed over the reins in 1946 to join the ICJ as the American judge, L's status and significance within the U.S. government had grown tremendously, a trend only to be fed further by the post-World War II rise of international law and institutions.

During the Cold War, L's size and role expanded quickly, with Herman Phleger emerging as another transformational Legal Adviser in the middle of the 1950s. Phleger knew and worked closely with both Secretary of State John Foster Dulles and President Dwight D. Eisenhower. Perhaps his greatest victory was bureaucratic. Phleger resisted the so-called "Wristonization" movement, which attempted to fold much of the Department's Civil Service, including L, into the career Foreign Service.[17] In staving off Wristonization, Phleger reaf-

14. GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW (8 vols., 1940–44). By the device of numbering these office traditions, I seek deliberately to highlight unwritten "Canons of L" that I had sensed from the outside but had not come to understand fully until I began to serve in the Legal Adviser's Office.

15. Even today, when we have two Deputy Secretaries of State and dozens of other important policy principals, the Legal Adviser is perhaps the only official besides the Secretary of State herself with such a Department-wide remit.

16. Dalton, *supra* note 8, at 4.

17. *Id.* at 5. The so-called Wriston Report of 1954 recommended that the State Department integrate its Civil and Foreign Service Officers. Phleger foresaw that L's independence would be compromised if the office were absorbed into the Foreign Service; as a result of his successful efforts to stave off this

firmed another critical L tradition: (8) *Its career lawyers would not report directly to their policy clients, but rather to their managing attorney and the Legal Adviser*. Thus, the office would function like a law firm, not as a disconnected assortment of lawyers embedded in their client bureaus. The Legal Adviser, moreover, would report directly to the Secretary—to whom Phleger demanded a direct line. This arrangement preserved L's identity as (9) *an office of professional international lawyers*, not just diplomats who are legally trained, thereby nurturing the creative tension between Career L and Political L that continues to this day. The bureaucratic procedures institutionalized during the postwar period reaffirmed an additional plank of the Legal Adviser's work: that (10) *L must be kept in the loop*. As Professors Scharf and Williams explain in their book, it is now well established within the Department that "virtually no foreign policy decision can be made without first receiving clearance from L, and no delegation can be sent to an international negotiation or international organization without a representative of L."[18]

Under President John F. Kennedy, Legal Adviser and renowned Harvard Law School Professor Abram Chayes refined that last plank, insisting not only that L be kept in the loop on important matters but also that its attorneys (11) *be "in at the takeoff"* of a new foreign policy episode, in order to help establish the legal and political legitimacy of the actions that follow. It was only because he was in at the takeoff that Chayes could, for example, develop the now-famous "defensive quarantine" theory that authorized the use of a naval cordon to remove the threat of Soviet missiles in Cuba. As Chayes later recalled in an oral history:

> [I]t was very important for both the validity of the [U.S. government] 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.[19]

Both Chayes and his Deputy and successor, Leonard Meeker, had close access to their principals. In his personal recollections, Meeker describes how, in February 1961, he received a direct call from none other than the new President, John F. Kennedy, who was hugely exercised about a mutiny on a Portuguese ship. "Kennedy's first reaction was, this is piracy; our Navy should step in."[20]

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fate, L's "professional identity remained that of a lawyer rather than a lawyer-diplomat." *Id.*; *see also* Bilder, *supra* note 7, at 636 n.7 (explaining that the decision not to integrate L with the Foreign Service was "important in retaining the Office's status and independence").

18. SCHARF & WILLIAMS, *supra* note 2, at xix.

19. *Living History Interview with Abram Chayes*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 459, 480 (1997).

20. Leonard C. Meeker, Recallings (Mar. 2001) (unpublished manuscript at 326) (on file with author). Meeker explained to the President "that piracy was when *others boarded a ship* and took it over . . . . Kennedy rather impatiently found this a technical legal answer. But he did not order the Navy to seize the ship." *Id.* at 326–27.

So you see, I am not the only modern Legal Adviser to have considered piracy issues.

In the 1960s, Chayes and his deputies Tom Ehrlich and Andreas Lowenfeld also helped develop another enduring L tradition: (12) *L's connection to the legal academy*, which has actively fostered what I have called Scholarly L. Chayes, Ehrlich, and Lowenfeld all returned to law teaching after their service in government, and they wrote publicly about the Cuban Missile Crisis as exemplifying an approach to law they called "International Legal Process." Their work became the foundation for the so-called "Process School of International Law," of which I have been an academic member.[21] In 1962, a young lawyer in L's economic affairs section, future Wisconsin Law Professor Richard Bilder, wrote an important and enduring article about the Office of the Legal Adviser in the *American Journal of International Law*, in which he described L as serving in nearly all of its current roles: counselor, draftsman, advocate and negotiator, internal judge, and most of all, international law expert.[22]

Like many L alumni, Richard Bilder went on to become a distinguished law professor, thereby exemplifying that L is historically influential not just inside the government but outside as well, as a training ground for international lawyers and scholars.[23] To this day, we remain connected to the academy in ways that enrich the office's ability to determine U.S. views on international law, similar to the role that the Justice Department's Office of the Solicitor General and Office of Legal Counsel have played with respect to U.S. constitutional law. That tradition has been reinforced by the scholarly engagement of Legal Advisers through their writing and lecturing;[24] through their close ties to learned societies, especially ASIL; through their own advisors, including Counselors on International Law drawn from the academy and Advisory Committees on Public and Private International Law that have a heavily academic composition; and through their unique audience, which includes both foreign legal advisers and international legal academics—not to mention the fact that a number of Legal Advisers, including myself, have been either part-time or full-time professors of international law.

The office's reputation for rigorous international legal analysis and scholarship has almost certainly contributed to another important L tradition, exemplified by Leonard Meeker's successor as Legal Adviser, John ("Jack") Stevenson. During the Vietnam War, in May of 1970, Stevenson gave an important speech

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21. *See, e.g.*, ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS (2 vols., 1968); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2617–29 (1997) (describing the evolution of the International Legal Process view).

22. Bilder, *supra* note 7, at 639–41.

23. *See* SCHARF & WILLIAMS, *supra* note 2, at 18 ("The Office of the Legal Adviser also serves as a training ground of sorts for future professors of public international law. L alum, including the Legal Advisers, have contributed substantially to the body of public international law scholarship, with more than 1,000 articles and books authored by former L lawyers.").

24. A partial list of publications by Legal Advisers may be found at the back of Scharf and Williams's volume. *Id.* at 285–90.

outlining the Nixon Administration's position on the international legal justification for its military operations in Cambodia.[25] As Stevenson explained,

> [i]t is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale.[26]

From a historical perspective, the most notable aspect of this speech was not that it was legally correct—in fact, its legal correctness has been significantly challenged—but rather, the simple fact that the speech was made. By laying out the Administration's legal theory in a public forum, Stevenson gave American citizens and legislators, as well as the international community, a fuller opportunity to assess that theory and to test the government's actions in light of it. The speech reflected and solidified what I will call (13) *the Legal Adviser's Duty to Explain*: the important transparency norm that senior U.S. government lawyers, and the Legal Adviser of the Department of State in particular, are expected not just to give legal advice in private but also to explain in public the international legal basis for what the United States has done.[27] The Duty to Explain is particularly important in the field of international law, given the central, constitutive role that this body of law assigns to state practice. Chayes, Meeker, and Stevenson, each in his own way, demonstrated the capacity of U.S. Executive Branch lawyers not only to interpret but more fundamentally to (14) *shape international law*, by interpreting precedents and guiding the creation of new state practices. That role was reinforced in 1973, when the *U.S. Digest of International Law* became an annual publication.

During the Carter Administration, two Legal Advisers affirmed yet another distinctive feature of the Office: (15) *L as action officer*. Through his work on the Middle East peace process at Camp David, Herb Hansell became far more than a reactive dispenser of advice. He became a *negotiator of treaties*. His successor Roberts ("Bob") Owen went further, when during the Iranian Hostage Crisis, Owen became both a *litigator* and an *architect* of a new legal institution. Owen played the litigator's role when Iran attacked the established international legal order by holding American diplomats hostage; Owen led the U.S. government team that went to the ICJ seeking a declaration of illegality and a request to restore the status quo ante. Then, in the Algiers Accords that ended the Hostage Crisis, Owen and Deputy Secretary of State Warren Christopher created a refuge of relative peace from the storms of our bilateral relationship, the Iran–United States Claims Tribunal, to resolve claims of the two countries and

25. John R. Stevenson, *Statement of the Legal Adviser*, 64 AM. J. INT'L L. 933 (1970).

26. *Id.* at 935.

27. As Legal Adviser, I have tried to fulfill this duty in a number of ways, including presentations at the annual meeting of ASIL and now even blog posts when certain particularly important international law events occur. *See infra* note 45.

those of our nationals through the application of law. Yet another side of L's work, that of (16) *counsel to diplomatic law and litigation*, took on new meaning in the Carter Administration's brief in the landmark human rights case of *Filártiga v. Peña-Irala*.[28] Bob Owen, his Deputy Bill Lake, and his Counselor Stefan Riesenfeld worked with Assistant Attorney General for the Civil Rights Division (and later Yale Law School Professor) Drew S. Days III to bring human rights sensitivities to the U.S. government's approach to the Alien Tort Claims Act, a tradition that Clinton Administration Legal Adviser Conrad Harper carried forward with the brief he and then-Solicitor General Drew Days filed in the *Karadžić* case.[29]

During the 1980s, Legal Adviser Davis Robinson continued L's tradition as litigator by appearing before the ICJ in the *Gulf of Maine* and *Nicaragua* cases and by overseeing the formation of a new L office to deal specifically with Iranian claims.[30] Developments in the latter part of that decade drew an unusual degree of critical attention to the work of the Legal Adviser. During those years, a series of controversies arose around such issues as the U.S. military operation in Grenada, the mining of Nicaraguan harbors, the rejection of the ICJ's compulsory jurisdiction, the assertion of the right to seize fugitives abroad, and the controversial reinterpretation of the Anti-Ballistic Missile (ABM) Treaty. All of these challenges led to a probing 1991 report by the Joint Committee of ASIL and the American Branch of the International Law Association on "The Role of the Legal Adviser of the Department of State," which noted that "since foreign policy decisions are often highly political, and policy makers are often skeptical concerning the relevance of international law, pressures on the Legal Adviser to 'bend' or ignore international law in order to support policy decisions may be intense."[31] It is therefore critical, the report stressed, that the Legal Adviser recognize and develop tools to carry out "the responsibility of resisting such pressures."[32]

Throughout the Clinton years, Legal Advisers Conrad Harper and David

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28. 630 F.2d 876 (2d Cir. 1980).

29. Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995). The evolution and importance of these two human rights briefs is described in Harold Hongju Koh, Filártiga v. Peña-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007). For the most recent U.S. government court filing in this line, submitted after this speech was delivered, see Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Dec. 21, 2011).

30. *See* Davis R. Robinson, *The Reagan Administration*, *in* SCHARF & WILLIAMS, *supra* note 2, at 55, 55–56, 60–63 (discussing these developments). Ironically, it was through the overwork of the office in this period that I, as a young Justice Department attorney at the Office of Legal Counsel, had my first experience with L, when I was detailed to L in 1984 on temporary duty to help fill in for lawyers who had been dispatched to The Hague to work on these cases.

31. *The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association*, 85 AM. J. INT'L L. 358, 361 (1991).

32. *Id.*

Andrews worked to address these concerns while confronting an ever-larger suite of legal issues. Perhaps most notably, Harper and Andrews strengthened the tradition of "L as architect" by assisting in the creation of the International Criminal Tribunals for Yugoslavia and Rwanda; and they strengthened the tradition of "L as negotiator" through Andrews' work to resolve the dispute arising out of the Chinese embassy bombing in Belgrade. Significantly, the Clinton Administration also called Bob Owen back into service, when then-Secretary of State Warren Christopher asked Owen to serve as a legal adviser to Richard Holbrooke at the Dayton Peace Conference in December 1995 and later as presiding arbitrator at Brčko.

For any Legal Adviser, the most intense moments arise when policymakers desire to use force out of a sense of external urgency. Ed Williamson worked extensively and productively on use of force and related issues as Legal Adviser during Operation Desert Storm in the early 1990s. In the difficult years immediately following 9/11, Will Taft and John Bellinger strove to uphold the rule of law and to maintain a strong dialogue with their counterpart legal advisers, even in the face of tremendous controversy about the Bush Administration's legal views. Legal Advisers can also find themselves in controversy when they seek to change prior legal positions or resist emerging positions. George H.W. Bush's Legal Adviser Abraham Sofaer became embroiled in public controversy over his efforts to reinterpret the ABM Treaty,[33] while George W. Bush's first Legal Adviser Will Taft became engaged in a heated interagency dispute when he attempted to resist and then to roll back the Justice Department's reinterpretation of the Geneva Conventions after 9/11.[34] Some of Taft's valiant efforts on these sorts of sensitive matters have since come to light.[35] Other such efforts by him, and by every Legal Adviser and by many L attorneys before and after him, may remain largely hidden from public view.

Thus, to review, L's institutional history has set the core canons of the office, which may be summarized as follows: Ideally, the Legal Adviser should act as an independent, nonpartisan expert on and scholar of international law, with a wide-ranging remit across the Department's entire workload, always giving

33. *See, e.g.*, Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986).

34. *See* William H. Taft IV, *The Bush (43rd) Administration*, *in* SCHARF & WILLIAMS, *supra* note 2, at 127, 129–30.

35. Perhaps the best known example is Will Taft's detailed January 11, 2002 memorandum responding to the January 9, 2002 memorandum by John Yoo, then-Deputy Assistant Attorney General of the Office of Legal Counsel at the Department of Justice. In arguing that Yoo's analysis was "seriously flawed," Taft wrote: "In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the [Geneva] Conventions. I have no doubt we can do so here, where a relative handful of persons is involved." Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice 1, 2 (Jan. 11, 2002), *available at* http://www.torturingdemocracy.org/documents/20020111.pdf. Taft ended on this memorable and poignant note: "Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete. We should talk." *Id.* at 2.

legal advice that is sensitive to the clients' policy objectives, takes the long view, and seeks to advance the best long-term interests of the State Department as an institution rather than the interests of any particular individual or administration. These competing commitments require the Legal Adviser to balance the concerns of politics and the law, to report directly to the Secretary (with career lawyers in turn reporting directly to the Legal Adviser), and to run an office of professional international lawyers that is kept in the loop with regard to all departmental matters. L must be in at the takeoff of a new foreign policy episode to help establish the legal and political legitimacy of the actions that follow. At the same time, L must also stay connected to the outside world, including the legal academy, which both reinforces the Legal Adviser's Duty to Explain and underscores the capacity of U.S. Executive Branch lawyers not just to interpret but more fundamentally to shape international law. In all of this work, L plays many roles, not only as a desk-bound interpreter but also as an action officer, negotiator, litigator, counsel to diplomatic litigation, architect of new legal institutions, and at times arbiter of international legal disputes.

II. "L PRESENT": OFFICE ROLES

Obviously, this breathless history cannot do our 163 years justice, but one point at least emerges clearly: As Professors Scharf and Williams explain in their book, "[j]ust as the Solicitor General is the government's point [person] for constitutional questions, the Legal Adviser is the government's principal expert in international legal affairs."[36] L continues to be the Executive Branch's primary agent, authority, and focal point for international law—the institution charged with figuring out how to formulate and implement the foreign policies of the United States in accordance with international law and the responsible development of international institutions. L helps determine how international agreements should be worded, how international organizations should be structured, and how customary international law rules should be articulated.

The core traditions of the office have all been evident throughout L's history: our wide-ranging portfolio, our independence from yet connection to the political apparatus, our close ties to the Secretary and her team on the State Department's Seventh Floor, the institutional predominance and personal dedication of the career staff, the multilayered mix of the scholarly and the worldly, and the stunning diversity of roles our lawyers must play. There are some great government offices in which the lawyers become expert at arguing in a particular court or giving advice to a particular client. But the lawyers in L must negotiate the roles of litigator, counselor, action officer, diplomat, arbitrator, negotiator, scholar, and opinion-giver, all at one time. One way to describe our role is as "togglers." We toggle constantly among domestic, international, and foreign legal sources, between public and private law, between our specific

36. SCHARF & WILLIAMS, *supra* note 2, at xix.

advice-giving duties and our broader normative and strategic responsibilities.

Thinking in functional terms, as I have previously explained, L plays four basic roles.[37] First, L serves as a *counselor*. Like any public or private general counsel's office, we give formal and informal legal advice to help our clients achieve their policy objectives, but in our case the law we apply includes U.S. constitutional provisions, statutes, regulations, judicial decisions, treaty commitments, and customary international law. Second, L serves as a *conscience*: both in the sense of an ethical conscience giving prescriptive advice[38] and as a group of individuals who understand how government bureaucracy works and thus can place issues in a broader normative perspective, especially in the complex, delicate, and contentious realm of international law, where legal issues may bleed into moral and policy issues. In this role, it is L's duty and its tradition not just to try to guide difficult policy choices into lawful channels but also to suggest when choices may be "lawful but awful." Third, L serves as a *defender* of U.S. interests in a variety of contexts. We represent the United States in treaty negotiations, diplomatic discussions, and international litigation before all manner of international tribunals, and we coordinate daily with the Department of Justice on litigation before domestic courts that implicates U.S. foreign policy interests. Fourth and finally, L acts as a *spokesperson* for the U.S. government regarding the meaning and importance of international law. Thus, speeches like this are, in an important sense, not distractions, but a critical part of my job as the Legal Adviser.

Another part of my job is to recruit the best and the brightest to come work at L, and here, the facts largely speak for themselves. Today, the lawyers in L—spread across twenty-four offices, nineteen functional and five regional—wear a mindboggling number of hats in many different fascinating and demanding settings. We currently have positions in New York; Charleston, South Carolina; Brussels; The Hague; Geneva; Kabul; and Baghdad, and at any given moment some percentage of our lawyers are on temporary duty assignments all over the world. The attorneys at these locations are not just observers who file the occasional field report. They are action officers and diplomats who actually get out there and solve problems, whether it is brokering peace treaties, supporting arms export control inspections, or helping American citizens in difficult circumstances. One reason young lawyers seek temporary duty at these locations abroad is that they know that, on these postings, they will be responsible for the entire range of issues confronting their institutional clients. By virtually any metric, L has become one of the most diverse international "law firms" in the world. Over the last eighty years, we have experienced tremendous growth, expanding from fewer than twenty-five employees at our birth to over 175 lawyers and over 260 total personnel in the office today, including many

37. *See* Koh, *supra* note 1.

38. Our L/Ethics office, for example, advises all political appointees on their ethical duties and reviews particular issues of potential ethical conflict.

non-lawyers who are essential to the work we do. At the same time, we have worked hard to maintain an informal collegial culture, to avoid becoming rigidly hierarchical, and to maintain a collective spirit of intellectual curiosity and inquiry.

By way of international comparison, we are significantly larger than virtually any other country's legal adviser's office.[39] We are more of a lawyer's shop, in that we have much less of a tradition than many of our foreign counterparts of diplomats (as opposed to lawyers) running the office. Generally speaking, our Legal Advisers do not go on to become ambassadors.[40] And, not infrequently, we are lawyers who counsel other lawyers. At this time, for example, L has a range of brilliant lawyers as clients, including the current President, Secretary of State, Deputy Secretary of State, National Security Adviser, and Director of the Department's Policy Planning Staff.

While we have gradually accreted functions over time, so that we now handle nuclear nonproliferation just as surely as we handle claims disputes, in the twenty-first century the pace of change has quickened. We must add to the list whole new fields, such as the law of the Internet, the law of the Arctic, the law of climate change, and the law of 9/11. As the worlds of international law, policy, and diplomacy grow ever more complex and interconnected, so does the work of L. Increasingly, we must address "old wine in new bottles," timeless concerns in new factual settings. I am thinking, for example, of the problems of piracy in the Gulf of Aden, the application of international human rights and humanitarian law to cyberspace, and international legal problems of discrimination as applied to previously unprotected minority groups. More broadly, over the course of the history I have recounted, L has developed a substantive institutional expertise and structural position within the U.S. government that allows it to be the government's leading authority on a variety of recurring international legal issues, ranging from diplomatic and consular privileges and immunities; to the negotiation of international instruments on counterterrorism, investment, and everything in between; to international environmental law; to private international law, particularly through the Hague Conference; to specific statutes and issue areas such as the Iran Sanctions Act and presidential proclamations imposing visa sanctions.

As my listing of roles above suggests, we also fulfill a variety of functions that are not exclusively legal in nature. L provides stability and continuity over the course of changing administrations and foreign policy visions, informing our clients about the broader context in which they operate and bridging bureaucratic chasms to lay the groundwork for interbureau and interagency solutions. In addition to counseling clients on what is legal, we may provide

39. *See* SCHARF & WILLIAMS, *supra* note 2, at 158 (remarks of Conrad Harper).

40. Our career deputies, however, not infrequently do become ambassadors. For example, longtime Deputy Legal Adviser Jim Michel became Ambassador to Guatemala in 1987, Mike Kozak became Chief of the U.S. Interests Section in Cuba in 1996 and Ambassador to Belarus in 2000, and Jim Thessin recently became Ambassador to Paraguay.

them with our assessment of the wisdom of lawful actions they seek to undertake. The client always remains free to disagree with such an assessment, but history shows that L's advice is ignored at the policymaker's peril.[41] L attorneys also do significant work outside the confines of the State Department's walls. We help manage strained relations and chronic tensions with foreign states in the context of international law—for instance, helping to negotiate agreements with Cuba to promote safe, legal, and orderly migration. We help resolve specific international disputes that bubble up. And we help design international mechanisms for dispute resolution. Increasingly, we are being asked to operate in conflict and post-conflict zones. All of which makes life at L endlessly fascinating and highly challenging. I have enjoyed every job I have had, but I have enjoyed serving as Legal Adviser the most, and nearly every lawyer who has worked in the office says the same.

III. "L PRESENT": TIMELESS CONCERNS, NEW CONTEXTS

Against this background, let me address in more detail three areas in which we have had to adapt old expertise to new situations: the law of armed conflict, the law of official immunities, and the law of international dispute resolution.

A. LAW OF ARMED CONFLICT

Cicero famously said that in times of war, the law falls silent. But I prefer the words of President Obama, who noted in his 2009 Nobel Lecture that even when a state is engaged in conflict with the most ruthless and lawless of adversaries, "adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't."[42] Historically, L lawyers have been passionately committed to this principle, particularly in the Office of Political-Military Affairs, or "L/PM." And in working every day to uphold it, these lawyers are conscious that they stand on the shoulders of a group of giants in the field, all of whom are members of what I have called Career L.

As many of you know, the history of the law of armed conflict in the post-World War II period is one of peaks and valleys. The Geneva Conventions

41. Davis Robinson provides a vivid example of this point in recalling the mining of the harbors of Nicaragua during the Reagan Administration, which was undertaken by the CIA without input from the Legal Adviser's Office:

> I would argue strongly that if L had been involved in the take-off in the case of the mining of the harbors of Managua, we could have provided constructive legal advice . . . . The input of L would, I believe, have added a significant dimension to the decision-making process and also improved the implementation of the President's ultimate decision. However, as it transpired, instead of being ready for the fire storm that followed the public disclosure of the mining of the harbors, the Administration was legally caught off-guard. Thus, all that the lawyers could contribute was assistance in after-the-fact containment of a train wreck.

Robinson, *supra* note 30, at 60.

42. President Barack H. Obama, Nobel Lecture: A Just and Lasting Peace (Dec. 10, 2009), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

of 1949 were a towering achievement in the development of humanitarian safeguards for vulnerable populations. They created for the first time in treaty law a baseline of protections, reflected in Common Article Three, that states must afford their enemies even in the context of civil wars and other conflicts of a non-international character.

Over the next three decades, our engagements in Korea and Vietnam demonstrated the need for further development of the laws of war. So during the 1970s, there was an initiative to devise protocols to the Geneva Conventions, elaborating additional rules applicable to international as well as non-international armed conflicts. Around that same time, many states also initiated a process—formally launched by the United Nations Conference on Certain Conventional Weapons (CCW) in 1979 and 1980—to regulate the use of specific weapons to protect civilians against certain indiscriminate effects.

L attorneys were at the very the center of this work. In 1973, George Aldrich, now known to many as a longtime arbitrator on the Iran–United States Claims Tribunal, was the State Department's Principal Deputy Legal Adviser and one of the Department's leading experts in the laws of war. He was assigned to head the U.S. delegation that from 1974 to 1977 negotiated the first and second Additional Protocols to the Geneva Conventions.

The negotiations were not smooth. There were a number of contentious issues, and the United States did not become a party to Additional Protocol I. But while serving from 1975 to 1977 as the Special Rapporteur to the Third Committee of the Diplomatic Conference (an extraordinary position for an American), Aldrich shared responsibility for drafting and negotiating some of the most important provisions of both protocols. These included the core rules that articulate what can be considered legitimate military objectives, when civilians lose their immunity from being the object of attack, and when attacks cross the line into indiscriminate or disproportionate conduct. Although the United States may not agree with every element of all of these rules, it agrees with a great deal of them, and it is for this reason that when President Reagan communicated to Congress in 1987 that the United States would not seek to become a party to Additional Protocol I, he nevertheless committed the United States to work with allies on incorporating the positive provisions of the Protocol into the rules that govern our military operations and into the customary international law that governs international armed conflicts.[43]

The task of taking forward the President's commitment fell to another lawyer in L: Mike Matheson, one of our longest-serving Principal Deputies and to this day a leading figure in the field of international humanitarian law. Like Aldrich, Matheson had served before joining L at the Department of Defense, where he developed an expertise in the laws of war, and in due course he rose to a position in the L Front Office. Working with attorneys from the Defense

43. *See* Letter of Transmittal from President Ronald Reagan to the Senate of the United States (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910, 911–12 (1987).

Department like Jack McNeill and with JAGs like Hays Parks, Matheson took on the important project of identifying those elements of Additional Protocol I that might be supported as customary international law. In 1987, he gave a landmark speech at American University in which he painstakingly worked through the elements of Additional Protocol I that the United States might consider to be customary international law.[44]

As mentioned previously, another major initiative in the laws of war during the post-Vietnam era concerned the development of a regulatory scheme for certain conventional weapons in the so-called "CCW" forum. Here again, Matheson is widely acknowledged for his leadership in concluding the Amended Mines Protocol in 1996. That protocol helped pave the way for further amendment and strengthening of the CCW framework itself, an achievement that owes a great deal to the late Ed Cummings, Matheson's successor as U.S. head of delegation to the CCW.

I first met Ed Cummings when I was a young U.S. government lawyer, and it is hard to identify another person in the law of war community who was as universally loved and admired for the combination of skill, expertise, and personal grace that he brought to his work. In addition to shaping efforts to broaden the scope of the CCW, Cummings was the driving force behind other signal achievements in the field and a consummate mentor to young lawyers. His work on Additional Protocol 3 to the Geneva Conventions, for example, was instrumental in forging a path for the Israeli society, Magen David Adom, to join the International Red Cross/Red Crescent movement. And he is credited for his important role in pressing the CCW group toward successful resolution in the 2005 Protocol on Explosive Remnants of War.

L also played a key role in the 1990s in developing the more robust use of Chapter VII authorities under the United Nations Charter to restore international peace and stability and to provide the basis for elaborate peacekeeping operations in East Timor and Kosovo. By the end of that period, I was serving in the Clinton Administration as Assistant Secretary for the Bureau of Democracy, Human Rights and Labor under then-Secretary of State Madeleine Albright. During the Kosovo episode, I admit, I felt uncomfortable about whether L had fully met its Duty to Explain. It seems to me that particularly when we use force, we have a duty to explain why we believe that use of force to be lawful. That is one reason why in various statements and speeches during my tenure, I have made a special effort to address some of these questions to the extent I can in a public forum.[45]

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44. Michael J. Matheson, Remarks, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

45. *See, e.g.*, *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Harold Hongju Koh) [hereinafter Koh Libya Testimony], *available at* http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf; Koh, *supra* note 1; Harold Hongju Koh, Statement Regarding Use of Force in Libya (Mar. 26, 2011), *available at* http://www.state.gov/s/l/releases/

I have spoken of the post-World War II history of the law of war as being one of peaks and valleys. As many know, the past years have been trying times, and it was the Legal Adviser's Office that pushed back at numerous critical junctures, including during Will Taft's tenure from 2001 to 2005. Senator Lindsey Graham memorably remarked in 2005 that "the lawyers in the Secretary of State's office, while I may disagree with them, and while I may disagree with Secretary Powell, were advocating the best sense of who we are as people."[46] I also admired Taft for writing in 2003 that "[w]hile the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled."[47] The Supreme Court went on to quote Taft's words in *Hamdan v. Rumsfeld*, when it underscored that "[a]lthough the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government 'regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'"[48] Although in his reminiscences today, Will described himself as having been embattled in this period, over time, by adhering to principle, L can sometimes win even when losing.[49]

When Will Taft left, he was replaced by John Bellinger, who deserves great credit for opening up channels of communication with our legal counterparts in allied and partner governments all around the world. Bellinger helped draw the U.S. government into a posture of engagement on a whole host of sensitive issues relating to the law of armed conflict, creating bilateral and multilateral channels for communication that helped rebuild some of the trust that had been lost in the years following the September 11 attacks. Some of the foreign government participants in this conference, including Legal Advisers Peter Taksoe-Jensen of Denmark, Alan Kessel of Canada, and Sir Daniel Bethlehem of the United Kingdom, played an important role in this effort.

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remarks/159201.htm; Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS, May 19, 2011, http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/; *cf.* Harold Hongju Koh, Statement Regarding Syria (Mar. 30, 2012), *available at* http://www.state.gov/s/l/releases/remarks/187163.htm.

46. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (2005) (statement of Sen. Lindsey Graham).

47. William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003).

48. Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (alteration in original) (quoting Taft, *supra* note 47).

49. On March 7, 2011, just a few days after these remarks were delivered, the Obama Administration announced that the "[t]he U.S. Government will . . . choose out of a sense of legal obligation to treat the principles set forth in Article 75 [of Additional Protocol I] as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well." Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. The Administration further urged the Senate "to act as soon as practicable" to provide its advice and consent to ratification of Additional Protocol II. *Id.*

Finally, I cannot complete this review without mentioning my former Principal Deputy Joan Donoghue, who recently left L to become a judge on the ICJ. Brilliant, principled, and composed, she was the perfect steward for a delicate transition from the Bush to the Obama Administrations. During my confirmation process, Judge Donoghue served as Acting Legal Adviser for a protracted period and spent much of her time guiding senior officials in the new Administration through the thicket of issues they were inheriting in this area, including by helping with the implementation of the President's three detention- and interrogation-related executive orders of January 2009.

In short, these select L/PM highlights reveal the continuing critical role of what I have called Career L: career attorneys, supported by the Legal Adviser, who are deeply committed to America's tradition of abiding by international humanitarian law. On a day-to-day basis they continue that tradition—always working closely with our colleagues at the Department of Defense Office of General Counsel and the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff, with whom we have forged an extraordinary partnership over decades of collaboration on armed conflict issues. Recently, a team of L lawyers returned from Geneva, where the U.S. delegation (led by an L attorney) has been continuing the work of their L predecessors by trying to reach agreement on a new CCW protocol that would govern cluster munitions; meanwhile, another team of L lawyers returned from the UN, where they had been engaged in negotiations regarding the arms trade issue. I myself have continued to engage with counterpart legal advisers to continue in the intergovernmental dialogue on political-military affairs that John Bellinger helped establish. The precise subject matter may change over the years, but in this time of armed conflict, like all others before it, we at L constantly engage in these sorts of conversations and negotiations to ensure that the law is not silent, but rather, loudly and proudly incorporated into the practice of modern warfare.

B. OFFICIAL IMMUNITY: FROM THE TATE LETTER TO *SAMANTAR*

Another area in which L has played a recurring, if changing, role over time has been in the area of foreign sovereign and official immunity.[50] Historically, the Executive Branch was considered the appropriate branch to determine immunity, by providing courts with so-called suggestions of immunity. Courts adopted a two-track process that looked to the State Department to decide whether immunity was appropriate. If the State Department offered a suggestion of immunity, the court would dismiss the suit. If the State Department was silent, the court would decide on its own "'whether all the requisites for such

50. For a fuller description of current State Department practice, see Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141 (2011), from which the following discussion directly derives.

immunity existed,'"[51] considering "'whether the ground of immunity is one which it is the established policy of the [the State Department] to recognize.'"[52]

The State Department practice of suggestions of immunity evolved over time. Before 1952, there was absolute sovereign immunity for friendly foreign sovereigns. In 1952, Acting Legal Adviser Jack Tate wrote the "Tate Letter" that adopted a more restrictive theory of sovereign immunity.[53] In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA),[54] which codified the standards for foreign sovereign immunity and transferred primary decision-making responsibility for determinations of foreign sovereign immunity from the State Department to the federal courts. The Executive Branch saw the FSIA as applying only to foreign states, however, not to foreign officials, and therefore continued the practice of providing suggestions of foreign official immunity. The circuits were split on this issue. In 2010, the Supreme Court held in *Samantar v. Yousuf* that the Executive Branch was correct: The FSIA does not govern immunity for foreign officials.[55]

In lieu of the FSIA, the Court's *Samantar* decision makes clear that the immunity of individual foreign officials derives from common law standards and from international law.[56] Accordingly, Samantar's own case was remanded so that the trial court could consider common law immunities potentially available to him.[57] The Supreme Court did not consider the precise nature and scope of those immunities. Just as they did historically, courts must now look to the Executive Branch—principally the State Department—to suggest principles governing official immunity. Before the FSIA was enacted, when the State Department suggested that a foreign sovereign defendant was immune from suit, district courts "surrendered [their] jurisdiction" over the case.[58] As the Second Circuit put it, "once the State Department has ruled in a matter of this nature, the judiciary will not interfere."[59] The *Samantar* Court expressly found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official

51. Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010) (quoting *Ex parte* Peru, 318 U.S. 578, 587 (1943)).

52. *Id.* (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945) (alteration in original)).

53. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULLETIN 984 (1952). Forgive me if I note with pride my own fleeting personal connection with Jack Tate. Born in Bolivar, Tennessee, in 1902, Tate graduated from the University of Tennessee at Knoxville in 1924, and after his historic service as Acting Legal Adviser moved to my hometown, New Haven, Connecticut, where he served for many years as the beloved Deputy Dean of Yale Law School. In that role, Tate showed great kindness to my family, and his wife Elizabeth became my older sister's revered and favorite high school English teacher.

54. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

55. 130 S. Ct. at 2282, 2292.

56. *Id.* at 2284–85, 2292–93.

57. *Id.* at 2292–93.

58. *Id.* at 2284.

59. Isbrandtsen Tankers v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971).

immunity."[60] The U.S. government's amicus brief in *Samantar* explained why a rigid statutory framework is not appropriate for these determinations; instead we need flexibility to consider complex issues relying on a nonexhaustive range of factors.[61]

As a result, building on pre-FSIA practice, we are now establishing a new process for making these official immunity determinations. We believe that, as the Court recognized, the State Department, in consultation with others in the Executive Branch, is best positioned to consider the policy, remedial, substantive, and prudential concerns raised by suits against officials. Four basic reasons underlie this belief. First, the Department has a unique and critical expertise in international law and practice; there are nearly 200 lawyers in L whose specialty is the determination of rules of international law, both positive and customary. Second, the State Department daily grapples with the impact of litigation on foreign states. Third, the State Department has expertise regarding the federal common law of immunity for individual foreign officials and can best distinguish true "*Samantar*" issues from "non-*Samantar*" procedural issues regarding status and parties. Fourth, the State Department has a special capacity and responsibility to evaluate foreign policy and reciprocal consequences of official immunity decisions. Moreover, the Department is better equipped to do all of these things today than it was in the era before the FSIA, when it lacked the resources to make recommendations in certain cases.

In our recent filing before the Eastern District of Virginia, we determined that Samantar was not immune from suit, based on a number of factors relating to the facts of the case in conjunction with "the applicable principles of customary international law."[62] We noted, among other things, that the defendant was a U.S. resident sued by a U.S. citizen, and that he was a former official of a state with no currently recognized government who would normally enjoy only residual immunity for acts taken in an official capacity.[63] We also considered "the overall impact of this matter on the foreign policy of the United States,"[64] and ultimately determined that Samantar was not immune from suit. The district court duly followed this determination.[65]

So that is what happens when the Executive Branch makes an official immunity determination—but what if the State Department stays silent? Will the State Department really be forced to make an immunity determination in every single case where that issue might arise? The Supreme Court in *Samantar*

60. *Samantar*, 130 S. Ct. at 2291.

61. Brief for the United States as Amicus Curiae Supporting Affirmance, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555).

62. Statement of Interest of the United States of America at 7, Yousuf v. Samantar, No. 1:04 Civ. 1360 (E.D. Va. Feb. 14, 2011) [hereinafter *Samantar* Statement of Interest]; *see also* Brief for the United States as Amicus Curiae Supporting Appellees at 5, Yousuf v. Samantar, No. 11-1479 (4th Cir. Oct. 24, 2011).

63. *Samantar* Statement of Interest, supra note 62, at 7–9.

64. *Id.* Ex. 1, at 2.

65. Order, Yousuf v. Samantar, No. 1:04 CV 1360 (E.D. Va. Feb. 15, 2011).

explained that under the traditional practice which the FSIA did not displace, if the Executive Branch chooses *not* to participate in the litigation, district courts must consider whether a defendant is entitled to immunity under "the established policy of the State Department."[66] Once again, the Supreme Court is looking to the Executive Branch to suggest broader principles of decision to govern individual immunities of foreign officials. And the more we say now to set forth an official immunity policy that can guide the courts in these cases, the less we will have to say in future cases. Thus, just as L works hard to ensure that during war, the law is never silent, in the area of official immunity, the most meaningful sound coming from the Executive Branch may ultimately turn out to be the sound of silence.

C. INTERNATIONAL DISPUTE RESOLUTION

Finally, we should not forget that, as befits an office originally known as the Examiner of Claims, the resolution of international disputes remains a critical piece of L's portfolio. At the time of L's founding in 1931, the world had just passed through its first tentative stages of building the architecture for the resolution of disputes through the use of international tribunals, and we continue to participate actively in such efforts before the ICJ, international claims bodies, and the various international criminal tribunals. Significantly, notwithstanding the establishment of world courts following the two world wars, this is a body of law that largely did not even exist at L's 50th birthday.

1. International Court of Justice

All of us are aware that, from early on, the U.S. relationship with international dispute resolution has encountered significant rough spots, reflecting in varying degrees a broader undercurrent within the U.S. body politic of ambivalence toward international institutions generally. Thus, for all the energies expended by statespersons like Elihu Root dating back at least to the beginning of the last century, the United States never became party to the Statute of the Permanent Court of International Justice, just as we famously declined to ratify the Covenant of the League of Nations. And while the United States provided true luminaries to serve as judges of the Permanent Court—for example, John Bassett Moore and Manley Hudson, not to mention former Secretaries of State like Charles Evan Hughes and Frank Kellogg—it is also true that the United States never participated in litigation before the Court.

After the horrors of World War II, however, the United States did become a party to the Charter of the United Nations and to the Statute of the ICJ. Throughout the postwar period, L has led an active U.S. participation before the ICJ. The United States has participated in more contentious ICJ cases than any other country, and L lawyers have played a pivotal role in many of the Court's

66. *Samantar*, 130 S. Ct. at 2284 (internal quotation marks and brackets omitted).

most significant cases. The same has been true in the Court's advisory cases, in which the United States has again participated in more cases than any other country, including the remarkable efforts led by Mike Matheson, the late Jack McNeill, and others in the *Nuclear Weapons* cases in the 1990s and, more recently, the efforts during my own time as Legal Adviser in the *Kosovo* case in The Hague.

Although our views do not always prevail, our contributions to these cases can nevertheless shape international law in profound ways. U.S. participation in advisory cases reads like a list of some of the most important questions in international law: Kosovo independence, nuclear weapons, Israel's construction of a security barrier in occupied territory, expenses of the United Nations, the Genocide Convention, and the list goes on. I consider myself fortunate to have represented the United States before the ICJ in the *Kosovo* case in December 2009. I was deeply moved both to have worked on human rights for Kosovo in the late 1990s while Assistant Secretary of State for Democracy, Human Rights and Labor, and then to be arguing a decade later as the United States' lawyer urging the international lawfulness of Kosovo's declaration of independence. U.S. participation in contentious cases has been equally important, with L representing the United States in disputes regarding consular notification, NATO's use of force in the Balkans, the inviolability of diplomatic premises and personnel, oil platforms, the Lockerbie bombing—in all, twenty-two contentious cases to which the United States has been party.[67]

2. International Claims Resolution

At the same time, L has continued its historic role in handling disputes over property and other economic claims. That role, too, has developed and continues to expand. For instance, L took the lead in achieving compensation for U.S. property losses resulting from World War II and the spread of communist governments in Europe. This was accomplished not through quasi-judicial commissions of the type that had been used in the 1920s and 1930s, but largely through bilateral negotiations and lump-sum settlements.

Three decades ago, in 1981, we saw the advent of the Iran–United States Claims Tribunal. By providing compensation to many American claimants and giving the world a weighty and important body of judicial decisions, the Tribunal has provided a forum for Iran and the United States, acting through their Legal Advisers, to settle a number of difficult claims. Some of these settlements have gone beyond the four corners of the Algiers Accords, including the settlement concerning the tragic shoot-down of the Iran Air passenger plane

67. At this time, we also continue to work vigorously to secure enactment of consular notification legislation that would implement the United States' obligations under the ICJ's outstanding judgment in *Case Concerning Avena and Other Mexican Nationals (Mexico. v. United States)*, 2004 I.C.J. 12 (Mar. 31). *See, e.g.*, *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Patrick Kennedy, Under Sec'y for Mgmt., U.S. Dep't of State), *available at* http://www.state.gov/m/rls/remarks/2011/169182.htm.

over the Persian Gulf in 1988. Remarkably, the Tribunal has continued to function to this day as a place where L lawyers and their Iranian counterparts regularly have bilateral interaction.[68] While the path has not always been smooth and remains far from perfect, the Tribunal has been the only forum in which such bilateral interaction has happened for thirty years without significant interruption. L lawyers were also instrumental in erecting the architecture of the United Nations Compensation Commission (UNCC), established to compensate individuals, companies, and states suffering losses from Iraq's 1990 unlawful invasion and occupation of Kuwait. Virtually without fanfare, over 1.5 million claimants have been compensated nearly $30 billion dollars by the UNCC.

Arbitration has taken firm hold in another area: international investment. Here too, L has played a significant role in shaping the way that the North American Free Trade Agreement (NAFTA) tribunals consider key international legal issues. The entry into force of NAFTA in 1994 ushered in for the United States, Canada, and Mexico a period of unprecedented growth in the resort to binding international arbitration to resolve investment claims under the Agreement's Chapter 11. L has led the defense of more than a dozen challenges to U.S. laws, and I had the privilege of arguing the *Grand River* case, in which the United States recently prevailed.[69] These tribunals render important decisions both for our investors venturing abroad with their capital and for law- and policymakers around the world who have agreed to a set of enforceable rules in NAFTA and in our broader suite of bilateral investment and free trade agreements.

3. *Ad Hoc* International Criminal Tribunals

When war raged in the Balkans in the early 1990s, L stood at the forefront of negotiations to establish the first international criminal tribunal since the Nuremburg trials. Created through a binding resolution adopted by the UN Security Council, the International Criminal Tribunal for the former Yugoslavia (ICTY) has served as a haven of justice for some of the worst atrocities perpetrated in the region, and its work continues to this day. L lawyers have been deeply involved in shaping every step of the process, from playing a lead role in drafting the founding statute for the ICTY, to managing U.S. cooperation with the Tribunal through our team at the Embassy in The Hague, to negotiating the terms of a resolution for an orderly transition to a successor institution that will handle so-called "residual issues" for both the Yugoslav and Rwanda Tribunals, seeking to ensure that any fugitives remaining cannot escape justice simply by outrunning the clock.

Over the course of nearly twenty years, the ICTY has indicted some 161

68. As this article goes to press, a group of L attorneys, including myself, are preparing to present the U.S. case to the Tribunal in Case No. A(15)(IV).

69. Grand River Enterprises Six Nations, Ltd. v. United States, Award (ICSID Jan. 12, 2011), *available at* http://www.state.gov/documents/organization/156820.pdf.

individuals and concluded proceedings for 125 accused, in the process creating a wealth of jurisprudence that elaborates and explains applicable international law on war crimes, crimes against humanity, and genocide. The ICTY has also served as a model for a number of other "*ad hoc*" and "hybrid" international criminal tribunals that have been created to address cries for justice in Rwanda, Sierra Leone, Cambodia, and Lebanon. Together, these tribunals have not only served as an endless source of novel and challenging legal issues for L to grapple with, but they have also proven to be an excellent training ground for new L attorneys, many of whom come to us after spending time as interns or employees at the tribunals engaged in the practice of international criminal law. The success of these tribunals has strengthened and entrenched the basic principle—for which support is now virtually universal—that perpetrators of gross atrocities must be held to account.

4. International Criminal Court

Although we sometimes forget, the United States was also an early supporter of an international criminal court. It will not surprise that this, too, has been a bumpy ride—with the United States first declining to sign the Statute of the International Criminal Court (ICC) at the conclusion of negotiations in Rome in 1998, subsequently deciding to sign on the last possible day during the final month of the Clinton Administration, and then in 2002 submitting a letter in which Under Secretary John Bolton purported to "un-sign" the Statute. Our rocky relationship with the ICC reflects a deep national tension between on the one hand, the longstanding bipartisan support for accountability in the face of atrocities, and on the other, a fear of international institutions that might sit in judgment of the United States, particularly in the form of criminal prosecutions against young Americans who serve in our Armed Forces.

While the exact path forward may not yet be known, it is clear that we have finally been able to swing the pendulum away from unsustainable U.S. positions of the past decade. That movement began at least as far back as the decision of the United States in the spring of 2005 to allow the UN Security Council to refer the situation in Darfur to the ICC, a decision that was followed by commendably steadfast efforts in the final years of the Bush Administration to oppose those who would interfere with the Court's work there. In the fall of 2009, the Obama Administration reengaged with the Assembly of States Parties, and in the summer of 2010, I co-headed a large observer delegation to the ICC Review Conference in Kampala. Thus, with little fanfare, in just three years we have shifted the default of our relationship with the ICC from hostility to positive engagement.[70] In a sign of how far we have come, the Security Council

70. *See generally* The U.S. and the International Criminal Court: Report from the Kampala Review Conference (June 16, 2010) (remarks of Harold Hongju Koh and Stephen J. Rapp), *available at* http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf. As an academic, I had discussed some of the challenges of addressing the United States' relationship with the ICC and other interna-

recently made a historic, unanimous referral of the Libyan situation to the ICC. The United States proudly, and without controversy, cast its first vote in favor of an ICC referral. The ICC's Prosecutor announced that he will open an investigation into those who are most responsible for the most serious crimes committed in Libya, and stressed that there will be no impunity.

As the *ad hoc* tribunals move to complete their work, it is to the ICC that eyes around the world will increasingly turn to provide accountability and legality in the face of unspeakable atrocities. And while there were and remain considerable questions about the Court and the Rome Statute, we have supported the Court's ongoing prosecutions; we now participate actively and constructively in the meetings of the Assembly of States Parties, as we did also in the Review Conference held last summer in Kampala; and we meet regularly with the Prosecutor to determine the kinds of tangible assistance needed to bring successful prosecutions. Within the framework of domestic legal and political constraints, L has thus helped the United States make significant headway in building a more productive and sustainable relationship with the ICC that will serve the interests of the United States as well as the cause of international criminal justice.

IV. "L FUTURE": NEW CHALLENGES, ENDURING PRINCIPLES

What this review of past and present should make clear is that the more L has changed, the more its basic roles have stayed the same. As Mike Matheson has succinctly summarized, the Legal Adviser "gives legal advice before decisions are made; he gives the best possible legal defense for the decision once it has been made; he contributes to solving practical problems with his lawyering skills; and he needs to be able to use the personnel available to accomplish these objectives."[71]

Even still, to stay the same, L will have to change. New factual challenges will constantly arise, and those challenges will force us to adapt our legal paradigms to new scenarios—at times providing old wine in new bottles, at other times providing an entirely new legal analysis to meet rapid technological change. Issues that could be described as old wine in new bottles have recently included such well-worn topics as piracy, immunity of foreign officials, and international dispute resolution, which increasingly raises not just questions about adjudicatory fora but also complex issues of compliance and implementation.

Most significantly, this recent period has also witnessed the emergence of technologies—digital, biological, chemical, genetic—that may require more profound adaptations by L. The Internet alone has generated major new debates about the nature of human freedom and expression, cyber war, cybersecurity, online privacy, and much else Hugo Grotius could never have imagined. When I

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tional tribunals in Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1503–09 (2003).

71. SCHARF & WILLIAMS, *supra* note 2, at 156–57 (remarks of Michael J. Matheson).

became Legal Adviser, I said we would concentrate on the law of globalization, an area that will increasingly grip our attention as we live in an age not divided by a Berlin Wall but linked by a World Wide Web. The defining players will not be blocs of countries, necessarily; they may be networks of actors connected in countless tangible and intangible ways that challenge our traditional understandings of international relations and international law.

Increasingly, we find ourselves addressing twenty-first-century challenges with twentieth-century laws. It is no secret that our polarized political environment has made it increasingly difficult to ratify treaties or to enact legislation. But rather than simply dismissing the extant law as quaint and outmoded, we find ourselves increasingly trying to translate the directive and spirit of these laws to unanticipated situations. On a daily basis, we seek to answer questions never contemplated by the framers of legal instruments, questions like: How should the War Powers Resolution apply to a limited, NATO-led, UN-authorized operation that implicates the international community's responsibility to protect innocent civilians?[72] How do the Geneva Conventions apply to an armed conflict with a transnational non-state terrorist organization like Al Qaeda, or to the efforts of a computer programmer to attack a government system by changing the number zero to the letter *o*?[73] What will the consequences be if global warming leads the Arctic ice cap to shrink and the United States cannot bring about a workable global climate change convention or accession to the UN Convention on the Law of the Sea?[74] How does the FSIA's language regarding "foreign states" apply to the emerging institutions of the European Union?[75] Does the FSIA permit execution of judgments against China upon giant pandas or their embryos?[76]

And in negotiating these myriad new challenges, how will we know if we are succeeding? By what metric can we judge our influence in advancing U.S. interests while promoting respect for, and compliance with, international law? I have no complete answer to this question. But surely, we cannot fairly measure L's influence by such crude metrics as counting how many treaties have been ratified or cases won. We cannot fall prey to the trap that when you cannot measure what is important, you make important that which you can measure.

One short measure of our worth is that we are only as good as our principals,

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72. *See* Koh Libya Testimony, *supra* note 45.

73. For a partial answer, see Koh, *supra* note 1.

74. *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (written testimony of Hillary Rodham Clinton, Sec'y of State, U.S. Dep't of State), *available at* http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf.

75. *See* Brief for the United States as Amicus Curiae in Support of Neither Party, European Community v. RJR Nabisco, Inc., No. 11-2475 (2d Cir. Oct. 4, 2011).

76. *See* Walters v. Indus. & Commercial Bank of China, Ltd., 651 F.3d 280, 284 (2d Cir. 2011) (discussing effort to execute default judgment upon two Chinese giant pandas on loan to the National Zoo in Washington).

and we are only as good as our principles. We are only as good as the principals for whom we serve as agents: President Barack Obama, Secretary Hillary Clinton, and the many other clients for whom we work. And we are only as good as our principles: the values that we live by and that we seek to uphold every day. On these qualitative dimensions, I am confident that L will continue to thrive.

More generally, I retain the utmost confidence in L's ability to meet new challenges because of three of the office's core, established strengths, already alluded to earlier. The first is *L's unique perspective*: its ability to place issues in broader geographic, historic, and legal context. This ability is nurtured by our system of attorney rotation, which keeps lawyers in L for long tenures while allowing them to work on an ever-expanding set of issues, thus avoiding intellectual calcification while maintaining institutional continuity and knowledge. It is nurtured by the structure of the State Department, which is effectively a microcosm of the U.S. government in the way it must balance all U.S. foreign policy interests—from trade to counterterrorism to tourism to human rights—and which is uniquely plugged in to foreign governments and events, international bodies, and emerging global trends and norms. It is nurtured by L's role as the U.S. government's primary interface with the international legal community, which allows our attorneys to bring other countries' views and experiences back to our interagency colleagues, and to share our views and experiences with allies. It is nurtured by L's role in helping to set the U.S. government's international law agenda and to coordinate its position on international law questions, which keeps us on the cutting edge of novel legal issues. And it is nurtured by L's reputation as a repository of information and insight on U.S. foreign policy, which gives us an unparalleled background in the legal precedents of diplomacy, crisis management, and the like.

Second, I take confidence in the strength and significance of *L's unique relationships*. This conference, and the participation of eminent foreign colleagues, has helped to showcase why the office will perpetually benefit from the multilateralism that is woven into the fabric of our daily work. What L understands, as Sir Daniel Bethlehem likes to say, is that you may not be able to herd cats, but you can move their food. And so we work daily with foreign colleagues to change incentives and restructure situations. Beyond our relationships with foreign colleagues, we are engaged in multiple other dialogues, mirroring the subjects of the panels today: our interagency conversations about international law with colleagues across the U.S. government; our conversations with groups such as ASIL and with the legal academy; and our conversations with ourselves, through our repeated examination of the office's precedents and practices. Only by maintaining such close ties with colleagues inside and outside the United States and inside and outside government, and by maintaining respect for and continuity with our predecessors, can L strike its trademark balance of independence, expertise, and creativity in solving problems and promoting the rule of law.

Third, and most important, I draw confidence from *L's unique dynamism*. The "ism" that best characterizes the lawyers in our office is neither conservativism nor liberalism, but "metabolism." We are a notably energetic bunch. We are not potted plants. Our job is to identify legal channels within which policy decisions can flow and to shape legal instruments through which policy goals can be pursued. That task can seem monumental, and the work ceaseless. But we engage daily in a remarkable exercise, an interactive process between lawyers and policymakers through which legal doctrine moves from abstraction to reality. Law influences policy, policy makes law, and that perpetual feedback loop is a key to understanding why lawyering in L has historically been such a dynamic enterprise and to determining why nations obey international law. In my academic work, I have observed and described this phenomenon, which I have called "transnational legal process."[77] For the past few years, I have been lucky enough to live within this process at L and, from that vantage point, to help shape it.

CONCLUSION

Across 163 years (eighty as a statutory entity), L's decades have been full of lessons learned in the crucible. Those experiences cast important light on what it means to be government lawyers committed to the rule of law in international affairs. For if international relations are to be more than just power politics, true international lawyers must fuse their training and skill with moral fortitude and guide the evolution of legal process with the application of reasoned and respect-worthy legal norms. Our foreign policy decisions most fully conform with international law when the international lawyers are at the table while important decisions are being made. By having the courage to argue with our clients; to invoke illegality when appropriate; to offer creative legal solutions, fearless advice, and loyal implementation; and to defend our country when challenged, we serve the highest values of our office. While much else may change, my time inside L has given me deep faith that future L attorneys will continue to uphold these proud traditions over the next eight decades and beyond.

77. *See generally* 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).

APPENDIX 1: LEGAL ADVISERS OF THE U.S. DEPARTMENT OF STATE

Legal Adviser	Year Began	Year Ended	Nominating President
Green H. Hackworth	1931	1946	Herbert Hoover
Charles H. Fahy	1946	1947	Harry S. Truman
Ernest A. Gross	1947	1949	Harry S. Truman
Adrian S. Fisher	1949	1953	Harry S. Truman
Herman Phleger	1953	1957	Dwight D. Eisenhower
Loftus Becker	1957	1959	Dwight D. Eisenhower
Eric H. Hager	1959	1961	Dwight D. Eisenhower
Abram Chayes	1961	1964	John F. Kennedy
Leonard C. Meeker	1965	1969	Lyndon B. Johnson
John R. Stevenson	1969	1973	Richard Nixon
Carlyle E. Maw	1973	1974	Richard Nixon
Monroe Leigh	1975	1977	Gerald Ford
Herbert J. Hansell	1977	1979	Jimmy Carter
Roberts Bishop Owen	1979	1981	Jimmy Carter
Davis R. Robinson	1981	1985	Ronald Reagan
Abraham D. Sofaer	1985	1990	Ronald Reagan
Edwin D. Williamson	1990	1993	George H. W. Bush
Conrad K. Harper	1993	1996	William J. Clinton
David Andrews	1997	2000	William J. Clinton
William Howard Taft IV	2001	2005	George W. Bush
John B. Bellinger III	2005	2009	George W. Bush
Harold Hongju Koh	2009	present	Barack Obama

APPENDIX 2: PARTIAL LIST OF L ALUMNI CURRENTLY IN TEACHING

Name	Title	Institution
José Enrique Alvarez	Herbert and Rose Rubin Professor of International Law	New York University School of Law
Ronald J. Bettauer	Visiting Scholar	George Washington University School of Law
Richard B. Bilder	Foley & Lardner-Bascom Emeritus Professor of Law	University of Wisconsin Law School
Andrea K. Bjorklund	Professor of Law	UC Davis School of Law
Christopher Blakesley	Cobeaga Law Firm Professor of Law	William S. Boyd School of Law (University of Nevada, Las Vegas)
Daniel M. Bodansky	Lincoln Professor of Law, Ethics, and Sustainability	Sandra Day O'Connor College of Law (Arizona State University)
Steven Burton	John F. Murray Professor of Law	University of Iowa College of Law
N. Jansen Calamita	Lecturer in International Law	Birmingham Law School (UK)
Christine Cervenak	Program Director and Concurrent Assistant Professor	University of Notre Dame Law School
Jacob Katz Cogan	Associate Professor of Law	University of Cincinnati College of Law
John R. Crook	Professorial Lecturer in Law	George Washington University School of Law
Lori Fisler Damrosch	Hamilton Fish Professor of International Law and Diplomacy and Henry L. Moses Professor of Law and International Organization	Columbia Law School
Kristina Daugirdas	Assistant Professor of Law	University of Michigan Law School
Ashley Deeks	Associate Professor of Law	University of Virginia School of Law
Mark Feldman	Assistant Professor of Law	Peking University School of Transnational Law
David A. Gantz	Samuel M. Fegtly Professor of Law	James E. Rogers College of Law (University of Arizona)

Name	Title	Institution
Monica Hakimi	Assistant Professor of Law	University of Michigan Law School
Duncan Hollis	Associate Professor of Law	Beasley School of Law (Temple University)
David Kaye	Executive Director, International Human Rights Law Program	UCLA School of Law
Orde F. Kittrie	Professor of Law	Sandra Day O'Connor College of Law (Arizona State University)
John H. Knox	Professor of Law	Wake Forest School of Law
Hans A. Linde	Distinguished Scholar in Residence	Willamette University College of Law
Andreas F. Lowenfeld	Herbert and Rose Rubin Professor of International Law Emeritus	New York University School of Law
Michael Matheson	Professorial Lecturer in Law	George Washington University School of Law
Timothy L. Meyer	Assistant Professor of Law	University of Georgia School of Law
Saira Mohamed	Assistant Professor of Law	UC Berkeley School of Law
John F. Murphy	Professor of Law	Villanova University School of Law
Sean D. Murphy	Patricia Roberts Harris Research Professor of Law	George Washington University School of Law
Diana Helweg Newton	Senior Research Fellow	John G. Tower Center for Political Studies, Dedman College (Southern Methodist University)
Bernard H. Oxman	Richard A. Hausler Professor of Law	University of Miami School of Law
Vijay Padmanabhan	Assistant Professor of Law	Vanderbilt Law School
Jason Palmer	Associate Professor of Legal Skills	Stetson University College of Law
Elizabeth Rindskopf Parker	Dean and Professor of Law	University of the Pacific, McGeorge School of Law

Name	Title	Institution
Antonio Perez	Professor of Law	Columbus School of Law (Catholic University of America)
David Pozen	Associate Professor of Law	Columbia Law School
Steven R. Ratner	Bruno Simma Collegiate Professor of Law	University of Michigan Law School
Sally Rider	Director, William H. Rehnquist Center	James E. Rogers College of Law (University of Arizona)
Sabrina Safrin	Professor of Law	Rutgers School of Law
Pammela Quinn Saunders	Visiting Assistant Professor of Law	Earle Mack School of Law (Drexel University)
Michael P. Scharf	John Deaver Drinko-Baker & Hosftetler Professor of Law	Case Western Reserve University School of Law
Dustin N. Sharp	Assistant Professor	Joan B. Kroc School of Peace Studies (University of San Diego)
Anna Spain	Associate Professor of Law	University of Colorado Law School
Peter J. Spiro	Charles R. Weiner Professor of Law	Beasley School of Law (Temple University)
David P. Stewart	Visiting Professor of Law	Georgetown University Law Center
Jane E. Stromseth	Professor of Law	Georgetown University Law Center
Kenneth J. Vandevelde	Professor of Law	Thomas Jefferson School of Law
Geoffrey R. Watson	Professor of Law	Columbus School of Law (Catholic University of America)
Allen S. Weiner	Senior Lecturer in Law	Stanford Law School
Paul R. Williams	Rebecca I. Grazier Professor of Law and International Relations	Washington College of Law (American University)
David A. Wirth	Professor of Law	Boston College Law School
Diane P. Wood	Senior Lecturer in Law and Federal Judge	University of Chicago Law School and U.S. Court of Appeals for the Seventh Circuit
Michael K. Young	University President	University of Washington

APPENDIX 3: LIST OF L ATTORNEYS CURRENTLY IN TEACHING

Name	Title	Institution
Elizabeth R. Amory	Adjunct Professor	Johns Hopkins Graduate School of Advanced International Studies
Evelyn M. Aswad	Adjunct Professor of Law	Georgetown University Law Center
Alexis R. Blane	Adjunct Professor of Law	Washington College of Law (American University)
Gilda Brancato	Adjunct Professor of Law	Georgetown University Law Center
Lee M. Caplan	Adjunct Professor of Law	Washington College of Law (American University)
Robert E. Dalton	Adjunct Professor of Law	Georgetown University Law Center
Steven F. Fabry	Adjunct Professor of Law	Georgetown University Law Center
Katherine M. Gorove	Adjunct Professor of Law	Washington College of Law (American University)
James A. Gresser	Adjunct Professor of Law	Georgetown University Law Center
Brian R. Israel	Adjunct Professor of Law	George Mason University School of Law
Darin E. Johnson	Adjunct Professor of Law	Georgetown University Law Center
Theodore P. Kill	Adjunct Professor of Law	George Mason University School of Law
Karin L. Kizer	Adjunct Professor of Law	Washington College of Law (American University)
Kathleen M. Milton	Adjunct Professor of Law	Georgetown University Law Center
Patrick W. Pearsall	Adjunct Professor of Law	George Washington University School of Law
Virginia P. Prugh	Adjunct Professor of Law	Georgetown University Law Center
Max L. Rettig	Adjunct Professor of Law	Georgetown University Law Center
Christina Sanford	Adjunct Professor of Law	Georgetown University Law Center
Jeremy Sharpe	Adjunct Professor of Law	Georgetown University Law Center
Neha Sheth	Adjunct Professor of Law	Georgetown University Law Center
Jennifer I. Toole	Adjunct Professor of Law	Washington College of Law (American University)
Richard C. Visek	Adjunct Professor of Law	Georgetown University Law Center
Jeremy M. Weinberg	Adjunct Professor of Law	George Mason University School of Law

APPENDIX 4: COUNSELORS ON INTERNATIONAL LAW

Name	Years of Service	Current Position
Marjorie Millace Whiteman	1965–1970	Deceased
Louis B. Sohn	1970–1971	Deceased (formerly Bemis Professor of International Law, Harvard Law School)
Richard R. Baxter	1971–1972	Deceased (formerly Professor of International Law, Harvard Law School)
John Norton Moore	1972–1973	Walter L. Brown Professor of Law, University of Virginia School of Law
Stephen M. Schwebel	1973–1974	International Arbitrator; President of the Administrative Tribunal of the World Bank
Gordon B. Baldwin	1975–1976	Deceased (formerly Evjue-Bascom Professor Emeritus of Law, University of Wisconsin Law School)
Detlev F. Vagts	1976–1977	Bemis Professor of International Law, Emeritus, Harvard Law School
Stefan A. Riesenfeld	1977–1980; 1981–1982	Deceased (formerly Professor of Law, UC Berkeley School of Law and UC Hastings College of the Law)
Gerald Rosberg	1980–1981	Senior Vice President, The Washington Post Company
Fred L. Morrison	1982–1983	Popham, Haik, Schnobrich/Lindquist & Vennum Professor of Law, University of Minnesota Law School
Harold G. Maier	1983–1984	David Daniels Allen Professor of Law Emeritus, Vanderbilt Law School
Stephen C. McCaffrey	1984–1985	Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law
Malvina Halberstam	1985–1986	Professor of Law, Yeshiva University, Benjamin N. Cardozo School of Law
Robert E. Dalton	1988–1991	Adjunct Professor of Law, Georgetown University Law Center; Senior Advisor on Treaty Practice, U.S. Department of State
Philip C. Bobbitt	1991–1993	Herbert Wechsler Professor of Federal Jurisprudence, Columbia Law School

Name	Years of Service	Current Position
Theodor Meron	2000–2001	Appeals Judge and President, International Criminal Tribunal for Former Yugoslavia; Charles L. Denison Professor of Law Emeritus and Judicial Fellow, NYU Law School
Nancy Ely-Raphel	2003	Retired (formerly U.S. Ambassador to Slovenia)
Curtis A. Bradley	2004	Richard A. Horvitz Professor of Law, Duke University School of Law
Edward T. Swaine	2005–2006	Professor of Law, George Washington University Law School
Paul B. Stephan	2006–2007	John C. Jeffries, Jr. Distinguished Professor of Law, University of Virginia School of Law
John C. Harrison	2008	James Madison Distinguished Professor of Law, University of Virginia School of Law
Lewis Yelin	2009	Attorney, Appellate Staff, Civil Division, Department of Justice
Sarah H. Cleveland	2009–2011	Louis Henkin Professor of Human and Constitutional Rights, Columbia Law School
William S. Dodge	2011–2012	Professor of Law, UC Hastings College of the Law