

Essay

Practicing International Law in the Obama Administration

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I. INTRODUCTION

Over the past half-century, the Office of the Legal Adviser in the U.S. Department of State has grown significantly in size and scope. During that time, a handful of articles have described the work of the Legal Adviser.¹ This Essay builds upon those accounts by describing the role of the Legal Adviser in the still-young Obama Administration.

The United States currently faces a defining moment for its relationship with international law, as we stand at the cusp of what President Obama has called a “new era of engagement.”² The defining image of this new world is not a world divided by a Berlin Wall, but a globe connected by the World Wide Web. As America resumes its leadership role on the world stage, renewed respect for international law and institutions will be crucial to achieving our goals of peace, justice, and prosperity. In this new era, the

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1. See, e.g., Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962); Ashley Deeks, *Inside “L”: Some Thoughts on the Office of the Legal Adviser*, 2 CHI. J. INT'L L. 503 (2001); Ernest A. Gross, *Operation of the Legal Adviser's Office*, 43 AM. J. INT'L L. 122 (1949); Current Development, *The Role of the Legal Adviser of the Department of State*, 85 AM. J. INT'L L. 358 (1991); L.H. Woolsey, *The Legal Adviser of the Department of State*, 26 AM. J. INT'L L. 124 (1932).

2. Barack Obama, President of the U.S., Remarks by the President to the United Nations General Assembly (Sept. 23, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-United-Nations-General-Assembly.

Office of the Legal Adviser will play a critical role in the development of international law and policy, both at home and abroad.

This Essay discusses the organization of the Legal Adviser's Office and the contemporary challenges the Legal Adviser faces in playing four key roles within the Obama Administration: counselor, conscience, defender, and spokesperson.

II. THE OFFICE OF THE LEGAL ADVISER

The Legal Adviser—who is subject to Senate confirmation and reports directly to the Secretary of State—acts as general counsel for the State Department, providing advice on all international and domestic legal issues that arise in the course of the Department's work. Modeled on the Legal Adviser of the British Foreign Office (hence, the British spelling, "Adviser"), the modern Legal Adviser was established by statute in 1931; since then, there have been twenty-two Legal Advisers.³ The Legal Adviser is assisted by four Deputy Legal Advisers (all career attorneys), who supervise approximately 175 permanent attorneys and 100 support staff members, as well as a Counselor on International Law, a position traditionally held by an international law professor. The attorneys and support staff are divided into twenty-three offices, roughly corresponding to their primary clients, the bureaus of the State Department, ranging in size from several attorneys to more than twenty. Each of these offices is headed by a senior attorney, known as an Assistant Legal Adviser (ALA), who has spent significant time in the Legal Adviser's Office. In the alphabet soup that is the State Department, the Legal Adviser's Office has long been called "L"—and its twenty-four sections of attorneys fall into two categories—regional and functional—each delineated by an alphabetic title prefaced by "L."⁴ Thus, the five regional sections oversee the legal issues concerning U.S. embassies and consulates and the U.S. foreign relations affecting each of their respective geographic areas: the Office of African and Near Eastern Affairs (L/AN), East Asian and

3. See Bilder, *supra* note 1, at 633-35 (discussing the history of the Office of the Legal Adviser and the previous analogues to the position before 1931).

4. See U.S. Dep't of State, *Practicing Law in the Office of the Legal Adviser*, Aug. 5, 2009, <http://www.state.gov/s/l/3190.htm#org> (listing the various sections within the Office of the Legal Adviser).

Pacific Affairs (L/EAP); European Affairs (L/EUR); Afghanistan, Pakistan, and South Central Asia (L/ASCA) and Western Hemisphere Affairs (L/WHA).⁵ The nineteen functional sections have worldwide responsibilities for the legal issues pertaining to specific program areas, such as the Office of Human Rights and Refugees (L/HRR) and the Office of Nonproliferation and Verification (L/NPV). Within sections, attorney-advisers often develop specialties, or “portfolios,” which are bequeathed to the attorneys’ successors when the lawyers rotate within and among different sections. Virtually all members of the Office of the Legal Adviser work in a few offices spread throughout greater Washington, D.C., although staff attorneys are also stationed at The Hague, Geneva, Baghdad, U.N. headquarters in New York (USUN), with several correspondent offices (to which L attorneys often rotate).

The Legal Adviser’s Office runs on a rotation system, unusual in government practice, that ensures significant movement throughout the Office. Rotating attorneys spend the first two years of their employment assigned to a single section in the Office, and thereafter, rotate between different sections every two to three years (and in later rotations for longer periods), depending upon the needs of the various sections and the attorneys’ own assignment preferences. Over time, attorneys may settle into certain offices for longer than three years, but the rotation system facilitates communication between different sections of the Legal Adviser’s Office, as attorneys maintain informal connections with their old sections. Since most of the Legal Adviser’s attorneys are located in or around the main State Department (Harry S. Truman Building) in Foggy Bottom, in-person communication between sections and the various bureaus of the State Department occurs frequently. Problems that come to the Legal Adviser often cut across the subject matter area and expertise of any single office, thus leading attorneys from several offices (e.g., a regional and functional office) to collaborate on a variety of projects. For example, an arms proliferation negotiation involving the Russian Federation could involve input and drafting from attorneys in a variety of offices, including the Office of European Affairs

5. Throughout this Essay, offices are listed for illustrative purposes rather than as an exhaustive catalogue of all Legal Adviser functions.

(L/EUR); the Office of Treaty Affairs (L/T), the Office of Nonproliferation and Verification (L/NPV), and the Office of Political-Military Affairs (L/PM).

III. THE LEGAL ADVISER'S CHALLENGES AND ROLES

Within this organizational setting, the Office of the Legal Adviser plays four key and often overlapping roles within the State Department: counselor, conscience, defender, and spokesperson. In playing these roles, the Office of the Legal Adviser faces five particularly important contemporary challenges in this new era of engagement. First, the *Law of 9/11*: the Legal Adviser's Office faces special challenges in the wake of September 11th, including sorting out detention policies, the closure of Guantánamo, international humanitarian legal questions, and the like. Second, the *Law of International Justice and Dispute-Settlement*: there are emerging set of challenges in the fields of international justice and dispute resolution, particularly with respect to a broad array of international tribunals. Third, the *Law of International Agreements*: the Legal Adviser must address the growing number of domestic and international issues surrounding the law of international agreements, ranging from the status of treaties in domestic courts, to the legal instruments constitutionally required to secure U.S. engagement with various regional and worldwide financial, economic, and political organizations. Fourth, the *Law of the State Department*: the vast size and geographic scope of the State Department's operations constantly reshape the law governing the Department's internal and external operations. Finally, the *Law of Globalization*, embracing transnational economics, finance and business, transport, communications, energy, and security will present special challenges in the years ahead.

In each of these five areas, respect for law is an essential element of American influence, self-definition, and power. The four roles of the Legal Adviser—counselor, conscience, defender, and spokesperson—collectively ensure that creative diplomacy will be accompanied by equally intense, thoughtful lawyering.

A. The Legal Adviser as Counselor

The Office of the Legal Adviser is the legal counselor for the State Department, a role that comprises the traditional function of in-house counsel and the special function of counselor on international law.⁶ As traditional in-house counsel, like the in-house legal department of a major corporation, the Legal Adviser's Office supports the multifaceted operations of the Department of State. For example, the Office of Employment Law (L/EMP) advises on the Department's human resources and labor relations matters and represents the Department in hearings before various Administrative Review Boards in cases involving employment-related claims; the Office of Management (L/M) handles the Department's myriad managerial and disclosure functions; and the Office of Buildings and Acquisitions (L/BA) plays the role of real-estate lawyer, though often for transactions occurring in every part of the world.

Every section of the Legal Adviser's Office is involved in the in-house review of the many Department communications, policies, memoranda, and diplomatic notes, a process referred to as "clearing." Often, multiple sections will clear a single document before the document is sent to the Secretary of State's Office or communicated to third parties. Some situations require near immediate responses on clearance requests, for example, each morning when clearance is required for press guidance and responses to questions taken during State Department press sessions.

As the Department's expert on international law, the Office of the Legal Adviser also provides advice regarding the construction of international law, the scope of U.S. treaty obligations and responsibilities, and the drafting of new international agreements. To play this role, the Office is the central locus of U.S. government expertise regarding the construction of international agreements and the Office of Treaty Affairs (L/T) supports other State Department offices in drafting, negotiating, and interpreting international agreements. L/T also serves as the U.S. depository for multilateral agreements and publishes an annual volume, *Treaties in Force*, detailing current

6. This second function is distinct from the formal position of Counselor on International Law, discussed in Part II, *supra*.

international agreements to which the United States is party.⁷ Members of the Legal Adviser's Office are often assigned to negotiating teams to help create international agreements and to provide support for such negotiations. Similarly, the Office of Diplomatic Law and Litigation (L/DL) provides advice to State Department personnel regarding the application of international agreements and domestic statutes to U.S. and foreign diplomatic and consular missions. The Legal Adviser's advice on international legal issues, particularly treaty matters, is also often sought by Congress via both written reports and oral testimony.

B. The Legal Adviser as Conscience

The Office has traditionally served not just as a counselor, but also as a conscience for the United States government with respect to international law. In the current administration—where the President, the Vice President, the Secretary of State, her Chief of Staff and Deputy Chief of Staff, both Deputy Secretaries of State, the White House Counsel and the Deputy National Security Adviser (to name just a few) are all outstanding lawyers as well as foreign policy experts—the Legal Adviser is only one of many lawyers offering opinions not just on the legality of proposed actions, but also on their wisdom and morality. But it is the unique role of the Legal Adviser's Office to coordinate and render authoritative legal advice for the State Department on international legal issues, or as Richard Bilder once described, to “speak law to power.”⁸ i.e., informing clients of the legality of possible actions and working with those clients to ensure that U.S. legal and treaty obligations are met. In this role, the Legal Adviser must serve not only as a source of black letter advice, but more fundamentally, as a source of good judgment to his or her clients. One former Legal Adviser Abe Chayes put it well, when he described the job of the Legal Adviser as “holding the United States to its own best standards and principles.”⁹

7. United States Department of State, TREATIES IN FORCE 2009, available at <http://www.state.gov/s/l/treaty/treaties/2009>.

8. Richard B. Bilder & Detlev Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 690 (2004).

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

In his opening address to the Office, one of us (Harold Hongju Koh) summarized this obligation by telling his attorneys that their job was to “never say no, when our law and conscience say yes. But we should never, ever say yes, when our law and conscience say no.” As conscience, the Office of the Legal Adviser plays the classic role of in-house counsel, who not only gives legal advice, but has a seat at the table with his clients to counsel them about the prudence and wisdom of proposed actions. Even when certain actions may be strictly legal, it is the professional responsibility of a good general counsel to advise clients on the normative implications and long-term impacts of their proposed actions.¹⁰ So too the Office of the Legal Adviser is charged to act as a conscience, arguing against policies and practices that are “lawful, but awful,” that while perhaps strictly legal, may not be prudent or otherwise in the best long term interests of the United States.

C. The Legal Adviser as Defender

The Office of the Legal Adviser also serves as a defender of U.S. interests and the U.S. Constitution with respect to international law. In this capacity, the Legal Adviser both advises private and public parties at the domestic and international level and helps to represent the United States before a broad array of international bodies and tribunals. For example, the Legal Adviser represents the United States before the International Court of Justice, regularly appearing in person (as current Legal Adviser Koh will do in December 2009 in the *Kosovo* case) for oral argument at The Hague. Although the Legal Adviser’s Office does not argue in federal courts, it regularly consults with the Department of Justice regarding positions taken by the U.S. government in U.S. courts on issues of international law, particularly

10. See, e.g., Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 281-83 (1985) (detailing the role of the general counsel in long term strategic planning); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1082-87 (1976) (analyzing the “difficult role” of a lawyer asked to press a client’s “unfair claim”); Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 242, 248-50 (2002) (describing and examining the role of professionals within the organization in terms of moral leadership).

when the U.S. participates as a party or amicus in federal litigation regarding international or transnational legal issues.

In the private arena, the Legal Adviser defends U.S. interests via the Office of International Claims and Investment Disputes (L/CID), which represents the State Department with respect to claims brought under international law by U.S. nationals against foreign governments, by the United States, and against the United States. In addition, L/CID also represents the United States before a variety of international dispute settlement bodies, including the Iran-U.S. Claims Tribunal in The Hague and the U.N. Compensation Commission in Geneva. L/CID also coordinates the claims of U.S. citizens against foreign governments and oversees the espousal of private claims by the U.S. government. In parallel, the Office of Private International Law (L/PIL) helps the Department to oversee and carry out efforts to harmonize and unify laws regarding international business transactions and arbitrations, often through multilateral negotiations, and may advise the Justice Department on submissions to U.S. courts on these questions.

On the public law side, the Office of Law Enforcement and Intelligence (L/LEI) helps to request extradition and advises the Secretary of State on the disposition of extradition requests from foreign governments. L/LEI also helps to draft and implement mutual legal assistance treaties on criminal law enforcement matters, such as the transfer of evidence from one country to another. The Office of Political and Military Affairs (L/PM) provides advice to the Secretary of State regarding the status of forces agreements and foreign military claims against U.S. Armed Forces. In sum, much of what the Legal Adviser's Office does is litigation-related, not simply counseling, and lawyers from the office often appear in court to protect the U.S. government's interests.

D. The Legal Adviser as Spokesperson

Finally, the Legal Adviser serves as a spokesperson for international law both inside and outside the U.S. government. In an era of global interdependence, the Legal Adviser reminds those both inside and outside the federal government of the founding credo in the Declaration of Independence

that the United States pay “decent respect to the opinions of mankind.”¹¹ Through speeches, writing, engagement with academia and legal groups, the Legal Adviser can highlight the ways in which obeying international law is both right and smart, for nations as well as individuals, and explain why making and keeping international promises both promotes sovereignty and makes the United States safer. In so doing, the Office in no sense abandons its role as defender of America’s interests. Recently, for example, the Office of the Legal Adviser, together with various client bureaus in the State Department, has taken a public role in the Administration’s reengagement with the U.N. Human Rights Council, arguing that fresh engagement with the Council signifies the commitment of the United States to a set of “international legal standards” that the United States both seeks to observe and encourages other nations to observe.¹²

V. CONCLUSION

At this writing, the Obama Administration is less than a year old, and its legacy in international law is in the early stages of being written. Yet already, President Obama has been honored with the 2009 Nobel Peace Prize as “an affirmation of American leadership on behalf of aspirations held by people in all nations.”¹³ While these are still early days, the recognition of President Obama and Secretary Clinton’s commitments to multilateral engagement and international law may signal an emerging “Obama-Clinton” Doctrine, dedicated to helping the United States live its values in its foreign policy through a four-part strategy of (1) *Engagement*: “a new chapter of international cooperation—one that recognizes the rights and responsibilities of all nations;”¹⁴ (2) *Diplomacy* as the vanguard of foreign policy, designed “not just to defuse tensions, but to achieve results that advance our security,

11. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

12. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, & Michael Posner, Assistant Sec’y for Democracy, Human Rights, and Labor, Geneva Press Briefing (Sept. 28, 2009), *available at* <http://geneva.usmission.gov/news/2009/09/28/koh-posner>.

13. Barack Obama, President of the U.S., Remarks by the President on Winning the Nobel Peace Prize (Oct. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Winning-the-Nobel-Peace-Prize.

14. Remarks to the United Nations, *supra* note 2.

interests and values;”¹⁵ (3) *Multilateralism*, which recognizes that the challenges of the twenty-first century “can’t be met by any one leader or any one nation;”¹⁶ and (4) *Smart Power*: a blend of principle and pragmatism that makes “intelligent use of all means at our disposal, including our ability to convene and connect, . . . economic and military strength; our capacity for entrepreneurship and innovation; and the ability and credibility of our new President and his team . . . to appl[y] old-fashioned common sense in policymaking.”¹⁷ Whatever happens, the multifaceted role of the Legal Adviser will be critical as the Obama Administration seeks to implement this strategy in the years ahead.

15. *Hearing on the Nomination of the Honorable Hillary R. Clinton Before the S. Comm. on Foreign Relations*, 111th Cong. 4 (2009) (statement of Sen. Hillary R. Clinton).

16. Remarks on Winning the Nobel Peace Prize, *supra* note 13.

17. Hillary Rodham Clinton, U.S. Sec’y of State, Foreign Policy Address at the Council of Foreign Relations (Jul. 15, 2009), *available at* <http://www.state.gov/secretary/rm/2009a/july/126071.htm>.