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978-0-521-16770-3 - Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser

Michael P. Scharf and Paul R. Williams

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SHAPING FOREIGN POLICY IN TIMES OF CRISIS

Shaping Foreign Policy in Times of Crisis grew out of a series of meetings that the authors convened with all ten of the living former U.S. State Department Legal Advisers (from the Carter Administration to that of George W. Bush). Based on their insider accounts of the role that international law actually played during the major crises on their watch, the book explores whether international law is real law or just a form of politics that policymakers are free to ignore whenever they perceive it to be in their interest to do so.

Written in a style that will appeal to the casual reader and serious scholar alike, this book includes a foreword by the Obama Administration's State Department Legal Adviser, Harold Koh; background on the theoretical underpinnings of the compliance debate; roundtable discussions with the U.S. State Department Legal Advisers and with Foreign Ministry Legal Advisers; an in-depth case study of the treatment of detainees in the war on terror; and a comprehensive glossary of the terms, names, places, and events that are addressed in the book.

Michael P. Scharf is the John Deaver Drinko–Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law.

Dr. Paul R. Williams holds the Rebecca Grazier Professorship in Law and International Relations at American University, where he teaches in the School of International Service and the Washington College of Law.

Scharf and Williams both served in the Office of the Legal Adviser during the elder Bush and Clinton Administrations. In February 2005, Scharf, Williams, and the Public International Law and Policy Group, a nongovernmental organization they cofounded and direct, were nominated for the Nobel Peace Prize by six governments and the Chief Prosecutor of the Special Court for Sierra Leone for their work in helping with peace negotiations and war crimes prosecutions.

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Shaping Foreign Policy in Times of Crisis

THE ROLE OF INTERNATIONAL
LAW AND THE STATE
DEPARTMENT LEGAL ADVISER

Michael P. Scharf

Case Western Reserve University School of Law

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Dedicated to the memory of Henry T. King, 1919–2009

Henry King was the youngest prosecutor at the Nuremberg trial; he subsequently served as General Counsel of the Agency for International Development during the Eisenhower Administration; worked as chief corporate international counsel for TRW Inc. and as counsel for Squire, Sanders & Dempsey LLP; headed the ABA's International Law Section; founded the Greater Cleveland International Lawyers Group; was appointed Honorary Consul of Canada to Cleveland and Northeast Ohio; and served for twenty-eight years as a Case Western Reserve University School of Law Professor and Director of Case's Canada–United States Law Institute.

He was an extraordinary colleague, mentor, and friend.

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Several people and entities deserve special recognition for the assistance they have furnished us during this project. Foremost among those are the ten former State Department Legal Advisers, who provided their candid accounts of the role of international law during the crises that occurred on their watch: Herbert Hansell, Roberts Owen, Davis Robinson, Abraham Sofaer, Edwin Williamson, Michael Matheson, Conrad Harper, David Andrews, William Taft IV, and John Bellinger III. Special thanks also to Harold Hongju Koh, the current occupant of that position, who provided such an insightful foreword to the book.

In addition, we would like to thank Professor Carol Fox for editing the transcripts of the sessions with the Legal Advisers; attorneys Lauren Baillie and Bridget Rutherford from the Public International Law & Policy Group for their research assistance; Jennifer Hines for preparing the index; and the following Case Western Reserve University School of Law and American University Washington College of Law students, who helped with the footnotes: Sarah Antonucci, Andrew Bramante, Brant Dichiera, Corey Fredericks, Kavitha Gridhar, Jennifer Hoover, Brian Klesh, Allison Kretz, Jared Livingston, Jennifer Mesko, Obiahjulu Okuh, Tom Renz, Mathew Shupe, and Nadeah Vali.

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We are also deeply appreciative of the financial and institutional support provided by the Carnegie Corporation of New York, the Public International Law and Policy Group, Case Western Reserve University School of Law, and American University, without which this project would not have been possible. In addition, we thank the American Society of International Law (ASIL) for hosting our U.S. and foreign Legal Adviser roundtables, and then ASIL President Anne Marie Slaughter for moderating the session with the U.S. Legal Advisers.

We are also indebted to John Berger, who had faith in this project from the beginning, and his team at Cambridge University Press, who improved our text in innumerable ways. Many thanks to freelance copy editor, Ellen Tirpak.

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Foreword: America's Conscience on International Law

Harold Hongju Koh*

What role does international law play in foreign policy crises? That is a question regularly discussed in the academy, but all too often without the reality check of experience in the arena.

In the United States of America, law and tradition have assigned the role of “conscience of the government” regarding compliance with international law to the little-known Office of the Legal Adviser of the Department of State.¹ Created by statute in 1931, and resting on a tradition of legal advice within the Department that dates back to 1848, the Office of the Legal Adviser is charged with advising the Secretary of State on all legal issues, domestic and international, and with advising all branches of the U.S. Government on how to formulate and implement the foreign policies of the United States in accordance with international law and the responsible development of international institutions.² Although the Legal Adviser is appointed by the President, by and with the advice and consent of the Senate, and heads an office of nearly two hundred government attorneys, until now, the history and function of that office have been far less well chronicled than those of smaller

* The Legal Adviser, United States Department of State (2009–); U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor (1998–2001); Martin R. Flug Professor of International Law (on leave) and former Dean (2004–2009), Yale Law School. This foreword draws heavily on testimony delivered at my April 28, 2009, confirmation hearing to be Legal Adviser and a previously published tribute to former Legal Adviser Abram Chayes, *see* Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT’L L.J. 7 (2001).

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elite U.S. Government legal offices, such as the Office of the Solicitor General and the Office of Legal Counsel at the Department of Justice.³

This book fills that gap by using the lens of oral history. Supported by a grant from the Carnegie Corporation of New York, Professors Michael Scharf and Paul Williams solicited all living former State Department Legal Advisers to discuss the influence of international law during the foreign policy crises that transpired on their watch. This volume begins by reviewing the scholarly debate about the nature of international legal obligation, presents a brief history of the Office of the Legal Adviser, and provides first-person descriptions of the paths that led each of the former Legal Advisers to their posts. The heart of the book rests in first-person accounts by ten different Legal Advisers, covering the administrations of Presidents Jimmy Carter (Herbert Hansell and Roberts Owen), Ronald Reagan (Davis Robinson and Abraham Sofaer), George H. W. Bush (Edwin Williamson and Michael Matheson), Bill Clinton (Conrad Harper and David Andrews), and George W. Bush (William Taft IV and John Bellinger III). The closing chapters illuminate the competing and shared perceptions of the role of the office and its impact on national compliance with international law, through roundtable discussions among the former U.S. Legal Advisers, as well as among former foreign ministry Legal Advisers from the United Kingdom, Russia, China, India, and Ethiopia.

I read this illuminating book in draft, while preparing for my own confirmation hearing as Legal Adviser of the State Department in the Obama Administration. I was asked by Secretary of State-designate Hillary Rodham Clinton to take that post shortly before President Barack Obama's January 2009 inauguration, was nominated by the President in late March, and had my confirmation hearing in late April. The Legal Adviser's role had fascinated me throughout my legal career. My late father, Dr. Kwang Lim Koh, studied international law in South Korea and came to Harvard Law School in the 1950s to study the law of the sea under the tutelage of Professors Manley O. Hudson and Louis B. Sohn. After studying government and international relations in

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college and graduate school, I took a class at Harvard Law School taught by former Legal Adviser Abe Chayes, whose book about the Cuban Missile Crisis helped me see how and why legal arguments matter in the shaping of U.S. foreign policy.⁴ I worked on transnational and international law cases as a law clerk to Judge Malcolm Richard Wilkey of the D.C. Circuit Court and Justice Harry A. Blackmun of the U.S. Supreme Court and partnered with lawyers from the Legal Adviser's office while serving both Republican and Democratic administrations as an Attorney-Adviser at the Office of Legal Counsel at the Department of Justice from 1983 to 1985, and later as Assistant Secretary of State for Democracy, Human Rights, and Labor from 1998 to 2001. As a young lawyer, I interviewed to work at the Office of the Legal Adviser. Since the early 1980s, I collaborated frequently with the talented attorneys from that office, encounters that confirmed my view that that office ranks with the finest legal offices in the U.S. Government and as the most outstanding international law firm in the world. When I came to teach at Yale Law School in 1985, I frequently used examples from the Legal Advisers' work to teach and write on national security and foreign relations law, international human rights law, the law of international organizations, and international business and trade law. I worked both with and against State Department lawyers while pursuing numerous human rights lawsuits, along with my students, on behalf of Yale's Lowenstein International Human Rights Clinic. Finally, while serving as a Yale Law School professor, and later as Dean from 2004 to 2009, I sent many students to "L" as part of my decadal effort to support the rule of law in an age of globalization.

These years of exposure have given me the strong sense that the Legal Adviser's key role is to promote the rule of law based on principle, not politics. As Abe Chayes once put it, whether inside or outside the government, there is "nothing wrong" with a lawyer "holding the United States to its own best standards and best principles."⁵ The Legal Adviser must provide the President and the Secretary of State with the very best legal advice possible and urge both our country and others to uphold the

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rule of international law, to the extent consistent with our own law. Ideally, the Legal Adviser should act not just as a counselor but also as a conscience to the U.S. Government with respect to international law. As counselor, the Legal Adviser should always accurately advise his client as to what domestic and international law says.⁶ But as the government's conscience on international law, wherever possible, the Legal Adviser should search for options that promote the sound development of international law and warn his clients not to follow an option that is awful, even if it may be lawful.⁷

The dawn of the Obama presidency represents a pivotal moment for the United States' relationship with international law, which may well require a revised role for the Legal Adviser. After the traumas of Abu Ghraib, the torture opinions (recounted in Chapter 16 of this book), Guantánamo, unsigning the International Criminal Court treaty, and withdrawing from the Kyoto climate talks, displaying renewed American respect for international law and institutions will be critical as the United States seeks to resume American leadership in a new global century. As President Obama recognized in his first joint address to Congress, "a new era of engagement has begun." In that era, "living our values doesn't make us weaker, it makes us safer and it makes us stronger."⁸ At her confirmation hearing as Secretary of State, Hillary Clinton similarly argued that American foreign policy should "use what has been called 'smart power,' the full range of tools at our disposal," including the legal tool, to place "diplomacy [at] the vanguard of foreign policy."⁹ To strengthen America's position of global leadership, she suggested, respect for law is an essential element of American "smart power," and intense creative diplomacy must be accompanied by equally intense lawyering.

The defining image of the Obama era will not be of a world divided by the Berlin Wall, but of a world interconnected by a World Wide Web. That web and the social networks that run through it geometrically multiply the links between domestic and international law and make the role of the Legal Adviser even more vital. What all of this suggests is that, in

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the twenty-first century, the Legal Adviser must function not simply as a counselor and a conscience but also as a public diplomat and educator, explaining both inside and outside of the government why obeying the law is both right and smart, for nations as well as individuals; why respecting constitutional checks and balances in foreign affairs is both constitutionally required and wise policy; and why making and keeping our international promises promotes our sovereignty and makes us safer. Believing those things does not undermine the notion that the U.S. Constitution is controlling law in the United States or that the Constitution ultimately directs whether and to what extent international law should guide courts and policymakers.

As I came to see during my confirmation process, many Americans continue to give too much weight to three enduring myths about international law, which this book does much to debunk. The first myth is that somehow “international law is not really law,” so Americans have no reason to follow it. But respecting international law was one of the founding credos of our country. In the framing act of our nation’s birth, the authors of the Declaration of Independence chose to pay “decent respect to the opinions of mankind.” Yet Americans who would never dream of disobeying the law at home still argue that obeying international law should be done only when convenient and in America’s interest. But in most cases, following international law *is* in America’s interest. Like individuals who obey domestic law, nations who obey international law find that it is both the right and the smart thing to do. No law is a straitjacket, but as Americans have learned since 9/11, if we don’t obey international law, we squander our moral authority and shrink our capacity to lead. When we break international law, we weaken its power to protect our own citizens – how can the Geneva Conventions protect our own soldiers abroad, if we violate them at home? And how can we protest other countries’ torturing of our citizens if our own public officials – past and present – condone or publicly defend the use of torture?

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A second myth: some believe that our foreign policy should be left to the president alone, operating in secret. But as we learned during Vietnam, Watergate, and Iran-Contra, checks and balances don't stop at the water's edge. Our constitutional system was designed – and indeed works better – when the President and his subordinates must answer to people who don't work for them, particularly those in Congress and in the courts.

A third and final myth is that the United States cannot take part in the international system without surrendering our sovereignty. But today, protecting sovereignty means engaging with the world, not retreating into our shell.¹⁰ Laws are sometimes called the “wise restraints that make us free.” Far from constricting us, international law *frees* us to pursue our global engagements. We are free to travel abroad; to take money out of foreign ATMs; and to speak with, buy from, sell to, and borrow from foreigners precisely because international law gives us the orderly frameworks to do so. As each day's headlines show, globalization is inevitable, is accelerating, and must be managed. Each emerging challenge – whether financial meltdown, energy crisis, climate change, swine flu, nuclear proliferation, piracy, or even terrorism – is not local but global. We live in an interdependent world, and in tackling our challenges, international law is not the problem, it's more often a solution. And if we don't work on building a framework of international law, too often we will have no good solution.

The most powerful lesson that emerges from reading this book is that, even during crisis situations, international lawyers should not be just potted plants. Properly deployed, they can identify otherwise invisible legal constraints and fathom available legal channels through which policy decisions can flow. By so doing, they help shape policy decisions, which in turn shape legal instruments, which in time become internalized into bureaucratic decision-making processes. And through this process, the word can become flesh. Law influences policy, which in turn makes law; this is a thumbnail description of “transnational legal process,” which I have argued is the key to understanding why nations obey international law.¹¹

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In the end, this book, full of lessons learned in the crucible, casts important light on what it means to be a lawyer committed to the rule of law in international affairs. For if international relations are to be more than just power politics, international lawyers must be moral actors who see their job as more than simply doing as they are told. True international lawyers fuse their training and skill with moral courage and guide the evolution of legal process with the application of fundamental constitutional and international norms. “If we seek to strengthen the role of law in the relations among states,” Abe Chayes wrote shortly after he left the Legal Adviser’s Office, “it follows that we should devote our energies to disclosing and articulating the common values and interests among them, of which law is an expression.”¹²

In the end, this book teaches that foreign policy decisions most fully conform with international law when the international lawyers are at the table while important decisions are being made.¹³ By having the courage to argue with their clients, to invoke illegality, to bring lawsuits and to negotiate treaties, international lawyers guide difficult policy choices into lawful channels and stand up for the rule of law.¹⁴ Or, as former Legal Adviser Herman Phleger reportedly said, the job of the Legal Adviser is, quite simply, to “speak law to power.”

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Introduction

“L” – that is the enigmatic name by which the State Department Legal Adviser is known throughout the U.S. Government. It is also the name of his office, which includes more than 170 Attorney-Advisers stationed in Washington, DC, and abroad. While L may be little known outside government circles, the importance of the office is considerable: 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. Just as the Solicitor General is the government’s point man for constitutional questions, the Legal Adviser is the government’s principal expert in international legal affairs. And just as the Solicitor General argues cases for the government before the U.S. Supreme Court, L argues on behalf of the United States at the International Court of Justice and other international tribunals.

Through the years, numerous scholars and practitioners have grappled with the question of the role of international law in shaping foreign policy. Unfortunately, what John Chipman Gray wrote in 1927 remains true today: “On no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on International Law.”¹ In an age in which a growing number of academicians and even high-level government officials have opined that international law “is just politics,” an understanding of the role that L and international law have

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played in shaping contemporary American foreign policy is more important now than ever before.

The inability of scholars and practitioners to precisely articulate the role of international law stems from four factors. First, many authors approach the question as an argument, asserting from the early pages of their work that international law matters, does not matter, should matter, or should not matter. Second, many of the best international legal scholars are positivists and thus are simply concerned not with the “role” of law but rather with the content of international law. Third, few members of the legal profession actually practice public international law. For instance, although the U.S. State Department employs more than 11,500 foreign service officers and specialists, they employ only 170 lawyers. In many small states, there is a single Foreign Ministry Legal Adviser who may hold the position for decades. The lawyers who practice regularly before the International Court of Justice number, at most, a few dozen. Fourth, the application of international law to the formulation of foreign policy nearly always occurs within the closed – and classified – confines of foreign ministries and other government agencies. This so-called black box is difficult for legal scholars and social scientists to penetrate to the degree necessary for sound analysis.²

In order to contribute to the development of an understanding of the role played by international law in shaping foreign policy, we determined that, given our background as former Attorney-Advisers in the U.S. Department of State, our best value added would be to penetrate the black box by bringing together former Legal Advisers and querying them about their experiences with the relationship between international law and the formulation of foreign policy.³ Although this is a modest contribution, it is unique in that never before have all the living U.S. Department of State Legal Advisers been brought together in a structured conversation about the role of international law in shaping foreign policy. Admittedly, the approach is United States-focused because that is the black box to which we have access. We have sought to set the platform for a wider discussion by those with access to other foreign ministries

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by including a colloquy among former British, Russian, Chinese, Indian, and Ethiopian Legal Advisers, which we arranged in cooperation with the American Society of International Law (ASIL).

To contribute to the illumination of the role played by international law in shaping foreign policy, we undertook six major activities. These six activities sought to explore the contours of the relationship between international law and foreign policy, as well as the unique and challenging role of the Legal Adviser in maintaining the balance between the proper application of international law and protection of his government's national interest.

First, we met with a small number of former Department of State and Foreign Ministry Legal Advisers to identify the themes to be addressed throughout the structured conversation. Together with these Legal Advisers, we developed five questions to guide the conversation:

Whether the Legal Advisers perceived international law to be binding law, such that it should be able to constrain the options available to the U.S. Government when dealing with a crisis central to its national security?

Whether the international legal rules relevant to a particular situation or crisis were clear enough to significantly shape the policy options available to the U.S. government?

Whether the Legal Adviser believed he had a duty to oppose policies or proposed actions that conflicted with international law, in those situations in which such conflict was objectively manifest?

Whether the position taken by the Legal Adviser was seen as influential in cases in which he advised against a course of action on the grounds that it violated international law?

And, whether the Legal Advisers perceived international law to hinder or promote their government's interests in times of crisis?

It was also agreed that it would be useful to use the unique opportunity created by this project to elicit answers to questions such as how the Legal Advisers acceded to their positions, how international law played

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a role in resolving the foreign policy crises that occurred during their tenure, and how the legal interpretations of these policy crises and issues have evolved since their time in office.

Second, we convened a closed-door historic meeting of all the living former State Department Legal Advisers at the Carnegie Endowment for International Peace in Washington, DC. The conversation centered on the five primary questions. Fortunately, the group has enjoyed exceptionally good health and longevity, and we were able to assemble contributions from ten former Legal Advisers covering the administrations of Jimmy Carter (Herbert Hansell and Roberts Owen), Ronald Reagan (Davis Robinson and Abraham Sofaer), George H. W. Bush (Edwin Williamson and Michael Matheson), Bill Clinton (Conrad Harper and David Andrews), and George W. Bush (William Taft IV and John Bellinger III).

Over the course of the gathering and subsequent exchanges, each Legal Adviser was asked to recount the role that his office and international law played in responding to the three most important international crises occurring during his tenure. Each presentation was followed by a series of questions and comments posed by the other Legal Advisers, as well as ourselves (who have served as Attorney-Advisers in L).

Third, we arranged with the ASIL to convene the Legal Advisers for an open roundtable discussion at the ASIL annual meeting. The topics for this roundtable were identified as the impact of each Legal Adviser's previous legal and political background on how he approaches the role of international law; who the Legal Advisers see as their primary client (the President, the Secretary of State, the American people, international law writ large, or their own conscience?); instances in which international law constrained U.S. policy directives, and areas in which it failed to do so; the role of other agencies with a legal mandate in the formulation of foreign policy; and a detailed examination of the case of humanitarian intervention.

Fourth, we again arranged with the ASIL to convene a panel of former Foreign Ministry Legal Advisers from the United Kingdom

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(Frank Berman), Russia (Leonid Skotnikov), China (Xue Hanqin), India (P. S. Rao), and Ethiopia (Seifeselassie Lemma). The panel was structured around the same five questions presented to the former U.S. Legal Advisers.

Fifth, we examined the efforts of the U.S. Government to develop a response to the terrorist attacks of 9/11 and to conduct the war on terror within the parameters of international law. In particular, the legal to-and-fro between the Department of State, Department of Justice, and the White House over the legality of certain coercive measures applied to detainees and the operation of the Guantánamo Bay detention center provides a rich text for further illuminating the role of international law and U.S. Legal Advisers in shaping the U.S. Government’s approach. The release of the so-called Torture Memos, the publication of memoirs written by their authors, and the findings of a bipartisan investigation have provided a rare glimpse into the black box, which so often obfuscates the understanding of the role of international law, and we have tried to synthesize the information into an accessible and brief case study.

Sixth, to ensure this work is accessible to a wide range of audiences, we prepared a succinct introductory review of the scholarly debate regarding compliance with international law. Although the question of the role of international law in shaping foreign policy is much broader than the question of compliance, there is no doubt that compliance is a key component, and thus we thought it necessary to include this brief review of both the historical and contemporary compliance debate. To promote accessibility, we have also included a comprehensive glossary, which provides historic background to the events, treaties, institutions, cases, concepts, and terms mentioned in the book.

Throughout this book, we have chosen to keep the material as close as possible to the format of the original narratives for three reasons: First, we wanted the Legal Advisers to speak directly to the reader, without the filter of editors whose own preconceptions or agendas might unconsciously alter the meaning. Second, we wanted the Legal Adviser’s

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views to be presented in context, so that the reader might fully grasp the nuances of their positions. Third, we wanted this book to be accessible to as wide a readership as possible, rather than being of interest and use only to scholars versed in the sometimes arcane language of the law or international relations theory.

Although the narratives contained within this book provide a unique perspective into the question of how international law, as interpreted and applied by the Legal Adviser, shapes the development of foreign policy in times of crises, certain limits must be recognized regarding the value of our approach. For example, because the accounts of the Legal Advisers are not contemporaneous with the events that they describe, there is the potential for memory lapses and revisionism. In addition, due to reasonable time constraints, the narrative of each Legal Adviser is limited to highlights, providing a somewhat perfunctory account of the internal interplay of normative and institutional factors. Moreover, although L plays a uniquely important role with respect to the U.S. Government's interpretation and application of international law, there are other legal officers within the bureaucracy (such as at the White House, the National Security Council, the Department of Defense, the Department of Justice, and the Commerce Department) whose influence relative to L's rises and falls depending on the type of international issue or political factors. Thus, the focus on L tells only part of the story within a disaggregated government. As discussed in Chapter 15, this is often not, in fact, the case with the formulation of foreign policy in other states.

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