# "POWER" TO "LAW": IT'S NOT AS BAD AS ALL THAT

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"It is worse than a crime. It is a blunder."
—Attributed to Talleyrand, on Napoleon's execution of the Duc d'Engiem.

Some of the best minds of our chosen profession of international law have become discouraged by recent misadventures of American foreign policy. This is understandable and regrettable. They seem to be drawing from these events the wrong lessons: that international law is of little significance, and that the effort to create a rule-based system of international relations has collapsed in the United States. Preeminently, Professor Thomas Franck, whose views are set forth in of this issue, and to whom, let it be said, all in the discipline owe a substantial intellectual debt, is offering counsel and advice not far from despair.[2] With perhaps just a touch of ironic pride, he notes that he has never held public office, and he implies that only those voices which have maintained their independence from the temptations of government can now speak with objectivity about international law and foreign policy. He also contends that those who have been co-opted into public service have forfeited their credentials of integrity, and that they have become minor cogs in a "large and complex decision-making process" which they neither "initiate nor finalize."[3] International lawyers in government now speak only when spoken to, are consulted after policy has been determined, and are not asked what policymakers may legally do but rather, to defend decisions already taken, he suggests. If I read him right, the role international law plays in government is to provide rhetorical justification for, and has no influence in determining, policy.

This is pretty discouraging. It is scarcely calculated to inspire an international lawyer who might be contemplating public

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[2] Thomas Franck, *An Outsider Looks at the Foreign Office Culture*, 23 WISC. INT'L L. J. 4-5 (2005).

[3] *Id.*, at 4.

service. The Franck view seems to teach that government lawyers in the foreign affairs departments are window-dressing. His advice to the young lawyer is more or less that they should abandon all hope of shaping policy. Their role will be to provide the rhetoric after the policy is made. Power – meaning, of course, the policymakers – does not listen to law. Law cannot talk to power.

This view of the role of foreign affairs lawyers in government, though stated with a high degree of generality, is not inspired by an appraisal of the full sweep of contemporary American diplomacy. What has brought on such dark musings is Iraq. Certainly many in the profession, both in and out of government, are disturbed by what passes for the foreign policy doctrine of the Bush Administration. It is, in their eyes, unilateralist, preemptive, casual in its willingness to resort to military solutions, dismissive of the views of allies and one-time friends and corrosive to the great multilateral institutions which earlier generations took such effort to create. No one can dismiss the severe consequences of all this for the struggle to construct a working system of collective security and to elaborate rules for the use of force in international affairs, to which Professor Franck and others have contributed so much.

For my own part, I have no great admiration for the Bush presidency. The Administration has justified the invasion of Iraq by pointing out that its leader was a brute who longed to possess dangerous weapons which he did not have. Mr. Bush has thus blasted a very large hole in the walls of restraint on the exercise of military power against other states The claim of such a license is unprecedented. It stretches Article 51 of the United Nations Charter and the concept of collective security and legitimate self-defense beyond the breaking point.

But to suggest that this has occurred because the lawyers in government abandoned their integrity, or that the non-lawyer policymakers are all denigrators of the law as Professor Franck suggests is a caricature. It certainly is inconsistent with my own experience. And to proceed from that to the proposition that law now counts for nothing in the conduct of international relations is wide of the mark.

First, as to international law and Iraq, in attacking policymakers and the international lawyers who advise them, the critics

are blaming the messenger. The problem is the message. That the invasion of Iraq was a terrible blunder is clear; that it contravened international law is far less, and important than the policy error itself. The superficial simplicities of Article 2(4) of the United Nations Charter have proven a fragile base on which to build a structure of restraint on the use of force in the contemporary environment. The major reason for the debacle in Iraq was not a craven failure of the lawyers to speak to power. Nor was it the refusal of the decisionmakers to listen. Law was relevant. It was just not decisive. International law with respect to the use of force is in an evolutionary state. In this case law was invoked on both sides of the debate. It was deployed to argue for restraint in the unilateral resort to military power against another sovereign power, and it was argued as justifying a unilateral move to preempt what was seen by the constituted intelligence agencies as a looming threat to the safety of the nation.

In short, in the words of Talleyrand, Iraq was arguably a crime. What is more important, it was certainly a blunder of colossal proportions, with consequences for the Iraqi people, for the American armed forces, for the U.S. economy and for the image and posture of this nation in the world. And that blunder was the work of the ultimate decisionmakers, a decision for which the lawyers should not be condemned.

Iraq, in short, is no basis for the conclusion that international law is of no moment in the conduct of America's foreign relations today. Iraq does not suggest that those who make policy denigrate the law. Nor does it prove that the international lawyers now occupied with the labors of the foreign relations ministries are devoid of integrity or influence. I extract two quite different conclusions from my own experience, both in government and subsequently in the private practice of international law in Washington.

The first is that the lawyers in the departments dealing with foreign affairs – State, Defense, Commerce, Transportation and the Office of the United States Trade Representative are fully engaged. From my experience, they were, and still are, involved in the creation as well as in the justification and application of policy. They are not gagged until the policymakers decide what is to be done. They are not invited to invent rhetoric after the fact to justify *faits accomplis*. They are in on the ground floor of

policy. No international negotiation of consequence in my time in the Department of State, nor in any of those with which I have been familiar during my years as a Washington practitioner with a pretty good view of the foreign policy process, has been conducted without a lawyer acting as an integral part of the team. I have certainly never known one who took it as his or her responsibility to speak only when spoken to.

To cite a live example or two, in the labored negotiations leading to the historic Panama Canal treaties, by which this country ceded an artifact of its empire, lawyers were at chief negotiator Ellsworth Bunker's elbow at every turn. Indeed, he was joined as co-negotiator by one of the best of the profession, Sol Linowitz, in the climactic stages of the talks. None of the lawyers involved were known for holding their tongues. Tom Farer, now Dean of the University of Denver Graduate School of International Studies, whom I appointed to the Inter-American Human Rights Commision, was no shrinking violet either. In an Administration not noteworthy for its initiatives in that arena, he was able to make major contributions to the development of human rights law in the Americas. Notably, the University of Wisconsin's own Richard Bilder and David Trubek, in their years of public service, were hardly representatives of what Professor Franck sees as a "culture. . . of reticence and deference."[4]

Lawyers have long made major contributions to policy, and continue to do so. Abe Chayes' heroic role in the resolution of the Cuban Missile Crisis is often grist for international law academics, sometimes unflatteringly as something to be disowned. Chayes confessed after the crisis that the Quarantine of Cuba, ratified by the OAS, and the basis for the American Navy's enforced ban on Soviet shipments to Cuba during the Crisis, was an invention which enjoyed no precedent in collective security law. The Quarantine, it is to be remembered, was a blockade. Chayes recognized that the nation needed some verbal fig leaf to repel suggestions that the U.S. was carrying out an act of war against Cuba. Declaring the Navy prepared to bar Soviet vessels with

[4] *Id.*, at 6.

missiles from reaching Cuba, however, was a more attractive alternative than the air strike that some in the military were recommending to President Kennedy. Chayes' ingenious semantics made it possible.

The Quarantine succeeded. Khruschev turned the Soviet missile-carrying vessels around, and did not challenge the blockade by another name. Nuclear war was averted. Some might argue that it was illegal; there was no clear precedent for the American action. But it was good. This was international lawyering at its highest and best.

Importantly, it is worth reflecting on that episode because it is a perfect response to the view that legal advisers are without voice in foreign affairs. I see no ground for disowning what Chayes and the nation did, as Professor Franck suggests. I give eternal thanks that an international lawyer proposed it, carried it through the internal debate and helped make it work.

But lawyers are not the end of the story. There is more law in foreign affairs than what comes from the mouth or the pen of the international legal specialists.

The sharp distinction drawn by Professor Franck between the lawyers and the policymakers is not reality. The power alluded to in the title of this exchange are, in the case of the State Department, the Under Secretaries, the Assistant Secretaries, the Office Directors, and the desk officers. They may not be ornamented with a degree from a recognized school of law. But they practice law. They may not quite realize it, but much of what they do is the creation of law. Agreements by nations to act in certain ways in exchange for reciprocal commitments by others is the very essence of diplomacy.

What, in short, is a treaty, if it is not law? What is a bilateral agreement for narcotics control with Mexico, or an aid contract with Ghana, or a status of forces agreement with Turkmenistan if not contract law and lawyering? This is what diplomats and policymakers, whether lawyers or not, do for a living.

War is proverbially referred to as the extension of diplomacy by other means. In reality, war means that diplomacy has failed. Thus the Iraqi war is no fair test of the relevance of laws to our diplomacy. The essence of international relations is the application of intelligence and wisdom to the conduct of peaceful relations between nations. Force and the threat of force may make

diplomacy more persuasive. But the conduct of international relations is not commonly about the use of force. Diplomacy aims not to apply power but to avoid the need to fight. Diplomacy is persuasion, not punishment. It is to a large degree the search for common ground, for consent and for agreement with others for the joint pursuit of mutual interests.That is in essence a legal process. Every diplomat is a lawyer.

It is therefore a mistake to see foreign policy as a struggle, between the good, the lawyers, and the wrong-headed, the policymaker. Nor is it generally a contest between the obviously legal and the plainly illegal. Policy, far more often than not, writes on a clean slate. In the process of writing on that clean slate, policy emerges from deliberation. Often enough, the deliberation seems endless. The debate is just within one or another international affairs agency, then between Executive Branch agencies, then often between the Executive and the Congress. These exchanges are not typically contests between Dr. Strangelove policymakers, anxious to throw American armed might at every international dispute, on the one hand, and some principled advocate of law on the other.

The distinction between law and policy is more verbal than real. Harold Nicolson (Diplomacy, Chapter II, section iv) said, that "the worst kind of diplomats are missionaries, fanatics and lawyers." Perhaps in his day. From my more contemporary experience, the best diplomats were also very good lawyers. They called on the same talents in the search for common ground, first with their colleagues, and then with other nations, just as skilled private practitioners do in the negotiation of contracts between private interests.

Perhaps, an illustration will make the point. As Under Secretary of State for International Economic Affairs, I was responsible for any number of issues for which there was no decisive principle of law. It was my responsibility to create that principle. As such, I was scarcely a disparager of the law. To the contrary, the effort required the full extent of whatever lawyerly instincts and experience I could put into it. All the issues for which I tackled engaged me in a process which every lawyer would find familiar. None was occasion for speaking law to lawless power.

I debated with the developing countries at the interminable Paris North-South dialogue meetings over commodity agreements and the extent the United States was obliged to provide bilateral assistance to their development efforts. I negotiated the terms for entry of the Concorde airplane into US airspace. I had responsibility for the US responses to the Arab nations' oil embargo in 1975 and for the US support for the International Monetary Fund ("IMF") standby agreements in the Lire, the Sterling and Peseta Crises. I conducted the preliminary negotiations with the leaders of the front-line states across Africa, with the United Kingdom which had primary imperial responsibility and with the South Africans in the Kissinger effort to end white e rule in Rhodesia in 1976.

To take another particular example, in the mid-1970's I was tasked by Henry Kissinger to undertake secret discussions with the Castro regime of Cuba. The purpose was to define what might now be called a road map – a series of defined steps by which the two countries would slip the bonds of mutual hostility and move toward more normal relations. Indeed, I was even authorized to promise that Kissinger himself would come to Havana and meet Castro if we succeeded. We failed. Lawyers sometimes do, in their private efforts to find common ground between two contending private parties. The reasons for the failure are another matter. The point for present purposes is that Fidel's negotiators and I were struggling for an agreement by which each side would bind itself to do certain things in exchange for the promise of the other side to take some stipulated action. This is familiar ground for every lawyer. So it is, if less dramatically, for the State Department every day. It would have been worth a great deal to have resolved the four decades of hostility between the two nations in 1976, and to have begun a more normal diplomatic relationship. To have tried, in my view, was a paradigm example of what, at its best, diplomacy is all about. It was in its essence a legal negotiation.

My purpose is to make the point that these were all issues calling for what was at bottom a lawyer's craft, and lawyerly talents. Success was a contract between the United States and our negotiating partner. I was creating, or trying to create, legal undertakings. In none of these undertakings could I look to past legal texts for binding guidance. In none, did existing law say no

or yes. There was no speaking law to power, because there was no established legal road map, only scope and opportunity for the application of the lawyer's instincts in the search for agreement. A lawyer's respect for what had been done in the past, and a lawyer's understanding that the acid test of any policy is how it might be turned to use by another country against one's own national interest. Law in fact was power. Power was law. Diplomacy is not the denigration of law. It is the creation of law. It is not about finding old precedents but making new ones.

Nor should it be understood that the game is entirely with other nations. Indeed, the most difficult negotiations are those aimed at fresh national policy. Many times, the most contentious disputes occur within one's own government, well before a proposal is put on the international bargaining table. A remarkably high fraction of the total time of the typical State Department policymaker is consumed in dealing. He or she deals first, with his or her own colleagues at State. Then, when State's position is resolved, with other agencies of government who conceive that they should have a voice. Finally, with the Congress—and perhaps after that with private interest groups, business interests, NGO's, churches, trade unions, the press and human rights organizations. It is through discussion and compromise that America generates its foreign policy.

Proposals for international initiatives that even arguably violate established international law are rare. American diplomats for the most part write on a clean slate. Where there is a settled rule, policymakers follow it, by and large. Henry Kissinger was joking when he said, "The illegal we do quickly. The unconstitutional takes a bit longer." The issues diplomats face day in and day out in the conduct of our international relations, are not issues which pit lawyers, bent on upholding some established legal principle, against policymakers intent on violating it. Diplomacy is first cousin to contract law. It is not criminal law. It may seem astonishing to those reared in the academic world, familiar with the enormous store of learned writings on our chosen subject, to learn that the quotidian labors of the foreign affairs ministries, precedent and established norms provide precious little guidance. But it is so. It is rare indeed that a proposed course of action is plainly illegal. International law rarely says yes or no to the diplomat.

To return to the Iraq debacle which inspired this excursion, all those concerned with the wise management of American foreign relations might well wish that the Administration had shown more restraint, more conciliation, more willingness to find common ground with its supposed allies and a greater appreciation of the consequences the day after the battle. But the brief words of Article 2(4) of the United Nations Charter – that brooding omnipresence of abstractions, a half century old, drafted by statesmen with a far different world in mind – did not yield that restraint. This is regrettable, no doubt. But it was not because lawyers failed to speak up. The United Nations Charter's proscriptions were there for all to see. They were inadequate to restrain the United States.

Restraint must first emerge as policy, and out of the policy process. It must be embraced as national practice before it can be said to be law. And, if this nation is to renew its reputation as respecter of the rules of law, it will occur through the dogged efforts of the foreign policymakers who, though they may not quite realize it, are acting in the finest traditions of the legal profession.