

FOREIGN POLICY AND THE GOVERNMENT LEGAL ADVISER

Stephen M. Schwebel

Milton Katz is fond of saying that “we are all prisoners of our own experience.” I will share with you, if I may, a few rays, hopefully of light, that were shed in and around my particular prison when I served in Government—and I do not use that analogy by way of suggesting that it was an unpleasant term of service; on the contrary, I enjoyed it immensely.

First, I should like to say a word about the setup of legal advice in the State Department, which is straightforward enough. There are some 60 lawyers which, in terms of the size of the State Department bureaucracy as a whole, is not many, headed by a Legal Adviser who is not necessarily a career official; at the moment he is a political appointee, and this has generally been the case since the War, although his predecessor was a career official. But the previous career official to the now Ambassador Meeker is Judge Hackworth, who went on the International Court of Justice with the founding of the United Nations. For all the years after that, apart from Ambassador Meeker’s term of service as Legal Adviser, the Legal Advisers were, as we say, political appointees—generally lawyers of eminence from private practice, one from academic life.

The Legal Adviser is assisted by three or four Deputy Legal Advisers, by a dozen Assistant Legal Advisers, each of whom have responsibility for servicing a Bureau of the State Department and each of whom, in turn, is assisted by Attorney-Advisers, as they are called, who make up the rest.

Each of these Assistant Legal Advisers has his particular client, and with that client his relations vary a good deal depending on the subject, the tradition, the personalities. Not only the personality of the Assistant Legal Adviser concerned is important; there also comes into play the personality of the Assistant Secretary of State, for whom he is the immediate lawyer, and of his deputies and colleagues. In some cases the symbiosis may be very close; it could be an intimate relationship, one of constant exchange of information and of advice. The involvement of the lawyers in the policy process could be very considerable. In other cases it would be less so. As a generality, I would say that the involve-

ment in the functional bureaus, such as the Bureaus of International Organization Affairs and Economic Affairs is very close. The Assistant Legal Adviser there can have a good deal to do with the conception of policy as well as its development and implementation. It tends to be less in the geographic bureaus; the Assistant Legal Adviser for the Near East and South Asian Affairs, or European Affairs, or the like, will normally tend to have a good deal less influence with the Assistant Secretary of State concerned who may feel that legal problems are generally peripheral to his concerns. This is only a generality, and it may not be uniformly accurate, but as a generality I think it is substantially correct.

The whole process works of course by that of "clearance." For an order or an instruction to go out of the Department, it must be cleared round the bureaucracy, and the Office of the Legal Adviser has clearance on matters which are of a legal character. There is a good deal of feuding, some genial and some less genial, about what involves the law, and what, therefore, requires the clearance of the Legal Adviser or one of his 60 associates. A general line taken by the Office of the Legal Adviser is that only a lawyer can tell what a legal issue is: A layman cannot see it; he does not know it; he may be speaking prose and just not know—that sort of thing. It is a constant battle. A Legal Adviser is left out of much in which he feels he should be, and he is in on much in which others in the Department feel he should not be. There is no absolute way of drawing the line. Many subjects traditionally involve the Legal Adviser; some less so.

There are some subjects on which the Legal Adviser does not act as adviser, but as action officer. The phrase "where the action is," while once favored among our youth, was even earlier favored in the Department of State, and remains so—"action" being the responsibility for issuing the instruction and getting the clearance of others. The Legal Adviser typically does not have "action," but exceptionally does, and exceptions are not all that infrequent. They can be very important. Take, for example, today, the law of the sea: an issue evidently of enormous consequence, and not one of legal dimension alone but of very great economic, military, and political impact. In the Department of State, the Office of the Legal Adviser has action, essentially sets the policy, chairs the groups in the State Department drafting the policy, chairs the inter-Departmental groups within the United States Government making the policy. A host of Departments other than the State Department are of course concerned with foreign policy in the United States Government, especially so with an issue of this kind.

There have been other cases: in the great battle over United Nations assessments and article 19 of the Charter, for some while the Office of the Legal Adviser had important elements of the action.

In the 1956 Suez imbroglio to which reference was made today by Mr. Noel-Baker in such eloquent terms, the Office of the Legal Adviser (I am told, I was not there) had action by reason not of bureaucratic rationality, but simply because of the intimacy between the then Legal Adviser, Mr. Herman Phleger, and the then Secretary of State (and of course a lawyer), Mr. Dulles. That gave much pain, I am told, to the Bureau of International Organization Affairs, which felt that the action was its.

Mr. Rusk said a few years ago that the Legal Adviser serves "as the conscience of the Department of State." Professor Falk of course would say that the State Department has no conscience, nor does the Government as a whole. I would like to have disagreed with him today; it would have been more fitting, since he was then present, but I did not feel I should take time this morning, which was so short. But I should like to say this evening, while regretting his absence but comforted by the thought that he knows my views, that I think he is profoundly wrong in his perception of the role of the bureaucrat in Western Government. I would think that it is generally true—I am convinced it is true (and I do not say this thinking the American Government is better than others)—that he is in error in his perception of the American Government—but not totally in error of course. There is some truth to what he says. I will not say "some and not much"; there may even be "much"; but there is an enormous difference between *much* truth and *the* truth. To assume that everyone who is caught up in the bureaucratic process is timid or simply concerned with the process of personal aggrandisement or indeed of holding on to the position he has and ensuring his promotion in due course, and so on, is to detect an element of reality, but by no means the whole truth; and to assume it is a fact *and* the motivating spring of action of people in Government is, I would submit, a gross and misleading distortion. I have known and know many people in Government who actively, vigorously, and vociferously differ with important elements of government policy, and do not do so as a charade to prepare position papers of differing views (there is some of that, too), but quite seriously and sincerely.

Many of these cases are public. Take that, for example, of our former Under Secretary of State, George Ball, a man of considerable independence and self-reliance and strength of viewpoint. It is well known that

he vigorously and steadily opposed our evolving policy in Vietnam over the years. He did so in Government, he has done so out; he has not done so in the most flamboyant way, perhaps for personal reasons of what he would see as taste or effectiveness, but at any rate the opposition was there. Quite clearly, on the historical record, it did not carry, but it was there.

I know others in Government who for obvious reasons I will not name, who are there today, and who have carried on a like losing battle. This is true of many issues.

I can cite another: that of the invasion of the Dominican Republic. Most of us, and certainly many of us in the Office of the Legal Adviser at the time, thought that that was an outrageous violation of international law. I certainly did. We had little hesitation in saying so. In that case, incidentally (although it is not so incidental, it is rather central and important), the Office of the Legal Adviser was not seriously consulted before the action was taken. The Legal Adviser was absent; there appears to have been a minimal consultation, but the Office was not seriously treated. The Office as a whole did not bring its weight to bear. The problem was handled very quickly at a very high level by two or three officers of the Department and the President, himself. We had a great debate in the Office after the intervention had occurred as to whether the Office of the Legal Adviser should say anything—this issue of picking up the pieces. We had very genuine differences of opinion. One of our most senior and distinguished members stoutly maintained that we should say nothing, that it was a hopeless case and it was best to keep quiet. A great number of us, myself included, thought that was impossible; one had to say something in our own defense; one could not let it go and sit there. And we did. Looking back on it, I think it was a mistake; we should have kept quiet. It would have been better not to have tried to justify the Dominican intervention in international law.

I happened on this illustration because I think it is pertinent to our case. But I would not want to leave you with the impression, which is incidental to the subject this evening but nevertheless came up this morning, that I am in general agreement with Professor Falk's appreciation (or depreciation) of the policies of the United States Government as a whole. I am not. I do not think that those policies have been predominantly imperialist and malignant, as apparently he does, although I think there have been important aberrations, one could say, important trends, that have been unhappy, unhealthy, and I think they are widely recognized as so. But predominantly I believe our policy has been rela-

tively enlightened and, compared to that which Great Powers have pursued in history, extraordinarily enlightened. I do not need to go into all that. But I did want to take this opportunity to say that the bureaucratic picture is by no means as simplistic as Professor Falk suggested this morning. All idealism about international law is really not to be found only in Princeton University.

I did indicate that the advice of the Legal Adviser is not uniformly sought, and that of course is true. It is a constant battle for the Legal Adviser fully to assert himself. I am speaking here of advice in this context of policy advice, loosely using the term. On something that is of obvious legal content as a rule (although there are exceptions even to that), the Legal Adviser will be brought in.

I can give you an exception to that, just to show that the bureaucracy has such an element of uncertainty to it. As you know, the United States is now in the deplorable position of not paying its assessments to the International Labor Organization—which I hope is an aberration. This came about because our vigorous labor leader, Mr. Meany, visited the House Appropriations Subcommittee concerned with these matters and advised it to threaten to withhold payment of assessments upon the United States because of his disagreements with certain developments in the I.L.O. On that occasion an Assistant Secretary of State was present who differed with Mr. Meany. But the Legal Adviser was not, and the Legal Office was not even informed that the hearing was to take place, and was not in on the discussions which led to the hearing in which some elements of the State Department had participated. There was hardly a phrase about United States legal obligations uttered in the course of these hearings. Many phrases have been uttered since in the course of the congressional debate, but at this very critical, initial stage the Legal Adviser was not there. This was by accident rather than design. Had he been there, it would probably have made no difference, because those who have made this decision are quite contemptuous of international legal obligations. Nevertheless, he should have been there.

There are cases of that kind. They are, I would say, unusual except in matters of the highest public moment involving use of force, as in the Dominican affair. There also the omission of the Legal Adviser is by no means uniform. Let me give you an example as a startling contrast, which will be the subject of a monograph that the American Society of International Law is sponsoring and which will appear in about a year, written by Abe Chayes, the former Legal Adviser to the State Department, on the Cuban missile crisis. In that crisis Mr. Chayes and (as he

then was) the Deputy Legal Adviser, Mr. Meeker—even more Mr. Meeker, because Mr. Chayes happened to be abroad during the initial critical stages—played a consequential role. This book demonstrates, as much as these things can be demonstrated (for it is hard to look into the very minds of people), that legal considerations were debated at some length in the “Executive Committee” that advised President Kennedy on the handling of the missile crisis. They were set forth with considerable energy by Mr. Meeker, and assaulted by no less a personage (and no less a lawyer) than Dean Acheson. As far as one can see, they played a consequential role in the decision taken to impose a quarantine rather than pursue an air strike and in the decision taken to seek O.A.S. authorization of a quarantine rather than impose it unilaterally. One can find in the contemporary history of mankind few incidents of greater moment to international security than the Cuban missile crisis. Those who dismiss international law as having nothing to do with international security would do well to read this book when it appears.

I should like to draw one contrast with my impression of the British experience (for which I have much admiration), and that is the arrangements that have been made over the years for legal advice at missions to the United Nations. Not only has the United Kingdom, which, I may say, has a superb legal service, sent to the United Nations lawyers of very great distinction, but it has accorded them, as far as an observer from another delegation can see (and this special relationship on which Monsieur Pompidou comments is very much a reality between our delegations at the United Nations, and so one can see somewhat), a considerable status which is manifested, for example, in the deliberations of the Sixth Committee, where the British Legal Adviser sits as a delegate. Now, the United States follows a less happy course. We have, I am glad to say, for the last four years had a legal adviser at our mission, and do today; previously, we used to service the mission from Washington, which was not hopeless, but not ideal. But we are still tied for the most part to the system of having a political appointee sit in the Sixth Committee, because we have on our delegation to the General Assembly, as many states do, a number of persons, parliamentarians, as you would say—people from Congress one year, people from the Senate the next—and other public members; and since the Legal Committee is invariably regarded as the least important of the six or seven committees, the person of least capacity on that delegation is sometimes sent to that committee. It is one of the challenges to those who must advise that person to assure decent representation of the United States. It is not

always an easy job. We have had some characters in that committee, although at other times it has worked out quite happily. It varies so much with the person concerned. The Secretary of State, Mr. Rogers, once represented the United States in the Sixth Committee most competently. I would not say on the whole, however, that the record of United States representation and influence in the Sixth Committee is all it should be.

As you can see, I have not given you very thoughtful remarks, but rather impressionistic ramblings. Please accept my apologies for that.