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Law, Lawyers, and the Conduct of American Foreign Relations

Richard A. Falk†

Recent commentary on the role of law in international affairs has frequently degenerated into a debate between legalists and anti-legalists. The legalists argue that world peace depends upon enlarging the scope and range of legal rules, the growth of habitual respect for law, and the creation of international institutions capable of interpreting and enforcing the law.¹ The anti-legalists argue that the expectations of the legalists are naive and misleading in a world of independent sovereign states, and that the best prospects for peace depend upon the maintenance of balance between the capabilities and commitments of antagonistic countries and ideologies. This balance must be grounded in a diplomatic equilibrium in which no state has any rational prospect of achieving significant expansion by conquest. As the world changes, the legalists, by and large, would alter and reform the legal rules, whereas the anti-legalists would concentrate upon making political readjustments to preserve the balance.² After an investigation of the arguments made by both sides in the debate, this essay will focus on three particular facets of the general problem posed by the assumed dichotomy between law and politics: (A) Lawyers as Foreign Policy Planners; (B) Adherence to Law and the Conduct of Foreign Policy; (C) Law and the Future of World Order. The discussion attempts to shift the focus of the present debate to an intermediate position that makes a more

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1. Judith Shklar, in her excellent book on the subject, defines legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." J. SHKLAR, *LEGALISM: AN ESSAY ON LAW, MORALS, POLITICS* 1 (1964).

2. The conflicting positions of the legalists and antilegalists have recently been set forth with clarity and insight by Louis Henkin. L. HENKIN, *HOW NATIONS BEHAVE; LAW AND FOREIGN POLICY* 245-71 (1968).

precise and realistic estimate of the contributions, limitations, and potentialities of law and lawyers to the foreign policy-making process of the United States.

The polarity of the opposing positions was clearly visible at the 1963 Annual Meeting of the American Society of International Law. On that occasion Dean Acheson dismissed the importance of law in matters of high sovereign concern in as unqualified a manner as we have heard in recent years from a person of high stature. Mr. Acheson told the large assembly of international lawyers, no doubt attracted partly by the lustre of his presence, that international law is of no significance in the resolution of important issues of foreign policy. His words were characteristically astringent:

I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position, and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty.³

Mr. Acheson's remarks were highly provocative. He shared the platform with Abram Chayes, then Legal Adviser to the Secretary of State, who appeared to be proud of the role that law had played in moderating and shaping the execution of the decision to interdict the placement of Soviet missiles on Cuban territory.⁴ But what is more, Mr. Acheson was himself an eminent international lawyer, who had returned to the practice of law after leaving the government in 1952. Perhaps the immediate adverse reaction to his comments was magnified by a subconscious feeling among the members of the audience that they had borne witness to a betrayal of their vocation. To justify their feeling it is not difficult to show that many governmental decisions on matters of war and peace are shaped in beneficial ways by a sophisticated handling of international law.⁵ Moreover, there are many practical drawbacks to a position that encourages all governments to insist on the legitimacy of sovereign prerogative on occasions of their own choosing.

But, perhaps the anti-legalist position was disputed too mechanically and without sufficient consideration of the way in which legal arguments can be and have been used. In the 1960's a series of controversial

3. Acheson, Remarks, Proceedings American Society of International Law 13, 14 (1963).

4. See Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550 (1963); Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T. STATE BULL. 763 (1962). See also Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963).

5. See HENKIN, *supra* note 2.

American foreign policy undertakings drew heavily upon legal rhetoric and argumentation to defend their validity, especially in reaction against domestic critics in the United States. We find, for instance, the Legal Adviser to the State Department, Mr. Leonard D. Meeker, going to considerable lengths to demonstrate a legal basis for the American military occupation of the Dominican Republic in April of 1965. Mr. Meeker suggested that his approach to international law "would properly be described as practical idealism." In his thinking "fundamentalist views on the nature of international legal obligations are not very useful as a means to achieving practical and just solutions of difficult political, economic, and social problems." Mr. Meeker went on to say that

[i]t does not seem to me that law and other human institutions should be treated as abstract imperatives which must be followed for the sake of obeisance to some supernatural power or for the sake of some supposed symmetry that is enjoined upon the human race by external forces. Rather, it seems to me that law and other institutions of society should be seen as deliberate and hopefully rational efforts to order the lives of human communities—from small to great—in such a way as to permit realization by all members of a community of the full range of whatever creative powers they may possess.⁶

The cosmic vision expressed by these sentiments is widely shared, but arouses suspicion when used to validate what appeared to most impartial observers as a blatant violation of one of the basic norms of modern international law: the prohibition of unilateral recourse to force except in a situation of self-defense. However one might interpret the Dominican turbulence at the time of the American military involvement, it was not a situation in which the United States could purport to be acting in collective self-defense to protect the Dominican Republic against external attack.⁷ Rather, the intervention in Dominican affairs bears an obvious, if odious, resemblance to the Soviet intervention in Czechoslovakia in August 1968. The strength of the comparison is heightened by the reliance of both principal governments upon a regional or collective endorsement to veil the unilateral nature of their use of military power to interfere with the domestic

6. Meeker, *The Dominican Situation on the Perspective of International Law*, 53 DEP'T. STATE BULL. 60 (1965).

7. This interpretation that the United States did not act in self-defense is strongly supported even in a conservative account of the Dominican intervention. See J. MARTIN, *OVERTAKEN BY EVENTS* (1966).

politics of a foreign country.⁸ Certainly the Soviet claim to maintain the integrity of governments in the socialist community has a hollowness comparable to the State Department's "practical idealism" when it is used to justify suppressing Czech domestic developments that appear to be merely antithetical to Soviet interests.

This excursion into the dark domains of interventionalist diplomacy adds a dimension to the debate between the legalists and the anti-legalists. The anti-legalists are entitled to complain when a government dresses rationalizations of policy in legal language. In such circumstances, law is less a fig leaf than a see-through garment. Consequently, there is a strong impulse to strip away the legalistic pretension; better see policy as naked power than disguise the choice by enshrouding it in a gauzy film of legalism. Such a call for directness, perhaps an element of Mr. Acheson's remarks, is evident in some more recent comments on the role of law and lawyers in the making of foreign policy.

Mr. Henry Kissinger, the now influential Assistant to President Nixon on National Security Affairs, has often inveighed against what he regards as the detrimental effects of legalism on the formulation of American foreign policy. In his widely studied article on settling the Vietnam war, Kissinger argued that these legalistic tendencies of the Government inhibited the commencement of negotiations with the North Vietnamese. He suggested that ours is "a government which equates commitments with legally enforceable obligations," and that our preoccupation with this equation prevented us from even discerning signals sent by North Vietnam's government indicating its willingness to take satisfactory action in exchange for a bombing halt provided that its action did not have to be based on a formal commitment. Kissinger also contended that "the legalistic phrasing" of Washington's demands "obscured their real merit," in effect arguing that the language of law was inappropriate to the setting and had an undesirable impact upon diplomacy.⁹ The repetition of this point several times in Mr. Kissinger's article makes it clear how strongly he feels that talking like a lawyer may keep the policy-maker from perceiving and resolving "the real issues."

This point of view becomes even more pronounced in a general

8. Cf. the principal Soviet legal argument (the so-called Brezhnev Doctrine) for occupying Czechoslovakia as formulated in an article translated from Pravda and published under the title *Sovereignty and International Duties of Socialist Countries*. N.Y. Times, Sept. 27, 1968, at 27, col. 1.

9. Kissinger, *The Viet Nam Negotiations*, 47 FOREIGN AFF. 211, 222-23 (1969).

essay that Kissinger wrote on foreign policy just before he took office.¹⁰ In this essay Kissinger contended that “we have historically shied away” from an inquiry “into the essence of our national interest and into the premises of our foreign policy” because of an insistence on casting our political interests in the form of legal responsibilities: “It is part of American folklore that, while other nations have interests, we have responsibilities; while other nations are concerned with equilibrium, we are concerned with the legal requirements of peace.”¹¹ The rejection of law by Mr. Kissinger was particularly significant because he reoriented his entire analysis of foreign policy in the direction of world order: “The greatest need of the contemporary international system is an agreed concept of order.”¹² And at the close of his essay he implied that unless we “ask the right questions”—that is, those that bear on interests—“we will never be able to contribute to building a stable and creative world order”¹³ It seems fair to suggest that Mr. Kissinger regards law and legal rhetoric as an encumbrance rather than as a resource in the construction of a stronger system of world order.

Presumably in the background of this analysis lies John Foster Dulles’s frantic search for treaties of alliance in the 1950’s, as if a treaty, however fragile its political basis, could give assurance of the ability and willingness of governments around the world to contain Communism. In the foreground, of course, lies the defense of the United States involvement in the Vietnam war by an appeal to treaty commitments and by a claim that a world legal order is thereby sustained.¹⁴ The pseudo-legalist ideology of Dean Rusk and Walt Rostow is the work of non-lawyers, who have frequently been more guilty than

10. Kissinger, *Central Issues of American Foreign Policy*, in *AGENDA FOR THE NATION* 585 (K. Gordon ed. 1968).

11. *Id.* 610.

12. *Id.* 588.

13. *Id.* 614.

14. Even Mr. Kissinger, despite his concern for the formalism and legalism of American foreign policy, writes as follows about “commitments” in the context of the Vietnam war: Much of the bitter debate in the United States about the war has been conducted in terms of 1961 and 1962. Unquestionably, the failure at that time to analyze adequately the geopolitical importance of Viet Nam contributed to the current dilemma. But the commitment of 500,000 Americans has settled the issue of the importance of Viet Nam. For what is involved now is confidence in American promises. However fashionable it is to ridicule the terms “credibility” or “prestige,” they are not empty phrases; other nations can gear their actions to ours only if they can count on our steadiness. The collapse of the American effort in Viet Nam would not mollify many critics; most of them would simply add the charge of unreliability to the accusation of bad judgment. Those whose safety or national goals depend on American commitments could only be dismayed. In many parts of the world—the Middle East, Europe, Latin America, even Japan—stability depends on confidence in American promises. Kissinger, *supra* note 9, at 218-19. Mr. Kissinger uses commitment in two different senses and is somewhat vague about the causal link between American “commitments” and specific behavior.

lawyers of rigid application of legal rules and the rhetorical use of the language of the law. In fact, Dean Acheson is just one of many attorneys who have served in the State Department; such lawyers tend to be exemplary exponents of the pragmatic traditions of the common law and are themselves anti-legalist in their philosophy. What is disturbing about the simpler statements of the anti-legalist position is its double confusion: first, an inaccurate and simplistic presentation of the legal tradition and, second, a false depiction of the relationship between "a characteristic legalism"¹⁵ and certain recent extravagances in American foreign policy.

The comments of Mr. Kissinger, among others, suggest how important it is to enter the debate between legalists and anti-legalists and to examine some particular aspects of the controversy in order to achieve a more realistic and constructive analysis of the proper role for lawyers in foreign policy-making on behalf of the United States Government.¹⁶

A. *Lawyers as Foreign Policy Planners*

Henry Kissinger characterizes "the sort of analysis at which [Americans] excel" in the conduct of foreign relations as "the pragmatic, legal dissection of individual cases."¹⁷ The same point is made more negatively by Zbigniew Brzezinski, the foreign policy specialist and former government adviser, who writes:

Coming from a society traditionally suspicious of conceptual thought (where a "problem-solving" approach is held in esteem and concepts are denigrated as "intellectual cubbyholes"), shaped by a legal and pragmatic tradition that stresses the case method and the importance of precedents, the understandable

15. Law functions within a structure of shared assumptions; its starting point is the acceptance, by all parties, of the legitimacy of the legal structure and of the values it embodies.

Everyone understands that this shared value commitment and belief in the adjudication of conflict does not exist in more than a fragmentary manner in international society. Nevertheless, the legal habit of mind has sometimes led the United States to discount these difficulties, even to assume for itself and its own policies an international legitimacy which other states were unwilling to concede. Along with this has gone a trust in formal arrangements and alliances which the social and political realities have not at all times justified.

N.Y. Times, Jan. 6, 1969, at 46, col. 1 (editorial). The intellectual underpinnings of this analysis are explicitly attributed to the celebrated critiques of American foreign policy made more than a decade ago by Kennan and Morgenthau. G. KENNAN, REALITIES OF AMERICAN FOREIGN POLICY (1954); G. KENNAN, AMERICAN DIPLOMACY, 1900-1950 (1952); H. MORGENTHAU, POLITICS AMONG NATIONS (4th ed. 1967); H. MORGENTHAU, IN DEFENSE OF NATIONAL INTEREST (1951).

16. For fuller development along these lines, see R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1969).

17. Kissinger, *supra* note 9, at 221.

conditioned reflex of the policy-maker is to universalize from the success of specific policies, formulated and applied in the "pre-global" age of American foreign policy.¹⁸

Kissinger and Brzezinski are associating the case method, which is the main emphasis of the lawyer's professional training, with an inductive and pragmatic approach to foreign policy. And Brzezinski also emphasizes this approach as the distinctive character of the common law as a legal system. Both authors find this strain expressed in the dominant philosophical traditions of the United States, themselves continuations and outgrowths of British empiricism that emphasize problem-solving and pragmatic criteria of judgment. This kind of inductive orientation toward governmental policy-making contrasts with the more conceptual, deductive traditions associated with Continental jurisprudence and philosophy.¹⁹ Each tradition has its distinctive strengths and weaknesses, biases and predispositions that have distinct impacts, depending on a country's particular historical setting.

What is important to appreciate, however, is that a particular legal style is derived from a wider tradition of thought prevailing within a particular society; it is a product of many influences and not attributable in any very illuminating way to a particular experience of vocational training in the law. Thus it is not surprising that ideological predispositions might take precedence over the problem-solving mentality for lawyers (*e.g.*, John Foster Dulles) and non-lawyers (*e.g.*, Dean Rusk, Walt Rostow) in the service of government. And whatever it is that is properly associated with the pragmatic approach of the common law is not at all identical with the legalistic patterns of justification invoked by some lawyers in the course of carrying out their governmental functions.

A parallel tradition of piety and self-sacrifice has its roots in the religious origins of the United States and can be seen clearly in the Puritan heritage. This religiosity seeks to disguise self-interested mo-

18. Brzezinski, *Purpose and Planning in Foreign Policy*, *THE PUBLIC INTEREST*, Winter 1969, at 52, 54-55. Kissinger also argues for a better conceptual framework for foreign policy in the essay cited in note 10, *supra*.

19. Brzezinski's statement about the legal tradition contains an odd mixture of misconceptions. The case method is a technique of analysis and pedagogy rather than a widely accepted system of adjudication. (Arbitration would be closer to the ad hoc "problem-solving" that Brzezinski first refers to.) The very importance of precedent is a demonstration that each case is not seen as a discrete problem in the American legal system. Universalizing from the numerous cases which form a line of precedent will quickly bring the thoughtful student of the law to the intellectual cubbyholes of conceptual thought. The difference from Continental systems lies in how we reach that plane of conceptual discussion rather than in taking the extreme nominalist position that generalized concepts have no value at all. The Restatement is the end rather than the beginning.

tives, aspires to act for the common good, and is interested in setting a moral example of unselfish sacrifice for the other governments of the world that, according to this outlook, follow a much more self-centered course of action in foreign affairs.²⁰ The ideas underlying the doctrine of the separation of church and state, together with the progressive secularization of American society, have stimulated a search for non-religious modes of expression by those entrusted with the task of making and justifying American foreign policy. Law and lawyers have often fulfilled this social need, providing a kind of idealistic discourse that represents partly a genuine reformist tradition and partly a hypocritical disguise for acquisitive behavior. Calvinism has

20. Those who support the role of the United States in the Vietnam War often emphasize the *absence* of any selfish American interests in Vietnam. We want no territory or foreign bases, and we have no economic holdings or ambitions. Although the denial of any selfish interest may not be altogether convincing, its frequent repetition by high officials is a powerful illustration of the point made in the text. The United States substitutes the rightness of its cause for the selfish pursuit of interests, and feels no compunctions about unleashing its destructive might upon a poor and rather backward Asian country. When interests are pursued then costs tend to be assessed and the enterprise confined by some concept of net worth. But when supposedly selfless principles underlie the commitment then no assessment can be made, and no cost is too high. The American effort to end the Vietnam war indicates that some sense of "worth" finally took precedence over the moralistic insistence that the United States was acting to show that aggression doesn't pay, or that collective self-defense works, or that we are a government that upholds its commitments; since no moral contention was very convincing there was a tendency to shift from one to another in a desperate struggle to plug the dike erected against the mounting tide of domestic and international opposition to the war. But up until President Johnson's speech of March 31, 1968, no government official moved the debate about the war off the terrain of selfless promotion of moral and legal principles the value of which could not be weighed against the adverse effects of its continuation. Within the American elite it has been the pragmatic counter-tradition that has broken with the moralism and legalism of the Rusk-Rostow position. The formulations of Arthur Schlesinger, McGeorge Bundy, and Henry Kissinger are characteristic of this pragmatic (opportunistic?) reevaluation of American policy in Vietnam. Bundy's Address at DePauw University in October 12, 1968, is one of the best examples of this break with moralism. Mr. Bundy says:

Until the present burden of Vietnam is at least partly lifted from our society, it will not be easy—it may not even be possible—to move forward effectively with other great national tasks. This has not always been my view, but . . . it seems to me wholly clear now that at its current level of effort and cost the war cannot be allowed to continue for long. Its penalties upon us all are much too great. (Mimeographed text, p. 2)

Lest he be understood as a sudden convert to matters of principle, Mr. Bundy makes plain that his change of position on Vietnam was a matter of pure expediency:

I remind you also, if you stand on the other side, that my argument against escalation and against an indefinite continuation of our present course has been based not on moral outrage or political hostility to the objective, but rather on the simple and practical ground that escalation will not work and that continuation of our present course is unacceptable.

Mr. Schlesinger expresses the same theme when he writes: "The tragedy of Vietnam is the tragedy of the catastrophic overextension and misapplication of valid principles. The original insights of collective security and liberal evangelism were generous and wise." *Vietnam and the End of the Age of Superpowers*, HARPERS, March 1966, at 41-49. My overriding contention, one that will be developed in later stages of the article, is that neither moralism-legalism of the Rusk-Rostow variety nor expediency of the Bundy-Schlesinger variety provide America with an adequate basis for policy and choice in world affairs.

contributed the zealously held notions of personal salvation and a vigilant, omnipotent god, and this combination has led to a confusion between what is beneficial for oneself and for the general welfare. Socially this confusion is compounded by the suggestively similar ideas of *laissez faire*, the “invisible hand” of Adam Smith, and Social Darwinism that are all embodied in American intellectual traditions. The world views of Woodrow Wilson after World War I exemplified these confusions—the idealistic gropings for the grand design conjoined to a search for American leadership and preeminence in world affairs.

In conclusion, then, the inductive particularism of the common law is neither confined to law, nor is it espoused by all American lawyers. The “case” approach reflects a broader kind of philosophical tradition associated with British empiricism and the whole struggle against Thomistic and Cartesian modes of thought and organization evolved out of Catholic dogma and Continental traditions of speculation.²¹ Similarly, the legalism that is found in American diplomacy often represents displaced religious and moral sentiments that derive from the whole spiritual foundation of the Republic in colonial times. Legalism in formulation and approach is a way of maintaining the pristine integrity of a moral system in a pluralistic society; the emphatic piety remains resonant even when the rhetorical appeal has been shifted to more secular grounds. It seems no accident that Woodrow Wilson and John Foster Dulles, our two most eminent legalists, were both men of deep, central, religious conviction who devoted themselves to careers in the vortex of secularism. It seems that the espousal of legalism has little, if anything, directly to do with membership in the legal profession. Law may be a foil for suppressed religious concerns; equally lawyers may be problem-solvers with neither the virtues nor the vices of statesmen of more grandiose visions who would build a new world order for our time.

B. *Adherence to Law and the Conduct of Foreign Policy*

The value of a law-oriented foreign policy is obscured by the character of the legalist-anti-legalist debate. The acceptance of a framework for legal restraint in the external relations of the country seems at least as much related to the promotion of national welfare as does adherence to law in domestic affairs. A discretionary basis for foreign policy in

21. Such particularism is also associated with the importance of “town meetings” in early America and the rise of a congregationalist tradition in ecclesiastical affairs.

the nuclear age seems to increase the risks of self-destructive warfare. The scale of violence is now so large that it becomes less and less tenable to entrust decisions affecting the interests and welfare of the world community to the particular appraisals of policy made by small numbers of executive officials at the national level.²² The problems of the world—peace, welfare, dignity—increasingly presuppose some form of supranational control to protect the general interest. The prospects for building governmental structures at the world level remain poor, and so in the interest of preventing disastrous breakdowns, the restriction of national freedom of choice could function as one formidable source of restraint upon the ruinous tendencies of our present international society. The norms of international law, impartially interpreted and applied, are a forceful source of restraint upon the self-seeking proclivities of sovereign states. The real difficulty with Mr. Acheson's views about the conduct of diplomacy in a situation of crisis is a prudential one, namely, that to affirm the discretionary basis of foreign policy in the nuclear age is to invite eventual disaster, even if, or perhaps especially if, the effective discretion to act is vested only in the governments of the major powers.

Mr. Kissinger contends that our dedication to "principle" makes it hard for us to articulate a truly vital interest which we would defend against a challenge we thought was "legal."²³ We deny that force is being used by the United States to uphold or enhance America's power and prestige, much less its wealth. American policy-makers normally rely upon a selfless explanation for action taken abroad. Thus we tend to justify our foreign policy decisions by turning to principles of universal appeal, such as the need to resist "aggression." According to Kissinger, these patterns of generalized justification lead to an indefinite multiplication of commitments. He counsels, instead, a hard-headed appraisal of vital interests as a strategy for bringing our "commitments" into better correlation with our "interests" and "capabilities." In such a reorientation it may be necessary to undertake some "illegal" courses of action and to refrain from joining many "legal" causes.

Why is international law a better source of national self-restraint than the kind of interest calculus that Mr. Kissinger proposes? Clearly

22. Garrett Hardin makes this argument in vivid and generic terms through an interpretation of the experience with over-grazing of community commons. Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

23. Kissinger, *supra* note 10, at 611.

law has little to offer as a basis for guidance and restraint if it is manipulated in a self-serving and post-facto fashion or becomes assimilated into the tradition of formulating pious self-avowals in legal rhetoric.²⁴ At the same time, international law provides the potential basis for guiding the action of all governments within an agreed framework. It has relatively stable principles that are not easily altered by shifts in governmental conception of the national interest or by miscalculations as to the intermeshing of definitions of national interests by adversary governments. Kissinger's views seem overly dependent on the wisdom and prudence of the particular group in control of a government.

Self-determination of rights and duties—a self-help system—is severely biased by self-serving interpretations of what is reasonable, interpretations which are marked by hostility, distrust, self-seeking, and wide cultural diversity. In this situation the position and traditions of the United States make its adherence to international law particularly important. The great power of the United States relative to every other country, including the Soviet Union, make its acceptance of restraint particularly significant. Secondly, there is little incentive or likelihood that other principal states could take advantage of American adherence to international law. Technological developments much more than territorial expansion are the key to changes in relative power in the present world. As a result, the legal order presents neither obstacles nor temptations to the potential expansionist state. Thirdly, the rules and expectations embodied in international law are sufficiently permissive to allow a government to take whatever action is needed to uphold its territorial integrity and political independence. Fourthly, the United States needs to set certain examples of self-limitation in the interest of inducing reciprocal restraints by other states. Such reciprocity seems an essential part of any program designed to cope with the spread of weapons of mass destruction to more and more countries in the years ahead. Fifthly, there is a genuine American

24. The following passage is a striking illustration of this tradition:

In the period of primarily American responsibility for peace since 1945, we have used our force prudently, cautiously, and for limited and defensive ends. We have used force in conformity with international law, in order to enforce it. When we had a monopoly of nuclear weapons, we did not seek to impose our will on the rest of the world. Nor have we even overthrown the regime of Castro in Cuba.

E. ROSTOW, *LAW, POWER, AND THE PURSUIT OF PEACE* 11 (1968).

Mr. Rostow seems to be confusing adherence to law with certain decisions to refrain from using all the power at the disposal of a national government. But surely some lesser uses of power may not be compatible with the sovereign status of other countries, nor with the legal prohibitions on non-defensive uses of national force against foreign countries.

tradition of respect for law and concern for justice that could play a part in seeking to strengthen the quality of world order. For all these reasons it is important to bring impartial legal perspectives to bear early in the formation of policy.

As in domestic law it is possible, and necessary to distinguish between an *ex parte* manipulation of law and its impartial and autonomous application. The present bureaucratic structure is ill-suited to serve the latter objective. The Legal Adviser is a subordinate officer of the Secretary of State. His role is often couched in terms that require him to be an adversary litigator with the Government as his "client." While his advice on legal matters may be enlightened, and he may try to avoid violence, he still is a subordinate State Department official essentially advocating an adversary position in the Government. This status and arrangement seem too haphazard, except in relation to the routine affairs of international life that are rarely considered by the political officers of government.

The President needs to receive legal advice at the Cabinet level from an Attorney General for International Affairs. The conception of official duty for this proposed post should stress the obligations of impartiality, the search for objective criteria of guidance, and the importance of participating at all stages of the formation and application of foreign policy. Such an Attorney General should be assisted by official panels of experts on various dimensions of international life who have access to all governmental information and are obliged to deliver expert opinions. The Attorney General for International Affairs should be regarded as a non-political appointee, subject to removal from office only for cause. He should sit as an *ex officio* member of the National Security Council and command a budget sufficient to enable careful, rapid staff work on all legal questions.

C. *Law and the Future of World Order*

Images of world order may be developed from both legal and non-legal traditions of thought about international affairs. Unfortunately, the images drawn from traditions of legal thought have tended to be models of domestic legal systems generalized to apply to the whole of international society. These models are static, tend to ignore the enormous difficulties of moving from the present decentralized structure of international society to a highly centralized structure, and appear artificial and unrealistic if offered as either a prediction of or a prescription for the future.

On the other hand, the images of world order deriving from non-

legal traditions of thought tend to be models of interaction that are only marginally different from the existing structure of power and behavior in international society. Mr. Kissinger's notions about world order appear to be little more than an updating of Metternich's ideas for securing a stable and dynamic equilibrium in international society. The chief buttresses of the non-legal model are alliances, an assessment of the correlation between capabilities and commitments, and a hierarchical ordering of interests vital to the country. The achievement of such world order depends upon an acceptance of the international status quo for an indefinite period, or at least a perceived unwillingness on the part of all major governments to secure major gains through force of arms. The difficulty with this diplomatist image of world order is that it seems to accept decentralized procedures as adequate for the maintenance of minimum order and welfare in international society.

There is presently an intellectual vacuum that needs to be filled with more adequate images of world order, responsive to the history and traditions of a world of sovereign states and to the emerging functional problems that cannot be handled, in many cases, by the national governments of even the most powerful states. The control of oceanic and atmospheric pollution, the regulation of weather modification and other uses of space, the beneficial use of data collection relevant to many phases of human existence, the regulation of the multi-national corporation, problems of resource conservation and exploration, and the moderation of the effects of shifts in the supply of and demand for food suggest the urgency of evolving functional bodies that have a transnational center of authority and control. The maintenance of world order may depend on the design and acceptance of a scheme of overlapping, interlocking, and organizationally disparate functional institutions that ignore the confines of national boundaries and elude the control of national governments. Such a network may come to play an increasingly vital role as problems of armed violence across boundaries are subordinated to the differential opportunities for and hazards of various strategies of technological exploitation. The deployment of fast-breeder nuclear reactors, capable of converting arid land into an agro-industrial complex may become more significant than the deployment of missiles with nuclear warheads. Failures to take adequate precautions to prevent damage from radioactive waste may pose greater problems than the danger of war and surprise attack. The proposals for order and control should be responsive to the problems emerging from the international environment.

Moderate population projections predict a world population by the first decade of the twenty-first century that will be almost double what it is today.²⁵ These increases will be concentrated in the poorer parts of the world which have no prospect of adequately feeding or caring for their populations. The problem is not only preventing famine, but also securing health, education, housing, and a life of some opportunity for most people in the world.²⁶ Population expansion vastly increases the difficulty of making reasonable progress along all these other lines, and also causes more than proportionate increases in garbage, pollution, and resource depletion. Increasing population densities also raise the propensity of social groups toward disease, riot, distress, and desperate politics. In such environments, strategies of internal and external change that rely on violence are much more likely.

Thus, like the Polish army of the thirties, supposedly buttressed by the working of the balance of power and by impressive treaty systems, we are a knight errant facing the future in gallant ignorance, equipped with ideas whose time has passed. Non-legal approaches to world order characteristically ignore the international dimension of the problems of pollution, population, and poverty. Legal approaches to world order equally ignore the problems of adapting to the new technological environment. Only in relation to nuclear war is the case for drastic change in our attitude toward world order sufficiently understood.

There are several suggestions that follow from this discussion: (1) the outline of a new kind of transnational functionalist world order should be put in explicit and coherent form; (2) international lawyers should begin to define ecological, demographic, and technological developments as within the province of their professional concern; (3) the idea of a world order emphasizing the problems of war and peace should be rejected in favor of a broader conception that is equally concerned with the protection and promotion of dignity, safety, and security for individuals and groups. Power and the mechanisms for restraining its use are no longer adequate foci of concern in our evermore interdependent and overcrowded world of shared danger and opportunity.

25. Projections of population growth and their conservative interpretation are to be found in Notestein, *Population Growth and Its Control*, in *OVERCOMING WORLD HUNGER* 9, 16-17 (C. Hardin ed. 1969).

26. For some discussion of projected population growth and its global consequences, see P. EHRLICH, *THE POPULATION BOMB* (1968); G. MYRDAL, *THE ASIAN DRAMA* (3 vols. 1968); W. PADDOCK & P. PADDOCK, *FAMINE—1975!* (1967).

Conclusion

The purpose of this article is to redefine the debate on legalism in terms that are more responsive to the international needs of the day.²⁷ Such an endeavor requires some clarification of what is truly characteristic and distinctive about the legal tradition, especially as it presents itself in our national setting. Only on this basis is it possible to assess the claims advanced for and against law in relation to the conduct of foreign policy. Above all, it is essential to distinguish between the intellectual traditions of an American lawyer and the ideological orientations of American statesmen, who may or may not be lawyers but who use legal rhetoric to express moral preferences which often spring from other and wider sources.

The rejection of legalism does not make the case for anti-legalism. The argument for a common framework of restraint that has some objective standing independent of the judgment of government officials seems overwhelmingly persuasive in the nuclear age when the margin of fatal miscalculation is so small and the prospect of mutually contradictory selection of facts and claims is so great. The search for objectivity in such an atmosphere deserves priority, and the techniques and vocation of the lawyer are admirably suited for the task, especially if the search is removed from governmental pressures by giving national legal advisers greater independence than they now enjoy. In the American context serious consideration should be given to the creation of a Cabinet post of Attorney General for International Affairs. Such efforts at the national level should be accompanied by parallel and complementary efforts to create procedures for the settling of disputes on the international level, whether within specialized agencies, regional or global institutions.

Both the traditional legalist and anti-legalist notions of world order have been slow to adapt to a new set of international concerns that are becoming problems of the first magnitude. We must work for a system of world order which will not only diminish the probability of large-scale and sustained violence, but will also meet the threats that arise from over-population, pollution, technological innovation, and resource depletion. We need, in other words, a redefinition of the task of

27. My argument should not be read to imply that international lawyers are by and large either legalists or anti-legalists. On the contrary, the academic mainstream of contemporary international legal studies exhibits my search for an intermediate statement of the link between law and politics. The legalist/anti-legalist discussion enjoys prominence mainly in discussions of the proper framework of restraint for the conduct of U.S. foreign policy.

global planning. That work should include a new, common effort by both legalists and non-legalists. No single disciplinary perspective is adequate in either its analysis of the problems of world order or the design of strategies for their solution. The argument for inter-disciplinary collaboration is both convincing and urgent, as is the case for forging a new synthetic concern for world order that engages specialists in many areas, including law, political science, economics, sociology, ecology, systems design, and the computer sciences.

The primary task is to keep the existing system under some degree of reasonable control during a period of transition to some more centralized system. The task is urgent. Cumulative and symbiotic developments in population growth, resource supply, pollution of oceans and space, and the technology of destruction suggest that only a few decades, at most, remain before the risks and costs of maintaining the existing system of world order will become unendurable.