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Speaking Law to Power: International Law and Foreign Policy

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**Speaking Law to Power: International Law and Foreign Policy
Closing Remarks**

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Madison Wisconsin, March 6, 2004**

Good afternoon. This has been a remarkable day, as well as a fitting and deserved tribute to Dick Bilder. It has been a pleasure to participate. Dave Trubek began our discussions by identifying three themes in Dick's work to guide our thinking about the relationship between international law and foreign policy: *pragmatic legalism, institutionalism and professionalism*. I would like to place these themes in the context of three conceptions of the relationship between law and power that have been significant in our discussions this weekend.

In 1962, Dick wrote a modest piece for the American Journal of International Law about the workings of the Legal Advisor's Office in the State Department. Since then, he has written dozens of other pieces – why do we keep returning to this early work? Dick's 1962 article has stood the test of time because it evokes a sensibility about the relationship between law and power, an approach to law and government, which we recognize now as the spirit of an age, of a generation, of a profession, of a ruling elite – and of a country. We recognize in Dick's description of the legal advisor's work the spirit of American lawyering that international lawyers in the United States have sought for a generation to universalize.

Here is Dick's evocation of the problem solving ethos of the American government attorney in mid-century:

The task of finding ways to work out international disputes tends also to develop in the Office attorney what might be called a pragmatic or functional approach to international law — a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order. Perhaps as an outgrowth of common-law training, there is a working habit of viewing new and unique areas of problems on a case-by-case basis at first, and letting the law work itself out, rather than jumping immediately into the enunciation of broad principles. In general, precedent and authority, while important, do not preclude analysis in terms of sensible result and workable rule.¹

Dick left government to write this sensibility down, and to teach it here at Wisconsin to generations of students. Bill Rogers lived it across an extraordinary career as lawyer and diplomat. Tom Franck theorized it, extolled its virtue, and participated in its development as the external voice of rule and reason – and faith in their potential.

A first idea about the relationship between law and power is reflected in the title of our

¹Richard Bilder, *The Office of the Legal Advisor: the State Department Lawyer and Foreign Affairs* 56 Am. J. INT'L L. , 633, 680 (1962).

deliberations: “speaking law to power.” In this vision, law and power are different – they promote different values, evaluate the national interest differently, and express different commitments. Law is associated with multilateralism, diplomacy and universal humanism – power with unilateralism, force and the national interest. Law expresses long run, rather than short term interests, attends more faithfully to reciprocity and the viewpoint of the “other,” while power attends to short run advantages and strategizes our unilateral potential. In this vision, the world of international affairs is predominantly a world of power and politics – law is marginal, it speaks but does not do. This idea was stressed at various moments in our debates by Philip Allott, by Joachim Frowein, and Tom Franck. In this vision, law is more a restraint than a pathway, although it also suggests a foreign policy engaged with multilateral institutions and wary of unilateral actions.

Dick Bilder’s gloss on law’s special point of view is what David Trubek termed his “pragmatic legalism.” It is a somewhat more hard-boiled vision — less sentimental about the virtues of multilateralism, and less idealist about universal humanist commitments. In Dick’s vision, international law contributes a distinct perspective, perhaps less outside power than alongside it. Dick’s description of the specific vocation of the Legal Advisor’s Office is catalogs what he saw as law’s unique contributions to policy deliberation: hesitant to write new law unless necessary, skeptical of the efficacy of agreement absent “shared or reciprocal interests,” attentive to the strategic uses of bilateral and multilateral instruments, “serious dedication to compliance with existing law” while attentive to the needs of a more flexible diplomacy, and more attuned to “sensible result and workable rule” than to “precedent and authority.”

While the Office seeks to accomplish maximum United States objectives in all negotiations, there is also a realization that any attempt to “win” a negotiation – to try to “put something over” on the other party — may be self-defeating, since experience suggests that an unbalanced or one sided agreement will in the long run tend to cause more disputes than it resolves. An agreement which is fair and confers benefits on both sides is thus a most profitable one for all parties.²

Over the course of the last days, we have also heard some of the difficulties this vision has encountered. Pragmatic legalism turns out not to be everyone’s idea of the best way to proceed. The sensibility Dick describes is rooted in culture – in the particular culture of a regime, in the culture of the State Department at a particular time. A great deal depends on the way the Legal Office is itself structured –different national regimes involve the lawyers at different stages for different purposes. As a result, the special viewpoint of “international law” varies with institutional, cultural and political context. Looking back, it appears that appreciation for “balanced” agreements — which Dick associates with the special perspective of international law — has varied across American administrations. Professors Frowein and Allott gave us a good sense for the rather different lawyer’s viewpoint in the British and German traditions of foreign policy making, resulting, as much from a different organization of the legal office as from broader historical and cultural ideas about the distinctiveness of law.

²*Id.* at 650

At the same time, the relationship between power and legal restraint is not as straightforward as the phrase “speak law to power” might suggest. Nathaniel Berman drew our attention to the significance of *defiance* and violation – of opposing the law – as a source of power, and suggested an image of law as part of the currency through which power is exercised. Pragmatic legalism can also make it difficult to see the dark sides of international law. I routinely take a vote in my international law class at the start of the year – do you think international law is a good thing and there should be more of it, or do you think international law, on balance, is a bad thing and there should be less of it? As one might expect, the overwhelming majority of international law students find it a good thing. But then I ask them what *costs* they were weighing against international law’s undoubted virtues. Rarely have the enthusiasts weighed any costs. Promoting international human rights is the same as promoting human justice, international law offers tools to protect the environment, but nothing to the determined environmental despoiler, nothing to the terrorist. Multilateralism may offer long term advantages and a world of law may be better than the world we now have – but what are the short term costs, and what eggs will need to be broken, what interests sacrificed, to get to the world of law? The image of law *outside*, speaking to power, expressing an *alternative* vision, makes law seem innocent of these costs.

A second image of the relationship between law and power that ran through our deliberations evoked an international governance regime riddled with law – rather than a world of power, spoken *to* by the marginal, if distinctive, voice of law. Law in the interstices of power, law as an instrument of government, as a compliance program and management tool. Law as a management system and a vocabulary for policy making. The word “policy” is crucial to this vision – a blending of law and power. Myres McDougal formulated this vision most explicitly at mid-century. Law as a vocabulary for world public order – at once a scheme of values, an institutional structure and a disciplinary sensibility for policy making and management. Bill Rogers expressed it most eloquently here when he stressed the *permissive* nature of international law, and the lawyer’s role as a creator of law.

Dave Trubek called Dick’s version of this vision “institutionalism.” Another term might be “liberal constitutionalism,” in the sense that we think of the United Nations Charter as inaugurating a constitutional framework for legitimating and delegitimizing uses of force, or in which John Jackson proposes we view the World Trade Organization as a “constitutional” regime for managing differences among national regulatory regimes impinging in different ways on international commerce. In this conception, the power of law is more diffused, and the global vernaculars of experts – lawyers, economists, technical specialists – are more significant than the ideological commitments or visions of national interest propounded by politicians. Policy making is less a struggle between a good law and a bad politics than a process through which specialists collaborate in devising solutions to problems.

This vision also raised innumerable difficult questions. Does “law as policy” favor the strong? Are third world states disempowered by a global regime which happens at once everywhere and nowhere, in the technical vernaculars of experts rather than the familiar vocabularies of interest and ideology? If we return again to midcentury, it was often international lawyers from the third world – following Wolfgang Friedmann and Mohammed Bedjaoui – who were most insistent on the need for antiformal, flexible, more “social” and

“cooperative” approach to international law. But one also hears complaints the other way – only the rich can afford to staff and press their interests through a medium so plastic. This vision is also anything but universal. “Constitutionalism” has rather different evocations in the United States, Britain, Germany, and the European Union – let alone Mexico, China or India. Globalization does seem to be promoting a kind of homogenization of expert vocabularies around the planet, the relationship between these policy managers and the rest of the economic and political system is quite different in different places. Nevertheless, the policy management sensibility evoked by Dick Bilder at the state department in 1962 has become more far more widespread in the ensuing years, creating a kind of “as if” world government of experts and expertise. Protestors across the globe reacted to the Iraq War in the vocabulary of international law: “it’s illegal.”

Of course here also there are difficulties. Expert vocabularies, for all their open flexibility and pragmatic attention to consequences and problem solving, also suffer from professional deformations, blind spots and biases. To a carpenter with a hammer, everything can look like a nail. What are the politics of this expertise? How can we translate the terms used by policy managers into the vernaculars of left-center-right, or of social interests, that we might contest the decisions experts take in political terms – or through political, even democratic, pathways? What are the ethics of this management expertise — how has it become universal? What alternative languages have been lost in the process? The pressing challenge in 1962 was to build a global machinery for problem solving – decentralized, professional, pragmatic. The most pressing challenge for the next generation might well be to open this process to political contestation — less to tame an unruly politics into the calmer paths of constitutional management than to open a technocratic world to political challenge and heterodoxy.

Taken together, these two visions – law outside, speaking to power — law inside, managing as power — pose a problem of responsibility. The best international lawyers are ambivalent, oscillating, eclectic in their engagement with these two sets of ideas. Sometimes shifting from one to the other can be a way of avoiding responsibility for the outcomes of global policy making while seeming able to participate fully in it. I worry that international lawyers so often seem to have a desire to be marginal — to be a silent power, or to be vocal and powerless.

A third idea about the relationship between law and power which ran through our work the last two days would see law as a vocabulary for power. People expressed this idea in various ways. Philip Allott spoke of law “constituting society.” Martti Koskenneimi spoke of a legal “spirit” beyond instrumentalism. Various of us expressed the notion that politicians are speaking the vocabulary of law, even when they make war – as they decide what is a proportional, necessary or legitimate application of military force. In this vision the legal and political vocabularies have merged – military effectiveness or market efficiency becoming both a legal standard and a policy objective.

In a way, this vision simply articulates the triumph of the liberal constitutional idea – the end result when humanitarian lawyers have fully infiltrated the minds and world views of those they would bend to humanitarian ends. In this vision, we should see George Bush as a human rights activist when he orders bombs dropped for humanitarian objectives – just as we should see international law as an environmental despoiler or terrorist when international legal rules – of

sovereignty, of jurisdiction – give cover to actors, whether states or private parties, who participate in terrorism or ecological harm. We often had occasion this weekend to refer to the remarkable biographical film about Secretary of Defense Robert McNamara, in many ways the exemplar of mid-century policy thinking. He reminded us repeatedly in that film that the problem was not generals who got away with murder, but the best and the brightest who planned, carried out and justified murder in the best vocabularies of law and policy.

Dick Bilder also contributed to our understanding of this third set of ideas, in what Dave Trubek termed his “international law professionalism.” For Dick, this meant an ethic of self-consciousness, a sensibility about the responsible exercise of power in the vocabularies of law and policy. Oscar Schachter’s term the “invisible college” might be another useful slogan for owning international law’s own will to power and experience of rulership, or for encouraging its responsible exercise. Philip Allott proposed a parallel sensibility – the lawyer who must decide between clarity and constructive obscurity, or between honesty and discretion, in the exercise of his or her authority. In these acts of discretion, the expert – lawyer, policy maker – knows him or herself to be a ruler, to be acting, deciding, in ways which will have consequences for others, and which are not determined by the terms of legal expertise or policy pragmatism. This is the domain — within the professions — of human freedom and responsibility.

In this vision, there is nothing wrong with lawyers or policy makers, whether national or international, seeking to rule the world. The question is whether they do so responsibly – or whether they do so in denial. Take the problem of war, which has been so present for us this weekend. The problem here is not whether international law legitimated or delegitimated war. The question is how those who decided to kill experienced their action — and how international law affected that experience. All too often, international law offers those who must *decide* to kill a comforting illusion. It might be the illusion that international law entitled them, even compelled them to do it – they were less killing than exercising and defending their rights. It might be the illusion that international law kept them on the margins of killing – they were safely to one side, speaking truth *to* power. But more often, in the flexible pragmatic world of policy, international law offers one the illusion that the *decision* to kill was actually a *judgment* – a judgment about the precise meaning of a vexingly vague standard, like proportionality, on an uncertain and shifting field of action. The professional must be practical, forward looking, flexible. The question whether killing this woman or child or man will be “collateral” and “necessary” and “proportional” is, we say, a *judgment call*. There is no legal rule, no metric. But there *is* escape from the experience of decision to the idea that those evaluating targets are *exercising judgment*.

I take another vote in my international law class each year. When we discuss the history of international law, I speak about the international lawyers of 1648 and 1918 – convinced by the trauma of war that the entire international system needed to be rebuilt root and branch. I speak about the generation of 1945, living in a house half built, half burned – who felt they must modify, extend and complete the vision of multilateral institutions and codified norms which had formed the basis for international law since the early 1920s. What, I ask, is our situation today? For you, largely born after 1980, living after the end of the cold war, after terrorism and 9.11, after globalization? How many think your generation lives in a world whose international law and institutions are up to the challenges we face, and need only to be used responsibly? How

many think the situation is like 1945 – the house is half built, half burned – the international system needing remodeling, updating, completion, to deal with new challenges? And how many think your generation faces a situation like that of 1918 or 1648, for whom all the ideas and institutions of the last century seemed part of the problem rather than the solution, and for whom everything would need to be rethought, remade, re-imagined?

For years, the overwhelming majority chose the middle position – the vocabulary is there, the institutions are there, we must work to extend them, update them, apply them and encourage their use. In the last three years something has changed – two thirds now feel all we have been discussing here must be thrown out, and we must begin again. It may be the romance, the optimism, the energy and anger of youth, but I admire the boldness of their vision. So long as we respond to the global challenges of poverty and war in the language of international law, I worry that we will blunt the energy needed to reconstitute our global political, moral and economic order. I would like to propose a different task for international law – less a program of action than the conveyor of a new sensibility about law and power. A sensibility of human freedom and responsibility, of clarity about what we do not know, and about the power in our hands, rather than clarity about what we know and denial of our power. Of moral action in an ethically irrational world. A training ground for what Weber once terms “politics as a vocation.”

Thank you for two days of fascinating conversation.