

Remarks on the Role of the Legal Advisor of the US State Department

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Introduction

There is a great deal of impressionism about the degree to which States apply considerations of international law in their policy-making and implementation, but there is very little precise information on the matter. In any substantial issue of complexity in international relations, this one included, (i.e. the impact of international law on foreign policy-making), isolating the elements of that issue and understanding how government decision makers dealt with it can be a daunting process. Many issues have political elements, economic elements, social elements, legal elements, and security elements; it is almost impossible to say what influence a single component has on the final outcome. This is, unfortunately, a subject that does not lend itself to confident specificity.

I. The Role of the Legal Advisor ('LA') within the State Department

The Office of the Legal Advisor is part of the State Department in which the Secretary of State is at the top, followed by the Deputy Secretary of State, two or three Under-Secretaries and finally a score of Assistant Secretaries of which the LA is one. The LA can have direct access to the Secretary when he wants it, but whether he has it is not so much a question of organizational structure as of the personalities involved.

The Office, which currently is comprised of more than 100 lawyers, is divided into sections which service the various departments of the Department of State. The geographic and topical bureaus are serviced by lawyers (Assistant LAs) who are not part of the bureaus themselves but part of the Office of the LA from whom they take their ultimate instructions. This imposes a certain uniformity on the legal advice fed to the State Department and, consequently, on the ultimate legal positions which the Department takes. I would emphasize again that much of the effectiveness or ineffectiveness of the legal advice given a particular bureau by the Assistant LA is a function not solely of structure but also of personality.

Normally, an Assistant Secretary of State begins his day by arriving at the office very early, where he is briefed by one of his senior assistants on the most vital of the cable traffic of the night. He then meets with the principal staff of his bureau, approximately fifteen people. Most of the Assistant Secretaries include the Assistant LA in that meeting even though he is not an official member of the bureau. This is to ensure that the legal advice which the Assistant LA gives be informed by full knowledge of the relevant situation from its inception. Of course, the Assistant LA too reviews the cable traffic of the previous evening so he can go to the staff meeting alive to what the issues are and put forth an informed opinion.

The meetings are generally free-wheeling, in the American style. They are not terribly directed or respectful; there is a lot of discussion, dispute, and banter in which an Assistant LA can play a significant role. If, however, his style is to sit there and say little, his advice may or may not be actively solicited.

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Much depends also on the disposition of the Assistant Secretary of State concerned. There are some, particularly in the geographic areas but less so in the functional areas, such as economics or international organizations, who will be reluctant to involve the lawyers. They may wish to make their decisions freely, or at least to make their recommendations in a particular way, and therefore may not share information fully. As I mentioned previously, the Assistant LA will be aware of information contained in the cables, but while there are cables that are very widely distributed there are also cables that are closely held in varying degrees of classification. Sometimes information which would be of great importance to the LA in performing his function as it should be performed is withheld from him, or at any rate his associates.

II. Composition of the Office of the LA

The members of the Office of the LA are recruited from the ranks of graduating law students and private practicing lawyers and are hired quite unlike the rest of the staff of the Department of State. The LA or his Deputies and Assistant LAs fan out each year among the principal law schools of the United States to recruit and interview likely candidates much as American law firms and large companies do. In fact the Office gets a large number of applications so the hiring process is selective. Most of the staff come straight from finishing law school although some do have work experience. Some of the best lawyers, however, leave within the first five to eight years because staying would foreclose pursuing other professional opportunities. In recent years, salaries in the private sector have so greatly outpaced those in government that recruiting the ablest law graduates has become more difficult than it has been for decades. Nevertheless, the quality of the Office remains high.

III. Aggressive Legal Advising

An American legal education prepares the Assistant LA for the aggressive nature of his job. The advice of the LA and his staff will generally be solicited but often they don't wait to be asked. In this American law practice is distinctive; lawyers in America play a policy-making role in many spheres of American life and they are conditioned to take an active rather than reactive role. An Assistant LA will decide whether there is a legal problem and will offer his opinion on it as opposed to waiting for the non-lawyer to seek him out. In this way many delicate or complex legal issues which a non-lawyer might not be able to identify receive the attention they deserve. In order for the law to have a sufficient impact on policy, it may be vital that the lawyers themselves define the questions and proffer their advice.

Another scenario in which an Assistant LA must take an aggressive advisory stance is that in which a Foreign Service officer, apprehending that the course of action he would like to pursue may not be a wholly legal one, makes a conscious decision not to ask for legal advice. In this case the Assistant LA will offer his advice, albeit unasked for, and stress the importance of considering the legality of the course of action contemplated.

IV. Duties of the Office of the LA

Generally, when the Government is disposed to take action but is still considering various options, and the issue has legal aspects, the LA will be consulted. There are certain matters in which the LA is consistently involved. For example, the LA's Office plays a central role in the making of treaties. The Office will draft the treaty, often in conjunction with the substantive officer, but the 'action' on the matter varies considerably ('action' being a term of the State

Department indicating who has the initiative and continuing responsibility). Normally in drafting a treaty the action would be in the Office of the LA, but the fundamental contents of the treaty might be, if not dictated, at least indicated by the substantive bureau concerned.

The Office is also consistently involved with the settlement of disputes particularly by international tribunals and the response to unlawful behaviour of other States, through sanctions, including the use of force, or otherwise. Particularly where the use of force is at issue, however, there are conspicuous examples of cutting out the LA, either because those proposing to take action are aware that the action may not be consistent with the LA's advice, or because policy is very closely held and there is great concern about leaks. There have been some notable instances in which the Office of the LA has been involved, not in the decision to act, but in the decision to explain away what has been done. The LA is always called in to pick up the pieces even if he was not influentially involved in the initial decision to employ force. But usually he is involved. Yet perhaps it is fair to say that, in questions of great State policy, particularly those which may entail the use of international pressure, and more especially when that pressure is force, the LA's advice will tend to matter less than otherwise. However, it is difficult to generalize since each case is unique. For example, lawyers played a considerable role in shaping US policy in the Cuban missile crisis, but played no role in the decisive initial stage of the intervention in the Dominican Republic. These two events occurred only four years apart.

The Office of the LA is almost always called in on matters involving the breach of treaties, maltreatment by a State of another State's nationals, unlawful expropriation, breaches of the rules of diplomatic and consular privileges and immunities, and human rights violations. Indeed the main engine of human rights concern in the Department of State for many years was the Office of the LA. In cases of gross breaches of human rights, such as genocide or apartheid, the LA is usually quite closely involved in the fashioning of the US response.

Also included consistently among his duties are issues concerning international trade, claims, outer space, navigation, aviation and so forth, and the devising of methods to combat terrorism. However, the Arms Control and Disarmament Agency, an autonomous wing of the Department of State, has its own LA's Office. This is composed of a rather small group of some six lawyers who handle disarmament matters and the legal controls on the use of weapons. Some issues of international trade and international economics will be dealt with principally by lawyers in other agencies, such as the Office of the Special Trade Representative at the White House, and the Treasury Department.

Whether the LA is involved in decisions concerning political or military incidents generally depends on the nature of the crisis. Above all the respective policies and personalities of the President of the United States, the Secretary of State, the National Security Advisor, the LA to the State Department, the Attorney General, and so on may determine the extent of the LA's participation; it is not principally a matter of organization, charts, or any other formal criteria.

Conclusion

The weight given by the US Government to the advice of its international lawyers somewhat depends on the nature of the issue and the decision-makers involved. In the routine run of matters in which legal considerations play a part, the position of the LA is regularly factored in and generally followed. But when a bureau has decided to contest or ignore the advice of its Assistant LA and pursue a course of action which in his view violates international law, the Assistant LA will inform the LA of the bureau's intentions. If the LA supports his colleague's position, he will confront the member of the bureau involved, lending his voice to the negative advice already given. If the member of the bureau still refuses to conform his behaviour to the

advice proffered, the LA may present the issue to a higher authority within the bureau, usually an Assistant Secretary of State, often in the form of a legal memorandum. This memorandum may contain a summary of the position taken by the bureau, a review of the other options for dealing with the issue, and the legal grounds upon which the LA's Office bases its refusal to clear the bureau's position. If the Assistant Secretary of State sustains his bureau's position, the LA may appeal to an Under-Secretary of State. If the Under-Secretary refuses to accept the Office's advice, the LA can bring the matter to the attention of the Secretary of State. Although it is the official duty of the LA to ensure that the Secretary of State takes no action in violation of the legal obligations of the United States, and the LA is therefore required to inform the Secretary if such action is about to be pursued in his name (all actions of the State Department are nominally the responsibility of the Secretary of State) in practice the LA may personally contact the Secretary of State only if he is confident in the personal relationship they enjoy. If the LA has ready personal access to the Secretary, or, failing that, if he knows he will be given the opportunity to present his position on an issue following the submission of his memorandum, it's very different than if he has to rely on that memorandum alone. These intangibles actually have a great impact on the disposition of the issue.