

The Politics of International Law

U.S. Foreign Policy Reconsidered

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Preface

This book is intended for introductory students of international relations, U.S. foreign policy, international law, and policy-making in Washington. I am not one to nitpick over academic boundaries.

Its origin lay in my difficulty in finding suitably political material to use in my international law classes, and suitably legal material for my classes in international relations and U.S. foreign policy. Most of the published material on international law was written by law professors and lacks a realistic sense of the political struggle involved in applying international law to public policy. This legalistic material lacks especially a sense of the conflict between the Executive and Congress that so pervaded Washington politics in the 1980s (and even before, say from the early 1970s).

The present book tries to capture and represent international law, warts and all, as it really functions in the policy-making process in Washington. Rather than presenting that law as interpreted by the International Court of Justice or by a distinguished legal scholar, I present it as interpreted by policy-making institutions, then compare that interpretation—and especially the political factors behind it—with a more cosmopolitan view of international law oriented to a stable and equitable world order.

The question may be raised as to why I limit myself in this book to the Reagan era. First, to students, going back more than a decade seems like ancient history. While there is much to be learned from a longer historical perspective, there are sufficient lessons to be learned just by concentrating on the more recent past. I believe that one should not attempt too much in a short book designed for teaching purposes.

Second, that more recent past feeds directly into the present. For example, decisions in the Reagan era about U.S. financial assessments to the United Nations affect the Bush administration. President Bush inherited the controversy over U.S. assessments; and when Bush continued to threaten unilateral withholding of those U.S. payments, in order to block U.N. *de facto* recognition of Palestine as a state, he resurrected all the old arguments that had been brought into play both for and against

such U.S. action. By understanding unilateral withholding of assessed U.S. payments to the U.N. by Congress and the Reagan administration, one understands the context within which the Bush policy-making team considered its options.

The same type of linkage between the recent past and the present can be demonstrated with regard to other issues covered in this book, such as strategic defense and arms control treaties, refugee policy, and intervention in Nicaragua. The Reagan past contributed directly to U.S. foreign policy under Bush. When President Bush decided to use military force in Panama in the fall of 1989, his decision was facilitated by Reagan's intervention in Grenada. George Bush even used many of the same arguments employed by his predecessor in trying to justify the forcible change of government in Panama—i.e., an asserted right of intervention in the name of democracy and human rights. The two situations were not identical, but in large part they played themselves out in similar fashion. Both uses of unilateral force proved politically popular at home, while they were clearly criticized at the United Nations and the Organization of American States as a violation of international law. There were other similarities as well. The more novel and sweeping arguments by the president were downplayed by professional diplomats and lawyers, who stressed traditional international legal arguments concerning self-defense and humanitarian intervention. Understanding Reagan and Grenada provides an appropriate frame of reference, not identical but still highly useful, for understanding Bush and Panama.

In addition President Bush retained Abraham D. Sofaer as the legal adviser in the State Department, and that ensured some continuity between the Reagan and Bush administrations on international legal questions.

Finally, at the time of writing, many policy positions of the Bush administration were not entirely clear, thus precluding detailed and definitive treatment of that era.

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The central value judgment permeating this work is that the United States cannot make a lasting contribution to world order by seeking short-term national advantage, but rather will promote its most fundamental national interests by adjusting its foreign policy to the transnational and cosmopolitan values found in contemporary international law. I am highly skeptical of the long-term benefits, even to ourselves and most certainly to others, of a moralistic and crusading American manifest destiny, which tends to confuse American nationalism and advantage with stable and equitable global order.

Realistically, attempts to build world order on disproportionate U.S. advantage are likely to prove unsuccessful in the late twentieth and early twenty-first centuries, given the relative decline of U.S. power, especially economic power. Stable and lasting order must entail a reasonably equi-

table sharing of values, advantages, and benefits. One of the geniuses of the American political experience, with the major exception of the Civil War era, has been the ability to compromise, to share values, between federalists and advocates of states' rights, between northerners and southerners, between liberals and conservatives, between developers and environmentalists. This point seems largely to have escaped those who manage U.S. foreign policy, and who have confused a temporary U.S. predominance in the world after World War II with the requisites of stable equilibrium in a basically polycentric world in which power, as well as other values such as wealth, must be shared. Greater U.S. attention to the legal rules of the game of international politics, since those rules encompass a sharing of benefits over time, is in fact in the real, if long-term, U.S. national interest.

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The intellectual roots of this central value judgment, as well as of my approach in general to understanding law and politics, can be traced to Richard Falk's seminar on international law at Princeton University some decades ago. There were more recent and direct contributions to this book from a variety of persons who at least refined my biases, if they did not succeed in totally eliminating them. The manuscript was read in whole or part by Margaret Galey, consultant to the House Foreign Affairs Committee; Frank A. Sieverts, an aide to Senator Claiborne Pell, chair of the Senate Foreign Relations Committee; Larry D. Johnson, a principal legal officer in the United Nations Office of Legal Counsel; Patricia Fagan from the Washington office of the United Nations High Commission for Refugees; Margaret Crahan, Luce Professor at Occidental College in Los Angeles; Burns Weston, Murray Professor of Law at the University of Iowa; and of course Richard Falk and Francis Boyle. Lynne Rienner and her chosen readers were also more than helpful, as well as gracious, in producing the final version—the contents of which are, as usual, the final responsibility of only the author.

The University of Nebraska, through its "Congress Fund" as administered by the Political Science Department, greatly facilitated this study with a grant that made possible some concentrated research and uninterrupted writing during the summer of 1989. My graduate assistant for much of the preparation of the book, Kelly Pease, was diligent in locating material and checking sources, particularly with regard to Chapter 5. My daughter, Lindsey, then a political science major at Davidson College, read parts of the manuscript and told me what undergraduates might like or dislike, might find confusing or need elaboration. Finally, my wife, Annette, helped me recover from a brief hospitalization, which allowed a more rapid completion of this book.