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THE ROLE OF THE LAWYER IN INTERNATIONAL AFFAIRS*

FRANK J BARRY**

I was most pleased to receive the invitation of your Dean to address you on the occasion of your Second Annual School of Law Honors Day. Let me add my congratulations to those who were honored for their achievements at this Convocation. And I was also pleased to learn that the suggested theme of the Convocation address is "The Role of the Lawyer in International Affairs." For this topic allows me the opportunity to discuss an important and timely subject which is somewhat removed—although not entirely as I will illustrate a little later—from my primary responsibilities as Solicitor of the Department of the Interior. The subject is far enough removed at least that I can speak freely and candidly without the risk of reading the text of my address cited chapter and verse in briefs or memoranda filed with my office. And believe me, this is a luxury for any public official.

It goes almost without saying that the practicing attorney, particularly in areas where there exists a concentration of institutions which do business in the international sphere, or a large population of persons of foreign extraction, must become generally familiar with principles of international law even though he need not be a specialist in the subject. International law in the United States has no boundaries, for its effects are increasingly felt in all parts of the country. Attorneys, whether in private practice, the teaching profession, or public service, will discover the possibilities of rendering an important service to their country and state as well as to their clients, by becoming acquainted with basic

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principles of this important field of law. It seems to me doubly important for those of you who anticipate practicing in a border State like North Dakota.

Yet, with all the importance which we attach to international affairs and relations in this age, it is still a fact that most attorneys have little interest in or knowledge of international law. Many regard the subject as mysterious and lacking in the opportunity for practical application. His lack of knowledge makes the lawyer hesitant and distrustful of the subject.

The greatest cause of personal failure of the lawyer is just this attitude of hesitation and distrust. To fall victim to it will condemn you to a career of mediocrity. We have need for mediocre lawyers, I suppose, just as we have need for notaries public. But our need for great lawyers is much more critical—so be not afraid! Have confidence in the efficiency of your brain; have the courage to use it. Take comfort in the fact that even the greatest lawyers have had doubts of their ability. Justice Holmes once said:

Having to listen to arguments, now about railroad business, now about a patent, now about an admiralty case, now about mining law and so on, a thousand times I have thought that I was hopelessly stupid and as many have found that when I got hold of the language there was no such a thing as a difficult case. There are plenty of cases about which one doubts, and may doubt forever, as the premises for reasoning are not exact, but all cases, when you have walked up and seized the lion's skin, come uncovered and show the old donkey of a question of law.

Sometimes, of course, the lack of knowledge stems from a lack of interest. The country cannot afford this lack of interest today, when law and the attorneys who formulate and apply it are most needed for the establishment and preservation of world peace. A working knowledge and understanding of international law is an obligation we owe our fellow man—unless we make a decision here and now that such matters should be left to greater minds or that the welfare of mankind is a trivial and unworthy concern.

Emphasis on the importance of the role of attorneys in

international affairs is not a new or original idea. It would be difficult to find a more timely statement than that made by Chancellor James Kent:¹

A comprehensive and scientific knowledge of international law is highly necessary, not only to lawyers practicing in our commercial ports, but to every gentleman who is animated by liberal views, and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the Nation, if he should be found deficient in the great leading principles of this law; and I think I cannot be mistaken in considering the elementary learning of the law of nations, as not only an essential part of the education of an American lawyer, but as proper to be academically taught.

As I mentioned earlier, you will find the opportunity to use and apply the principles of international law whether you enter private practice, the teaching profession, or public service. My personal experience as an official in the public service is illustrative.

The Department of the Interior, as I am sure you are aware, has the primary responsibility for the administration, conservation and development of large portions of this country's natural resources including its public lands, water, mineral and recreational resources. These resources, while generously distributed throughout the United States, were not arranged and distributed conveniently within the political boundaries of the nations on this Continent. Many of our natural resources straddle those boundaries. Early in our history it was understood that the optimum utilization of resources required coordination, cooperation and planning on a national and international level. This coordination and planning might best describe the function of the Department in which I serve—despite the fact it is the Department of the "interior"

I do not mean to suggest that the early recognition of the need for coordination and planned development through

1. 1 KENT, COMMENTARIES ON AMERICAN LAW 20 (10th ed. 1860).

the Department of the Interior has led to the final achievement of the goal of full utilization of these resources. Many of the great political and legal battles which have forged the history of this country have been waged because of conflicting needs and uses of our natural resources. And even in this advanced age, these conflicts persist. Only recently have we seen the beginning of the end of the historic conflict between Arizona and California over the lifeblood of the Pacific Southwest—Colorado River water

Upon the issuance of the decree by the Supreme Court in *Arizona v California*,² ending some twelve years of litigation between the two states, it became possible to make plans for harnessing, developing and utilizing this great resource in the Lower Colorado River Basin. The Department of the Interior and other interested agencies (both State and Federal) are now engaged in attempting to meet that challenge with farsighted plans of development. Only this past month, Secretary Udall has endorsed and presented for consideration by Congress, the Pacific Southwest Water Plan calling for the Regional approach to the comprehensive development of the entire Lower Basin of the Colorado River

I cannot overemphasize the importance of the role which the attorneys have played in developing such plans. And, perhaps more pertinent to this discussion, I want to point out that the resolution of differences between the individual States and between these States and the United States, is largely dependent upon a knowledge and understanding of the dynamics of interstate and Federal-State relations and the legal framework within which these relations are conducted. Though different in form and protocol, the legal principles which underlie Federal-State and interstate relations, clearly derive from the basic law of nations or international law to which Chancellor Kent made reference in an earlier age.

2. 373 U.S. 546 (1963).

THE DEPARTMENTAL ROLE IN
INTERNATIONAL RELATIONS

Just as many of our great natural resources transcend the boundaries of our States, they similarly overreach our National boundaries to the North and South. The Department of the Interior has played a key role in the formulation and implementation of many of the perfected compacts between the States and Treaties between this country, Canada and Mexico. The list of such treaties, each involving the use or development of natural resources, is impressive:

1. The Rio Grande Convention, 1906,³ for the equitable distribution of the waters of the Rio Grande between the United States and Mexico;
2. The Boundary Waters Treaty, 1909,⁴ for the prevention of disputes between the United States and Canada over the use of boundary waters;
3. The Lake Of The Woods Convention, 1925,⁵ for the joint regulation of the level of the Lake of the Woods in order to secure to the inhabitants of the United States and Canada the most advantageous use of the waters of the lake;
4. The Rainy Lake Convention, 1938,⁶ for the regulation of the level of Rainy Lake and other boundary waters in the Rainy Lake watershed in the United States and Canada;
5. The Rio Grande, Colorado And Tijuana Treaty, 1944,⁷ for the regulation of the use of the waters of the Rio Grande and the Colorado River for purposes of navigation and other purposes;
6. The Niagara River Water Diversion Treaty, 1950,⁸

3. 34 Stat. 2953 (1906).

4. 36 Stat. 2448 (1909).

5. 44 Stat. 2108 (1925).

6. 54 Stat. 1800 (1938).

7. 59 Stat. 1219 (1944).

8. 1 U.S.T. & O.I.A. 694 (1950).

a joint effort to preserve and enhance the scenic beauty of the Niagara Falls and River and to provide for the most beneficial use of the water of that River;

- 7 The Columbia River Treaty, 1961, for the cooperative development and utilization of the water resources of the Columbia River Basin for flood control, power production and related purposes.

This last-mentioned Treaty provides me with an excellent opportunity for illustrating the importance of the role played by attorneys in international affairs.

The Columbia River rises in British Columbia, flows northerly and then reverses its direction and flows south across the Canadian border into Washington. The Kootenai River rises in the same area as the headwaters of the Columbia, flows south into Montana, from thence westward to Idaho and then it flows northward into Canada to join the south-bound Columbia a short distance north of the International Boundary

In 1909 the Boundary Waters Treaty was made with Canada. By its terms both nations agreed that the levels of rivers crossing boundaries would not be changed without mutual agreement.

The rivers of the Columbia Basin are affluent, but their flow is erratic. In the late summer, fall and winter they are low but when the snow starts to melt they carry torrents of water to the sea.

These torrents have done great damage in the lower basin of the Columbia but since so much of the water comes from Canada and since the best remaining sites for control of the waters are in that country, we had to look to developments in British Columbia to protect the United States' interests downstream.

Also, there are several run-of-the-river dams on the lower Columbia which do not store significant quantities of water but only raise the head so that a power drop is created and electric power can be generated.

The amount of water which comes down the river in the wet part of the cycle is far more than can be used or contained by run-of-the-river dams. The total storage on the River, including Grand Coulee, is only about 12 million acre feet.

In this factual context a treaty is the logical solution. A treaty has been negotiated and has been ratified by the United States. We are hopeful that it will soon be ratified by Canada.

The treaty provides that the United States may back water into Canada by building Libby Dam on the Kootenai River in Montana, a short distance south of the border. The United States would get the at-site power generated at Libby. The Canadians would be entitled to use the regulated flow of the river to generate power at run-of-the-river dams in Canada. This power would be retained for Canadian use.

Canada—or British Columbia—would build three storage dams, one at Duncan Lake, on a tributary of the Kootenai, one at Mica on the Columbia at the point where it reverses its direction from north to south, and one at Arrow Lakes on the Columbia just north of the confluence of the Kootenai. The total storage provided by these dams would be over 15 million acre feet, thus providing the United States with substantial flood control benefits for which the United States will pay over \$60 million.

In addition the United States will also receive substantial power benefits for its downstream run-of-the-river dams. The flood waters of Spring and Summer will be stored and will be released in the Fall and Winter to equalize the year-round flows of the Columbia and permit the continuous generation of power at our hydroplants.

This power will be divided 50-50 between the United States and Canada.

I need not point out the importance of the services of lawyers on both sides of the table in these negotiations and I need not point out that once the lawyers learned

the language and the facts they "walked up and seized the lion's skin" and found the old donkey underneath. I do not mean that they solved the problem, but their understanding and their work has provided a substantial contribution to its successful solution so far

I want to point out that the attorney's role does not end with the formulation and ratification of International Treaties. Nowhere is this more apparent than in connection with a current dispute between the United States and Mexico over the degree of salinity of the Colorado River water which the United States delivers to Mexico pursuant to the Rio Grande, Colorado and Tijuana Treaty of 1944. Under that Treaty, Mexico is guaranteed the delivery of one and one-half million acre feet of Colorado River water each year. The Treaty, however, contains no explicit provision as to the quality of such water. It reads "from any and all sources." A significant increase in the salinity of Colorado River water reaching Mexico has resulted in a serious dispute which calls for interpretation and analysis of the Treaty and a balancing of the interests involved. The analysis and interpretation of the Treaty language and of the written history of the negotiations and the application of the appropriate rules of International Law and comity are the important functions of attorneys. Even now, members of my staff are working closely with officials of the Department of State in an effort to reach a resolution of this dispute.

THE PASSAMAQUODDY PROJECT

One of the most challenging proposals which has come to my attention since I took office is the proposal to harness the tides of the Bay of Fundy in the Passamaquoddy Project. This project is still in the early stages of planning. But if these plans are to be realized and the project completed on this site, it must be a cooperative effort on the part of the Governments of the United States and Canada. The potential benefits in both countries accruing from the production of electrical power by harnessing the tides is fantastic. But like all great projects, the realization of these benefits comes only after careful study and planning by

representatives of the two countries. And again, the attorneys will have a primary role in the formulation, presentation and implementation of these plans. I cannot imagine a better opportunity for an attorney to render an important service to his country

PEMBINA RIVER PROJECT

Before I close, I want to comment briefly upon a proposed international project which is of immediate concern to each of you. In fact, this project, at some future date, may afford some of you the opportunity of which I have spoken tonight. I speak of the proposed development of the water resources of the Pembina River just north of here and extending into the Province of Manitoba.

I must assume that this proposed international project has received wide publicity in this area in view of its potential effect on the natural, economic and recreational resources of this State.

In the common belief that the combined comprehensive development of these water resources would be beneficial to both countries, the Governments of the United States and Canada have requested the International Joint Commission to investigate and report on such development. Specifically, the Joint Commission has been requested to determine what plan or plans of cooperative development of these water resources would be practicable, economically feasible, and to the mutual advantage of the two countries, having in mind:

- (a) Domestic Water supply and Sanitation;
- (b) Flood Control;
- (c) Irrigation;
- (d) Other beneficial uses.

At this time, the matter is still under consideration by the Commission. On April 7th, the International Pembina River Engineering Board filed its Fourth Progress Report with the Commission covering the period from October 1, 1963, to March 31, 1964. I will not attempt to summarize

the contents of the report. It is sufficient to state that substantial progress has been made on the study and many phases have been completed. The Engineering Board announced, in the April 7th report, that, under the present schedule, the final report to the Commission can be submitted by December of this year

The pendency of this proposal and the potential development suggested therein emphasize the immediate need for interest and knowledge of the principals of international law among the future leaders of the Bar of North Dakota. I hope that some of you will have this opportunity and I hope that each of you will have equipped yourself with the interest and understanding necessary to take advantage of the opportunity and meet the challenge.

It is unfortunate that responsible members of the Bar are sometimes ignorant and disinterested in this field. The attorney has an important professional responsibility to the community and to the country. Lawyers have been among the principal leaders in politics and have played an important role in shaping both national policies and public opinion. No segment of the population is potentially more capable of communicating an understanding of international relations than lawyers. I think it is most important that we draw on this potential and that we discharge this important professional responsibility

Ours is indeed a noble profession. Law is the only activity of man which deals directly with justice. And justice is the only reality which the mind of man has created. Television, the airplane, atomic power are merely discoveries of the nature of physical forces. But in a state of nature might would be right. The weak would perish and the strong survive. To this jungle man has added law. The effect of law has been that in our personal lives we enjoy a measure of peace instead of war, a measure of security instead of poverty and starvation, and a measure of order instead of chaos. Some lawyers have played a major part in the success of man. And today when war has become so terrible that we all could perish, the lawyers and law must help create a society in which we are safe from war.

Let me say again how much I have enjoyed being here and sharing some of my thoughts on an important and timely subject with you. Let me also thank you again for your kind hospitality, extend my congratulations to those who were honored at this convocation, and express my hope that we will meet again in the future.