**Law, Lawyers, and Empire: From the Foreign Policy Establishment**

**To Technical Legal Hegemony**

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**(forthcoming in modified form as a chapter in the Cambridge History of American Law, edited by Michael Grossberg and Christopher Tomlins)**

At the end of the twentieth century, scholars from many disciplines noted the rise of "norms" or even "legalization" in U.S. foreign policy and in the practice of international relations more generally. Legal debates about the rules for governing foreign relations and questions of how to enforce desirable laws such as those outlawing genocide or ethnic cleansing became central to international diplomacy. Even the debates for and against "globalization" came to feature lawyers, and trade debates focused on such issues as the legal standing of environmental groups in proceedings before the World Trade Organization. For many scholars, these developments marked an important and desirable shift from the "realist" focus on struggles for power and influence toward greater cooperation and rule-oriented behavior.[1] More than at any time in the past, ideas of how to build and improve laws and legal enforcement dominated the agenda of foreign policy.

This chapter uses an historical and sociological approach to examine the process of legalization (and its celebration). By tracing current institutional developments to their geneses a century ago, the chapter argues that the current situation in international relations reflects a relative success in "Americanization" abroad that also reinforces the power of lawyers and the clients they serve in the United States. Law and lawyers have been central to what can be characterized as U.S. "imperial strategies"[2] throughout the twentieth century, but the role of law and lawyers in these strategies has changed over the course of that time. In particular, we

examine the process by which the power of the so-called "Foreign Policy Establishment" (FPE) was entrenched in the workings of the law. The power became more legalized and more autonomous, which meant also that the specific power of the FPE declined.[3]

Since our sociological approach is still somewhat unorthodox, we highlight some puzzles and paradoxes that it may help to explain about internationalization and law. Our analysis explains the combination of legal idealism and instrumental pragmatism that we see in U.S. foreign policy (partly reflected in the ongoing debate between so-called realists and idealists) and the way in which champions on each side often appear to change sides or receive help from unlikely partners (such as corporate speculators turned philanthropists -- exemplified recently by George Soros). It explains the coincidence of the recent acceleration of the process of legalization at the same time as the relative demise of the legal elite that once enjoyed a quasi-monopoly over U.S. international politics. There are also some odd combinations of continuities and discontinuities that this analysis highlights. The field of human rights, as one prominent example, moved from a deep embeddedness in Cold War politics to reinvention as a weapon by opponents critical of the Cold War, and then to institutionalization as a new orthodoxy. The legalization of trade disputes has been promoted at the same time by multinational companies such as Pfizer and by leading anti-globalists such as Lori Wallach. Even the War on Terrorism promoted by the Neo-Conservatives behind George Bush can be understood better not as the rejection of "multilateralism" and law but rather as an episode in the continuing series of battles that produces and globalizes U.S. law.

Our analysis, more generally, explains why and how law could maintain its central position as the battlefield for political and economic power in foreign relations. We recognize that the content of the laws that emerge from these battles is important, as are the contests –

including those between “realists” and “idealists” -- to produce laws favoring one or another political position. We further note that the fact that the law has become more autonomous and institutionalized in recent decades also has major implications in the ability of individuals to enforce rights related to foreign policy domains. But our focus in this essay is not on the content of laws or their enforceability. It is on the process through which a particular group of lawyers succeeded – and succeeds -- in channeling successive waves of both realism and idealism, progressive and conservative politics, into a foreign policy apparatus that empowers and allows them – despite various challenges -- to manage the process in the overall interest of themselves and their large corporate clients.

A basic hypothesis of this chapter is that in order to understand the international usages of American law, we must focus on how it is produced, by whom, and in what kind of social context. A social history of American law, even one that emphasizes foreign policy, requires an examination of the mode of production of American law. This task requires an exploration of the identity of the legal elite, the principle means by which it influences the politics of law – namely, control of the producers and domination of the mode of production of law --, and the resources and strategies it employs, found through individual and collective biographies. In this way we can understand both the particular U.S. mode of production of law -- and law firms -- and how that mode has been transformed over the course of the twentieth century. Changes, as we shall see, take place both through external challenges to the legal elite embodied in the FPE and from challenges from within the legal field involving new entrants, increased competition, specialization, and a greater division of labor. [4] The internal changes increase the pressure on the generalists who once could pretend to do a bit of everything – acting as the “wise men” for the

state or business, as learned lawyers, and as idealistic visionaries. The internal changes take place and are accelerated through the process by which battles in the field of state power are fought on the terrain and with the weapons of law.

The starting point for this chapter is a narrative of the rise, relative decline, and subsequent rise, challenge, reconversion, and institutionalization of the so-called "Foreign Policy Establishment." The broad outline of the story can be depicted as a protracted and hardly inevitable Weberian movement from governance – in the sense of shaping and overseeing the government agenda – by the "charisma" of elite lawyers to the "routine" of bureaucratic institutions and a combination of "hard" and "soft law." The broad outline, however, masks the details that determine the particulars of today's contingent "rules of the game" for governance. In particular, we seek in this chapter to show how in the United States the "charisma" was situated in a recognizable group of individuals involved in contested struggles for power and how a distinctive "routine" emerged as a contested set of rules and approaches for the governance of foreign policy. In both cases, in addition, we see the role of law and lawyers in the United States as part of a multi-polar field of "quasi" state power – a field of power without a "core" but structured around three main pillars – Ivy League campuses, Wall Street, and Washington, D.C.

One result of the story examined here, as mentioned before, was that U.S. law and U.S.-trained lawyers became central to globalization and to America's relatively successful effort in the 1980s and 1990s to define and shape globalization to its ends – ends defined by the neo-liberal economists who became preeminent in the 1970s. The World Trade Organization's legal regime, as one example, sought to lock-in and legalize basic free trade principles and approaches modeled on U.S. trade law. This mostly liberal trade regime complemented the somewhat earlier

rise of a "lex mercatoria" and a system of international commercial arbitration that moved U.S. (and English) contract law and U.S.-style litigation to the center of transnational business relations. In addition to the developments in business, the international human rights movement over the last quarter of the century succeeded in elevating the place of law and human rights – and U.S.-based Non-Governmental Organizations (NGOs) such as Human Rights Watch and foundations such as the Ford Foundation – in international relations. Finally, combining human rights and business law into a recipe for legitimate governance, "rule of law" programs became central to the foreign assistance of not only the United States, but also the World Bank, the International Monetary Fund, and many European countries. These and parallel developments worked to promote "globalization" through states and economies built to accommodate U.S. business and the knowledge industry constructed to serve that business – including especially legal service providers and the investment banking and business consulting industries modeled after corporate law firms.[5]

This legalization and globalization faces challenges within the United States and abroad. The Bush-Cheney administration, in particular, has questioned the WTO, especially by asserting protection for the steel industry (even though ultimately capitulating); refused to adhere to treaties establishing an International Criminal Court, banning anti-ballistic missile systems, and seeking to regulate global warming, and used the war against terrorism to lower the profile and importance of human rights and activities directed toward the rule of law. The continuing vitality of the human rights regime is at the same time quite evident, however, especially as seen in the response to the evidence of U.S. torture of detainees taken as part of the "war against terror." Indeed, somewhat paradoxically, the Bush-Cheney administration ended up grounding the second Gulf War largely on the theory that Saddam Hussein's human rights violations justified

humanitarian intervention, and considerable resources are going into the documentation of Iraq war crimes. While quite resistant to any legalization that threatens to constrain U.S. power, even the Bush-Cheney administration takes advantage of the persistent legitimacy of human rights considerations when it serves their purposes.

In order to understand the position of law currently in international relations, this chapter will explore two closely related but separable stories. The first will be a story of the people who came to make up the so-called "Foreign Policy Establishment" (FPE). They built their powerful positions in and around the U.S. state through legal legitimacy, but they relied at least as much on their capital of personal relationships, business connections, and social class. Legal authority was a key basis of their power, but their investment in the law itself was relatively light. Their role can be explored by looking at some of the central figures from the origins of the FPE late in the nineteenth century to its apotheosis in the 1960s. The challenges to the FPE represented especially by the Vietnam War and a series of economic crises will then be highlighted. The second story will address the more subtle issue of the actual investment in law and "legalization," evident prior to World War I but only gaining substantial importance – and a much greater degree of institutionalization (or autonomization) – well after the end of World War II.

This chapter is based in large part on our jointly published works. Our first book examined the development of international commercial arbitration in the period after World War II.[6] The second explored the transformation of the U.S. state since the 1960s and the transformation in globalization processes based on the import and export of U.S.-based technologies and approaches – including legal ones.[7] The chapter is also based on work in progress that focuses more specifically on the rise of the FPE and the role of law in U.S. colonial ventures, especially in the Philippines. These different research projects share an approach that

links domestic political and economic developments to those that take place internationally. "Palace wars" for control over the national state are often fought on international terrain.

**From Servants of Big Business to Lawyer Statespersons: The Invention of the Foreign Policy Establishment as a Means to Legitimate that Service, Make it More Valuable, and Protect the Long Term Interests of Themselves and their Clients**

The activities of the founders of the FPE can only be understood in relation to the rise of the new industrial class in the late nineteenth century connected to the railroads, the banks, and the emerging oil industry – centered ultimately in New York City.[8] The economic transformations presented both opportunities and risks to lawyers.[9] One risk came from the way the so-called robber barons used legal hired guns instrumentally to defeat their competitors.[10] Lawyers who served them became identified with and somewhat tainted by the businesses and business tactics they served. There was opposition within the more traditional, litigation-oriented, bar to these alliances, which threatened the legitimacy of a profession beginning to organize and become more self-conscious.[11] The continuing mode of production of U.S. law can be traced to the handling of this professional crisis of legitimacy.

The rising corporate bar in New York City adopted a variation on a traditional strategy of building a relative autonomy from their clients in order to make their expertise more valuable and their own roles more legitimate. They invested in regulatory law, including antitrust, and in the state through politics in the Progressive era and beyond. This investment took place at the local level, involving municipal justice and good government,[12] but it was also found in the effort to build a legitimate but active foreign policy[13] coinciding with the interests of their clients in expanding their markets[14] and avoiding losing ground as other powers expanded their empires.[15] The success is evident from the fact that elite lawyers dominated the FPE[16] and more

generally by the ability of the corporate lawyer as "lawyer-statesperson" to embody the elite of the legal profession and to shape its norms and values.

The strategy of this group of lawyers serving business was a mix of professional and technical investment. It was also a learned strategy. The corporate law firms led by the Cravath firm invested substantial resources in the law schools and in the science then being developed through the case method pioneered at Harvard. Those who excelled at the case method were invited to join the leading corporate law firms. The elite law firms valued and gained value through their close ties to leading law schools and by claiming the top graduates. Part of the state strategy for the law firms and their clients involved the mobilization of social capital to help civilize the robber barons into philanthropic patrons -- led by the Carnegie and Rockefeller foundations.[17] In this way the aspiring legal elite could use their clients to enhance the public arena, including foreign affairs. They could broker the interests of business and the state from positions of close proximity to both.

This ambitious strategy, which produced a unique group of elite corporate lawyers central to institutions of governance, required an initial accumulation of symbolic capital -- combining social class, elite school ties, meritocratic criteria, political investment, law firm size, and entrepreneurship. The professional firms were able to combine the social capital of the well bred cosmopolitan elite with the ambition and talent of meritocratic newcomers promised partnership if they could succeed as associates. Sullivan and Cromwell provided a perfect example, with Sullivan bringing ties to an old family and Cromwell the entrepreneurial drive of the outsider.[18] The pattern was repeated often, for example with the absorbing much later of Irish and Jewish litigators into the corporate law firms.

The Wall Street law firm – often termed the Cravath model – became the

institutionalization of this double agent strategy. Law firms served as buffers and crossroads between academia, business, and the state. This double agency can be seen as an institutionalized schizophrenia, according to which the lawyers would alternately seek to find ways for their clients to avoid state regulation and find ways for the state to regulate their clients.[19] The practical result was that it allowed the lawyers to construct rules to protect and rationalize the power of their clients, to build the need for their own professional services, and to gain some power in the state and economy.

The professional firms structured to serve corporate clients increasingly sought to cultivate the image of learned gentlemen of the law. [20] Especially as they became older, they sought to gain more respect and recognition. The elite Wall Street firms balanced their profits with a certain amount of noblesse oblige. There was very little competition among the top firms, and the relations with clients were organized in an almost familial mode. The group at the top was relatively small and socially homogeneous, comprising an exclusive cadre of old boys groomed and trained in elite institutions led by Harvard and Yale. Corporate law in this way became the core of the Eastern establishment in the United States. Law in the United States became closely linked and identified with the reproduction of an establishment built around the state and a fraction of the corporate world closely linked to (and dependant on) state resources and patronage.

The links between lawyers, business, the academy, and the state were openly recognized and built into the system, and the system was cemented by other institutions such as the press and the philanthropic foundations. Well-connected and ambitious undergraduates easily came to the conclusion that, in the words of Kingman Brewster, a direct descendent from the Mayflower, Harvard Law professor, and President of Yale, describing the 1940s, “on to law school, not to

become a lawyer but because it seemed like the best way to move forward without burning any bridges."[21] Such a "non-decision" assumed that one available base, source of financial security, if necessary, and network of like-minded friends, was the elite corporate law firm. When Cyrus Vance, for example, left the Department of Defense in 1967, he went to Simpson, Thatcher because he "had five children approaching college age, and having depleted his savings after six and a half years in government service, 'I simply had to get back and earn some money'."[22] And the base in the corporate law firm facilitated service on various business and philanthropic boards, including oversight of the elite universities and law schools.

The career of Elihu Root, who became Secretary of War under McKinley in 1899 in the period of the Spanish American War, shows how this mode of production of law and lawyers developed and how it led to investment in foreign affairs. Root at the time of his appointment was already quite prominent as a corporate lawyer. His clients included the infamous Sugar Trust, which he helped survive the threat embodied in antitrust legislation. He also made his name by investing in good government generally through the Republican Party in New York, including close ties to Theodore Roosevelt. As a generalist lawyer with cosmopolitan connections and a reputation for good judgment, Root made sense as a trouble shooter for the new and problematic colonial ventures. A key task was to deal with the continued resistance in the Philippines to the U.S. occupation and colonization and in the U.S. to the idea of the U.S. as a colonizing power. Root brought the same approach to foreign affairs that he did to New York City – serving the general interests of his clients and seeking to build legitimacy for the world in which they operated.

Root had to work to overcome the traditional U.S. idea that colonialism was inconsistent with U.S. legal and moral values. [23] McKinley and Root enlisted Judge William Howard Taft to

help respond to the challenge. Taft, then the presiding judge of the Sixth Circuit Court of Appeals and dean of the law school of the University of Cincinnati, accepted the position in charge of the Philippines effort. The work to build a new government in the Philippines, he stated, was "a national obligation, indeed a 'sacred duty.'" He would "create a government adapted to the needs of the Filipinos, one that would help to develop them into a self-governing people."[24] In line with Root's ideas, Taft led "the effort of the United States to transplant its values and institutions in the Philippines."[25] According to Taft, "We hold the Philippines for the benefit of the Filipinos."[26]

These lawyers sought to defend a U.S. brand of colonialism through this moral facade, both as a way to make it more legitimate – at home and abroad – than the more traditional Spanish colonialism that it replaced and to offer legal morality as a kind of civic religion to substitute for the conservative Catholicism that was a key component of the Spanish model of colonization. There were, of course, real economic interests and concerns underlying this U.S. assertiveness abroad, but the business concerns were combined with idealism that these corporate lawyers encouraged and expressed.[27] Foreign involvement was an opportunity to transplant the universal U.S. values which they represented.

Some sense of this role of law can be garnered from testimony of one of the dominant "civilizers" in the Philippines. George Malcolm was a young law graduate of the University of Michigan who went to the Philippines in order to "see my country initiate a system of ever increasing self-government for the Philippines ... [and] to take a stand in favor of resolute adherence to America's revolutionary anti-colonial policy."[28] Through entrepreneurial initiative, he helped to establish the University of Philippines College of Law in 1911, and he became the first dean. His goal with the law school was "the training of leaders for the country. The students

were not alone tutored in abstract law dogmas; they were inculcated with the principles of democracy." One of the graduates in 1913, who "established the reputation of the new school by topping all candidates in the Bar examination,"[29] was Manual Roxas, who became the first President of the Philippine Republic. The career of Roxas reflects the double strategy of the elite U.S. lawyers. One was to ally with – and even help to produce – their counterparts in the Philippines. The second was to support a moral and legal facade capable of aligning the colonial venture with U.S. values – including the idea of U.S. exceptionalism from the despised world of European colonialism.

The U.S. leaders used their Philippines experience -- and its very high value on resumes at the time -- to build their arguments for comparable approaches in U.S. foreign policy more generally. Expressing hostility to colonial empires, for example, Taft as President of the United States sought to open markets for U.S. business as an aspect of "dollar diplomacy" – designed to supplant military strategies while facilitating U.S. prosperity -- through trade and investment rather than new colonial conquests. Dollar diplomacy led the way to the policies of Woodrow Wilson, who succeeded Taft as President. Those policies are often mistakenly characterized as policies of "idealism," when in fact they reflect the same mix of interest and ideals found in the legal elite's formula combining clients and civic service. The ideals were consistent with a worldview in which the lawyers and their clients would prosper.

Henry Stimson is another of the most prominent members of the FPE, and he too combined colonial service in the Philippines with corporate law and government service at home. After Andover, Yale, and Harvard Law School, Stimson in 1890 took advantage of a family friendship to secure a position working for Elihu Root. When Root became McKinley's Secretary of War in 1899, he turned over the law practice to his two partners, one of whom was

Stimson. The law firm of Winthrop and Stimson thrived by representing the trusts and moving toward specialization in "national and increasingly in international business."[30] Stimson's personal ties and professional stature led him to be appointed Secretary of War by Taft in 1912.

When Stimson returned to the practice of law, he also resumed service on behalf of large corporate interests. He later returned to the government as the Governor General of the Philippines in 1927, a year later becoming Herbert Hoover's Secretary of State and still later Secretary of War for Roosevelt and Truman (1940-45). Individuals close to Stimson, many of whom worked with him during World War II, including Dean Acheson, William and McGeorge Bundy, Cyrus Vance, and Elliot Richardson, were active well into the 1970s.[31]

After World War I and the failure of the U.S. to join the League of Nations, a group of these elite lawyers and others formed the Council on Foreign Relations (CFR) to keep alive the case for active U.S. engagement with the international community.[32] They worked closely with counterparts in Europe representing comparable mixes of social, legal, and state capital.[33] As indicated by the early leadership of Elihu Root and John W. Davis,[34] these activists were also leading corporate lawyers. Davis himself was J.P. Morgan's lawyer. He combined his representation of the J.P. Morgan interests with a strong internationalist portfolio including the CFR, which he headed for twelve years, and service as Ambassador to the Court of St. James.[35] John Foster Dulles, later Eisenhower's Secretary of State, fit the same mold. Dulles joined Sullivan and Cromwell prior to World War I, played a role as a young man in negotiations at Versailles, and went on to a career representing major corporations – including United Fruit -- and supporting an internationalist foreign policy. He wrote one of the articles in the first issue of Foreign Affairs, the journal of the CFR. Paul Cravath – another pillar of the corporate law firm world – also became a director and vice president of the CFR at the time it was established. In

the era of so-called isolationism, the Council on Foreign Relations continued to promote interest in international relations: "To oppose isolationism had been the bedrock of the Establishment's policy during its years in the wilderness...."[36]

It took World War II, however, to bring the individuals associated with the CFR to the pinnacle of power, and it took the Cold War to maintain and further build that position. Regional divisions in the United States between "American First nativism and pro-interdependence globalism" were put aside. As noted by the Silks, "Above all, there was the Communist threat. Resistance to the more humanitarian forms of foreign aid gave way before the ready argument that this was designed to hold off the Russians. Indeed, in many quarters this was the only argument that worked."[37] John J. McCloy noted the importance of the CFR in the 1950s: "Whenever we needed a man,…we thumbed through the roll of Council members and put through a call to New York."[38]

McCloy, as the emblematic figure of the FPE from the 1940s until the 1960s, merits elaboration. John Kenneth Galbraith designated McCloy the "chairman" of the Establishment. According to Kai Bird, McCloy's biographer,

> "His story ... encompasses the rise of a new national elite, composed largely of corporate lawyers and investment bankers, who became stewards of the American national-security state. Beginning in the 1920s, these men formed an identifiable Establishment, a class of individuals who shared the same social and political values and thought of themselves as keepers of the public trust. Unlike the British Establishment, from which the term is borrowed, the American Establishment was dedicated not to preserving the *status quo*, but to persuading America to shoulder its imperial responsibilities."[39]

McCloy began his career at the Cravath firm just after World War I and eventually helped establish another "white shoe" firm, Milbank Tweed, which was the vehicle for his legal representation of the Rockefellers. His career included service as the High Commissioner to

occupied Germany after World War II, the President of the World Bank, the Chair of the Ford Foundation, and Chair of the Council of Foreign Relations, to name a few of his positions. He was also, in Bird's words, "legal counsel to all 'Seven Sister' oil companies, a board director for a dozen of America's top corporations, and a private, unofficial advisor to most of the presidents in the twentieth century."[40]

The apotheosis of the FPE came in the Kennedy administration. The social profile, professional trajectories, and the political opinions of Kennedy's "action intellectuals" from Cambridge suggest their continuity with the FPE. Not all were corporate lawyers. Comparable careers could be made by circulation among the various institutions dominated by the legal elite, including the related career of investment banker, but the members of the FPE were all cut from the same mold. The central figure of the Kennedy administration, for example, was McGeorge Bundy, the principal organizer of Kennedy's elite group and later advisor to the President for foreign affairs. Bundy was a direct descendent from a traditional Eastern WASP family, a graduate of Yale, and the son-in-law of Dean Acheson -- one of the famous "wise men" of the foreign policy establishment.[41] Bundy's cosmopolitan career also included service as a very young dean of the Harvard College of Arts and Sciences, the Council of Foreign Relations, National Security Advisor, and finally the leadership of the Ford Foundation, which he directed from 1967 to 1979. Unlike his father, Harvey Bundy, and brother, William Bundy, he did not attend law school, but he was close enough to law to be offered a clerkship by Felix Frankfurter.[42] Bundy's generation and close circle of friends also included Cyrus Vance, then in his first government service with the Department of Defense (and whose father figure was his close relative, John W. Davis); Kingman Brewster, the President of Yale from 1964; Eliot Richardson, Secretary of State and of Health Education and Welfare under Nixon, and John

Lindsay, Mayor of New York City.

The brief account of the names and influence of lawyers in the FPE attests to the importance afforded to lawyers and legal training in U.S. governance, especially after World War II. Yet most general historical accounts of foreign policy during the Cold War pay almost no attention to law itself. The neglect is not an oversight. Neither the opening of markets and protection of investments, nor the attention to development in the third world, nor the mobilization of foreign policy against Communism drew very much on law. The academic influences behind the policies were the "realists" represented by scholar/political activists such as George Kennan, Hans Morgenthau, Reinhold Niebuhr, and Arthur Schlesinger, Jr., all of whom built their position by attacking remnants of "Wilsonian idealism," seen as "legalistic" and "moralistic." They scoffed at the idea that international relations might be grounded in international law and legal institutions. Even as late as 1968, for example, Dean Acheson scolded an audience at the American Society of International Law for confusing what the law is with what they wanted it to be by invoking international human rights.[43] The rhetorical posture against Wilsonian idealism, however, exaggerated the differences between these individuals and their predecessors in the FPE.

This relatively weak position of law over the entire period is not difficult to explain. Elite lawyers, it is true, were quite important as the embodiment of the establishment. Indeed, they had much in common with the law graduates who occupied similar positions in other countries. Prominent examples include the law graduates who dominated the state in Brazil or Chile.[44] As in Latin America, in addition, legal elites also served as advisors to business, as business leaders themselves, and as intellectuals, professors, and reformers in and outside of the government. To be sure, the mode of production of law differed in key respects between Latin America and the

United States, but in both cases a key source of the power of the legal elite was a relative lack of investment in pure law and legal institutions -- or, put another way, a diverse portfolio of capital that could be drawn upon at different times.[45] These lawyers were at the top of the legal profession despite activities that relied relatively little on the formal law or legal institutions. And they were at the top of the social and political structure because of a combination of activities and connections that placed them above the mundane world of law. A relatively few people could occupy and rotate among a large number of power bases.

The FPE in the same way was able to dominate a number of related bases, including the elite campuses, exemplified by MacGeorge Bundy's leading position at Harvard (despite only having a B.A.) and Kingman Brewster's presidency of Yale; the philanthropic foundations, including Ford and Rockefeller[46]; the State Department; the media, especially the leading newspapers exemplified by the New York Times;[47] and representation of the major U.S. corporations and financial institutions. All these individuals were generally united on the goals and tactics of the Cold War, which were of course quite consistent with their vision of the interests of the clients of the elite law firms that provided the glue that linked the other institutions. "Bipartisanship" in foreign policy safeguarded the power of the FPE and those they represented.

It also was consistent with a foreign policy built around collaboration with elites in the fight against Communism. The approach can be seen in the Cultural Cold War under the CIA and in the many related programs supported by the Ford Foundation and others. From the perspective of the Ford Foundation, for example, it almost did not matter what kind of economics it supported as long as the programs made friends for the U.S. (e.g., Chile). Similarly, in the Philippines the policy was to build friendly leaders – largely from among the traditional

Philippine elite – rather than truly to reform the state or state policies. The "modernization" theory on the campuses of the elite schools fit this mission perfectly with a scholarly rationalization for the search and support of "modernizing elites." That was also the strategy at home, where the FPE participated strongly in the reformist policies associated with a relatively activist state governed with a large dose of noblesse oblige.

Lawyers were not, of course, the only important group holding the elite together. Particularly after the depression, economics became another important academic home, but mainstream economics was not inconsistent with the methods or approach of the lawyers. Within the Kennedy administration, for example, Walt Rostow's recipe for developmental assistance entitled "The Stages of Economic Growth: An Anti-Communist Manifesto" fit the Cold War strategy perfectly (and the politics of his lawyer-brother, Eugene Rostow, the Yale Law School Dean before joining the government). One of Walt Rostow's collaborators at MIT, Max Millikan, also an economist, was a key leader of the CIA in the 1950s and beyond. The general consensus survived largely because the Cold War masked these and other tensions and conflicts. The legal establishment easily assimilated these challenges. Similarly, to the extent that the attack on Wilsonian idealism by non-lawyers was an attack on law in the name of a new field of international relations in the United States, it could also be absorbed and even used to bolster the position of the FPE above the law -- and therefore relatively unrestrained in the tactics they could promote as part of the Cold War.

The general assumption is that the power of the FPE has declined substantially in the United States, and further that the lawyer-statespersons so important to that power are also on the road to extinction.[48] Lawyers and law professors are proliferating calls in one form or another for more such lawyer-statespersons.[49] The number and weight of these panegyrics suggests that

there is something to their analysis, even though it also serves tactically to promote individual claims to embody the traditional virtues of the lawyer statesperson. More importantly, however, the asserted decline is not inconsistent with the fact that the legal project connected to the lawyer statespersons has in many respects triumphed.

Law and legal approaches are far more important in foreign policy than they were in the past. This apparent paradox can be explained by examining the challenges to the lawyer statespersons and the Foreign Policy Establishment that took place in the 1960s and beyond. The effect of the challenges was to undermine the ability of lawyer statespersons to occupy multiple positions while at the same time transforming and deepening institutional investment in the law – and the legal role as broker of choice for the Ivy League, New York, and Washington, D.C.

**Challenges and Responses: Legalization in a New Division of Labor of Domination at Home and Abroad**

The Vietnam War and the civil rights revolution of the 1960s were the obvious manifestations of a profound challenge to the power of this legal establishment. By the end of the 1960s, the FPE was certainly on the defensive, leading to the rise of the new right, the Presidencies of Richard Nixon and Ronald Reagan, and the two President Bushes. The Eastern establishment Republicans such as John Lindsay and Elliot Richardson lost their place in the Republican Party. More generally, seen in all the presidential administrations, the relatively liberal and reformist minded – or "progressive" – establishment gave way to a much more conservative social and economic orientation.

This change is often depicted as an ideological shift, an abandonment of the relatively progressive political agenda of the 1960s and 1970s. The ideological story is appealing, since it suggests that another ideological "change in direction" would return to an age of social

progressivism. The ideological story also distracts attention from the interests involved in the transformation and those who served them. The more complex story can be traced by using the FPE to focus on the field of political power. Challenges and continuities revealed through this analysis help to explain the complex role of law in relation to corporate power and globalization.

The general sociological and historical approach here, based on Bourdieu's reflexive sociology, is to examine contending forms and amounts of capital doing battle within more or less autonomous fields – including especially the field of state power. The description of the leaders of the FPE over the course of the twentieth century is one of the reproduction of elites (with the addition of a relatively few meritocratic entrants, including for example McCloy) who attended the same prep schools and colleges, worked at the same law firms, represented the same clients, and knew each other and each other's families very well.[50] They built a distance from their clients that in the United States allowed them to serve in the place of a European style state. In the interests of winning the Cold War, preventing domestic turmoil, and protecting their own position, they worked on behalf of a reformist state through the institutions they controlled – including the state itself, the philanthropic institutions,[51] and the elite universities.[52] They embodied the realism of their clients' interests and the noblesse oblige/ idealism that also served to define them as lawyer-statespersons.

One key element of the various challenges was built on a contradiction internal to the system that reproduced the FPE. The reformist policies of the Eastern establishment, accelerated by World War II and the GI Bill, contributed to an opening up of the elite educational institutions, which helped to build the relative autonomy of the Ivy League and the enlargement (again in relative terms) of its social recruitment.[53] This enlargement helped to open the networks of power of the establishment to new arrivals, less disposed to accept the traditional hierarchies

and orthodoxies. The demographic element underlies much of the pressure on the establishment that emerged over the 1960s and 1970s in the United States (and elsewhere in the world).

A second challenge includes the escalation of the Cold War after Castro came to power in Cuba, the problems of that escalation represented by the Vietnam War, and then the consequences of failure in Vietnam. The war cut the FPE off from the campuses and the idealists who had helped bolster their role, and eventually the war divided the FPE itself. The bipartisan consensus that kept the FPE united failed to hold together, especially with the pressures that came with the demographics of the new set of actors. They new actors challenged the establishment for failing to adhere to its professed ideals and invested much more in the law itself, since they did not possess as much social capital as the FPE. New actors mounted political, academic, and other challenges, including "exposing" the FPE, the "power elite," and the connections between, for example, the CIA and a number of notable academics. Many of the protégés of the FPE split with their mentors and worked actively to defeat them.[54]

A third challenge was economic. It became more difficult to combine Cold War expenditures, the social policies associated with liberal reform, and the Bretton Woods trade system then leading to huge U.S. deficits – especially with Japan. The oil crisis of 1973 was the last straw, leading to a fundamental challenge to the relatively activist state that had prevailed since the depression of the 1930s. Expectations of reform had here too been exacerbated by the demographics of the 1960s, which accelerated the demands for reform and therefore the pressure on business to find a way to curb those demands. The literature from the right and the left at the time on the "crisis of the state" was consistent with this analysis. Kabaservice's study of the "liberal establishment" accordingly notes that Brewster at Yale, Bundy at the Ford Foundation, and Lindsay in New York all found their ideals thwarted to a large extent by the problem of

shrinking resources. The perception of economic crisis helped shift attention and credibility away from Keynesian economics toward the emerging neo-liberalism associated with the University of Chicago. Nixon said "we are all Keynesians," but soon after the orthodoxy changed through an alliance among Chicago economists, business leaders, and a supporting media led by the *Wall Street Journal.*[55]

A fourth challenge, present in varying degrees throughout the twentieth century but exacerbated by the economic crises and the demographic transformations of the university, was to the generalist expertise of lawyer statespersons. Challenges from political science and economics have already been mentioned. The most powerful of the academic and professional challenges, linked to economics, came from the business schools, which gradually gained power and credibility over the course of the century. They moved from low status schools of commerce to high prestige institutions producing a competing (but also complementary) elite group.[56] Academic challenges from outside the law also became resources used by those investing more deeply in the law.

Each of these challenges can be presented as an external one, but they were exacerbated by crises that can be conceptualized as internal to the mode of the production of the legal elite. The members of the FPE, as noted, invested in a variety of organizations that together supported and defined the establishment. They encouraged the idealism and scholarship connected to the law schools and the foundations, for example, and they supported efforts to make their leadership more legitimate by making more space for new and more meritocratic arrivals. After World War II, in fact, a group of establishment leaders – despite denunciations as traitors to their class – worked to open up and "modernize" the Ivy League and the foundations confronted by the anti-

war and civil rights movements.

The leading individuals of the liberal establishment in these transformations comprised a small group with very privileged backgrounds and close personal ties, chronicled recently in a book on Kingman Brewster and his circle – MacGeorge Bundy, John Lindsay, Paul Moore, Jr., Elliot Richardson, and Cyrus Vance.[57] Four of the six were law-trained at Harvard or Yale, and all four worked at one time or another as corporate lawyers. As modernizers, they all to some extent participated in what Kabaservice describes as Brewster's project at Yale: "By reducing the weight of inheritance, wealth, and social standing in admissions, Brewster was helping to shrink the power of the WASP elite, even while he was gambling that its influence would be redistributed to other, rising groups."[58] The modernizers sought to accommodate those who, lacking the social capital of the WASP elite, invested much more strongly in moral virtue, scholarly capital, and the law itself. They recognized the need to embrace and support the civil rights and feminist revolutions of the 1960s.

With the changing demographics, furthermore, these investments led to further growth, specialization, and the social diversification of recruitment. The new entrants pursued the professional strategies and investments pioneered by and controlled by individuals who had themselves invested only a little in a whole range of institutions. The new adversaries challenged each other by borrowing from (and therefore enriching) the same repertory of legal tools and moral arguments used to legitimate the FPE and its role. They also succeeded in deploying those tools to represent both the challengers and the defenders of the power and policies of the FPE. They made the legal battlefield central to the contest for power.

Finally, as described in more detail below, the FPE's efforts to accommodate the forces

for change of the 1960s and 1970s faced not only an economic but also a social challenge that ultimately produced the New Right. The New Right, as we shall see, specifically challenged the "liberal elite" as out of touch with "Middle Americans" – as privileged elites fomenting social rebellion and permissiveness.

The story of the internationalization of American law thus shows both contrast and continuities between its genesis by pioneers and its further rationalization and autonomization by the later generations. By definition, law represented only one of the resources in the portfolio of the founding fathers; therefore it was only one of the objectives in their complex agenda of power. Yet, even if their investment in law was relatively limited, it had been successful enough to induce their followers to push it further – and to work to channel competing social and economic interests towards confrontations in legal terms.

The multiplication and control of so many positions and institutions around the state, coupled with the claim of the "wise men" that they needed to be trusted to fight the Cold War, had given the FPE substantial autonomy in the implementation of policies on which they could generally agree. Every one of their sources of power -- family, corporate-state alliances, academic legitimacy,[59] philanthropic foundations,[60] the state,[61] and the Episcopal Church[62] -- was subjected to challenge.

The internal and external challenges led to some understandable defensive responses. One organizational embodiment of the perceived response was the Trilateral Commission, established in 1973. Led by David Rockefeller and funded appropriately by the Ford Foundation among others, the early documents provide a list of virtually all the factors mentioned above. It sought to revive the establishment as an antidote to the "excesses" of democracy seen in the

1960s. Not without some successes, the Trilateral Commission became part of the story of transformation that we explore in this chapter.

The story of challenge and response could be traced in many spheres of domestic and foreign policy in the United States. The focus of this chapter is on foreign policy, and we therefore will concentrate on a few specific attacks and responses selected to account for important details of the legal rules – and a more general legalization – that became characteristic of foreign policy in the 1980s and 1990s. The following sections will focus on the accumulation of investment in international human rights, the development of a legalized trade regime, and finally the emergence of international commercial arbitration as a means to legalize business disputing globally. It will also discuss the emergence of an industry promoting the rule of law as a means to institutionalize what was called the "Washington Consensus"; and the movement that allowed other service providers – namely business consultants and investment bankers – to share and in part shape the field of business/legal advice. The processes described here point to more general implications about the role of law that could be applied in other settings.

**International Human Rights**

International human rights concerns and organizations played a very small role in the first two decades of the Cold War.[63] Drawing on their own global networks and their access to a variety of domestic centers of power, the lawyer statespersons of the FPE invested in human rights, but the activity came mainly in response to the Soviet support of the International Association of Democratic Jurists (IADJ), which had been very critical of Macarthyism in the early 1950s. John J. McCloy, then the High Commissioner for Germany, joined with a small group of political lawyers close to him -- including Allen Dulles, then President of the Council on Foreign Relations and Deputy Director of the CIA -- to respond to the IADJ. They feared it

had “stolen the great words-- Peace, Freedom, Justice.”[64] With funding and administrative support provided by the CIA, they created the International Commission of Jurists (ICJ), located it in Geneva, and entrusted it to the management of a group of notables in their own image: “The AFFJ (American Fund for Free Jurists) directors favored the Council on Foreign Relations approach -- the organization of a highly exclusive elite, selected and governed by a small inner circle.”[65]

The ICJ recruited well-known persons from the academic or diplomatic worlds to serve as secretaries-general. Those who served included Norman S. Marsh, barrister and fellow of University College Oxford; Jean Flavien Lalive, an eminent Swiss jurist who had held leading positions in the International Red Cross, the United Nations, and the Court of Justice at the Hague; Sir Leslie Munro, ambassador from New Zealand and president of the UN General Assembly; and in 1963, Sean McBride. McBride, one of the founders of the Council of Europe and a signatory of the European Convention on Human Rights, was especially active until his dismissal in 1967 when the CIA's involvement was made public.

This human rights strategy was inseparable from the Cold War strategy linked to the FPE and implemented in all the major institutions in and around the U.S. state. There was little difference in this respect between the Ford Foundation and the CIA. Both were enlisted in a fight that was organized in part as a search for high prestige friends who would fight communism (and reinforce the power of their counterparts back in the United States). Law was relatively unimportant in the struggle at the time. The ICJ was reactive, created to provide a counterpoint to the IADJ. Despite the relative lack of importance of the law except for the legitimacy and cover it might provide for politically motivated activities, the ICJ did in fact develop legal expertise and a group of individuals schooled in human rights and willing to invest that learning and

experience in other organizations where their expertise would be valued and where they could build their careers.

The move from the ICJ (and related organizations) to a greater institutionalization of human rights came from a variety of investments and circumstances. First, there was the group of individuals who tried to take the ostensible ideals of the ICJ more seriously. Several, for example, were active in the establishment of Amnesty International in 1961 in Great Britain. Seeking to remedy some of the perceived inadequacies of the ICJ, the founders of Amnesty International sought to gain more influence for human rights arguments (and their own expertise) through a mass organization financed exclusively by activists and characterized by " a quasi-obsessional identification with neutrality."[66] They sought systematically to focus the attention of the media on their campaigns and activities. They also gave priority to prisoners of conscience punished for the expression of their opinions, and they excluded those who had committed or encouraged acts of violence.[67] The obsession with neutrality did not prevent many from thinking that Amnesty was a leftist organization, but it helped to build legitimacy in the 1960s,[68] particularly after the revelation of the ICJ's links to the CIA put it on the defensive. The growing legitimacy helped put Amnesty and others who had increased their investment in human rights ideals into a position to take advantage of a series of events and crises that occurred in the late 1960s and early 1970s.

Although beneath the radar screen of the Cold War at the time, there was also some academic investment in a positive law of international human rights. The post-war quest to make law in this domain began with the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948 through work of a Commission chaired by

Eleanor Roosevelt. As the Cold War took shape, however, investment in this domain was quite small -- relatively marginal to international law and to foreign policy in the United States. As part of the law schools' increasing focus on scholarship, a few scholars linked in one way or another to human rights issues began to invest in this domain.

The first U.S. casebook on international human rights was published in 1973. The authors were two scholars born in Europe, Louis Sohn and Thomas Buergenthal, both somewhat out of the legal mainstream.[69] They drew extensively on European developments and quite self-consciously pulled together whatever might contribute to build law. The authors of the second casebook, Richard Lillich and Frank Newman,[70] followed the same strategy. These works of legal idealism and promotion began to gain some academic respectability in the 1970s, but the effort was not always easy. One of the early promoters of the field stated that the leaders of the American Society of International Law – still under the sway of the FPE-- had argued that "human rights is not really law." Even worse, according to the leaders of the FPE, impractical idealism should not overstep the focus of the Society on the law as it is.

The circumstances surrounding the presidency of Richard Nixon reflected a challenge to the hegemony of the eastern establishment. The challenge came from generational and other divisions about the war, symbolized by the Chicago Democratic Convention of 1968, which split the Democratic Party and made possible Nixon's election. The doves on one side of that division were crucial in responding with an increased investment in the field of human rights. The Congressional mandate to take human rights into account in foreign policy, in particular, was sponsored by Donald Fraser, a Minnesota Congressman who had earlier been a leading liberal protégé of Hubert Humphrey. Reacting to the revelations of the role of the CIA in the fall of Allende, he and some activist members of Congress joined with the pioneer academics, including

Frank Newman, to "put the country on the side of angels, by using human rights as the touchstone of US foreign policy."[71] Drawing extensively also on Amnesty International and the now revitalized International Commission of Jurists, Congressional staffs produced a report on "Human Rights and the World Community" (1974) which led to legislation calling for the State Department to deny certain assistance to countries "committing serious violations of human rights."[72]

The key link between these idealists and the fights in the field of power was evidently Newman, the former dean at the University of California-Berkeley (and later California Supreme Court Justice). He came to this interest in human rights law through an acquaintance with the International Commission of Jurists in Geneva in the late 1960s (where he went for other reasons). He worked on the ICJ case against Greece in the U.N. in the early 1970s, in the process developing materials that became central to the text that he and Lillich produced. Newman was reportedly the architect of the legislation enacted into law in 1975. The idealistic strategies of these scholars on the margin of international law thus played into U.S. palace wars, helping to provide legitimacy for the liberal Democrats' attack on U.S. intervention in Chile.

Amnesty International's investment in neutrality similarly paid dividends after the coup that brought Pinochet to power – along with the military's "Dirty War" in Argentina. The process that produced this emphasis on human rights on both sides revealed the response to the attacks on the FPE and their counterparts. In Chile, the reformist elite removed from power and persecuted by Pinochet searched for legal arguments that would gain international support. They found that the invocation of international human rights gained credibility with the *New York Times* and others, including the Chilean representatives of the Ford Foundation, who had made friends and supported many of those now persecuted by Pinochet.

The idealists in the Ford Foundation offices caught the attention of MacGeorge Bundy, head of the Ford Foundation since 1966, and persuaded him that the public interest law he was supporting at home should also be implemented abroad. Ford proceeded to fund organizations in the United States and in many other countries to support this legalization, and it required the same kind of links to establishment boards and corporate law firms that Ford had required of the public interest law firms in the United States to ensure their respectability. The Ford Foundation became the leading provider of funds to human rights organizations, thus spreading the movement further.

Amnesty International's membership and activities grew substantially. In the 1960s, 900 prisoners were the focus of Amnesty campaigns with a staff of one full-time and one part-time salaried person. In 1976, the staff was about 40. Amnesty gained further credibility by winning the Nobel Peace Prize in 1977, based in large part to the report on Argentina published in March of that year. By 1981, Amnesty supported the campaigns of 4000 prisoners, had 250,000 members, and drew on a budget of £2 million and a staff of 150 persons.

The story of human rights is part of the attack on the FPE's authority – joined by a number of individuals who had been part of the consensus. The attack on the establishment gained from the role of Humphrey Democrats (the "hawks"), including Jeanne Kirkpatrick and other "neo-conservatives," who joined the camp of an emerging new right organized at that time mainly around economic issues. A new and revived set of well-funded think tanks -- American Enterprise Institute, Hoover Institute, Heritage Foundation, Cato Institute -- pushed this new economic and more aggressively anti-Communist agenda. They defended the authoritarian states of Latin America that showcased the neo-liberal economics centered at Chicago and promoted as the recipe to rebuild business power in the United States and circumscribe the regulatory state.[73]

The strategy of this counterrevolution, at the same time social and ideological, was to take on the "liberal monopoly on the intellectual marketplace" exemplified by the "liberal establishment" and the institutions they dominated.[74] Politicians on the right noted quite clearly, for example, that it was the Eastern establishment – represented by Elliot Richardson and Archibald Cox – that made President Nixon submit to the legal authority that led to his resignation. While denouncing the networks of this "tight knit establishment," the new arrivals in politics – and others who felt marginalized in the field of power -- followed the same set of tactics. As suggested above, the creation of a new generation of think tanks, such as the Heritage Foundation, sealed this new reactionary alliance that triumphed with the Reagan election -- using the media by playing on the double register of economic rationality and moral order.

The success of these new competitors nourished the development of a response that also changed the rules of the game.[75] Each of the adversaries had to increase their investments in policy research, while at the same time privileging the quest for media attention. The production of learning became less important than its packaging -- to facilitate the task of journalists charged with organizing confrontations between experts as spectacles.

The new think tanks attracted one portion of the divided establishment in an alliance with conservative businesses and those disturbed by the various movements of the 1960s and the way the establishment related to them. Their opponents drew on the full ensemble of the institutions -- traditional foundations, professional associations, universities, churches, NGOs – where their positions remained very strong and the resources still formidable. These positions could be used in order to generate a counter attack against the ultra-conservative (and even populist) offensive.

The terrain of international human rights offered a number of tactical advantages to the individuals aligned against the emerging right. That is not to say, however, that investment in

human rights was simply a matter of opportunism. Again, we can best understand the dynamic by returning to the process of reinvestment in a professional movement in human rights. We can then examine how a very specific socio-political configuration contributed to shape the new structures around which the institutions for the protection of human rights were re-constructed.

Jimmy Carter, fortified and guided by the Trilateral Commission, picked up the human rights mantle. He sought more generally, however, to re-invigorate the great design of an international alliance of notables. Compensating for the loss of the technocratic/reformist illusions behind the Alliance for Progress and the War on Poverty, he borrowed from the ideology of human rights. The appeal to morality was consistent with the rhetoric of the FPE, but the legalistic turn was also made more opportune by the perceptions of economic crisis. The various economic problems noted before had undermined the progressive reform ideals given voice in the 1960s. As stated cynically by Samuel Huntington, one of the key thinkers behind the Trilateral Commission, the conjuncture of crises seemed to require a limitation of the aspirations of subordinated groups toward more equality, even for more prosperity. Such aspirations, from this perspective, were rendering democracies ungovernable. The discourse in favor of human rights -- limited generally to "political and civil rights" -- offered a substitute ideology. It was not inconsistent with a new emphasis on the needs of business and a disqualification of social movements as "rent-seeking activity."

For the new left, seeing this aspect of the emphasis on human rights, the virtuous discourse was nothing more than the "moral mask on the face of trilateralism."[76] This new tactic offered the advantage of turning the page on the failure in Vietnam and on the deeds of the military dictatorships, while also allowing a counter offensive against the claims of the aggressive voices from the third world – who could also be pressured to conform to democratic

dictates. In a parallel fashion, and in a more classical manner, this human rights strategy could also put pressure, through the focus on the treatment of dissidents and Soviet Jews, on the communist block -- weakened by the economic crisis.[77] From a left perspective, therefore, this symbolic weapon continued the hegemonic enterprise in the name of the Cold War.

There was truth in the leftist critique of the human rights strategy. Yet the shifting of positions in the strategic game contradicts ex post this diagnosis. In particular, the later victory of the new right and neo-liberal economics, embodied in the Reagan victory, transformed the nature of the human rights strategy.[78] It became the center of a political fight between the new conservative holders of state power and a large coalition uniting the most liberal fraction of the establishment and a portion of the left coming from the civil rights movement (ACLU, NAACP).

This alliance gave birth to a third generation of the movements for the protection of human rights, with Human Rights Watch the leading example. Contrary to Amnesty, this third generation of actors and institutions was willing to accept more political ambitions and a more elitist profile. But it was not a matter of following a secret strategy among notables of the state, as had been the case ten years earlier. On the contrary, these professional notables decided to invest in the terrain of human rights to contest the orientations of a new ultraconservative right that was fighting against their institutional bases in the social state -- in the name of an anti-communist crusade. And in this combat, where the stakes were as much domestic as international, the potential new elite was quite prepared to mobilize their social capital of personal relations as well as the professional institutions that they controlled.[79]

The political configuration was in fact nearly the inverse of the ICJ. The alliance was cemented by a common opposition to the hawks who supported the Vietnam War and similar interventions. Still, it also was the by now familiar mix of noblesse oblige and civic convictions

that led them to mobilize in the service of the public interest. It was no longer the regime of the Soviets, however, that appeared to be the principle enemy. The target was now military dictatorships inherited from the Cold War and converted by the "Chicago boys" into a new religion of the market. The symbolic target was Jeanne Kirkpatrick and her rationale for the support of Pinochet and the Argentine generals-- that they were authoritarians, as distinguished from Communist totalitarians.

In 1982, with funding from the Ford Foundation and others,[80] Human Rights Watch, along with a new branch termed Americas Watch, became formally established. The director was Aryeh Neier, a prominent former leader of the ACLU, and the early board included establishment lawyers identified with opposition to the Vietnam War. As one of the individuals noted, the focus was on the state at home even though the investigations were conducted abroad: "we were oriented toward Washington, D.C. at the time."[81] This new elite of human rights -- which flourished in institutions like Human Rights Watch -- reinforced a strategy of "mediatization" designed to combat the tactics adopted by the new right.

Professionalization and mediatization mutually reinforced each other. In order to gain the attention of the media in the new era of adversary politics, information not only had to be credible, but also "sexy". As NGOs multiplied in number, moreover, the competition increased in the media and in the domain of philanthropy. The competition exacerbated because the success of NGOs in gaining exposure in the media determined in large part their visibility, their capacity to recruit, and even finally their budget. The individual contributions made to these enterprises and, to a certain extent, their support from the foundations, were closely connected to their notoriety. In this new context, the professionals that they recruited were anxious to operate with objectives and methods that appeared to be most effective pursuant to this media-oriented

strategy.

The new breed of activist NGOs were also dependent on the philanthropic foundations. Indeed, they owed their existence to the symbiotic relationship between the professionals of activism and the managers of philanthropy. The foundations made their decisions by consulting the judgment of peers, in this case the small network of professionals and intellectuals of philanthropic activism, both for the selection of projects and for their evaluation. They also contributed to the education of new generations of professionals. Activities included the financing of seminars about human rights, courses on the elite campuses, and the granting of intern fellowships to young graduates who wanted an apprenticeship in an NGO -- thus developing local paths for the development of leaders for the often related transnational NGOs. With the active support of the foundations, therefore, the human rights field was developed far more extensively.

Within the emerging field of international human rights, as in other domains, the competition permitted this space of practice to develop itself and to professionalize under the impulse of policy entrepreneurs. In many respects, as suggested by several journalistic accounts, the prosperity of the human rights field in the 1980s -- and the conversion of the Reagan administration with respect to Chile -- came from the widely reported debates between Reagan administration officials, especially Elliot Abrams, and human rights advocates such as Aryeh Neier and Michael Posner.[82] The media success on both sides of these debates ensured that, in the words of a New York Times editor, "the American public has made it fairly clear that it sees human rights as an absolute good -- a universal aspiration to be pursued for its own sake..."[83] In addition, the debates forced the human rights movement to "balance" their reporting in terms of

the countries that were looked at, and to upgrade the quality of the work that was produced. Finally, and not insignificantly, the adversarial media campaign organized around human rights gave legitimacy and importance to law and to lawyers in debates around foreign policy. The legal expertise of the new generation of lawyers became central to the enterprise.

This return of the legal establishment was less about lawyer statespersons and more about a set of connected organizations that produced and autonomized law in relation to the institutions that the FPE had controlled and served – the universities, the foundations, the law firms, and NGOs that draw on all these sources. International human rights law became central to U.S. foreign policy and closely defined in relation to U.S. politics. The international agenda depended on issues with credibility in the United States – violence against women, elections, a media free from government domination. These products of the alliance among elite campuses, the executive branch, and the U.S. media[84] restored a provisional consensus in foreign policy that had been lost in the 1960s. They provided a justification for U.S. intervention in Kosovo[85] and much of the justification for the War in Iraq.

This return of the establishment in the form of a body of rules for foreign policy also reflected a new set of clients eager to move into the establishment. In particular, a new group of extremely wealthy business clients – the "Robber Barons" of the 1980s – sought both respectability and legitimacy in a new economic era of deregulation and lightning capital mobility. The new energy and body of resources helping to sustain and revitalize the FPE was led and epitomized by George Soros, the leading funder of Human Rights Watch and creator of his own powerful Open Society Institute.[86] But it could also be found in many of the activities of the foundations created by the technology boom of the 1990s. No longer able to dominate the statecraft with lawyer statespersons armed only with generalist knowledge, the FPE responded to

the challenge of the 1970s and 1980s by drawing on its apparatus of institutions around the state to "legalize" a position consistent both with a strong position for law and lawyers and the global interests of their clients anxious to invest in places with legitimate governments to go with their newly privatized economies.

## Trade and the World Trade Organization

One of the tenets of "dollar diplomacy" and Wilsonian idealism early in the 20th century was a belief that free trade would lead to economic growth and world peace. The long U.S. hostility to a European-style empire was consistent with an opposition to systems of colonial exploitation that not incidentally closed markets to U.S. exports. This ideal was often expressed but faced difficulties in practice. High tariffs characterized U.S. policies throughout most of the first half of the century as the more particular interests of business overcame the general sentiments of the FPE.

The story revolves around the State Department – the FPE's traditional preserve in the Executive Branch – in the period after World War II. State had long identified with free trade, and that position led to support after the war for the proposed International Trade Organization -- one of the three proposed Bretton Woods institutions, along with the International Monetary Fund and the World Bank. Cold War tenets proclaimed by the FPE also tended to support more open trade policies as a way to open markets to U.S. goods and to build trading alliances against Communism, but there was no strong movement promoted either by businesses desiring more open markets or by the trade idealists at State. As had happened in the past, the concerns for more open markets did not get top priority. Truman and Acheson were not willing to fight for it, and they settled for the General Agreement on Trade and Tariffs (GATT) without the proposed organizational structure.

During the 1950s, in fact, the policies promoted by the Department of State were frequently at odds with business concerns. In part, the mismatch came from the social position asserted at State. John Heinz, head of the Heinz food products company, reported that the staff at a briefing by State "treated him as a sophomore, instead of the head of a great company with wide knowledge of world conditions in general, and trade in particular."[87]The Cold War, in addition, provided a justification for State to tolerate the "trade sins" of political allies. Neither the particular aims of businesses seeking broader markets nor the general commitment to free trade had a great impact in practice on the State Department. Free trade was just one of many positions supported in principle by the FPE, and it did not interfere with the practice of a more personal diplomacy linked to the Cold War and the alliance of notables.

The initiative on trade issues began especially during the Kennedy administration. Kennedy's Undersecretary of State for Trade was George Ball, a longtime pillar of Cleary Gottlieb, an advisor to Jean Monnet, the lawyer and lobbyist for the European Community, and later one of the founders of the Trilateral Commission. Fitting his position with the FPE, he had a strong belief in free trade as "a variation of the old nineteenth-century theology that free trade led to peace, updated for the Cold War world."[88] In 1961, during the GATT tariff negotiations termed the Dillon Round, Ball persuaded Kennedy to allow the European Community to protect its markets from U.S. agriculture. From his perspective, once again, the relationships with the EC were more important than the details of trade issues. The Department of Commerce, much closer to business, complained of a lack of involvement in the decision and of the substance of the proposed policy, but Kennedy, as could be expected, proposed trade legislation close to Ball's policy orientation, kicking it off with speeches by Ball and others and strong media support by the *New York Times.* The bill ultimately passed in 1962, but growing business hostility to State

led Kennedy to make a key concession. He would appoint a Special Trade Representative apart from State and who would negotiate further trade issues. Treating the concession as more symbolic than a mandate to move trade issues outside the FPE, Kennedy offered the position to John J. McCloy, but McCloy turned it down. After further consultations within the FPE, Kennedy appointed Christian Herter to the position.

Herter had the classic profile of the "elder statesman." He was the grandson of a German immigrant who had a very successful career as architect in New York. Born in Paris in 1895, both his parents were painters. He graduated from Harvard, entered into diplomatic service, and joined the State Department. His marriage to the granddaughter of an associate of John D. Rockefeller relieved financial concerns and permitted him to prolong his cosmopolitan apprenticeship, which was prestigious but poorly compensated. He became the assistant to Herbert Hoover for missions of aid to central Europe. After these "adventures of youth," he began a real career as a Massachusetts politician, where he was elected through the support of his Boston Brahmin friends. Valued by the reformist and internationalist elite, friendly with McCloy, he was named as under secretary and then Secretary of State by Eisenhower. He was especially well-prepared for the honorific functions of an "elder statesman" also through experience in numerous quasi-governmental commissions of the Alliance for Progress and the Atlantic Alliance.[89]

Despite the formal separation from State, therefore, trade remained the province of the elite of the FPE. The close relationship between State and the Trade Representative continued after Johnson became President, although the Trade Representative began to take a stance more supportive of pressure on U.S. allies, especially the European Community (despite pressure from Acheson and MacGeorge Bundy to ease up).[90]

Economic difficulties, the erosion of the power of the FPE, and a growing awareness of the imbalance in trade with the increasingly powerful Japanese economy, called into question the existing State-oriented approach to trade issues. Nixon began to listen more carefully to business concerns and to increase the pressure on allies. The FPE -- retooling in the Trilateral Commission in part in response to Nixon's seeming move toward protectionism -- continued to push for a liberalism akin to what State had long fostered, and David Rockefeller, one of the key founders, had already began to lobby for stronger policies in favor of opening markets,[91] but it was the administration of Nixon, led by Treasury Secretary John Connally, that finally became more confrontational. Under the leadership of William Eberle, a Harvard JD-MBA and former business executive, the Office of the Trade Representative was retooled with the idea of actively promoting trade liberalization outside the United States, not simply promoting tariff reductions through new GATT rounds. The argument made by Eberle and Harold Malmgren, one of his deputies, was that economic and financial issues were "starting to replace traditional diplomatic issues as the main stuff of foreign policy."[92] The Trade Act of 1974, signed by Gerald Ford, ratified and reinforced this transformation in the position of the Trade Representative.

The Trade Act also provided the Section 301 remedy for U.S. businesses claiming that they are excluded unfairly from foreign markets. Now U.S. businesses could make their arguments without depending on the good graces of the executive branch. This and other more aggressive and pro-business positions on trade created opportunities for legal entrepreneurs to move away from a domain of negotiations among notables. As Dryden notes,

> "Many USTR graduates were finding steady employment through work for foreign governments and companies... [a] s foreign trade began to play a larger role in the American economy in the 1970s and 1980s.... Starting with the Trade Act of 1974, representatives of American business were notably successful in engineering changes in the dumping laws and other trade regulations that virtually required foreign companies

and governments to hire small armies of Washington-based experts."[93]

There were opportunities for both sides of the trade practice. Those who traditionally resisted opening U.S. markets to foreign competition could make a case through the doctrine of "anti-dumping," while the new generation of business -- including the new financial services industries -- aggressively seeking new markets and places to invest, could use Section 301. Adversarial trade practice began to flourish, helping to sustain the traditional FPE orientation toward more free trade, now bolstered with more demanding clients, but also giving legal doctrines that could be invoked by the more traditionally oriented businesses.

As noted by one of the longtime participants in trade law, the "trade bar was pretty small up through ... the middle 70s."[94] Steptoe and Johnson appears to have been one of the pioneers, led by Monroe Leigh, a well-known figure in public international law, former legal advisor to the State Department, and a long time teacher (until 1988) of trade law at the University of Virginia School of Law. Richard Cunningham, also at Steptoe, was another one of the deans of the practice field. Those who left the USTR office followed the pattern of the FPE in moving from government back to client service, but in this case they committed themselves to a specialized expertise:

> "at the end of the Tokyo Round [in the late 1970s, the USTR alumni] all made out really well. They got partnerships and the real boom, the boom really went up during the 80s. The early 80s was a great time to be in the trade practice because there was a drastic, you had a big expansion in imports, you had the high dollar policy of the ... Reaganites."[95]

According to another,

> I would view the major change in that as being the Tokyo round GATT negotiations, and the 1979 Trade Agreements Act. What that did was to greatly judicialize the practice. Ninety percent of the practice of trade law is dumping and countervail…. And so it went from being this wildly informal procedure where you never saw the other side's facts, and the files are literally this thick, to being everyone saw everyone else's facts. The files are now infinite. And I can actually quantify it for you. I was at Steptoe & Johnson. We

> had represented British Steel in 1978 in a series of 6 linked anti-dumping cases. And I was one of the junior lawyers. There were 3½ lawyers working on it. And then … the cases were settled and the law was changed in '79. The same cases were brought in 1980. I mean literally identical, the identical cases, and it took 10½ lawyers.[96]

Trade practice proceeded in two basic ways. According to one of the leaders of the trade bar in Washington, D.C., "and they are fairly separate. One is anti-dumping and countervailing duty litigation which is a kind of highly specialized form or administrative litigation which the law firms really got into in the 1980s when you had the dumping cases on steel. And so most of the big Washington, D.C. law firms will have an anti-dumping practice."[97]

The other, according to the same source, is "sort of like trade policy," but it has a strong legal aspect.

> "I think that trade law has always been unique because the GATT gave you a real legal system. There's always been this debate about ... international rules or international norms [are] really law. And what happened in the GATT is you got a sanction in the dispute settlement process, it was built into GATT article 23 – the potential for getting compensation.... And then you see the process becoming much more elaborate and legal in the later 1980s.. [T]he decisions become a lot longer, the effort to articulate doctrine becomes more elaborate. The process becomes more legalistic."[98]

Citing two U.S. professors, John Jackson and Robert Hudec, as influential in the process of legalization, the interviewee noted that GATT "was interpreted as a legal instrument rather than, you know, kind of a political/diplomatic instrument."[99] Advocacy, however, was somewhat muted. "The GATT has roots in diplomacy and for that reason is much more of a civil forum so... New York lawyers don't fit in real well."[100] This kind of trade law, now focused on the WTO, also appears to be more prestigious.[101] Rather than the strictly business efforts to limit competition, the WTO partakes of "policy," "diplomacy," and the long commitment of the FPE to principles of free trade.

The WTO, established finally after the Uruguay Round and the support of the Clinton

Administration, protected the key elements of U.S. trade practice, including anti-dumping, and provided a natural forum for U.S. trade lawyers to push further in the direction of legalization. In addition, through the efforts of a coalition of U.S. businesses heavily invested in the "knowledge industry" – drug companies, software companies, the film industry – aggressive lobbyists succeeded first in making the section 301 remedy available with respect to intellectual property protection and then in moving the key forum for the protection of intellectual property from the World Intellectual Property Organization to the WTO,[102] thereby entrenching and legalizing the rules that favor U.S. and a few other countries. One of the negotiators of the WTO agreement, more generally, noted "there was general support for a more effective dispute resolution" that would eliminate the state veto process found in the GATT.[103] And despite nearly universal opposition to U.S. style anti-dumping laws, long tainted as protectionist,[104] the U.S. took the position that it was politically impossible for negotiators to agree to any provision that would restrict the scope of anti-dumping laws.[105] The result has been a further increase in the legalization of U.S. style free trade, and one result is that the other parties – including Europe and now even some developing countries such as India and Brazil are building the legal credibility and adversarial structure themselves by taking advantage of the strategic opportunities presented by the legal structure.[106] Further, even the opponents of globalization have themselves treated the WTO as a quasi-legal forum, criticizing it for a lack of transparancy, lack of independent appellate review, and above all for lacking mechanisms to provide standing to environmental groups.[107] The result is that the international field of trade law has a very strong momentum both to enforce rules that promote the free trade long part of the ideology of the FPE and to perpetuate U.S. approaches – build through U.S. politics – toward defining how to enforce such policies and provide outlets for important businesses harmed by international competition.

There is now an active body of panelists schooled in trade law and practice and eager to continue to develop the field.

Economic challenges, the weakness of the FPE in the 1970s, a stronger business commitment to opening markets abroad, a new generation of lawyers and academics investing in trade, and growing adversarial opportunities, again challenged the FPE and forced institutional responses. The responses legalized and provided some autonomy for what had been handled through the personal relations of notables. The province of generalists with multiple portfolios went mainly to what became a highly specialized bar. At the same time, the transformation kept and even enhanced the ability of law and lawyers to assert control over the domain of trade – even if the business concerns weighed very heavily on the rules that were put in place.

## International Commercial Arbitration

Arbitration came of age with the international alliance of notables or statespersons. Elihu Root, the grandfather of the FPE in the United States, won the Nobel Peace Prize in part for his role in establishing the Hague Court of International Arbitration prior to World War I. After World War I, the same group of individuals behind the Council of Foreign Relations helped to promote the International Chamber of Commerce, established in Paris in 1919 by business leaders from the allied countries in order to encourage trade and open markets. The ICC International Court of Arbitration was established right away, in 1923, in order to encourage the development of commercial arbitration to resolve transnational business disputes. International arbitration, quite simply, is based on the idea that, if other means fail to resolve a dispute, the dispute can be entrusted to the good judgment of wise statespersons known to the international community.

The business of arbitration began relatively slowly, consistent with a reliance on

personal relations before entrusting the dispute to one or more of the notables acting as arbitrators. The ICC had some 3000 requests for arbitration in the period from 1923 to 1976, and then the business rose dramatically with the next 3000 arbitrations coming in the following eleven years. The commercial arbitration was centered on French and Swiss professors, but there were important ties with the FPE in the United States. Two of the leading Swiss arbitrators in the period after World War II, for example, were Pierre Lalive and Jean-Flavian Lalive from Geneva, with the latter also one of the early heads of the International Commission of Jurists. The leading French figure in much of that period was Pierre Bellet, who also had close ties with the U.S. diplomatic community.

For the most part, however, international commercial arbitration was a relatively marginal – even if elite – activity until the 1980s. It was an activity of distinguished "amateurs" also involved in many other activities – as was true of the FPE. There was scholarly investment in the field, but it was the broad mix of intellectual and social capital that gave authority to the relatively small pool of arbitrators. At the same time, however, the prestige of arbitration -- for state and business disputes -- meant that arbitration clauses were placed in the various resource exploitation agreements that characterized the relationships between, for example, the Seven Sister oil companies and the countries where they operated their business.

Nevertheless, major multinational companies had little use for arbitration in practice, which is why the caseloads of the ICC and its few competitors remained quite small. Disputes were managed through personal relationships that extended over long periods of time. The lawyer for the Seven Sisters, for example, was John J. McCloy, and there is no evidence that McCloy played any role in handling disputes between companies and countries. He instead helped protect the Seven Sisters from antitrust trouble in the United States.

The oil nationalizations that occurred increasingly in the post World War II period were resolved mainly through state pressure and personal relations, but they also provided an opportunity for the arbitration community to build its international business reputation and show its commitment to a private law – the so-called "lex mercatoria" – that would protect business investments against state action.[108] This marketing in the developed world, coupled with a number of legal mavericks and entrepreneurs who helped convince third world countries of the utility of legal investment and helped spread arbitration clauses, especially those naming the ICC as the presiding authority. The ICC also led the charge for the creation and adoption of the New York Convention of 1958 -- which made arbitration awards more enforceable than litigation in court.

The field of arbitration -- as a small "club" of dilettantes – thrived under the umbrella of the ICC and the *lex mercatoria* in the 1960s. Disputes were resolved through a mix of social capital and legal capital, more like today's mediation than the litigation-like processes now associated with arbitration.

The small world was shaken by the establishment of OPEC, the petroleum crisis of 1973, and the subsequent recycling of petrodollars into large infrastructure projects, which meant a proliferation of arbitration clauses involving U.S. and other multinationals and third world countries. The proliferation of clauses, however, still did not mean that they necessarily would be used. There still were long personal relationships that could be used to moderate disputes and split differences when projects cost more than originally predicted.

The role of the lawyer statesperson, as the activities of McCloy suggest, had been to give advice to company leaders, help them negotiate when appropriate with governmental entities, and use their company contacts to strengthen their ability to hold numerous other positions in

private and public life. Challenges mentioned earlier from within the United States combined with the external changes to reshape the world of arbitration. Many have been listed, but they merit highlighting in relation to international commercial arbitration. First, MBAs were gaining power in terms of business advice and in the management of corporations, and their training and relative lack of social capital led them to emphasize the specific terms of contracts and their performance over personal relationships. One of the reasons for an increase in arbitrations in the late 1970s and into the1980s, therefore, was that a new generation of business leadership evaluated contractual and personal relationships differently than predecessors -- who had been confident that matters would work out to everybody's satisfaction. Another could be that "third worldism" in the developing countries also undermined some of the personal relationships between multinationals and elites in "host" countries.

The economic crisis and petrodollar abundance also meant that the MBAs could try out their financial tools and get involved in mergers and takeovers, which undermined the role of lawyer advisor in two respects. One is that the lawyers lacked the financial tools to play a leading role and the second is that a wave of mergers and acquisitions undermined longstanding lawyer-client relationships. The new situation also provided an opportunity for lawyers outside the elite to invent ways to make legal expertise serve business needs. In particular, Skadden Arps and Wachtell Lipton pioneered in aggressive litigation as part of a new business strategy both for general competition and for preventing or facilitating mergers and acquisitions. Soon the old "white shoe" firms of the FPE had to copy the strategy and boost the status of litigators long subservient to the elite of corporate advisors.

In the field of international commercial arbitration, the caseload started to expand dramatically in the 1980s. Finding themselves with a notable disadvantage using their own local

legal resources, in addition, a number of third world countries began to employ U.S. law firms, especially those located in Paris and socialized to the elite world of the International Chamber of Commerce. Sonnetrach, the Algerian oil and gas company, for example, hired Shearman and Sterling for their arbitrations. As the field expanded and commercial litigation began to take off in the United States, litigators and their tactics began to be found in international commercial arbitration. Instead of gentlemanly proceedings conducted under the legal doctrine of the *lex mercatoria*, there was cross-examination, extended efforts at discovery, motions, and above all mountains of documents.

The "grand old men" of arbitration resisted this invasion, and they lamented the "proceduralization" and "bureaucratization" of arbitration that went with this increased caseload and adversarial approach. They continued to thrive because of their reputations and social capital, but a new group of self-conscious "technocrats" from the next generation led the transition from the *lex mercatoria* and social capital – arbitration by the lawyer statespersons according to the norms of the group – to "off-shore litigation" that replaced the vagueness of the lex mercatoria with the commercial law of New York or England. The U.S. law firms also helped to multiply the number of arbitration centers, creating a competition and a pressure for all countries to join the international commercial arbitration mainstream. The field continues to thrive and bring the legitimacy of a full legal system to the norms that the statespersons had used to protect global business.

In relation to the other examples, we can see that a world of personal relations that informally guaranteed the rights of private property and the terms of investments, the FPE thrived and could, when necessary, draw on and work with their counterparts in Europe organized mainly around the ICC – itself a product of so-called Wilsonian idealism. The

challenge of MBAs, increased business activity, third worldism, and the related development of litigation – long subordinate to deal-making and business advice in the corporate firms – as a business weapon, threatened the world of the grand old men while establishing an off-shore litigation that institutionalized in a specialized legal arena what had been handled informally by generalists cut from the same mold as the FPE. As with respect to trade, the move gave a more central place to business concerns and business power, but it also protected -- even enhanced -- the role of law and lawyers in presiding over the institutional arenas for handling business disputes.

**A New Generation**

Each of the three examples illustrates the decline of the FPE as a social group oriented around law and capable of occupying all the major positions in business, law, the academy, and the state. What has replaced it is a multi-polar field of quasi state power with a much more institutionalized division of roles. At the same time, however, there is still a fair amount of mobility and multi-positionality that can be tailored to fit the particular mixes of competencies and social capital available to the overlapping players in and around the law. Three examples of representatives of the generation that followed the FPE – one each from the three topics of the case studies – can illustrate the variation from the earlier generation. Michael Posner joined Human Rights First (formerly Lawyers Committee for Human rights) in 1978. He received his J.D. from the University of California, Berkeley Law School (Boalt Hall) in 1975. While in law school, he became one of the "interns" of the International Commission of Jurists through his mentor, Dean Frank Newman of the University of California at Berkeley -- one of the U.S. pioneers of human rights and later a justice of the California Supreme Court. Since there were few if any legal jobs in the field of human rights at the time he graduated, he took a job with

Sonnenschein, Nath & Rosenthal in Chicago. Luckily for him, the Lawyers Committee for Human Rights was formed and he became the Executive Director -- after having been sponsored by Newman. As Executive Director, he has also lectured extensively at elite law schools, including Yale and Columbia. He is very well connected in the world of corporate law firms in New York, and indeed they have been essential resources in the work of Human Rights First. The various boards and councils that support HRF represent the elite of the legal profession in the United States in the academy and in the large corporate law firms. HRF is at the forefront in coordinating an enlightened legal response to Bush programs restricting civil liberties and limiting immigration in the name of national security.

Gary N. Horlick is a partner in the leading Washington, D.C. law firm of Wilmer, Cutler and Pickering. He graduated from Dartmouth College, Cambridge University (where he obtained a B.A. and Diploma in International Law) and the Yale Law School (1973). After graduation, he worked for the Ford Foundation in South America for several years, and he moved into international work as an associate in Steptoe and Johnson in D.C. Through Monroe Leigh, a former Legal Advisor to the Department of State and one of the pioneers of trade law, which he taught at the University of Virginia. Steptoe was one of the first firms to do trade law. Horlick happened into some of the early trade cases and quickly became an expert, which then led to a position as International Trade Counsel for the U.S. Senate Committee on Finance. He followed that with the Deputy Assistant Secretary of Commerce for Import Administration, leaving the government in 1983. Both positions focused heavily on the emerging field of trade law. He has taught at Yale Law School and Georgetown Law Center, among other places, and been on the Executive Council of the American Branch of the International Law Association. He is also a member of the Council on Foreign Relations. He frequently lectures on trade law and policy.

James Carter is a partner in New York with Sullivan and Cromwell. He attended Yale College, had a one year Fulbright Scholarship, and then graduated from Yale Law School in 1969. He joined Sullivan and Cromwell because of his international interest. Working with his mentor John Stevenson, another former Legal Advisor to the Department of State, Carter became involved in several of the leading oil expropriation cases in the early 1970s. The oil arbitrations brought him into the world of international commercial arbitration, and he has been an arbitration specialist since then. He has also been active in the ABA, where among many other activities he was the chair of the Section on International Law, the American Society of International Law, where he is the President as of this writing, and the American Arbitration Association, whose executive committee he chairs. He is also a member of the Council of Foreign Relations.

All three of these leading international lawyers are active in the academy, the bar, and in practice, but they are far more specialized than the previous generation and even than their own mentors – Frank Newman, Monroe Leigh, and John Stevenson --, whose careers involved more positions and more interchange between government, the academy, and private practice. It is not that these leaders of the generation after the FPE neglect public service or the academy. They take advantage of and combine many activities, but each has a core specialization that is central to their professional careers and to their practices. In addition, they reinforce the "hollow" field of power that allowed the FPE to prosper. Power comes from an interaction of New York representing business and finance, Washington D.C representing the state, and the Ivy League, representing legitimate and legitimating knowledge. Finally, in contrast to most of the members of the preceding generation of FPE notables, all appear to be from middle class backgrounds and lack the prep school education so important to their predecessors.

## Conclusion

External and internal challenges to the power of the FPE during and after its apotheosis in the Kennedy administration led in each case – foreign policy, trade, and international commercial arbitration – to a weakening in the power of the FPE. The legal and other capital behind the FPE allowed it generally to weather the storm in the governance of the state and the economy, but the price was the delegation of control to more specialized and legalized sets of institutions – a division of labor or bureaucratization in the terms of classical sociology. The set of developments kept and indeed enhanced the role of law itself in all three areas, which now are embedded in mutually reinforcing institutions – in particular, the elite legal academy as source of talent and legitimating doctrine; leading corporate law firms in New York and Washington, D.C.; elite NGOs defending and attacking the various institutions and practices of, for example, U.S. foreign policy or the WTO; elite foundations bridging the worlds of law firms, the legal academy, and the NGOs; and sets of institutions including the World Bank, the IMF, the WTO, and various centers of arbitration – all looking especially to the U.S. for legitimacy.
At the same time, despite an increasing division of labor, the law schools continue to attract idealists socialized to expect that their career ought to start with a stint in a large corporate law firm.

The rules that emerge from these sets of relationships, in addition, are bound to be ones that favor the interests and practices of the U.S. business establishment, incorporating now the 1980s versions of the nineteenth century robber barons, and those who serve that establishment, including law firms. They are updated and legalized versions of the combination of client interests and lawyer ideals produced early in the life of the FPE – and similarly promoting law and lawyers, legitimating their role by investing and channeling noblesse oblige or legal

idealism, and at the same time serving the general interests of their clients. U.S. legal weapons – scorched earth litigation, playing the U.S. media – are of great importance in these settings. These sets of norms and practices provide the beginnings of a strong effort to legitimate U.S. domination in the global marketplace. The transnational legal fields that contain these practice areas are made up increasingly out of U.S. material. Along with the examples discussed, we can also point to the legal response to neo-liberal economics as a basis for foreign aid and the policies of the World Bank and IMF. Lawyers assimilated the attack and have succeeded in making the "rule of law" a key element of developmental assistance promoted by virtually all the actors in the field – including the investment banks and business consultants working equally hard to globalize a U.S.-friendly version of the rules of the game.

Our analysis in terms of field reveals the contrasts and continuities between the grand notables of the FPE and the legal enterprises and technologies that they helped to construct: from huge law firms to law schools competing to legitimate the law to legal specialties that serve as custodians of an area of practice and its orientation. Indeed all the case studies of the second part illustrate perfectly the process of institutionalization and autonomization. We see rather slow departures in frequently ambiguous contexts and dubious strategies (for instance mobilizing the rhetoric of human rights in the Cold War politics or bringing in lawyers for oil disputes) and then a sudden acceleration when social, political or economic competition is channeled into these various legal arenas to contribute to its institutionalization. In the trade arena, for example, trade disputes become legalized and more "rule based" in dramatic contrast to an earlier period when trade issues were not considered as "real law." Indeed, the similarities between the three stories reveal the same process of professionalization occurring new domains.

Another way to see the success of law is to reflect on the ability of lawyers to take

external conflicts within and among the leading institutions of the state and manage them by translating them into law. In arbitration, trade, and human rights, the "take-off period" is the one where contending groups use an emerging field as a battlefield, leading lawyers to prosper by selling their weaponry to both sides. The legal field succeeds by managing and facilitating exchange between the contending factions contending for the definition and control of the state. The institutions within each of the subfields manage to replicate and manage – and therefore "represent" the factions at war on the outside.

The price of legalization is some degree of autonomization, even if the rules and practices tend to favor the U.S. Sometimes the U.S. will lose or be held accountable as a price for the legitimacy of the system. The Bush administration's reaction in many arenas is that, as the most powerful nation, it ought not to lose. Accordingly, we see the various positions taken on global warming, the International Criminal Tribunal, the Anti-Ballistic Missile Treaty, and the initial but later reversed stand on steel and the WTO. The war in Iraq, similarly, probably could have been justified in some manner similar to the war in Kosovo, but the Bush administration elected to proceed with different rationales. The administration drew on human rights, and that remains the most widely-supported justification, but the approach was very different from that of President Clinton. It is not surprising that George Soros in particular helped lead the campaign against Bush precisely for Bush's undermining of the world capitalist system that Soros and others worked so hard to build and legitimate. The role of law and lawyers is therefore still contested by those who mounted the major challenge to the establishment from the right in the 1980s.

The transformations discussed in this chapter point to a survival and reinforcement of the position of law in the United States over the course of the century. The highest status in the legal

profession still goes to those who embody the combination of major corporate clients and a noblesse oblige that helps create a legitimate playing field for those clients. The General Counsel for General Electric, for example, called for a reinforcement of the role of the lawyer-statesman, which he suggested might thrive best with in-house counsel rather than law firms.[109] The success in legalization, however, is also part of a pattern of circumscribing the power of the FPE. Serving almost as a relatively autonomous and reformist "state" in the period after World War II, thanks especially to the Cold War, they survived attack but only by entrenching the law and losing some of their freedom to act – including some of their freedom to act "above the law."[110]

Finally, it is important to note that these are not examples of U.S. exceptionalism. Similar processes take place in other countries yet with different timings. It is precisely the different rhythms and different patterns according to the mode of production of law and lawyers that has to be taken into account in other countries. The import and export processes that proceed among countries different in the place of law are central to understanding the transformations that take place constantly in the field of international law.

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[1] Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin* America (Cornell 2004); Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Legalization and World Politics," *International Organization* 54:385-703 (2000).

[2]Strategy is used in the sense that Pierre Bourdieu used it. It refers to activities shaped by "fields of practice" and not necessarily to self-conscious activities with any particular instrumental design – such as building an empire or becoming a foreign policy establishment.

[3] We use the term "Foreign Policy Establishment," despite its contentious history, for two

reasons. One is that it aptly describes the mix, characteristic of the United States, of numerous and lasting personal relations within a relatively small and homogeneous group which moves easily between business, academia, and state foreign policy institutions. Second, the term at times has served as a rallying cry for groups seeking to challenge the domination of that group.

[4]Christopher L. Tomlins, "Law's Disciplinary Encounters: A Historical Narrative," 34 *Law & Society Review* 911 (2000).

[5] See Yves Dezalay and Bryant G. Garth, "The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility," 29 *Law & Social Inquity* 615-38 (2004).

[6] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

[7]Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers. Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002); also see Yves Dezalay and Bryant G. Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002).

[8]Swen Beckert, T*he Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie* (Cambridge University Press, 2001).

[8]Andrew Carnegie's lawyer, who helped establish U.S. Steel, was Philander Chase Knox, who used his representation of Carnegie in part to become head of the Pennsylvania Bar Association, Attorney General under Theodore Roosevelt, Senator of Pennsylvania, and then Secretary of State under Taft, where he was instrumental in developing "dollar diplomacy."

[10]Marc Galanter and Thomas Palay, *Tournament of Lawyers : The Transformation of the Big Law Firm* (University of Chicago Press 1991).

[11]The founding of the City Bar was in fact largely a reaction to Stephen Field's notorious representation of Jay Gould. Robert Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910." In Gerald Gawalt ed. *The New High Priests: Lawyers in Post-Civil War America* (Greenwood Press 1984), p. 57. The situation for corporate lawyers remained challenged for some time. Ellen Condliffe Lagemann's history of the formation of the American Law Institute in 1921 with a large grant from the Carnegie Corporation shepherded by Elihu Root, then a trustee of the corporation, shows the connection to a perceived crisis in the profession and especially in the corporate bar – challenged for their subservience to business clients by other lawyers and by the emerging legal academy. The corporate bar sought to invest in the ALI to join with the academy in the name of relatively unthreatening goals such as better legal certainty Ellen Condliffe Legemann, *The Politics of Knowledge: The Carnegie Corporation, Philanthropy, and Public Policy* (University of Chicago Press 1989).

[12]Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge University Press 2003).

[13] E.g., Ralph Eldin Minger, *William Howard Taft and United States Foreign Policy: The*

*Apprenticeship Years 1900-1908* (University of Ilinois Press 1975).

[14]Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (Russell Sage Foundation 1988). See also Gordon supra note .

[15]"It was in part because they were at home in international affairs, as few if any lawyers who practiced in Chicago or St. Louis could be, that partners in the Wall Street (and to a lesser extent Washington) firms began to be natural choices for international work in government." Geoffrey Hodgson, *The Colonel: The Life and Wars of Henry Stimson* (Alfred A. Knopf 1990) p.56.

[16]Peter Grose, *Continuing the Inquiry : The Council on Foreign Relations from 1921 to 1996. Council of Foreign Relations Press* (Council of Foreign Relations 1996).

[17]Harold Berman, *The Ideology of Philanthropy : The Influence of the Carnegie, Ford, and Rockefeller Foundations on American Foreign Policy*. (Syracuse University of New York Press 1983).

[18]Nancy Lisagor and Frank Lipsius. *A Law Unto Itself : The Untold Story of the Law Firm Sullivan & Cromwell* (Morrow 1988).

[19]Gordon, supra note .

[20]Linked to the fact that they were often the cousins or colleagues – or social "superiors" – of their corporate clients. Stimson stated that, "[T]he profession of law was never entirely satisfactory to me, simply because the life of the ordinary New York lawyer is primarily devoted to the making of money." Hodgson, supra note , at 44.

[21]Geoffrey Kabaservice, *Kingman Brewster, His Circle, and the Rise of the Liberal Establishment* (Henry Holt and Co. 2004) p. 99.

[22] Id. at 306.

[23]The Anti-Imperialist League, established in 1898 and including Mark Twain and Andrew Carnegie, was nevertheless dominated by Harvard and Yale graduates with about 50 percent of the members lawyers. The senior generation of lawyers remained opposed to colonialism. Warren Zimmerman, *First Great Triumph: How Five Great Americans Made Their Country a World Power* (Farrar, Strauss, and Giroux 2002) Pp. 330, 361.

[24]Minger, supra note , at 2.

[25]Stanley Karnow, *In Our Image: America's Empire in the Philippines* (Ballantine Books 1989) p. 170. According to Karnow, "Inspired by a sense of moral obligation, they [the U.S.] believed it to be their responsibility to bestow the spiritual and material blessings of their exceptional society on the new possession– as though providence had appointed them to be its savior. So, during its half-century in the archipelago, the United States refused to be labeled a colonial power and even expunged the word *colonial* from its official vocabulary" p. 197.

[26]Id.

[27]Martin Sklar, *The United States as a Developing Country* (Cambridge University Press 1992).

[28]George A. Malcolm, *American Colonial Careerist* (Christopher Publishing House 1957) p. 23.

[29]Id. at 98.

[30] Hodgson, supra note , at 56.

[31]According to Stimson's biographer,

> "Stimson, in fact, forged the link between the global thinking of the expansionists of 1898 and the new 'globalism' of 1945. There was more than a difference of individual style between the raw, assertive nationalism of Theodore Roosevelt and Elihu Root's generation, and Stimson's world view. Stimson shared his mentors' conviction that America was destined for leadership, but he polished it and made it acceptable to a generation of Americans more and more of whom were offended by colonial empires, their own or anyone else's. Stimson is a key figure in the process by which the 'new nationalism' of the first decade of the twentieth century made the traverse between two Roosevelts and emerged transformed into what might be called the 'new internationalism' of World War II." Id. at 140.

[32]Including many activities of the Carnegie Endowment.

[33] The contemporary European situation is explored in an illuminating article by Sacriste and Vauchez, "Les 'bon offices' du droit international: Analyse de la constitution d'une authorite non politique dans le concert diplomatiques des annes 1920," forthcoming in *Critique internationale.*

[34]Leonard Silk and Mark Silk, *The American Establishment* (Basic Books 1980) p. 187. There were actually two organizations with the same name. Root headed the less formal one and Davis was the first head of the organization that succeeded the informal one. See Grose, supra note .

[35]William H. Harbaugh, *Lawyers' Lawyer: The Life of John W. Davis* (University Press of Virginia 1990) p. 129.

[36]Hodgson, supra note , at 385.

[37]Silk and Silk, supra note , at 200.

[38]Id. 202.

[39]Kai Bird, The Chairman : John J. Mccloy, the Making of the American Establishment (Simon and Schuster 1992), p. 18.

[40] Id. At 18-20.

[41]His father served Henry Stimson (and clerked for Oliver Wendell Holmes). William Bundy was a Harvard Law graduate. Id. At .

[42]Id. at 100.

[43]Interview with Oscar Schachter.

[44]See *Palace Wars*. For the related European developments see Mathieu Garrigues, *Les global elites a travers trois groupes internationaux* (Ecoles des Haures Etudes en Sciences Sociales 2004).

[45]The relative lack of investment did not mean that pure law was neglected. Part of their strategy was to invest in legal science – as being developed through the case method pioneered at Harvard. Those who excelled at the case method were invited to join the leading corporate law firms – cementing the relationship between the elite schools and the leading corporate firms. Another was to invest actively in the construction of law through the establishment of the American Society of International Law in 1906, and they participated in the Hague Peace conferences of 1899 and 1907 – with Root winning the Nobel Peace prize for his efforts.

[46] And Carnegie, which had been shaped to a great extent by Elihu Root.

[47] MacGeorge Bundy was offered his choice of the head of the editorial page of the Washington Post or the head of the Ford Foundation when he resigned from the Johnson administration. Kai Bird, *The Color of Truth: McGeorge Bundy and William Bundy, Brothers in Arms* (Simon & Schuster 1998).

[48]E.g., Anthony Kronman, *The Lost Lawyer* (Harvard University Press 1992).

[49]A prominent example is the former General Counsel of General Electric, Benjamin Heineman Jr. See "Where's the Lawyer," *The Economist* March 18, 2004.

[50]Thus, in their biography of the "wise men" who were the principal strategists of the Cold War, Isaacson and Thomas emphasize the importance of the prep schools and colleges that were openly elitist for the acquisition of the habitus that was at the same time pragmatic, aristocratic, and international for these professionals of the business world who became a kind of state aristocracy. Walter Isaacson and Evan Thomas, *The Wise Men: Six Friends and the World They Made* (Simon and Schuster 1986).

[51]According to a former Ford Foundation official, the grants in the 1950s were "heavily Cold War influenced.... The role of the Ford Foundation was very much in propping up governments -- in providing them technical assistance or training and so forth. So that ministries concerned with development ... could do their jobs better" (Int. 1). Many grants went to state institutions. According to another former official, the gradual switch was to a more "Rockefeller" model of "consciously building human assets to work with"-- "trying to work with and nurture those communities of people" (Int. 87).

[52]The climate of consensus among notables that facilitated this division of tasks is well-illustrated by the movements of personnel. David Rockefeller, for example, the President of the Council of Foreign Relations, proposed to his friend Allen Dulles that Dulles became the President of the Ford Foundation if he would forego his ambitions to be the director of the CIA Grose supra note , at 336). Richard Bissell went from the Ford Foundation to covert operations in the CIA, and Dean Rusk went from the head of the Rockefeller Foundation to become Kennedy's Secretary of State. David Rockefeller was also active in the 1950s and 1960s in the Bilderberg Conference, along with many European and U.S. leaders, including especially George

Ball.

[53]E.g. Richard Freeland, *Academia's Golden Age: Universities in Massachusetts 1945-1970* (Oxford University Press 1992).

[54]Bird, supra note . (Bundy book)

[55]*Palace Wars.*

[56]Nicholas Lemann, "Kids in the Conference Room, The New Yorker, October 18 and 25 (1999).

[57] Kabaservice, supra note .

[58] Id. at 289.

[59]Id. at 189 (noting potential marginalization of Yale if it did not recruit talent and also build up resources to compete with state universities as well as the challenge of making the emerging social science into state knowledge).

[60]Id. at 272 (noting that Ford Foundation trustees were "fed up" with the foundation's avoidance of "direct engagement with social ills").

[61]Id. at 202, 254-55 (describing McNamara and Vance's efforts to reform the armed services and John Lindsay's efforts in New York City to address social problems).

[62]Id at 170-171 (Moore's work to get the establishment church directly involved in the civil rights movement).

[63] Within Western Europe, human rights was similarly employed with the European Convention on Human Rights as a statement of the ideology opposed to communism – and an effort to prevent a return of Fascism. Michael Madsen and Antoine Vauchez, "European Constitutionalism at the Cradle: Law and Lawyers in the Construction of European Political and Legal Orders," (unpublished 2004); Michael Madsen, "Preliminary Conclusions: The Legal Profession and Post-War Human rights Practices" (unpublished 2004).

[64]Howard Tolley, Jr.,The International Commission of Jurists: Global Advocates for Human Rights. University of Pennsylvania Press 1994), p. 29.

[65]Id at 51.

[66] See William Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine*(St. Martin's Press 1998); Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton University Press 2001). Jopnathan Power, *Like Water on Stone: The Story of Amnesty International* (Northeastern University Press 2001).

[67]Clark supra note , at12-16.

[68]Korey, supra note , at 168-69. Power, supra note ; Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (Public Affairs 2003), p. 151.

[69]Louis Sohn and Thomas Buergenthal, eds., *International Protection of Human Rights* (Bobbs-Merrill 1973).

[70]Richard Lillich and Frank E. Newman, *International Human Rights: Problems of Law and Policy* (Little Brown 1979).

[71]Interview with member of Congress at the time.

[72]Foreign Assistance Act of 1973, Section 32.

[73]It is interesting that the in the mid 1970s, the publisher of the New York Times also decided that it had gotten too "anti-business." Arthur Ochs Sulzberger finally decided in 1976 to purge the anti-business editorial board and to endorse neo-conservative Patrick Moynihan for U.S. Senator of New York -- rejecting an editorial board that was divided between Ramsey Clark and Bella Abzug. David Rockefeller, one of the critics of the Times, complained about the tone of pieces on political prisoners and human rights violations in Argentina and Chile. Silk and Silk, supra note , at 95. The Times also inhabits a space between power and ideas, and its transformation parallels what happened elsewhere.

[74]After analyzing the development of the "policy research industry," Smith suggested that two-thirds of them had been created since the end of the 1970s. James A. Smith, *The Idea Brokers: Think Tanks and the Rise of the New Policy Elite* (The Free Press 1991).

[75]The leaders of the Heritage Foundation after 1977 take particular credit for changing the rules of the game among Washington think tanks in favor of aggressive marketing of ideas. The greatest success was the "Mandate for Leadership," which became the blueprint for the Reagan revolution. Heritage Foundation, *Annual Report* (1996).

[76]Judith Sklar, ed., *Trilateralism, the Trilateral Commission, and Elite Planning for World Management* (South End Press 1980), p. 29.

[77]Korey, supra note , at 229-47; See also William Korey *The Promises We Keep: Human Rights, the Helsinki Process, and American Foreign Policy* (St. Martin's Press 1993).

[78]This process was evident even as the Reagan administration took office. Aryeh Neier was quoted in the New Republic as saying that Americas Watch "was founded in reaction to the arrival of the Reagan administration. 'Those of us who created Helsinki Watch,' he said, felt that it [the Reagan administration] 'threatened to undercut Helsinki Watch because it politicized the issue of human rights in the Soviet Union.' When Jeane Kirkpatrick suggested treating friendly authoritarian regimes more charitably than hostile totalitarian ones, 'We felt that the only way we could be credible in dealing with human rights in the Soviet Union, and not subject to the charge of waging a cold war attack, was if we were even handed and were concerned with human rights abuses in friendly authoritarian countries.'" Martin Kondracke, "Broken Watch: Human rights or Politics," *The New Republic*, August 22, 1988, p. 8.

[79]The chairman of the U.S. Helsinki Watch Committee was Robert Bernstein, the president of Random House who had been the President also of the Association of American Publishers. He had earlier organized a group to support freedom of expression in Eastern Europe and the USSR. The two other officers, Orville Schell and Adrian DeWind, were partners in leading Wall Street law firms and had been or were at the time presidents of the New York City Bar. The latter's career includes also serving as the chair of the Natural Resources Defense Council, one of the most active NGOs in the domain of the environment. Schell was also a member of the select Council for Public Interest Law in the mid-1970s. Along with this group associated with Helsinki Watch were presidents of major universities including Chicago, MIT, and Columbia; leaders of great banks, including Lazard Freres and Salomon Brothers; and also representatives of the literary world, including the authors E.L. Doctorow, Toni Morrison, and Robert Penn Warren as well as well-known editors and literary critics.

[80]The Ford Foundation gave Helsinki Watch its first $500,000 in 1978. See Kondracke,

supra note . Other major funding sources in the 1980s were the MacArthur Foundation, the Revson Foundation, the J.M.Kaplan Foundation, and George Soros, who ultimately hired Aryeh Neier to head his own foundation.

[81]Interview with early leader.

[82]An article in The New Republic noted that, "As combatants go, you could not ask for a better match -- in terms of intelligence, assurance, activism, sometimes savage partisanship, and argumentative skills, than Abrams and Neier. " Kondracke, supra note . From an insider's perspective, "Americas Watch ... was designed to show that we were going to apply the same standards not only to the communist governments that had been the subject of Helsinki Watch but also to the right-wing governments that were the subject of Americas Watch in Latin America. And that movement into head on confrontation with the Administration in Washington over its human rights policy be it supporting the Salvadoran regimes, supporting the Contras in Nicaragua, you know tolerating Pinochet in Chile or the Junta in Argentina, that very adversarial relationship was very interesting to the press and we found that the argument... because the Reagan Administration couldn't say human rights are irrelevant or 'we don't mind if we're supporting human rights abusers,' they tended to try to apologize for and defend the human rights records of these very repressive right-wing governments and they did it by lying about the facts. And so we... that sort of pushed us into our methodology which was to be absolutely certain that we got our facts right and it forced us to be much more sophisticated, to go out into the field in the middle of the war zone and get the firsthand witnesses who can reliably tell you what happened and then to put that information out in a way that could affect the policy debates in Washington about whether to continue funding the Contras or whether to cut off aid to the Salvadoran government."

[83]Tamar Jacoby, :The Reagan Turnaround in Human Rights," *Foreign Affairs* 64:1071-72 (1986).

[84] See John Hagan, *Justice in the Balkans: Prosecuting War Crimes at the Hague Tribunal* (University of Chicago Press 2004).

[85]One of the young lawyers in Human Rights Watch provided an account, celebrated by his alma mater, Stanford Law School, of the relationship between HRW, the NYT, and the war in Kosovo. Two HRW experts in 1998 brought a NYT reporter to see three corpses and to do interviews on some 13 deaths of Albanians. The reporter "wrote a front-page story in *The New York Times*, for which the editors made the rare decision to run explicit pnotographs of the victims.... After the war, Richard Holbrooke, the American diplomat, was quoted as saying that the *Times* story ... helped galvanize U.S. intervention .... strengthened by the expertise ... and the authority of Human rights Watch on the scene." Ian Fisher, "Making the World Unsafe for Dictators," *Stanford Lawyer,* Summer 2002, pp. 18, 23.

[86]See works in progress by Nicolas Guilhot, including "Reforming the World: George Soros and the Management of Social Sciences," (unpublished paper 2003).

[87]Steve Dryden, *The Trade Warriers: USTR and the American Crusade for Free Trade* (Oxford University Press 1995) p. 37.

[88]Id. at 42.

[89]Id at 59.

[90]Id at 86-87.

[91]In late 1967 the Emergency Committee for American Trade (id. at 119-20) was

established by David Rockefeller to bring together a business elite in favor of increasing exports. The organization is still quite active.

[92] Id at 165.

[93]Id. at 344.

[94]Trade interview #1, p.4.

[95] Id. at 11.

[96] Trade interview #2.

[97]Trade interview #3, p.2.

[98] Trade interview #4, p. 5.

[99] Id.

[100] Id.

[101] "I think it's more, it's certainly much more interesting than doing ...anti-dumping cases.... I think after you've done a couple,... the positive part of an anti-dumping case is it's over a lot faster than a big anti-trust case. The negative part is a lot of figures, a lot of basically accounting issues." Trade interview #1, p. 22

[102] As documented in Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (The New Press 2002).

[103]Trade interview #5, p. 13.

[104]"[Y]ou talk to people from Hong Kong and they'll tell you about how there are companies in Hong Kong they had to shut down because they couldn't afford to hire the lawyers they needed to respond to the document requests. And they view the whole thing as just harassment. And so at one time, ... a good part of the rest of the world [hoped] to use the Uruguay Round to significantly cut back on the use of anti-dumping laws." Id. 16).

[105]Further, there was "a very tense faction of the D.C. trade bar that is very committed to anti-dumping laws." Trade interview # 5, p 15.

[106] See recent works of Gregory Schaffer, including "Can WTO Technical Assistance and Capacity Building Serve Developing Countries," (unpublished 2005).

[107]E..g., Lori Wallach and Michelle Sforza, *Whose Trade Organization?Corporate Globalization and the Erosion of Democracy* (Public Citizen 1999.

[108] See generally *Dealing in Virtue*.

[109]"Where's the lawyer?" *The Economist*, March 18, 2004.

[110] But the balance may have changed. To summarize a complicated set of developments these business advisors have stepped into the role of trusted corporate advisor – complete with a certain investment in noblesse oblige -- that was a key element of the power of the FPE. They provide the "strategic advice" that often defines the role that law will play. Their power ebbs and flows partly in relation to the economy, since lawyers gain power in times of economic crisis when accountability issues come to the fore, but the net result is that a good portion of the leading talent goes to business schools and thrives in the world of elite corporate advice. See Dezalay and Garth, supra note (2004), at .