Valedictory Speech
Boalt Hall Graduation
1966

Dean Newman, Professor Halbach, President Kimbrough, members of the faculty, members of the class of 1966, ladies and gentlemen.

Professor Halbach's remarks echo the hope that lawyers can really do something about the state of the world. It echoes the view – which I share – that we do have an obligation. Not to think any one thing about the nature and function of law, but an obligation to attempt to discover how the insights we have are relevant to the demands for change in the world we face.

Yet today, for this class, this sense of obligation is, I think, overshadowed by a profound feeling of unease. It seems to me, therefore, that it would serve us ill to ignore the issue that many of those graduating must think about – if only because having left the ivied embrace of alma mater, we become objects of the perverse affection of the solid citizens who staff local draft boards. I want to talk about Vietnam, and why it is that the course of the war poses great dangers to American constitutional liberty, and to the rule of law in the international community.

War is the enemy of political freedom. Some of us remember Senator Joseph R. McCarthy, who more than a decade and a half ago traded upon American hysteria over the Korean conflict to fuel an atmosphere or fear and hatred. "Why is it," the Senator cried in his famous speech at Wheeling, "why is it that in every time and place there are those who would betray America." And the crowd cheered.

We are still paying the costs of that period – not only in the unrepaired lives, livelihoods and reputations. The impact of the legislative investigations -- the accusations, the vilifications -- deterred imaginative and bold thought about the social problems of an urban society at a time when that thought was most needed. For the fear of innovation did not halt the growth of the festering ghetto, did not halt the steady deterioration into slums of the buildings at the core of the great cities, did not halt the complex of social problems which breed disease, illiteracy and crime. We are still paying the price of the awful, fearful silence of that period – in Watts, in Harlem, and yes, in Oakland.

And it is fair to say that the motive force of McCarthyism was the atmosphere generated by the conflict in Korea. Foreign adventure may be resisted at first, and men are quick to count its human costs. But in the wake of the first casualty reports comes a new and more ugly spirit. In the first world war, the ban on free speech did not touch only German sympathizers. It swept within it speech and association by leftists – and even by fighters for woman suffrage. In World War II we were treated to the spectacle of the Japanese relocation. Within the past few months, the offices of groups protesting the Vietnam war have been bombed. And the voices which cry out to silence protest have grown more strident of late. The casualty reports make us reckless of the costs of such repression. As Herman Melville wrote: "But the people in their weeping bare the iron hand. Beware the people weeping when the bare the iron hand."

But the freedoms of speech and assembly are not the only victims. The course of *this* war imperils the American system of separation of powers. We witness the erosion of any Congressional check upon executive warmaking activity.

Article I, section 8, clause 11 of the United States Constitution vests in Congress the power to declare war. The Constitutional Convention of 1787 considered giving the power

to the Executive, where it had always rested under the British monarchy. But the Convention rejected this thought, and gave the President only the power to repel sudden attacks.

A century and more ago, Joseph Story, distinguished lawyer and Justice of the United States Supreme Court and the greatest legal scholar of the 19th century, wrote this of Congrssional power:

> The power of declaring war is not only the highest sovereign prerogative; but it is in its own nature and effects so critical and calamatous that it requires the utmost deliberation, and the successive review of all the councils of the nation. War . . . never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing and agricultural interests . . . . It is sometimes fatal to public liberty itself. It should therefore be difficult in a republic to declare war; but not to make peace.

The State Department, in a legal brief released in March of this year, claims that the President has always had a broad power to deploy forces and engage them in combat without Congressional approval. The State Department lawyers have claimed that a "limited conflict: such as the present one needs no Congressional assent. And they cite for authority the situation that obtained during the conflict with France in 1798 and 1799. But this very example proves just the opposite. The *Congress* regulated those hostilities in a series of acts which defined the enemy and delimited the spheres within which American forces were to operate. Indeed, the Supreme Court, in an admiralty case reported in volume 4 of Dallas's reports, page 37, had occasion to construe the situation in relation to the capture of French vessels, and all the Justices agreed that the warmaking power then, as when the Constitution was ratified, remained firmly in the hands of the Congress whether the conflict be a general war or a limited war. This case is not cited or discussed by the State Department's lawyers.

Nor can it be said that the Gulf of Tonkin resolution of 1964 is authority to the President. That resolution was passed to authorize retaliation for an attack on American vessels. It was passed when the President was publicly committed to a policy of caution in opposition to Senator Goldwater's views. Its general language must be qualified by these circumstances. It is not a declaration of war.

Let it be clear so that none may mistake the course on which the President has embarked. The debate over our course in Vietnam has begun and shows no sign of slackening. But the Congressional voices, and those of the people who communicate concern to their representatives, are of little effect so long as the President arrogates to himself the power to make a choice which the constitution commits to another branch of the government.

Up to now, the focus has been on American international behavior as regulated by rules and values which originate wholly within the United States -- by our constitution, our national goals and interests. But international behavior is subject to constraints of a different and wider kind. It is subject to the rules which govern the world community of nations – what is properly called international law.

Now is no time to seek a precise and pedantic definition of the nature and function of international law. In the days of the Roman Empire, and after that of Papal temporal power, the community of nations was governed by law from a single sovereign. When the

papal order broke down, men sought to replace it with a mythical "natural law" legal order. Men, it was said, are creatures of reason and can deduce from general principles the essential elements of correct international behavior. If a nation erred, other nations could revert to the "just war" to set things right. This line of thought began with Grotius' great innovating treatise, *De Jure Belli Ac Pacis*, and continued through Pufendorf and in a slightly different form, Christian Wolff.

In the 19th and early twentieth centuries, international law was what the big powers felt free to impose upon small ones. One need only call to mind in this connection the division of Africa by the big powers drawing lines on a map. And time and again in this century, the United States imposed its ideas of international conduct – and, indeed, internal government – upon the republics of this hemisphere.

But the emergence of dozens of newly-independent nation states since the Second World War has made the world a different place. And the existence of the United Nations Charter imposed a voluntarily-assumed treaty obligation on this country to renounce the use of force. These two events – the existence of the United Nations and the emergence of new nations – are the central facts of the postwar legal order.

It is plain that absent some excuse or justification, the United States' action in Vietnam violates the basic collective security scheme of the United Nations Charter. The United States State Department has argued that Vietnam is being subjected to an armed attack that began no later than February 1965, and that the United States is exercising its inherent right to go to the aid of South Vietnam.

American military involvement in Vietnam, however, antedates February 1965 by 15 years. And this involvement must be seen in light of the 1954 Geneva accords which ended the French-Indochinese war. Those accords were designed, in part, to unify Vietnam with free elections to be held in 1956. The United States, though not a signatory, pledged its support to the agreements and said that it would refrain from threat or use of force to disturb them.

From the first, the International Control Commission, set up to administer the accords, reported the intransigence of the government of South Vietnam. Within the first 300 days after the accords were signed in July 1954, the government of South Vietnam had begun carrying out propaganda against the Geneva agreements. The government of South Vietnam, from November 1955 began (with the aid of the United States) to violate the provisions of the agreement relating to military buildup, and it compounded this behavior by declining to permit international inspection teams to check on its activity.

In the North, the International Control Commission had some complaints about cooperation with inspection teams but expressly found them minor compared to the situation in the South, and found no military buildup.

In the South, within the first 300 days of the accords, the Commission found 522 cases of violations of the treaty guarantees of democratic rights, resulting in 303 cases of injury or death. Investigations of complaints in the North yielded negative results, and the Commission found little evidence of such behavior by the North Vietnamese government. The Commission did find that both governments pressured refugees to move from one area to another.

Certainly, neither half of Vietnam was a paradise of democracy. There had been strife for many years, and conditions of life were difficult. But the State Department's charge in *1966* that free elections could not be held in *1956* because the North Vietnamese

agents would have coerced the people is without foundation in the evidence. Indeed, in 1956 when President Eisenhower and Secretary Dulles supported the South Vietnamese refusal to permit elections, they said candidly that it was because in a free election the supporters of Ho Chi Minh would achieve a substantial majority.

Nor can the United States invoke its commitment under the Southeast Asia Treaty Organization, and claim under the Charter exception permitting regional organizations to act without reference to the Security Council. To call SEATO a true regional organization under the Charter, allowing this country – as a member – to act on its own, is doubly wrong.

First, we are not part of the Southeast Asia region, as we *are* a part of the Western Hemisphere region. A buffalo is not a giraffe, even if he sticks his neck out a long way.

Second, SEATO is not a regional organization because the ties which it creates are not exclusively those of *collective* defense and cooperation. Under the SEATO treaty, the United States may act unilaterally, irrespective of the views of other alliance members. This sort of arrangement is not at all the regional cooperation alliance which the Charter contemplates.

In short, this country's treaty obligations under the United Nations Charter, and its pledge at Geneva, forbade our getting into Vietnam in the first place, and our continued presence there illegal, and require us to get out without further ado.

But the Charter is only a document, a piece of paper. Though it is a treaty, our action in Vietnam, like our action in the Dominican Republic, and our involvement in the Bay of Pigs invasion, raises problems more serious than the violation of a treaty. International law, to be effective must rest – like any law – on common concerns and common values. Wherever there is community, said Cicero, there is law. The network of international rights and duties requires that the nations of the world share enough values, and enough concerns, to make it meaningful to speak of their action as governed by rules. Without that basic minimum consensus, it is idle speak of law, and lawyers are irrelevant.

Candor compels the observation: American actions in Vietnam – and in the Dominican Republic, and in Cuba – give rise to some uncertainty about whether we share the values that most nations of the world proclaim. Now, in this period, the new nations are developing political and economic systems which are quite different from what which obtains in this country. They are proclaiming their wish to be free of "entangling alliances" – as George Washington expressed it. The same question came up in the British parliament around 1776, -- whether a band of rebels were to be permitted to lay waste the countryside, coerce their opponents, confiscate land, and destroy property – all in the name of "independence." And when the British fought back, the rebels had the effrontery to invite the French to help them. The only difference is that we have intervened in sovereign states, not in colonies.

The question, therefore, is still with us. The UN Charter, international law, even the policy provisions of our own constitution, are meaningless if this country does not decide to accept a world order composed of independent states – states with systems of government which we may regard as iniquitous, though they be chosen by the peoples of those countries. Secretary Dulles had his answer in 1956: It was that we would not permit elections which dangerous men might win.

But the risks which attend the role of international vigilante multiply with each nuclear device we build. The world community grows each day more impatient with disregard of the norms it shares but which are cast aside by one or two great powers.

The question is not simply whether the rule of law shall obtain. It is first whether this country is willing to accept the values which most of the world feels limit the international conduct of nations.

If we reject this plea then the malaise which we see in the world will spread and grow more virulent. And we will have no answer but force and more force – force which will prevent the growth of an international legal order, subvert existing international institutions, and in the end sacrifice the lives of our young men and the liberties of all of us.

And yet the malaise will go on. And we will take for ourselves the words of Herzen: "We are not the doctors, we are the disease."

To our professors who express concern lest we ignore the demands for altruism, perhaps we can give assurance that we will concern ourselves in the great work that defining America's position in the world entails.

To our wives, friends, and relatives gathered here, you do us honor. But I say frankly that honor is illusory and fame chimerical when accorded to the vain shadows and insensible ashes that must lie in the wake of mankind's next embarkation upon the settlement of disputes by other than peaceful means.

To my colleagues, only some of whom I suspect agree with me, I ask you to consider your role. I have tried to suggest that lawyers must be concerned with the impact of this wretched war upon our liberties, and upon the structure of our government. And surely you will be called upon to defend those whose liberty is impaired, and give advice on questions of constitutional law and policy. You may take a professional or private interest in the law of the Charter. But the basic question will remain – can this country so regard the values of the international community as to provide a valid basis for an international legal order? The question has been a long time in coming. The answer will require our patient effort. In the words of another time and where: Let us begin.