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Gentlemen:

The symposium on Vietnam deserves congratulation. Since you invited comment, here is one.

I. Legality of the War Under Municipal Law.

I was disappointed to see that so little space was given to the legality of American participation in Vietnam as a matter of municipal law. Professor Alford does not touch this question at all, and Professor Falk briefly concedes the point to the State Department with a short caveat to the effect that a violation of customary international norms may also violate "the law of the land" (whatever that may be).

I do not think the problem is quite that simple. The Lawyers' Committee argues that the Article I grant to Congress of the warmaking power makes the President's unilateral action illegal. The State Department replies that "no declaration of war is necessary" and that, in any case, the Gulf of Tonkin resolution constitutes sufficient Congressional approval of the President's action.

Unfortunately, the State Department's citation of "the undeclared war with France" as a precedent for the present conflict rather embarrassingly forgets that the Supreme Court recognized in Bas v. Tingey, 4 Dall. 37, that the conflict there was defined and delimited (both as to the identity of the enemy and as to the sphere of hostilities) by acts of Congress. The unanimous view of the Court in Bas v. Tingey was apparently that Article I cognizes no distinction between "general" and "limited" war.

The Gulf of Tonkin resolution simply cannot be used as a justification, if one gives a fair reading to the circumstances which surrounded its passage. One recalls with particular clarity that President Johnson was at that time firmly committed to a policy of nonescalation, in opposition to Senator Goldwater. It therefore ill-behooves him (or his lawyers) to say now that the true intention of the resolution

was to authorize unlimited escalation. If the resolution really says all that the State Department now claims, then it was procured by the kind of extrinsic fraud upon the Congress which would suffice to set a side most judicial judgments.

When all of this is said, however, what difference does it make? Professor Falk persuasively argues that the net effect of a declaration of war would be more escalation, and a hardening of positions on both sides of the conflict. That is certainly true, but it assumes too much both as to the consequences of leaving the question to the Congress and as to the purport of the Article I argument.

The purpose of the Constitutional Convention in vesting the warmaking power in Congress was in part to reaffirm the design of a tripartite government, and to renounce the monarchial maxim that war is the ultimate argument of kings, that is, executives. At a more practical level, Story wrote:

> "The power of declaring war is not only the highest sovereign prerogative; but it is in its own nature and effects so critical 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 make war, but not to make peace."

Two points deserve examination here. First, the lesson of the declaration of war clause in a limited war situation is that the Congress must be consulted to define and declare policy coequally with the executive at each stage of the conflict. That seems to me to be the teaching of the case in 4 Dallas, reflecting as it does some contemporary understanding of separation of powers. The Lawyers' Committee, the State Department, and Professor Falk all seem to assume that war-declaring is an all-or-nothing proposition; that notion should be dispelled, if not otherwise, by Professor Falk's cogent exegesis of world conflict as predominantly marginal and peripheral in a world of great powers and unstable developing countries. The kind of consultation and discussion envisioned by this view of Congress' role has been arrogantly shunned by the Executive in recent months, which may account in part for the credibility gap whihh both Professor Alford and Professor Falk find exists among great sections of the

American people. (I must note my agreement with Professor Falk; the gap seems to me to be the result of Administration disingenuousness, not to say mendacity.)

The second point is more elusive. I am frankly worried that if we turn the question over to Congress, even for advice and ratification, the voices of chauvinistic vainglory will overcome those of moderation and reason. We would then be swept along on a rising crest of nonrational "consent." In part this dilemma is created for us by the follies and angers of the Administration heretofore. Like it or not, our young men <u>are</u> being killed in Vietnam, and the martial spirit is upon us. As Herman Melville said in another context:

> "The people in their weeping bare the iron hand,
> Beware the people weeping when they bare the iron hand . . ."

The hawks have enjoyed having it both ways in their call to escalate the war and silence its critics. Their theory has been that it is not enough of a war to have the Congress declare it, but clearly enough of one to justify extraordinary measures to silence opponents. This state of affairs does no more for me than require a corollary to the President's duty to submit these matters to Congress. It requires that he submit them in such a way as to permit dispassionate and fair discussion of alternatives, that he use the power of his office to undo the evil he has done by his shrill calls for force to defend the national honor.

The above discussion touches upon one of the ~~most urgent~~ central problems in this war; the breeding of intolerance of its opponents. The recent spate of bombings of leftist meeting-places and offices appears to reflect the activity of the fringes of a great mass of opinion which decries dissent. This is perhaps the most urgent domestic question raised not only by the Vietnam war but the counterinsurgency concept itself: How long can we stay democratic while the bulk of our military effort is directed at halting social revolutions with all the violence at our command? Fortunately, the courts remain open to litigate these questions, though one is led in recent days to wonder how long the Supreme Court of the United States can withstand the cry to stifle freedom of expression.

To be distinguished from the questions we can easily litigate is the basic question of separation of powers. I suppose a draft-refuser might raise the question in defending a prosecution under 50 U.S.C. App. § 462; without scanning the literature, I have heard that some have in recent months. For the most part, however, the advocates of separation of powers are left with a cogent rhetorical appeal to the

Constitution not unlike that of the abolitionists in the early 19th Century, or the electoral reformers in the bad old days before Baker v. Carr. And the trouble with that kind of a legal argument is, as any student of Austinian jurisprudence will tell you, is that "properly so called" it is not legal at all.

It is nonetheless important, it seems to me, to insist upon the fragile protections which the system of separation of powers was designed to give: The preservation of some sense of public responsibility among those who make our foreign policy decisions is one small assist in preserving the "public liberty" which Story noted is often an early casualty in time of war. The lawyer's task is twofold: He must seek novel ways of litigating the legality of the war as a matter of municipal law, and he must frame the quasilegal argument about separation of powers in order to achieve the maximum persuasive impact.

II. The Nature of International Law.

The question "what is law?" is not raised above as a mere cavil. Indeed, the ambiguity (one unpleasantly disposed would call it the studied ambiguity) in most legal documents about Vietnam results in my view from a failure to begin with the examination of the term "international law." Only Professor Falk makes a beginning in his piece, and his analysis is excellent so far as it goes. (In beginning this analysis, I should register my agreement with the Lawyers' Committee view of the nature and applicability of existing rules of international law. Here I want only to analyze those rules in an attempt to make "law" mean more in the context of the Vietnam war than it has heretofore.)

Assume that A and B are arguing over a pig. (I demonstrate that I am not a pedagogue by omitting to call the pig P.) In a feudal society, if A and B had the same suzerain, the question of the "law" which decided the ownership of the pig would be rather simple. Just as their joint suzerain had an interest in the land which A and B might till, so, too, they owed him a personal fealty which gave him jurisdiction over their personalty and over their very lives. This rigid structure made all litigable questions referable to an easy source of decision, provided the common seigneur could be found.

(This rigidity and simplicity was characteristic of the feudal period, certainly from the 13th Century on, after the disintegration of the "personal law." The principle is best seen by contrast; when a common seigneur could not be found, the question of "choice of law" and "jurisdiction" (as those terms are understood in Anglo-American law) sought

solution in the logic of the hierarchical feudal system. If A sued for the pig, and B lived in Beauvaisis and A in Bourgogne, A had to seek B in the forum of his domicile; for only the act of B's suzerain could liberate B from that which he had. This was in consequence of B's obligation of fealty. Just as an illustration, B could not counterclaim against A before B's lord; he had either to sue before A's suzerain or get a permit to counterclaim from the common suzerain of A and B (the king).)

It was natural that the feudal system should give birth to theories of international law which assumed that God, as the ultimate sovereign, had a divine order for the world--for international relations--which was enforced by his earthly representative, the Pope. The dissolution of Papal temporal power dealt a severe blow to this theory, but it re-emerged as the natural law doctrine of such thinkers as Grotius and Pufendorf. And no doubt it was a bit cleaner for being freed of the stigma of Vatican politics.

We do not any more harbor illusions about a natural law basis for international law (though some recent American foreign policy statements have been wrapped in such pretensions of righteousness that we do well to recall Ruskin's dictum that no snare is more dangerous than the illusion that our enemies are also the enemies of God). In consequence, we are in a definitional quibble as soon as anybody wants to talk about the legal basis for this or that national action. It should not, however, be too difficult to set up some categories.

When some people say "international law," they mean a rule that nation A and nation B will both agree is a rule governing their conduct. There is thus no dispute about the propriety of the rule, about the "ought" proposition implicit in it. These Type I rules are found in treaties and in some principles of international customary law, such as for example, the elementary notion of the inviolability of another's territory.

Another kind of rule of international "law" is that which is accepted by nation A but not by nation B. However, it is accepted by nations D, E, F, and so forth, comprising a substantial majority of the nations of the world. This we may term a Type II rule.

All questions of force aside, the breach by nation B of the first kind of rule brands it as a hypocrite. Breach of the second kind brands it as an outcast.

Now, most of the debate about American action in Vietnam is framed in terms of Type I rules. The dispute then revolves around propositions of fact: for example, is North Vietnam's action an "armed attack" or an "intervention." Or, does Article 51 of the UN Charter justify American action on the facts? If the United States engages in what most states regard as breaches of these Type I rules of conduct, the principal consequence (as Professor Falk points out) is the subversion of existing international legal institutions and of systems of recognized international rules. For the United States will be unable to complain of violations of international rules of conduct by others in consequence of its own attitude. The result of this estoppel is particularly clear in a world of great powers: The most powerful nation disqualifies itself as a force for lawfulness.

At the same time, should conflict erupt and spread outside Vietnam, the potential allies of the United States may be deterred from entering because of their inability to satisfy their own publics of the justice of the American cause. Conversely, aid to our enemies would seem justifiable to a larger number of countries than in a different legal setting. These consequences were particularly well illustrated in the last years of French activity both in Vietnam and in Algeria. American reluctance to bail out the French at Dienbienphu was an illustration of the hesitancy of Allies; the extensive aid received by the Algerian F.L.N. was an illustration of the alacrity of otherwise-neutrals. Thus, so long as the dispute is about Type I rules, we have some hope for the future of international law as a guide to American practice. For the strength of these rules in the international community, as measured by the actions of other nations, is great. Also, since by our initial postulate they are genuinely accepted by all nations, including the alleged lawbreaker, as the basis for national conduct, the dispute over whether and to what extent they have been broken in a particular case ought to be resolvable by pacific means.

Professor Falk has noticed a difficulty with this line of thought. In his final paragraphs, he hopes that law will be used by the United States as the <u>predicate</u> of action rather than as the post hoc <u>justification for</u> action. What Falk is really saying, and with justification, is that the precepts of international law are used as <u>ideology</u> by American apologists. International law has thus become a part of the "folklore of capitalism." As Paul Baran has cogently argued, ideology is a phenomenon of the superstructure of society; it is a part of the way we explain things. It is, as Baran has written, the social equivalent of the Freudian "rationalization." If it is true that American planners use law only as a rationalization, then we have reached the borderland between a Type I and a Type II situation. If

nation B does not "really" accept the legal principle at issue, then the situation is not analytically different from that which obtains when B will not accept a rule which A, C, D, and so forth believe ought to govern international conduct.

For the sake of completeness, we can identify another variety of Type II situation. American power and influence was developed beginning late in the last century, and in our rise we influenced the development of legal rules which tended to approve our conduct. Today, a world in ferment rejects a number of these rules: Expropriation is a topic upon which attitudes are in flux; the rights and duties of colonies and colonial powers is another. It is clear, therefore, that social revolutions in underdeveloped areas will create a number of situations in which our version of legal rules will be at odds with the views of many, or even most, states.

Either because it limits legal concepts to an ideological use, or because its notions of law are at odds with those being developed in a revolutionary world, the United States may be expected to find itself in more and more Type II situations. The escape from such situations lies in either of two directions.

First, we may seek some accomodating principle at a higher level of abstraction than the principle which is under dispute. For example, if expropriation is in issue, the differing attitudes of the "have" and "have not" countries can be reconciled by common agreement upon the principle of recognition of extranational judgments. Banco Nacional v. Sabbatino is an example of this type of accomodation. By this means, we convert a Type II disagreement into a Type I disagreement. The motive for this kind of accomodation is a desire to preserve some semblance of international order, and to prevent (even at some cost in terms of national goals) the war of all against each. If there is a "force" which makes rules of international conduct into law properly so called it is perhaps this fear of international lawlessness more than any other. This is of course in addition to the fears of one's allies leaving, and the prospective neutrals joining the other side, which fears become more justified as the rule of law at issue becomes more and more accepted by othermembers of the international community. And, if the science of totalitarian government has not rendered it moot, the aspirations for national self-determination, which lie at the basis of rules of conduct being forged in the present social revolutions, may be shared by the people of the outcast state to such a degree as to make wars in defense of outmoded principles unpopular. (Here, by the way, is one crossing point between the democratic principle of separation of powers and the dynamic formation of new rules of international law.)

A second arguing point in Type II situations would require

a look at the trend of history. The social systems of emerging nations are quite different from our own. We can apply fairly objective analytic devices and determine that the domination of Afican, Asian, and Latin American economies by the West leads to economic instability and lack of social progress. Thus is explained the autistic demands of the new nations as an alternative to economic subjugation. We have been warned repeatedly by astute commentators that we cannot forever resist these pressures for political and economic self-determination without expending great sums on armaments and taking a great toll in the lives of our young men. Ought this forward-looking analysis to influence us to acquiesce in the adoption of rules of international conduct which enable social revolutions to succeed? This is a question which each of the "have" nations must answer for itself, and here the Type II rule has the least hold of any as a guide to international conduct.

I would suggest only that it is not self-evident, as Professor Alford seems to think it is, that we are justified in imposing our own notions of "democracy" and "stability" on the underdeveloped nations because we think it is good for them. In some cogently argued views, to paraphrase Herzen, we are not the doctors, we are the disease.

In the end, therefore, the rules of international conduct are flexible rules, and the question of American participation in building a stable legal order is much broader and deeper than finding some rules written down in some books about international law. Professor Alford is right: The debate thus far has been too narrowly cast. What we really ought to be arguing about is the nature and wisdom of the legal system that thrust up by the world conflict since 1917. We may discover in the end that no accomodating principle can be found that will enable us to use rules of conduct as a basis for action on the international scene. If that is true, then we are in the position of a national society which can no longer find common norms of conduct. First, the dominant group attempts to impose its norms by force; then, there follows a period of social revolution followed in turn either by repression of the contenders or the building of a new society upon new norms. The difference, of course, is that no social revolution heretofore has held promise of becoming a nuclear conflict.

In sum, the debate is not what law should be applied, but whether law properly so called is possible.

Sincerely,

Michael E. Tigar