# LAW AND SOCIETY

## FREEDOM TO DISSENT: THE VIETNAM PROTESTS AND THE WORDS OF PUBLIC OFFICIALS

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> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.†
>
> —Mr. Justice Holmes

> The constitution is the mandate of a sovereign people to its servants and representatives, and no one of them has a right to ignore or disregard its plain commands. Every officer, legislative and executive as well as judicial, is required by the constitution, as a condition of holding his office, to take a solemn oath to support it. It was not intended that the whole burden of that support should fall upon the judicial department. As a matter of fact it rests equally upon every department . . . . In a doubtful case the final responsibility is with the court, but in a case reasonably plain it is the duty of every officer to support it even though his act may have undesirable consequences to himself.‡
>
> —Mr. Justice Rosenberry

Of the many problems posed by the conflict in Vietnam, not the least troublesome is one that has arisen in the United States. The increasing national involvement in the Vietnamese struggle has brought with it a corresponding increase in the breadth and militancy of the protests against our government's policies there. Government in turn has responded to these protests in a number of ways: with legislation; with investigation; and, most significantly for our purposes, with a variety of public statements directed at the propriety of protest itself. It is with this last form of response—

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† Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

‡ John F. Jelke Co. v. Emery, 193 Wis. 311, 321-22, 214 N.W. 369, 373 (1927).

as embodied in the official reports, speeches, and offhand comments of government officials—that we shall be concerned in this article.

Statements issued by government officials can perform an important educational function, for they furnish citizens with the information and ideas relevant to a rational examination of national policy. And, subject to limitations not relevant here, government officials are entitled to the same freedom of speech that private citizens enjoy. But there is another side of the coin. Such statements can also cause potential protesters to fear the consequences of openly expressing their views. Government touches the individual in many ways, and for that reason the attitudes of its officials are important: one may think twice before angering Presidents, Senators, prosecutors, selective service administrators, and others who have the power both to bestow favors and impose punishment.

In a more subtle fashion, too, the statements of government officials may deter dissent by either creating or reinforcing an atmosphere in which those who protest official policy find themselves exposed to various private sanctions: to the loss of friends, for example, and other forms of social ostracism; to denial of employment; to verbal abuse; and at times even to physical assault. This relationship between governmental statements and private sanctions was rather clearly suggested by events which occurred earlier this year. On March 5, 1966, newspapers reported the Attorney General's announcement that he had instituted proceedings to require the W.E.B. DuBois Club to register as a Communist-front organization.[1] The next day an angry crowd gathered in front of the DuBois office in Brooklyn.[2] One of those present, a member of a social club located a few doors away, said, " 'I didn't know what they were, till I read in the papers that they were Commies.' "[3] Someone else shouted, " 'Kill the Commie bastards.' "[4] When the youths within the DuBois office emerged, they were pelted with eggs, then attacked and beaten.[5] On the same day, across the country in San Francisco, an explosion ripped the DuBois headquarters, scattering debris over nearby rooftops and shattering windows in a one-block area.[6]

Viewed against the basic values embodied in the Constitution, the potential consequences of such statements suggest the two problems with which this article deals. The first concerns the extent to which government officials, in issuing public statements, may be obliged to avoid those which are likely to deter dissent. It

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1 N.Y. Times, March 5, 1966, p. 1, cols. 6-7, p. 4, cols. 3-5.
2 *Id.*, March 6, 1966, p. 53, col. 1.
3 *Ibid.*
4 *Ibid.*
5 *Ibid.*
6 *Id.*, March 7, 1966, p. 15, col. 1 (city ed.).

is our thesis that officials, though they have the legal power to say what they want, ought nevertheless to exercise that power consistently with constitutional values. One set of values critical in this respect is that reflected in the protection the first amendment affords to speech, petition, and assembly. Similarly, given a causal relationship between official conduct and the invocation of private sanctions against such protest, the implications of our constitutional commitment to due process of law must also be examined. A consideration of these matters will suggest, we believe, the criteria by which the propriety of government's public pronouncements ought to be gauged. This brings us to the second problem: so gauged, have the statements in fact issued by government officials about the Vietnam protests been proper?

Before proceeding to these problems, however, it is important to relate the events that have given rise to them. Thus the first portion of this article presents a brief résumé of United States policy in Vietnam, followed by a more detailed description of the actions protesting this involvement and a survey of the private and public responses to those protests. No doubt events of this sort will go on as long as the war itself. Our descriptions, however, come to a close at the end of February 1966.

It may be just as well at this point for us to disclaim any personal involvement with the Vietnam protest movements.[7] Our views on the merits of United States foreign policy have varied widely from time to time; and in any event, the questions discussed here in no way turn on the soundness of the government's policies in Vietnam. Rather, as we have suggested, they turn on the implications of constitutional values applicable to all dissent, wise and foolish alike.

## I. WAR, PROTEST, AND RESPONSE

### A. *The American Positions in Vietnam*[8]

#### 1. THE BACKGROUND: THE FRENCH WAR WITH THE VIET MINH

After the Second World War, the French returned to their Indochinese colony intent on resuming their prewar status. The Viet

[7] Along with a number of other law professors such as Dean William C. Warren of Columbia and Dean Louis H. Pollack of Yale, we both signed a letter to President Johnson opposing the use of draft reclassifications as a penalty for demonstrating against the war in Vietnam. N.Y. Times, Dec. 23, 1965, p. 1, col. 7, p. 4, cols. 4-5. Whatever the merits of the war or of demonstrating, we think it clear that draft reclassification or threats to take such action are improper.

[8] Except where specific citations are given, all of the discussion of the American position in Vietnam is based on the following sources: COLUMBIA BROADCASTING SYSTEM, CBS NEWS SPECIAL REPORT—VIETNAM PERSPECTIVE (1965) [hereinafter cited as VIETNAM PERSPECTIVE]; FALL, VIET-NAM WITNESS 1953-66 (1966); LACOUTURE, VIETNAM: BETWEEN TWO TRUCES (1966); PRUDEN, VIETNAM: THE WAR (1965) (a *National Observer* newsbook); VIET-

Minh had other ideas. Led by Ho Chi Minh, a Vietnamese nationalist and Communist, the Viet Minh, in late 1946, began a war to win independence from France. The French responded by creating the state of Vietnam within the French Union and installed former emperor Bao Dai as chief of state. It was at this time that the United States began to supply Viet Nam with limited military and economic aid.

The war with the Viet Minh went badly for the French. The United States increased its military aid, but the French Army still was unable to cope with the Viet Minh's guerrilla tactics. In France the colonial war became increasingly unpopular. Hoping to turn the tide with a decisive victory, the French military command fortified Dien Bien Phu in northwestern Vietnam in an effort to tempt the Viet Minh into a conventional military battle. Accepting the challenge, the Viet Minh attacked the fortress in the spring of 1954. The French generals thought the terrain made it impossible to bring artillery to bear on the fortress, but they were wrong. As the battle turned against the French, the United States government debated sending troops to relieve the garrison, but finally decided to avoid involvement in an Asian land war.[9] On May 8, 1954, the Viet Minh defeated the French at Dien Bien Phu. The French government fell, and a new premier who was willing to negotiate a settlement came to power.

The negotiations took place in Geneva under the chairmanship of Great Britain and the Soviet Union. Though invited, the United States refused to participate officially but did send observers.[10] While the Geneva Conference on Indochina was in session, Bao Dai, the French-appointed chief of state, named Ngo Dinh Diem as premier of Vietnam.[11]

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NAM (Gettleman ed. 1965); THE VIET-NAM READER (Raskin & Fall ed. 1965); Carver, *The Faceless Viet Cong*, 44 FOREIGN AFFAIRS 347 (1966).

An excellent chronology of events in Vietnamese history can be found in THE VIET-NAM READER 377 (Raskin & Fall ed. 1965). A shorter but still useful chronology appears in Saturday Review, Dec. 18, 1965, pp. 18-19. While we have placed great reliance on this material, we have tried to use it all with appropriate caution. See, *e.g.*, MADGE, THE TOOLS OF SOCIAL SCIENCE 75-119 (1965). For example, Senator Fulbright has pointed out that while Mr. Carver is a specialist on Vietnamese affairs who works for the American Central Intelligence Agency, his position and possible bias were not disclosed in the issue of *Foreign Affairs* that contained his article. N.Y. Times, April 30, 1966, p. 10, col. 6 (city ed.). On the other hand, M. Lacouture has known many of the leaders of the North Vietnamese government for a number of years and obviously admires them. Despite these indications of possible bias both the Lacouture book and the Carver article are useful if read critically.

[9] See Roberts, *The Day We Didn't Go to War*, in THE VIET-NAM READER 57 (Raskin & Fall ed. 1965).

[10] See Lancaster, *Power Politics at the Geneva Conference 1954*, in VIETNAM 118 (Gettleman ed. 1965).

[11] LACOUTURE, VIETNAM: BETWEEN TWO TRUCES 12 (1966); Saturday Review, Dec. 18, 1965, pp. 18-19.

On July 21st the Geneva accords were signed by France and the victorious Viet Minh. These agreements provided that Vietnam was to be partitioned temporarily along the 17th parallel; the Viet Minh were to remove their forces from South Vietnam and the French theirs from the North; the North, of course, would be governed by the Viet Minh while it was assumed that the French would continue to control the South. Foreign military personnel and bases were to be limited and there was to be no increase in armaments. National elections, leading to the reunification of North and South Vietnam, were to be held by July 20, 1956. Finally, an International Control Commission was created to supervise the execution of the agreements.[12] The final declaration of the conference contained language which invited trouble:

> 7. The Conference declares that, so far as Vietnam is concerned, the settlement of political problems, effected on the basis of respect for the principles of independence, unity, and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July, 1956, under the supervision of an international commission composed of representatives of the Member States of the International Supervisory Commission, referred to in the agreement on the cessation of hostilities. Consultations will be held on this subject between the competent representative authorities of the two zones from July 20, 1955, onward.[13]

Neither Communists nor non-Communists were likely to agree on the meaning of these terms. The United States and the government of Ngo Dinh Diem did not join in the agreements. President Eisenhower said that the United States would accept them as the best of a bad bargain, but would not be bound by their terms.[14]

### 2. 1954 TO 1956: FAILURE TO HOLD ELECTIONS

After the Geneva accords the Diem government sought to assert control over the southern part of the country. Generally the situation was chaotic. Battles were fought against several religious sects which had their own armies. Tensions developed between the Roman Catholics, who controlled the government, and the Buddhists, who composed the country's largest religious group.

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[12] Agreement on the Cessation of Hostilities in Vietnam (July 20, 1954), in VIETNAM 137-50 (Gettleman ed. 1965).

[13] Final Declaration of the Geneva Conference (July 21, 1954), in VIETNAM 151, 152-53 (Gettleman ed. 1965).

[14] N.Y. Times, July 22, 1954, p. 1, col. 8.

Hoping to create a stable situation and to contain Communist expansion in Southeast Asia, the United States decided to back the Diem government. On October 24, 1954, President Eisenhower wrote Premier Diem, promising that economic and military assistance would be given to South Vietnam if certain reforms were made.[15] In early 1955 American military personnel began training the South Vietnamese Army, and in February the Southeast Asia Treaty Organization (SEATO) was formed.[16] Arguably this treaty contained an American pledge to defend South Vietnam.[17]

Diem won his battles against the religious sects and their armies, and there followed a period of relative calm. In July he took a stand on national elections: first, he asserted that since his government had not signed the Geneva agreements, it was not bound by them; second, he stated that there could be no free elections in the North because of the nature of the Communist government, and as a result the conditions for elections under article 7 of the declaration of the conference had not been met; finally, he refused to discuss the situation with representatives of North Vietnam. In 1955 and 1956, both North and South accused each other of violating the Geneva agreements.[18] Certainly United States military assistance ran counter to the terms of the accords unless it could be interpreted as no more than a replacement of existing personnel and equipment, or unless the obligations imposed by the agreements either did not apply to the United States or were excused because of violations by North Vietnam.[19] On April 26, 1956, the French, who

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[15] 31 DEP'T STATE BULL. 735 (1954).

[16] See Southeast Asia Treaty Organization: Response to the Communist Threat (September 1954), in VIETNAM 92-96 (Gettleman ed. 1965). Secretary of State Dulles viewed the Geneva agreements as a major setback of 1954 for United States foreign policy. The SEATO agreement was viewed as an effort to limit American losses. N.Y. Times, Jan. 1, 1955, p. 1, col. 1.

[17] This argument was first introduced by Secretary of State Rusk in February 1966. See *id.*, Feb. 20, 1966, § 4, p. 1, col. 2.

[18] See First and Second Interim Reports of the International Commission for Supervision and Control in Vietnam, in VIETNAM 166-72 (Gettleman ed. 1965); Fall, *How the French Got Out of Vietnam*, in THE VIET-NAM READER 81, 91-92 (Raskin & Fall ed. 1965).

[19] The official position is:

> The Accords prohibited the reinforcement of foreign military forces in Viet Nam and the introduction of new military equipment, but they allowed replacement of existing military personnel and equipment. Prior to late 1961 South Viet Nam had received considerable military equipment and supplies from the United States, and the United States had gradually enlarged its Military Assistance Advisory Group to slightly less than 900 men. These actions were reported to the ICC and were justified as replacements for equipment in Viet Nam in 1954 and for French training and advisory personnel who had been withdrawn after 1954.
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> As the Communist aggression intensified during 1961, with increased infiltration and a marked stepping up of Communist terrorism in the South, the United States found it necessary in late 1961 to increase substantially the numbers of our military personnel and the amounts and types of equipment introduced by this country into

were clearly bound by the Geneva agreements, left South Vietnam to Ngo Dinh Diem. Not surprisingly, July 20th of that year passed without all-Vietnamese elections. Many assert that had the elections been held, Ho Chi Minh would have won, although it also seems clear that at least a large minority of the South Vietnamese did not want a Communist government.

### 3. THE SECOND EISENHOWER AND THE KENNEDY ADMINISTRATIONS: GUERRILLA WARFARE AND RESPONSE BY PROXY

After 1956 the Diem government increased its efforts to suppress opponents and to impose the authority of Saigon on the rural areas. Some time after 1957 Diem's opponents responded to these efforts and the failure to hold all-Vietnamese elections with terror tactics: bombs were exploded in theaters in the larger cities, and in the rural areas district officials were tortured and killed. The degree to which this action was an invasion from North Vietnam, a revolution controlled and directed by the North, or a local revolution only aided by the North is a point of contention between the American government[20] and its critics.[21] On one hand, the tactics of the guerrillas were consistent with the Communist "war of national liberation" strategy, and Ho Chi Minh had many followers in the South at the time of partition; on the other hand, many non-Communist opponents of Diem were involved. The Diem government sought to characterize all these opponents as Communists by labeling them the "Viet Cong" (which means Vietnamese Communist(s)).[22]

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South Viet Nam. These increases were justified by the international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations.

OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET NAM 29-31 (1966).

[20] See, *e.g.*, U.S. Dep't of State, *Aggression From the North: The Record of North Vietnam's Campaign to Conquer South Vietnam* [the "White Paper"], in THE VIET-NAM READER 143 (Raskin & Fall ed. 1965).

[21] See, *e.g.*, I. Stone, *A Reply to the White Paper*, in THE VIET-NAM READER 155 (Raskin & Fall ed. 1965).

[22] On the nature of the Viet Cong and the involvement of North Vietnam, *compare* LACOUTURE, VIETNAM: BETWEEN TWO TRUCES (1966), *and* Devillers, *Ngo Dinh Diem and the Struggle for Reunification in Vietnam*, in VIETNAM 210 (Gettleman ed. 1965), *with* Carver, *The Faceless Viet Cong*, 44 FOREIGN AFFAIRS 347 (1966), *and* Pike, *How Strong Is the NLF?*, The Reporter, Feb. 24, 1966, p. 20. See also FALL, *op. cit. supra* note 8, at 234.

While the paragraph in the text speaks of the serious faults of the Diem government and the terrorist tactics of its opponents in South Vietnam, perhaps it is appropriate to note some of the history of the government of North Vietnam. Bernard Fall reports:

> Following the Geneva accords, the D.R.V.N. settled down to the task of transforming itself into a full-fledged "people's democracy." A "Population Classification Decree" issued in March, 1953, had divided the population into distinct social categories, and the regime now proceeded to eliminate all landlords by methods of force and

From 1956 to the present, American military support for the Diem government and its successors has progressively increased. During President Eisenhower's administration and the early part of President Kennedy's, American policy was to equip and train the South Vietnamese forces, but to let them do the actual fighting. By 1961 Americans were going into combat as advisors; in 1962 two United States Army air support companies were sent to Vietnam, increasing the total American military personnel there to 4,000. By the time of President Kennedy's death in 1963, the total had advanced to over 15,000.[23]

### 4. THE JOHNSON ADMINISTRATION: ESCALATION BY BOTH SIDES

President Johnson took office shortly after Ngo Dinh Diem was assassinated and his government overthrown in a military coup. In the initial months of the Johnson administration, the South Vietnamese government proved to be unstable and the Viet Cong continued to defeat the South Vietnamese Army. The Johnson administration continued to increase the American military commitment. By July 1964 American forces in South Vietnam numbered 25,000, and they were participating significantly in the fighting.[24]

In August North Vietnamese torpedo boats attacked American destroyers in the Gulf of Tonkin. In retaliation, American planes bombed the boats' bases in North Vietnam. In February 1965 the American base at Pleiku was attacked and heavy losses inflicted. It was reported that President Johnson saw this action as a test:[25] he responded by ordering regular bombing of military targets in North Vietnam.[26] American forces were openly fighting by June, and by the end of the year about 200,000 American soldiers had been sent to Vietnam.[27] During the fall of 1965, large numbers of North Vietnamese regulars began to appear in battles in the South.[28]

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terror reminiscent of the Chinese Communists—and with similar results. Exact figures remain unavailable, but the number of peasants killed during the North Vietnamese "land reform" drives from 1954 to 1956 is variously estimated at between 50,000 and 100,000.

This brutal policy led to the outbreak, in November, 1956, of a veritable peasant rebellion in Nghe-An Province—the same region which had been the seat of the pro-Communist peasant uprising of 1930. Ho [Chi Minh] stepped in . . . to save the unity of his movement . . . . In the ensuing "rectification of errors" campaign, tens of thousands of people were released from prison camps . . . .

*Id.* at 124. See also Carver, *supra* note 8, at 353-55.

[23] See the chronologies in THE VIET-NAM READER 377-93 (Raskin & Fall ed. 1965); Saturday Review, Dec. 18, 1965, pp. 18-19, 20.

[24] See the chronologies in THE VIET-NAM READER 393-96 (Raskin & Fall ed. 1965).

[25] N.Y. Times, Feb. 8, 1965, p. 1, col. 7.

[26] *Id.*, col. 8.

[27] *Id.*, Jan. 13, 1966, p. 1, col. 2.

[28] THE VIET-NAM READER 402 (Raskin & Fall ed. 1965).

The Johnson administration has explained its policy as the fulfillment of the commitment made by President Eisenhower in 1954,[29] as the fulfillment of its obligation to defend South Vietnam under the SEATO treaty,[30] as the containment of Communism in Asia,[31] and as a test case of American ability to win a "war of national liberation"—a war waged by Communist-supported nationalists and fought with guerrilla tactics.[32] In February 1965 the official view of the war was stated in a White Paper released by the State Department:

> North Viet-Nam is carrying out a carefully conceived plan of aggression against the South. . . .
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> The people of South Viet-Nam have chosen to resist this threat. At their request, the United States has taken its place beside them in their defensive struggle.
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> . . . . . .
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> . . . the United States . . . will not abandon friends who want to remain free. It will do what must be done to help them.[33]

Both sides have talked about a negotiated peace at various times. In August 1964 United Nations Secretary General U Thant told the United States that the North Vietnamese were willing to discuss the possibility of ending the war; but our government, feeling that it lacked bargaining power at that point, declined the offer.[34] In April 1965 President Johnson offered "unconditional" discussions to North Vietnam and a one-billion-dollar aid program for Southeast Asia.[35] The degree to which the American offer was unconditional is a subject of debate.[36] In May, to indicate American good faith, the bombing of North Vietnam was halted for five days; but the American government perceived no satisfactory signal of an intention to negotiate and the bombing was resumed.[37] Many asserted that the five-day suspension was not long enough to prompt negotiations.[38] The bombing was again stopped for the Christmas truce and was not resumed for thirty-seven days.[39] During that time

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[29] VIETNAM PERSPECTIVE 5 (interview with Secretary of State Rusk).

[30] N.Y. Times, Feb. 20, 1966, § 4, p. 1, col. 2.

[31] VIETNAM PERSPECTIVE 17-19 (interview with Secretary of State Rusk).

[32] Rusk, *American Foreign Policy and International Law*, in VIETNAM 330, 331-34 (Gettleman ed. 1965).

[33] U.S. Dep't of State, *Aggression From the North: The Record of North Vietnam's Campaign to Conquer South Vietnam* [the "White Paper"], in THE VIET-NAM READER 143, 155 (Raskin & Fall ed. 1965).

[34] See FALL, *op. cit. supra* note 8, at 313, for a discussion of the incident.

[35] Johnson, *American Policy in Viet-Nam*, in THE VIET-NAM READER 343 (Raskin & Fall ed. 1965).

[36] Morgenthau, *We Are Deluding Ourselves in Vietnam*, in VIETNAM 365 (Gettleman ed. 1965).

[37] VIETNAM PERSPECTIVE 17.

[38] See, *e.g.*, N.Y. Times, Dec. 4, 1965, p. 1, col. 8.

[39] See, *e.g.*, Newsweek, Feb. 14, 1966, pp. 17-22.

President Johnson waged his "peace offensive" by conveying the American position to governments around the world and making contacts with the North Vietnamese.[40] On January 31, 1966, American planes again resumed their raids on North Vietnam because there had been only a negative reaction from Ho Chi Minh's government and the rebels in the South.[41] At the same time, the American government asked the United Nations to prompt the resumption of the Geneva Conference so that negotiations would start.[42] The war continues.

### *B. The Protests*

#### 1. THE DISSENTERS: REASONS AND IDENTITY

At various times during the war in Vietnam, some Americans have opposed or criticized our government's policies there. The arguments which have characterized this dissent have been many, and we can do little more than sketch them here. Most of the critics of our policy have based their objections to the war on one or another, or some combination of, the following contentions:

(1) This war offends the moral sense of Americans because of the way in which it is fought. The United States, for example, has used weapons which kill or injure in horrifying ways. The victims have included many innocent bystanders—old people, women, and children. All sides have mistreated prisoners of war.[43]

(2) All wars are morally wrong; military force should never be used.[44]

(3) South Vietnam, by refusing to hold national elections, and the United States, by encouraging this refusal, have violated the Geneva agreements of 1954.[45]

(4) The United States, until 1966, violated its obligations to invoke the assistance of the United Nations in settling conflicts which endanger world peace.[46]

(5) The policy of the United States has in effect blocked elec-

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[40] See, *e.g.*, N.Y. Times, Jan. 1, 1966, p. 1, cols. 1, 2, 4, 5; *id.*, Jan. 2, 1966, p. 22, cols. 1, 2, 5.

[41] See, *e.g.*, Newsweek, Feb. 14, 1966, pp. 17-22.

[42] *Ibid.*

[43] See, *e.g.*, FALL, *op. cit. supra* note 8, at 295, 300-03; VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS 136-37 (1965) (transcript of unofficial hearings held by Congressman Robert W. Kastenmeier in Madison, Wis., July 30-31, 1965).

[44] See, *e.g.*, *id.* at 92, 100.

[45] See, *e.g.*, *id.* at 27; N.Y. Times, May 17, 1965, p. 30, cols. 1, 4 (city ed.) (statement of Dr. George Kahin at National Teach-In).

[46] See, *e.g.*, VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS, *op. cit. supra* note 43, at 17-18, 84-85, 89. See also Memorandum of Law of Lawyers' Comm. on American Policy Toward Vietnam, reprinted in the *Congressional Record* at the request of Senators Wayne Morse and Ernest Gruening, 111 CONG. REC. 24010, 24011-18 (daily ed. Sept. 23, 1965).

tions which the Communists would probably win; this, in turn, is seen as inconsistent with the principle of self-determination to which this nation subscribes.[47]

(6) The governments we have supported in South Vietnam have been dictatorial and have represented the upper or privileged classes; as a result, our efforts have prevented a social and political revolution that would serve the best interests of the vast majority of the Vietnamese people.[48]

(7) Negroes and other members of American underprivileged groups have supplied a disproportionate share of the fighting men in Vietnam; at the same time, the war has diverted attention and resources needed to combat poverty and discrimination at home.[49]

(8) The risks of escalation and a general nuclear war are too great to justify whatever gains might be realized through military action in Vietnam.[50]

(9) Before engaging in what amounts to a war, the government should supply full and accurate information to the public to facilitate intelligent discussion of the issues, and the President should obtain a declaration of war from Congress; yet without doing these things, President Johnson has committed more and more troops to South Vietnam and has ordered the bombing of North Vietnam.[51]

(10) Vietnam is the wrong place to fight to contain Communism because the North Vietnamese and the Chinese enjoy great logistical advantages; moreover, our superior weapons are of little use in a guerrilla war.[52]

Those opposing the war have also advanced a variety of proposals concerning what should be done in Vietnam. Some have urged that all forces be withdrawn immediately.[53] Others want a negotiated settlement and call for discussions with North Vietnam and the Viet Cong leading to a coalition government for South Vietnam which might include the Communists.[54] Some have proposed

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[47] Wisconsin State Journal (Madison, Wis.), April 2, 1965, p. 1, col. 6, at 2, col. 8.

[48] VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS, *op. cit. supra* note 43, at 27; STAFF OF INTERNAL SECURITY SUBCOMM., SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., THE ANTI-VIETNAM AGITATION AND THE TEACH-IN MOVEMENT 141, 200 (Comm. Print. 1965) [hereinafter cited as STAFF STUDY].

[49] See, *e.g.*, N.Y. Times, March 10, 1966, p. 4, cols. 4-5 (city ed.).

[50] VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS, *op. cit. supra* note 43, at 32, 36, 51.

[51] See, *e.g.*, *id.* at 68.

[52] See, *e.g.*, Morgenthau, *We Are Deluding Ourselves in Viet-Nam*, in THE VIET-NAM READER 37 (Raskin & Fall ed. 1965); N.Y. Times, Feb. 9, 1966, p. 1, col. 7, at 14, col. 1 (city ed.) (retired General James M. Gavin).

[53] VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS, *op. cit. supra* note 43 at 109.

[54] Capital Times (Madison, Wis.), Feb. 23, 1966, p. 11, cols. 1, 2-3 (statement of Senator Robert Kennedy); see also Newsweek, March 7, 1966, pp. 24-25.

that we defend enclaves which we now control, but abandon efforts to fight outside of them or to make military gains by bombing.[55] Some have talked of a United Nations military force which would stop the fighting and keep the peace.[56]

The great majority of those who have opposed United States policy in Vietnam during the past few years are middle-class adults who consider themselves part of the mainstream of American society.[57] In many instances they are opposing an administration which they helped elect by working for the Democratic Party in the 1964 elections.[58] Many are leaders of local churches and synagogues.[59] Many are college teachers.[60] A number are prominent people: for example, writers Saul Bellow[61] and Arthur Miller,[62] and actors Robert Ryan[63] and Tony Randall.[64] Dr. Benjamin Spock,[65] undoubtedly this nation's best-known pediatrician, has vigorously opposed American policy. Recently Senator J. William Fulbright[66] joined Senators Morse[67] and Gruening[68] in their long-standing opposition to the war in Vietnam.

Then there are the student groups which have organized and participated in many of the protests. One writer has described them in this fashion:

> On many campuses, all factions of the peace movement are

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55 N.Y. Times, Feb. 9, 1966, p. 1, col. 7, at 14, col. 1 (city ed.) (retired General James M. Gavin).

56 VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS, *op. cit. supra* note 43, at 17-18.

57 For example, the *New York Times* said of those who participated in the November 27, 1965, march on Washington, D.C., "Most of the marchers appeared to be middle-class whites . . . and they far outnumbered the student groups and the radical left." N.Y. Times, Nov. 28, 1965, § 1, p. 87, col. 4.

58 See, *e.g.*, Statement of Wisconsin Americans for Democratic Action, in VIETNAM HEARINGS—VOICES FROM THE GRASS ROOTS, *op. cit. supra* note 43, at 77.

59 See, *e.g.*, N.Y. Times, Feb. 15, 1966, p. 2, cols. 3-4 (city ed.); *id.*, Feb. 17, 1965, p. 1, col. 8, p. 2, cols. 5-8 (city ed.); *id.*, Feb. 20, 1966, § 1, p. 2, cols. 4-6; *id.*, Feb. 23, 1966, p. 15, cols. 3-5 (city ed.); *id.*, March 20, 1966, § 4, p. 8, cols. 1-2.

60 Over 1,200 college teachers were listed as sponsors of the National Teach-In. NATIONAL TEACH-IN ON THE VIETNAM WAR 10-35 (undated pamphlet distributed as a program at the National Teach-In, May 15, 1965).

61 See the full-page newspaper ad listing sponsors of the November 27, 1965, march on Washington, D.C., N.Y. Times, Nov. 23, 1965, p. 28, cols. 1-8 (city ed.).

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 Sevareid, *Why Our Foreign Policy Is Failing—An Exclusive Interview With Senator Fulbright*, Look, May 3, 1966, p. 23.

67 For a recent statement by Senator Morse, see Morse, *American Policy in Viet-Nam*, in THE VIET-NAM READER 281 (Raskin & Fall ed. 1965).

68 For a recent statement by Senator Gruening, see The Progressive, Feb. 1966, p. 15.

> united in an Independent Committee to End the War in Vietnam—a frail, tangled coalition of forces and personalities that includes groups ranging from religious pacifists to militant supporters of the Vietcong; sociological types ranging from children of left-wingers of the thirties to what one student called "some of your preppier New Englanders, who are in it for moral reasons;" a few students who simply hope to evade the draft; a few representatives of national, local, and ad-hoc committees; a few hard-line members of the Young Socialist Alliance (Y.S.A.), who are commonly referred to as Trotskyists and are known within the movement, familiarly, as the "Trots;" and a new breed of lonely hangers-on and demonstration enthusiasts who might be described as Sunday Outing Radicals.[69]

### 2. THE TACTICS AND TECHNIQUES OF DISSENT

At this point we shall sketch a short history of the protests against American policy in Vietnam and catalogue the tactics used by the dissenters. In this connection, four events deserve special emphasis because of the responses they prompted: the National Teach-In held in Washington, D.C., in May 1965; the nationwide protests held on October 15th and 16th; the march on Washington held on November 27, 1965; and the Fulbright hearings of February 1966.

The first protests were made in 1954 when Democrats in the United States Senate opposed going to the aid of the French at Dien Bien Phu.[70] Senator Fulbright stated that we had no right to intervene on behalf of a colonial power,[71] and then Senator John F. Kennedy joined in this opposition.[72] What was probably the first actual protest demonstration occurred in July of that year when four Vietnamese students who were studying in the United States picketed the White House to protest the partition of their country.[73] But apart from these efforts, little else occurred until the end of 1963. Since then, as the war has escalated, so have the expressions of dissent. They have become progressively more organized and have received an increasing amount of publicity.

In September 1963 Senator Church offered a resolution opposing continued aid to the Diem government;[74] and an advertisement protesting American involvement, representing the views of 17,358 clergymen of all faiths, appeared in the *New York Times*.[75] In the months that followed, some student groups and various peace organizations took up the cause of opposition to American policies.

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[69] The New Yorker, Dec. 11, 1965, p. 195.
[70] N.Y. Times, Oct. 18, 1954, p. 19, col. 2.
[71] *Id.*, July 12, 1954, p. 3, cols. 3-5.
[72] *Id.*, Sept. 22, 1963, § 4, p. 11, col. 1.
[73] *Id.*, July 21, 1954, p. 3, cols. 1, 2, 5-7.
[74] *Id.*, Sept. 11, 1963, p. 1, col. 4.
[75] *Id.*, Sept. 15, 1963, § 4, p. 5, cols. 1-8.

In March 1964 students at the University of Wisconsin picketed a speech given in Madison by Secretary of State Dean Rusk.[76] The Columbia University chapter of the Congress of Racial Equality (CORE) sent a petition to President Johnson opposing any military action against North Vietnam and urging him to support the French proposal to neutralize Vietnam.[77] In April FBI agents seized a Viet Cong propaganda film which some Haverford College students had planned to show at a protest meeting.[78] A group of eighty-seven students stated in an advertisement that they would refuse to fight in South Vietnam.[79] On May 2nd about 400 college students held a rally in New York protesting the United States participation in the war;[80] the group continued thereafter as an organization known as the May 2nd Movement.[81] Other demonstrations, rallies, and picketing were held at prominent places during the rest of 1964.[82]

At the beginning of 1965, Senator Morse called the United States policy in Vietnam "bankrupt" and asserted that it violated the United Nations Charter and the Geneva accords.[83] Norman Thomas, the Socialist leader, urged neutralization and withdrawal of American forces.[84] Quincy Wright, the noted international relations scholar, urged the United States to respect international obligations and permit nations to follow a policy of self-determination.[85] The bombing of North Vietnam, which began in February, prompted greatly increased activity. Students on college campuses began wearing buttons symbolizing opposition to the war. Two thousand pickets, sponsored by the Women's Strike for Peace, demonstrated in front of the United Nations.[86] An organization called Youth Against War and Fascism conducted a protest march in front of the United States Mission to the United Nations.[87] Demonstrations in front of the United Nations,[88] the White House,[89] and other

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[76] *Id.*, March 7, 1964, p. 1, col. 8.

[77] *Id.*, March 11, 1964, p. 36, col. 3. A few days later a military building in New York City was picketed to protest United States participation in the fighting in Vietnam. *Id.*, March 15, 1964, p. 72, col. 5.

[78] *Id.*, April 22, 1964, p. 9, col. 6. See also *id.*, April 15, 1964, p. 5, col. 5.

[79] *Id.*, April 26, 1964, p. 20, col. 3.

[80] *Id.*, May 3, 1964, p. 5, col. 1.

[81] See, *e.g.*, LUCE, THE NEW LEFT 110-17 (1966); Munk, *Most Radical Youths Nonsocialist—New Left: The Ideological Bases*, in STAFF STUDY 217, 218-19; Lens, *The New Left—and the Old*, The Progressive, June 1966, p. 19.

[82] See, *e.g.*, N.Y. Times, Aug. 7, 1964, p. 3, col. 1; *id.*, Aug. 9, 1964, p. 1, col. 2; *id.*, Aug. 16, 1964, p. 1, col. 2; *id.*, Oct. 4, 1964, p. 5, col. 1; *id.*, Dec. 15, 1964, p. 18, col. 5; *id.*, Dec. 20, 1964, p. 52, col. 2; *id.*, Dec. 26, 1964, p. 4, col. 4.

[83] *Id.*, Jan. 6, 1965, p. 8, col. 4.

[84] *Id.*, Jan. 3, 1965, § 4, p. 8, col. 5.

[85] *Id.*, Jan. 31, 1965, § 4, p. 8, col. 5.

[86] *Id.*, Feb. 14, 1965, p. 5, col. 1.

[87] *Ibid.*

[88] See, *e.g.*, *id.*, Feb. 13, 1965, p. 7, cols. 1-4; *id.*, Feb. 20, 1965, p. 2, cols. 3, 5-6; *id.*, March 6, 1965, p. 2, col. 2.

[89] See, *e.g.*, *id.*, Feb. 11, 1965, p. 6, col. 4; *id.*, Feb. 21, 1965, p. 4, col. 1.

places[90] became more frequent. A large number of college professors used newspaper advertisements to assert their opposition to American policy.[91] The Central Conference of American Rabbis urged President Johnson to negotiate through the United Nations.[92]

In March 1965 thirteen professors at the University of Michigan, seeking a more effective way to express their dissent, announced a plan to cancel their classes in protest against the war.[93] Governor George Romney attacked the proposal,[94] and the state senate passed a resolution which declared that the action would be "a clear violation of their duties as instructors at a State University to their students and to the people of the State of Michigan . . . ."[95] After much informal discussion, the original thirteen professors, now joined by many others, held an all-night meeting at which it was decided that on March 24th the professors would conduct a "teach-in."[96] On that day instead of cancelling classes about 200 faculty members supported anti-war-in-Vietnam rallies, speeches, and panel discussions which extended over a twelve-hour period and occupied four auditoriums.[97]

From March to July, teach-ins were held at many schools. Wisconsin,[98] Columbia,[99] Pennsylvania,[100] Temple,[101] Swarthmore,[102] Carlton,[103] Rutgers,[104] Princeton,[105] Oregon,[106] Yale,[107] Illinois,[108] Berkeley,[109] and Harvard,[110] among others, saw this kind of faculty

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90 See, *e.g.*, *id.*, Feb. 8, 1965, p. 16, cols. 1-3, 5; *id.*, Feb. 21, 1965, p. 4, col. 1; *id.*, Feb. 23, 1965, p. 9, col. 1; *id.*, March 27, 1965, p. 3, col. 3.

91 See, *e.g.*, *id.*, Feb. 16, 1965, p. 14, cols. 3, 4, 8, p. 31, col. 1; *id.*, Feb. 28, 1965, § 4, p. 10, col. 3; *id.*, March 1, 1965, p. 17, col. 5; *id.*, March 4, 1965, p. 9, col. 1.

92 *Id.*, March 7, 1965, p. 3, col. 5.

93 STAFF STUDY 17.

94 N.Y. Times, March 17, 1965, p. 8, col. 1.

95 STAFF STUDY 18.

96 The notion of a "strike," while sufficiently dramatic, was so controversial that it diverted attention from the basic aim of the protest group. During a meeting on the night of March 17 they were batting around alternative ideas such as night classes or a vigil, when Anthropologist Sahlins suddenly interrupted the discussion. "Hold everything. I've got it," he shouted. "They say we're neglecting our responsibilities as teachers. Let's show them how responsible we feel. Instead of teaching out, we'll teach in—all night." *Id.* at 32; see also N.Y. Times, May 9, 1965, p. 2, col. 3 (city ed.).

97 *Id.*, March 25, 1965, p. 9, col. 1.

98 *Ibid.*

99 *Id.*, March 27, 1965, p. 29, col. 2.

100 *Id.*, April 8, 1965, p. 2, col. 5.

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Id.*, April 24, 1965, p. 2, col. 3.

105 *Id.*, May 5, 1965, p. 16, col. 1.

106 *Id.*, May 9, 1965, § 6 (Magazine), p. 25.

107 *Id.*, May 30, 1965, p. 39, col. 6.

108 *Id.*, May 16, 1965, p. 62, cols. 2, 6, 8.

109 *Id.*, May 23, 1965, p. 26, col. 1.

action. It would be difficult to describe a typical teach-in, but the atmosphere may be suggested by a look at one held at the University of Wisconsin on April 1st. It began at two o'clock in the afternoon and ended some time after midnight.[111] It was held in several large lecture halls in the Social Science building of the university.[112] There were signs on the wall of one room reading, "Out of Vietnam by Easter," "End Gas Warfare," and "In Your Heart You Know It Is Wrong."[113] Antiwar buttons and literature were distributed.[114] The campus newspaper reported that the crowd ranged from 300 early in the afternoon to 1,600 late in the evening;[115] a local paper hostile to the event estimated the peak crowd at 900.[116] CBS televised excerpts on the network's evening news program.[117]

All told, twenty-six professors participated.[118] There were at least ten from the history department and four from sociology, two from philosophy and two from the Humanities Institute. One law professor moderated a panel discussion. While many of the teachers were only assistant professors, at least three or four were among the most distinguished senior professors at the university.

What happened at the ten-hour affair? Eighteen of the participants lectured on "a wide range of topics ranging from U.S. foreign policy to French existentialist philosophy,"[119] and eight others participated in two panel discussions.[120] Basically, all the speakers opposed the war; and there was no spokesman for the administration.[121] A wide variety of positions were taken. For example, one professor said that America had no clear objective in Vietnam; there was no border to close and no permanent government to support; given free choice, South Vietnam would prefer Communism; the United States should negotiate with the North and, he added, hold the free elections it advocates for East and West Germany.[122] Another professor argued that the United States was losing the war and that nothing short of the use of nuclear weapons would

110 *Id.*, July 16, 1965, p. 17, col. 5.
111 Daily Cardinal (Madison, Wis.), April 2, 1965, p. 1, col. 4.
112 *Ibid.*
113 Wisconsin State Journal (Madison, Wis.), April 2, 1965, § 1, p. 1, col. 6, at 2, col. 8.
114 *Id.* at 1, cols. 6-8.
115 Daily Cardinal (Madison, Wis.), April 2, 1965, p. 1, col. 4.
116 Wisconsin State Journal (Madison, Wis.), April 2, 1965, § 1, p. 1, col. 6.
117 Daily Cardinal (Madison, Wis.), April 2, 1965, p. 1, cols. 4-5.
118 *Ibid.*; Capital Times (Madison, Wis.), April 2, 1965, p. 1, col. 4, p. 4, col. 1; Wisconsin State Journal (Madison, Wis.), April 2, 1965, § 1, p. 1, cols. 6-8, p. 2, col. 8.
119 Capital Times (Madison, Wis.), April 2, 1965, p. 1, col. 4.
120 Daily Cardinal (Madison, Wis.), April 2, 1965, p. 1, col. 4.
121 Capital Times (Madison, Wis.), April 2, 1965, p. 1, cols. 4, 6.
122 Wisconsin State Journal (Madison, Wis.), April 2, 1965, § 1, p. 1, col. 6, at 2, col. 8.

make any difference.[123] Another said that the entire East Asian situation should be discussed with Red China.[124] Still another asserted that "this is an age of overkill and of underthought." He contended that America's attitude reflected a "scorched earth policy" which was "an assault on beloved earth belonging to other people."[125] One, who had some involvement with the civil rights movement, announced that the affair was not really a teach-in at all, but rather Wisconsin's "first Freedom School." He received, it was reported in the campus newspaper, a five-minute standing ovation in response to this remark.[126]

Undoubtedly, the majority of the audience heard from the speakers what they wanted to hear. There were relatively few in the audience who supported American policy in Vietnam.[127] A locally prominent member of patriotic groups tried to question one of the speakers. The local newspaper which opposed the teach-in reported that he was "beaten down";[128] the other paper, which had some sympathy for the event, reported that he was handled quietly.[129] Some students appeared in their ROTC uniforms, worn apparently to show support for American policy.[130] In so far as the University of Wisconsin teach-in was a rally for protesters and not a balanced debate, it was probably typical of most teach-ins. But the lack of administration supporters on the platform and in the audience may have been caused in part by the fact that another rally, in support of the war, was going on at the same time in another university building.[131] Reports from other teach-ins indicate that some efforts have been made to have the administration's case presented.[132] But in most instances speakers supporting the government have addressed predominately hostile audiences.[133]

At the University of Michigan the professors who had participated in the original teach-in created a group called the Inter-University Committee for a Public Hearing on Vietnam in order to continue and promote activities such as teach-ins.[134] Some time in late April Richard Mann, a professor of psychology and executive

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123 *Ibid.*

124 *Ibid.*

125 Daily Cardinal (Madison, Wis), April 2, 1965, p. 1, col. 4, at 15, col. 2.

126 *Id.* col. 1.

127 Capital Times (Madison, Wis.), April 2, 1965, p. 1, cols. 4, 6.

128 Wisconsin State Journal (Madison, Wis.), April 2, 1965, § 1, p. 1, cols. 6, 8.

129 Capital Times (Madison, Wis.), April 2, 1965, p. 1, cols. 4, 6, p. 4, col. 1.

130 Wisconsin State Journal (Madison, Wis.), April 2, 1965, § 1, p. 1, col. 6, at 2, col. 8.

131 Daily Cardinal (Madison, Wis.), April 2, 1965, p. 1, col. 1.

132 See STAFF STUDY 21-33.

133 *Ibid.*

134 N.Y. Times, May 1, 1965, p. 3, col. 6 (city ed.).

secretary of the Inter-University Committee, wrote McGeorge Bundy, President Johnson's chief assistant on foreign affairs, and invited him to debate in a national teach-in to be held in Washington, D.C., on May 15th.[135] Bundy accepted, which was something of a surprise since he had refused a similar offer from a group of professors at Washington University in St. Louis shortly before.[136] However, the academic criticism had been growing, and the State Department's "truth teams" which had been sent to various college campuses had failed to quiet the critics of American policy.[137]

Bundy and the Michigan committee negotiated arrangements carefully.[138] There were to be no placards in the hall and no demonstrations. Bundy's opponent was to be George Kahin, a professor of political science at Cornell. There was to be a series of panel discussions, and Bundy demanded fair representation for his side.[139] Later he remarked that "the preliminary arrangements . . . have been fair to a fault."[140]

The confrontation between Bundy and his academic critics was viewed as a major event. About 5,000 people, many of whom travelled great distances to be there, attended the Washington sessions on May 15th.[141] Special radio-telephone hookups were set up on over 100 college campuses in thirty-five states.[142] An estimated 100,000 listened at these meetings.[143] Many educational television stations carried live the entire fifteen-and-one-half-hour teach-in.[144] The three major networks broadcast highlights of the debate at various times.[145] Some of the debate was carried by radio stations throughout the country.[146]

At the morning session Professor Hans Morgenthau of the University of Chicago opened the attack on American policy. He said that America's announced goals in Asia required a willingness "to go to war with China, with all that that implies."[147] In short, "we set ourselves goals in Asia . . . which cannot be achieved with the means we are willing to employ."[148] Arthur M. Schlesinger, Jr., a Harvard professor and formerly an assistant to Presidents Ken-

135 Greenfield, *After the Washington Teach-In*, The Reporter, June 3, 1965, p. 16.
136 N.Y. Times, May 1, 1965, p. 3, col. 5 (city ed.).
137 See, *e.g.*, *id.*, May 5, 1965, p. 16, col. 1; *id.*, May 6, 1965, p. 13, col. 1; *id.*, May 7, 1965, p. 2, col. 4; *id.*, May 8, 1965, p. 4, col. 3.
138 Greenfield, *supra* note 135, at 16.
139 *Ibid.*
140 N.Y. Times, May 17, 1965, p. 30, col. 1 (city ed.).
141 *Id.*, May 16, 1965, § 1, p. 1, cols. 2-3.
142 *Id.*, May 14, 1965, p. 16, col. 1 (city ed.).
143 *Id.*, May 16, 1965, § 1, p. 1, cols. 2, 4.
144 See *id.*, May 15, 1965, p. 63, cols. 2-3.
145 See *id.* col. 3.
146 See *id.*, May 14, 1965, p. 16, col. 1.
147 See *id.*, May 17, 1965, p. 31, col. 3 (city ed.).
148 *Ibid.*

nedy and Johnson, was presented as a defender of the administration. He found fault with both the administration's policies and the slogans of its academic critics. He was questioned sharply by the audience.[149]

A two-hour recess was taken for lunch. During this period it was announced that McGeorge Bundy, who was scheduled to speak at the afternoon session, could not appear because of an important assignment from the President.[150] The great confrontation was not to take place. There was considerable disappointment, and some charges of evasion were made.[151] At the afternoon session Professor Kahin delivered his argument against American policy, stressing that the United States had failed again and again to work with Asian nationalism.[152] Professor Robert Scalapino of the University of California at Berkeley made the main presentation in support of the administration.[153] He asserted that Communist China views the United States as a "paper tiger" that will collapse when pushed. "If Peiping is able to demonstrate this works in South Vietnam, it will work elsewhere."[154] Shorter statements were made against the admministration's position by Professor Morgenthau, Professor Mary Wright of Yale, Professor Stanley Millet of Briarcliffe College, and Professor William A. Williams of the University of Wisconsin.[155] Statements supporting the administration were made by Professor Zbigniew Brzezinski of Columbia, Professor Wesley Fishel of Michigan State University, and Professor Michael Lindsay of American University.[156] Members of the panel commented on statements made by the other members, and there were a number of questions from the audience.

Up to this point the atmosphere resembled that of a heated roundtable at a professional meeting. The comments and questions were pointed but presented with politeness.[157] Undoubtedly most of the audience was critical of the administration, but much of the debate was played to those watching on television. The *New*

149 *Id.*, May 16, 1965, § 1, p. 1, col. 2, at 62, cols. 3-4, 5-6.
150 *Id.*, May 17, 1965, p. 30, col. 1 (city ed.).
151 *Id.*, May 16, 1965, § 1, p. 62, col. 5.
152 *Id.*, May 17, 1965, p. 30, cols. 1-5 (city ed.).
153 *Id.* cols. 5-8, p. 31, cols. 1-2.
154 *Id.* at 30, col. 8.
155 *Id.* col. 2.
156 *Ibid.*
157 Greenfield, *supra* note 135, at 17. The *New York Times* reported the comments of a professor of philosophy at City College of New York. "'I liked the spirit of it, the sharp questioning. There was nothing stereotyped about it.'" A graduate student at George Washington University was critical. He thought that there was insufficient representation of the administration point of view. N.Y. Times, May 16, 1965, § 1, p. 62, cols. 5, 6. One of the participants at the University of Wisconsin teach-in who attended the National Teach-In was critical but for a very different reason. He complained privately that there was too much discussion and not enough emotional condemnation of an immoral war.

*York Times* commented that "contrary to some expectations among the sponsors, however, [the debate] produced few specific recommendations of alternative policies in Vietnam."[158] Most of the critics urged negotiations; the supporters replied that the administration wanted negotiation; the critics then charged that the administration had set too many conditions.[159] In the context of the discussion, it was perhaps inevitable that few participants would address themselves to how the war might be ended in a manner acceptable both to the United States and its opponents. There were simply too many disputes about the facts, as well as about ends and means.

In the evening the teach-in continued with nine panel discussions. The topics were called the Realities of North Vietnam, the Issues of Chinese Expansion, the Domino Theory in Southeast Asia, the United States Record in South Vietnam, the "Civil War" and "Aggression From the North," United States Military Policy, Can the War Be Won?, Political and Moral Effects of United States Policy, and the Making of United States Policy.[160] No one represented the administration on some of these panels because for some reason those who were supposed to participate had not been asked.[161] At the end of the panels, members of the audience were allowed to make statements, which tended to be highly critical of American policy in Vietnam and, in some instances, highly emotional.[162] Nevertheless, while some criticized the evening sessions, the *New York Times* noted in an editorial that "the academicians on both sides conducted themselves with a dignity and respect for fact that contrasted favorably with the emotionalism that too often passes for discussion in foreign affairs among champions and critics of Government policy alike."[163]

After the National Teach-In, the debate continued. The sponsors of the teach-in called on Bundy to face a panel of academic critics on national television;[164] and on June 21, 1965, CBS News, with Eric Sevareid as moderator, televised a debate between critics and supporters of American policy.[165] Besides Bundy, the participants were Professor Hans Morgenthau, Professor Zbigniew Brzezinski, Professor Edmund O. Clubb, Dr. Guy J. Pauker, and Professor John D. Donoghue. Sevareid posed four questions and changed the subject about every fifteen minutes. As a result, the debate was very fragmentary. But unlike the National Teach-In, it did focus on the gains and costs of possible alternatives open to the

158 *Id.*, May 17, 1965, p. 1, col. 4, at 29, col. 2 (city ed.).
159 *Id.* at 30, cols. 1-8, p. 31, cols. 1-8.
160 *Id.*, May 16, 1965, § 1, p. 62, cols. 2-4.
161 STAFF STUDY 150.
162 *Id.* at 35.
163 N.Y. Times, May 17, 1965, p. 34, col. 1 (city ed.).
164 *Id.* at 1, col. 4.
165 *Id.*, June 22, 1965, p. 1, col. 8.

United States.[166]

The July 1965 protest schedule was a full one: Martin Luther King, Jr., stated that the war in Vietnam must be stopped and that the United States must negotiate a settlement,[167] nine pacifists blocked the entrance to an army recruiting center in New York City,[168] about 400 people protesting the war silently picketed the same center,[169] and several burned their draft cards.[170]

August saw an event of major significance. A group called the Assembly of Unrepresented People met in Washington, D.C.[171] Many leaders of this event had directed civil rights projects in the South, and others were active in various causes, sometimes collectively referred to as "The New Left" to distinguish their adherents from the radicals of the 1930's.[172] The Assembly symbolized a loose merger of one wing of the civil rights movement, the more militant peace groups, and a group of young radicals. Although opposition to the war was only one of the announced goals of the Assembly, the activities of those who came to Washington dealt almost exclusively with that topic.[173] The group held rallies at the Washington Monument and picketed the White House, singing songs of the civil rights movement.[174] It staged a sit-down at the White House and sought to block one entrance until its leaders could talk with President Johnson, McGeorge Bundy, or Secretary of Defense Robert S. McNamara and present a "declaration of conscience" against the war.[175] The group also attempted to march from the Washington Monument to the Capitol[176] with a view to sitting-in at the House of Representatives and forcing Congress to "declare peace with the people of Vietnam."[177] At the Washington meeting, the various groups making up the Assembly formed a thirty-three-member National Co-ordinating Committee to End the War in Vietnam.[178] The Committee's first project was to prompt peace demonstrations throughout the United States and other countries on October 15-16, 1965.[179] A co-ordinating center was opened in Madison, Wisconsin.[180]

One of the most active members of the National Committee was

166 A transcript of this program is reproduced in STAFF STUDY 224-35.
167 N.Y. Times, July 3, 1965, p. 6, col. 2.
168 *Id.*, July 22, 1965, p. 3, col. 3.
169 *Id.*, July 30, 1965, p. 2, col. 4.
170 *Ibid.*
171 See, *e.g.*, *id.*, Aug. 9, 1965, p. 4, cols. 5-7 (city ed.).
172 See, *e.g.*, *id.*, Aug. 11, 1965, p. 3, cols. 5-8 (city ed.).
173 *Ibid.*
174 *Id.*, Aug. 9, 1965, p. 4, cols. 5-7 (city ed.).
175 *Id.* col. 5.
176 *Id.*, Aug. 10, 1965, p. 3, cols. 2-4 (city ed.).
177 *Id.*, Aug. 9, 1965, p. 4, cols. 5, 7 (city ed.).
178 *Id.* col. 7.
179 *Ibid.*
180 *Id.*, Sept. 12, 1965, § 1, p. 6, cols. 1, 2.

the Vietnam Day Committee, an organization which grew out of the teach-in held at Berkeley, California.[181] During August 1965 this group organized a series of attempts to stop troop trains bound for the Oakland army base from which troops sailed for Vietnam.[182] There were at least four such attempts, involving groups of from 200 to 300 people.[183] The trains did not stop, and some of the demonstrators narrowly escaped injury.[184] Also two people tied an outrigger canoe to a troopship at Oakland as a form of protest.[185] Demonstrators invaded the hotel in San Francisco where General Maxwell Taylor, former American Ambassador to Vietnam, was staying.[186]

Meanwhile, the National Co-ordinating Committee to End the War in Vietnam was proceeding with plans for the October 15th and 16th International Days of Protest, an event which was to trigger considerable hostility and some calls for suppression of protests. The various groups affiliated with the National Co-ordinating Committee notified it of their plans, and the Committee, in turn, disseminated this news to interested people. Thus on September 13th the Committee issued a newsletter which first described the protest plans of groups located in seven different cities[187] and then suggested: "direct action such as sit-ins at induction centers or recruiting centers could be tried. Furthermore, a demonstration consisting of a march of young men to the local draft board or induction center with the expressed intention of filling out CO [conscientious objector] forms might be attempted."[188]

Berkeley's Vietnam Day Committee was very active in planning and promoting the International Days of Protest. On September 11th Dr. Stephen Smale, a professor of mathematics at the University of California and one of the leaders of the Vietnam Day Committee, held a press conference to announce the International Days of Protest.[189] He distributed a statement which said in part that "revolutionary struggles for self-determination are sweeping the world today. American suppression of these movements is immoral and a threat to the peace of the world."[190] He announced that there would be civil disobedience, including "peace invasions" of the Oakland army base and movements of boats into restricted waters.[191] Later, on October 11th, the Vietnam Day Committee an-

181 *Id.* col. 3.
182 *Id.* cols. 1, 3.
183 See *id.*, Aug. 7, 1965, p. 3, cols. 2, 6; *id.*, Aug. 13, 1965, p. 3, col. 2; *id.*, Aug. 24, 1965, p. 2, col. 4.
184 *Id.*, Sept. 12, 1965, § 1, p. 6, col. 1.
185 *Id.*, Aug. 25, 1965, p. 15, col. 3.
186 *Ibid.*; *id.*, Aug. 26, 1965, p. 4, col. 4.
187 STAFF STUDY 196-205.
188 *Id.* at 204.
189 N.Y. Times, Sept. 12, 1965, § 1, p. 6, col. 1 (city ed.).
190 *Ibid.*
191 *Ibid.*

nounced that groups in seventy American cities and in some major foreign cities were planning to participate in the mid-October protest.

It was indeed a major production. On Friday, the 15th, there were speeches and a poetry reading in Chicago.[192] Hundreds of demonstrators gathered at Philadelphia's City Hall.[193] In New York, there was a rally outside the Army induction center, and one man burned his draft card.[194] Demonstrations were held at many schools, including City College of New York,[195] Wayne State University,[196] the University of Colorado,[197] the University of California at Santa Barbara,[198] the University of Texas,[199] and Iowa State University.[200] At Yale University, 250 students and faculty members held a rally and a march in New Haven.[201] A forty-eight-hour peace vigil was held at the University of Michigan;[202] some 300 people marched to the selective service office in Ann Arbor, where a few attempted a sit-in.[203] At Berkeley, a large rally was held on the University of California campus, and there were folk songs, speeches, and seminar discussions.[204] In the evening approximately 10,000 marchers began to walk from the campus to the Oakland army base.[205] However, the city of Oakland had denied the Vietnam Day Committee a march permit,[206] and the group was blocked by police just short of the city limits.[207] There was no attempt to resist the police. As a price for permission to use the university facilities for the rally, the Chancellor of the Berkeley campus had received written guarantees from the Vietnam Day Committee that there would be neither civil disobedience nor advocacy of it, and these guarantees were honored.[208]

The protests continued on Saturday, the 16th. Demonstrations were held in many American and foreign cities, typically involving marches, rallies, and speeches against the war in Vietnam. The largest occurred in New York City where 10,000 to 20,000 paraded

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192 *Id.*, Oct. 16, 1965, p. 1, col. 8, at 2, col. 2.
193 *Id.* col. 5.
194 *Id.* cols. 2-4.
195 *Id.* col. 4.
196 *Id.* cols. 4-5.
197 *Id.* col. 5.
198 *Ibid.*
199 *Ibid.*
200 *Ibid.*
201 *Id.* col. 2.
202 *Id.* col. 4.
203 *Ibid.*; *id.*, Oct. 17, 1965, § 1, p. 1, col. 6, at 43, col. 1.
204 *Id.*, Oct. 16, 1965, p. 2, col. 1.
205 *Ibid.*
206 San Francisco Chronicle, Oct. 14, 1965, p. 1, col. 5, at 12, col. 1; *id.*, Oct. 15, 1965, p. 1, cols. 6-8, p. 16, col. 1.
207 *Id.*, Oct. 16, 1965, p. 1, cols. 7-8, p. 7, col. 2.
208 San Francisco Examiner, Oct. 17, 1965, § 1, p. 1, col. 3, at 20, col. 1.

down Fifth Avenue.[209] "One group carried dozens of enlarged copies of a photograph showing a Vietnamese mother comforting a maimed child. Another group wearing skeleton masks, marched with instruments, playing the Marine's Hymn."[210] Following the parade, there was an outdoor rally with folk songs and speeches demanding an end to the war.[211] On the West Coast, the Vietnam Day Committee led another attempt to march through Oakland, but once again the marchers were turned back by the police.[212] In San Francisco approximately 750 people marched and 1,500 attended a rally where poet Allen Ginsberg read a work attacking President Johnson and the war.[213]

There were other activities besides speeches and marches. For example, at a football game students of the University of Colorado formed a card section and flashed antiwar messages to the crowd at halftime.[214] In Madison, Wisconsin, most of the protesters marched and attended a rally at the state capitol,[215] but eleven went to the United States Air Force Base at Truax Field and attempted to arrest the base commander for war crimes.[216] They were barred from the military base, sat down in the road, and were arrested for obstructing traffic.[217]

All told, many people took part in some form of protest activity over this week end. The chairman of the National Co-ordinating Committee placed the number at between 70,000 and 100,000.[218] Other leaders of demonstrations pointed out that most of these people could hardly be classed as radicals.[219] The bulk of the activity consisted of picketing, marching, making speeches, and singing folk songs.[220] Far less civil disobedience than was announced beforehand actually occurred.

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209 N.Y. Times, Oct. 17, 1965, § 1, p. 1, col. 7, p. 43, cols. 2-3.

210 *Id.* at 1, col. 7, p. 43, col. 2.

211 *Ibid.*

212 *Id.* at 1, col. 7, p. 43, cols. 5-8; San Francisco Examiner, Oct. 17, 1965, § 1, p. 1, col. 8, p. 1B, cols. 5-6.

213 N.Y. Times, Oct. 18, 1965, p. 8, cols. 2-3 (city ed.). Ginsberg's poem discussed the pains of a malfunctioning gall bladder and of death in Vietnam.

214 Denver Post, Oct. 17, 1965, § c, p. 29, cols. 4-8. Also, the local Vietnam Day Committee distributed handbills before the game. On one side it had printed the rosters of the teams playing in the homecoming game; on the other it had printed a satire describing "the University of Reason's difficulties in trying to get into the Brinksmanship Conference over the objections of the U. S. Naval Academy, the University of Hanoi and Saigon College."

215 See Wisconsin State Journal (Madison, Wis.), Oct. 17, 1965, § 1, p. 1, col. 7, p. 2, col. 3.

216 N.Y. Times, Oct. 17, 1965, § 1, p. 1, col. 6, p. 43, col. 1.

217 *Ibid.*

218 *Id.*, Oct. 18, 1965, p. 8, col. 1 (city ed.).

219 *Id.* cols. 1-2.

220 For a national report, see *id.*, Oct. 17, 1965, § 1, p. 1, col. 6, p. 43, col. 1. For local reports, see Dallas Morning News, Oct. 16, 1965, § A, p.

The weeks following the mid-October protests saw numerous scattered sequels. Six more men burned their draft cards, in violation of the new federal law.[221] One explained his action by citing the need for a dramatic protest since picketing had become too common.[222] Some antiwar groups announced plans to attack the draft by helping young men avoid induction into the Army. The Students for a Democratic Society (SDS) announced plans to distribute leaflets urging inductees to claim exemption as conscientious objectors; to picket recruiters for the various services and members of the ROTC, labeling them as war criminals; and to give advice in neighborhoods on how to stay out of service.[223] About a month later, SDS announced that it was dropping this program because some local chapters feared that the issue of draftdodging would cloud the group's position against the war in Vietnam.[224] Other groups, however, announced that they would help those who did not want to fight in Vietnam.[225] In California, United States District Judge William T. Sweigert ordered the city of Oakland to give the Vietnam Day Committee a permit for a march through the city,[226] and on November 20th about 8,000 people marched through Oakland to protest the war.[227] Also during this period, at least two groups sought to collect blood and supplies to aid civilian injured by American bombing raids. One group was at the University of Michigan;[228] another was at Stanford University.[229]

Almost overlooked in the activity of the International Days of Protest was an announcement on October 15th that a march on Washington was planned for November 27th.[230] This march was co-ordinated by Sanford Gottlieb, Washington political action director for the National Committee for a Sane Nuclear Policy (SANE), the sponsoring organization.[231] Among the prominent sponsors were writers John Hersey, Arthur Miller, Saul Bellow,

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13, cols. 4-5; *id.*, Oct. 17, 1965, § A, p. 4, cols. 2-4; *id.*, Oct. 19, 1965, § A, p. 6, cols. 1-2; Denver Post, Oct. 16, 1965, § 1, p. 3, cols. 5-8; *id.*, Oct. 17, 1965, § 1, p. 3, cols. 1-8; Raleigh News & Observer, Oct. 19, 1965, p. 16, cols. 3-4.

221 N.Y. Times, Oct. 19, 1965, p. 5, cols. 1, 4; *id.*, Oct. 21, 1965, p. 14, cols. 4-6; *id.*, Oct. 23, 1965, p. 2, cols. 5, 6; *id.*, Nov. 7, 1965, p. 1, col. 3.

222 *Id.*, Nov. 4, 1965, p. 9, col. 2 (city ed.).

223 *Id.*, Oct. 18, 1965, p. 9, cols. 1-4; *id.*, Oct. 19, 1965, p. 1, col. 8, p. 6, cols. 3-8 (city ed.).

224 *Id.*, Nov. 19, 1965, p. 5, col. 1 (city ed.).

225 *Id.*, Dec. 6, 1965, p. 15, cols. 1-2 (city ed.) (May 2nd Movement; W.E.B. DuBois Club; War Resisters League).

226 *Id.*, Nov. 19, 1965, p. 5, col. 1 (city ed.).

227 *Id.*, Nov. 21, 1965, p. 32, col. 3 (city ed.). One of the leaders of the Vietnam Day Committee commented, "most of us know we are going to the army terminal . . . . We wanted to go today. We are very disappointed by the judge's order. But that's what you get when you go to court." *Ibid.*

228 *Id.*, N.Y. Times, Nov. 24, 1965, p. 21, col. 1 (city ed.).

229 Stanford Alumni Almanac, Autumn 1965, p. 1, col. 4, at 3, cols. 1-2.

230 N.Y. Times, Oct. 15, 1965, p. 35, col. 6 (city ed.).

231 *Ibid.*

and Michael Harrington, and actors Ossie Davis, Tony Randall, and Robert Ryan.[232] In the beginning, this was to be the project of the "moderates." Gottlieb stated, "This is not a protest march but a march to make positive proposals. . . . This is to be a demonstration in support of a negotiated settlement and not for a pullout."[233] The official call for the march said, "The tone of the march will be affirmative and creative. There will be no civil disobedience."[234]

But Gottlieb's group was not to have things its own way. A five-day convention which the National Co-ordinating Committee to End the War in Vietnam had scheduled for Madison, Wisconsin, was moved to Washington so that delegates could participate in the march on Saturday, the 27th.[235] Many of the student groups which made up the National Co-ordinating Committee viewed SANE as too conservative and ineffective, and the positions which were to be taken in the Washington march as too moderate.[236] On the other hand, SANE viewed the National Committee as sufficiently militant to drive away most Americans.[237] At first, Gottlieb stated that anyone could join the march but that no unauthorized signs could be carried.[238] The Students for a Democratic Society issued its own call to march, demanding an immediate cease fire and the withdrawal of all American troops.[239] Leaders of the May 2nd Movement asked their members to invade the march with their own signs, including two which read "Get Out of Vietnam Now" and "Organize Against the Draft."[240] Gottlieb asked the Washington police to help in preventing participation by groups carrying such unapproved signs.[241] However, the next day all efforts to exclude them were dropped; the difficulties, including the risk that disorder might erupt, were too many.[242]

The group that proved most disruptive was the United States

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232 *Ibid.*
233 *Id.*, Nov. 21, 1965, § 1, p. 32, col. 7.
234 *Ibid.*
235 The New Yorker, Dec. 11, 1965, pp. 195, 196.
236 *Ibid.*
237 See N.Y. Times, Nov. 21, 1965, § 1, p. 32, cols. 7-8 (city ed.). The cochairmen of SANE sent a cable to President Ho Chi Minh of North Vietnam which read, "our organization helping provide leadership for Nov. 27 demonstration in support of cease-fire and negotiated settlement based on 1954 Geneva accords. Again urge you respond favorably to immediate peace talks. Demonstrations will continue, but will not lead to a U.S. pullout." *Id.*, Oct. 29, 1965, p. 3, cols. 1, 2. Since many groups in the National Co-ordinating Committee advocated an immediate pullout and civil disobedience tactics, inevitably there were major differences between the organizers of the November march and groups in the National Co-ordinating Committee.
238 *Id.*, Nov. 21, 1965, § 1, p. 32, col. 7.
239 *Ibid.*
240 *Ibid.*
241 *Ibid.*
242 *Id.*, Nov. 22, 1965, p. 4, col. 3 (city ed.).

Committee to Aid the National Liberation Front of South Vietnam.[243] In addition to soliciting money and supplies for the Viet Cong, this group set up a booth and sold Viet Cong flags for ten dollars.[244] Several members announced that they would carry these flags in the march.[245] Sanford Gottlieb said that people carrying Viet Cong flags would be asked to leave the march, but conceded that if they refused, not much could be done. He suggested that his group might surround them with American flags.[246] The battle over the Viet Cong flag occupied far more television news coverage than the ideas of the various participating groups. The *New York Times* editorialized: "It is tragic that the action of exhibitionists—many of them openly pro-Peking—now threatens to upset the useful purpose the demonstration might have served in promoting a valid debate."[247]

The actual march and rally were subdued. The first two hours were spent in marching around the White House with picket signs.[248] Between 20,000 to 50,000 people participated.[249] The great majority were "middle-class adults," and they far outnumbered students and members of the radical left.[250] Most marchers carried the approved signs calling for an effort to negotiate a settlement.[251] Only a relatively small number carried signs demanding an immediate withdrawal and an even smaller number carried Viet Cong flags.[252] One small group chanted, "Hey, hey, LBJ. How many kids have you killed today?"[253] While all this was going on, Gottlieb, Dr. Spock, Norman Thomas, and other leaders of the march held a ninety-minute discussion with three "second string" administration officials. Each side praised the other for sincerity and courtesy, but neither made any concessions.[254]

After the picketing and the meeting, the group marched to the Washington Monument to hear speeches by Norman Thomas, Dr. Spock,[255] and Carl Oglesby, president of Students for a Democratic Society.[256] Oglesby attacked American liberals on the score of complacency. He asked, "[W]hy can't we see that our proper human struggle is not with Communism or revolutionaries but with the social desperation that drives good men to violence, both here and

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243 *Id.*, Nov. 26, 1965, p. 4, cols. 4-5 (city ed.).
244 *Id.* col. 4.
245 *Id.* cols. 4-5.
246 *Id.*, Nov. 27, 1965, p. 12, col. 1 (city ed.).
247 *Id.* at 30, col. 2.
248 *Id.*, Nov. 28, 1965, § 1, p. 1, col. 3.
249 *Ibid.*
250 *Id.* at 87, cols. 4-6.
251 *Id.* p. 1, col. 3, at 86, col. 3.
252 *Id.* at 1, col. 3; *id.* at 87, cols. 4-5.
253 Newsweek, Dec. 6, 1965, pp. 29, 30.
254 N.Y. Times, Nov. 28, 1965, § 1, p. 1, col. 3, at 86, cols. 4-5.
255 *Id.* col. 4.
256 The New Yorker, Dec. 11, 1965, pp. 195, 201-02.

abroad?"[257] Sanford Gottlieb raised Oglesby's arm to rousing cheers from the large crowd.[258] Oglesby had struck a note that united many who were there.

The next evening, Norman Thomas and Dr. Spock defended the march on an ABC television program while Georgia Governor Carl E. Sanders and United States Senator Joseph Tydings charged that it had helped the Communists.[259] Dr. Spock said that "we should turn Vietnam over to the Vietnamese people for them to decide their Government as they see fit."[260] Thomas said that the Vietnam conflict was "an immoral war ethically and a stupid war politically."[261] Sanford Gottlieb issued a statement saying that the march had made the point that "many serious, respectable people are looking for an alternative policy in Vietnam . . . ."[262]

During December 1965 and January 1966, a variety of demonstrations against the war took place. For example, leaflets were sent to American soldiers in Vietnam urging them to stop fighting.[263] Pickets marched in Times Square[264] and Herald Square[265] in New York City. Women's Strike for Peace mailed many Christmas cards to President Johnson urging him to work for peace.[266] There was a demonstration in front of a factory where military helicopters for use in Vietnam were made.[267] An antiwar group dropped leaflets from an airplane on Oakland, California.[268] Also, late in January, debate about the wisdom and legality of American policy in Vietnam began in the United States Senate. Secretary of State Dean Rusk testified before the Senate Foreign Relations Committee in support of a foreign aid bill and clashed with the committee's chairman, Senator J. William Fulbright, about the legal basis for large-scale American operations.[269]

More Americans had an opportunity to consider American policy in Vietnam in February when that policy was challenged in a new forum. The Senate Foreign Relations Committee continued its hearings, and a significant new dimension was added when NBC and CBS decided to televise a large part of them, including a seven-hour exchange between Secretary of State Rusk and the commit-

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257 *Id.* at 195, 201.
258 *Id.* at 195, 202.
259 N.Y. Times, Nov. 29, 1965, p. 3, col. 1 (city ed.).
260 *Ibid.*
261 *Ibid.*
262 *Ibid.*
263 *Id.* at 7, col. 1; *id.*, Dec. 1, 1965, p. 6, col. 1 (city ed.); *id.*, Dec. 19, 1965, p. 8, col. 2.
264 *Id.*, Dec. 17, 1965, p. 3, col. 6.
265 *Id.*, Dec. 24, 1965, p. 2, col. 8.
266 *Id.*, Dec. 13, 1965, p. 12, col. 1; *id.*, Dec. 16, 1965, p. 3, col. 4.
267 *Id.*, Dec. 30, 1965, p. 8, cols 4, 5.
268 *Id.*, Jan. 11, 1966, p. 3, col. 8.
269 *Id.*, Jan. 25, 1966, p. 1, col. 1.

tee.[270] The participants in these televised debates were administration defenders Rusk,[271] General Maxwell D. Taylor,[272] and foreign aid administrator David Bell;[273] critics General James M. Gavin[274] and former ambassador George F. Kennan;[275] and the nineteen members of the committee.[276] Chairman Fulbright was a major challenger of administration policy,[277] as was Senator Wayne Morse.[278] Senator Russell B. Long emerged as the most passionate advocate of this country's role in Vietnam.[279]

Senator Fulbright explained the need for public hearings by saying that while top administration officials had made speeches presenting their case, the public would nevertheless benefit from discussion clarifying the boundaries of American policy and exploring the factual assumptions behind it.[280] To some extent, at least, Senator Fulbright was right. One commentator observed:

> The desirability of televising the hearings was clearly demonstrated in the six hours of questioning of David E. Bell, administrator of the Agency for International Development. . . .
>
> . . . . . .
>
> In answering the extraordinarily wide range of questions asked by Senator J. W. Fulbright, Democrat of Arkansas, committee chairman, and his colleagues, Mr. Bell gave a lucid picture of the exceptional complexity of the Asian war. Seldom on television has there been such a full primer on the endless economic ramifications of the Vietnam conflict, both in Saigon and here at home.
>
> That the Senators and the spokesmen for the Johnson Administration disagreed much of the day added to the viewer interest, but the larger gain was the set owner's

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270 See *id.*, Feb. 4, 1966, p. 55, col. 4 (city ed.); *id.*, Feb. 19, 1966, p. 1, cols. 5-6 (city ed.). In May of 1966, extensive excerpts of the Senate hearings were published as a Vintage paperback book: THE VIETNAM HEARINGS (1966). Thus the information presented at the hearings will be widely available and could, in Senator Fulbright's words, "provide the American people with the raw material upon which they must base their judgment of the efficacy of national policy in serving the national interest." *Id.* at xi.

271 N.Y. Times, Feb. 19, 1966, p. 1, col. 8, p. 3, cols. 1-4 (city ed.); *id.* at 2, cols. 1-8.

272 *Id.*, Feb. 18, 1966, p. 1, col. 8, p. 12, cols. 1-2 (city ed.); *id.* at 12, cols. 4-8 (city ed.).

273 *Id.*, Feb. 5, 1966, p. 1, col. 7, p. 7, cols. 3-5 (city ed.).

274 *Id.*, Feb. 9, 1966, p. 1, col. 7, p. 14, cols. 1-3 (city ed.).

275 *Id.*, Feb. 11, 1966, p. 1, col. 8, p. 3, cols. 1-4 (city ed.).

276 *Id.*, Feb. 20, 1966, § 4, p. 1, col. 1; *id.*, Feb. 5, 1966, p. 1, col. 7, at 7, col. 3 (city ed.).

277 *Id.*, Feb. 19, 1966, p. 1, col. 8, at 3, col. 1 (city ed.).

278 *Id.*, Feb. 20, 1966, § 4, p. 1, col. 4.

279 *Id.*, Feb. 20, 1966, § 4, p. 1, cols. 4-5.

280 *Id.*, Feb. 8, 1966, p. 1, cols. 6-7, at 21, col. 2.

> sense of great familiarity with the over-all agonizing problem.[281]

Those who watched saw General Gavin assert that American troops should stay in South Vietnam.[282] But he warned that increasing the tempo of the war might impair the nation's ability to meet other more important commitments and might provoke Red China to intervene.[283] Foreign affairs expert George F. Kennan called for the United States to dig in and wait for a political solution.[284] He argued that we could not expect to win a complete victory over the Viet Cong without inflicting unacceptable civilian suffering.[285] In his view a settlement was preferable, even though it "appears to us as something less than ideal."[286] On the other hand, General Maxwell Taylor, the architect of much of present American policy, contended that the United States should win military and political victories in order to force Communist acceptance of a non-Communist South Vietnam.[287] The committee confronted Secretary of State Rusk for seven hours.[288] Rusk called for toughness to preserve the peace of the world.[289] Senator Fulbright sharply questioned the Secretary and said that this war did not involve the vital interests of the United States and might trigger a world war.[290] The hearings occasionally were a good show: this was particularly true when General Taylor and Senator Morse clashed angrily.[291] After the public hearings closed, a number of Senators proposed alternatives to the present American policy. Some wanted more war;[292] in various degrees others wanted to give recognition to the National Liberation Front (the South Vietnamese rebel group) in peace negotiations.[293]

### C. *Responses to the Protests*

So much, then, for the various ways in which opposition to the Vietnam war has been expressed. The following description of responses to those protests is divided into two sections. The relevance of the second section is obvious because in it we shall report the very statements by government officials which we evaluate in the last part of this article. Before, that, however, we shall describe

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281 *Id.*, Feb. 5, 1966, p. 58, cols. 2-3 (city ed.).
282 *Id.*, Feb. 9, 1966, p. 1, col. 7, at 14, col. 1 (city ed.).
283 *Id.* at 1, col. 7.
284 *Id.*, Feb. 11, 1966, p. 1, col. 8 (city ed.).
285 *Ibid.*
286 *Id.* at 2, cols. 1, 5.
287 *Id.*, Feb. 12, 1966, p. 12, col. 4 (city ed.).
288 *Id.*, Feb. 19, 1966, p. 1, cols. 5-7 (city ed.).
289 *Id.* col. 8.
290 *Id.* at 3, col. 1; *id.* at 2, col. 1.
291 *Id.*, Feb. 18, 1966, p. 12, cols. 4, 5-6 (city ed.).
292 See, *e.g.*, *id.*, Feb. 6, 1966, § 4, p. 4, col. 5.
293 See, *e.g.*, *id.*, Feb. 20, 1966, § 1, p. 1, col. 8; *id.* at 20, col. 1; *id.*, Feb. 22, 1966, p. 1, col. 6 (city ed.).

other kinds of responses in order to suggest something of the larger context in which these statements were made. An ideal study of context would show just what impact different kinds of statements have on the public's reaction to protests; some statements might be ignored while others might inspire violence. An ideal study would also show how such responses, in turn, affect the willingness of dissenters to express themselves. Undoubtedly, the influence of an official's statements depends on many interrelated factors. Geography probably is important: the reactions in Madison, Wisconsin, would probably differ from those in Atlanta, Georgia, which in turn would differ from those in Santa Barbara, California, and so on. People also are important: some are made afraid by government criticism; others are goaded on to more extreme protests. In addition, the positions which protesters assert, as well as their appearance, are likely to have a bearing on whether they are ignored, cheered, or jeered. A neatly dressed young man urging a negotiated settlement in Vietnam is likely to evoke different reactions than a sloppily dressed, bearded student waving a Viet Cong flag. But to our knowledge, no such ideal study exists. The best we can do here, then, is to take note of those factors which seem to reflect the existing situation and suggest some of the implications of each.

### 1. THE CONTEXT: REACTIONS TO DISSENT

On balance, a number of indicators suggest that people are not only remarkably willing to express dissent, but face relatively little risk of harassment or violence when they do. In the first place, the number of people taking part in antiwar demonstrations and the quantity of protest activity itself have grown steadily.[294] Nor has any political leader gained lasting prominence by attacking antiwar activity. Indeed, some well-known Senators,[295] Congressmen,[296] and former government officials[297] have criticized the administration's policy in Vietnam. And it seems likely that one would suffer fewer penalties for agreeing publicly with Senator Robert Kennedy's statements about dealing with the Viet Cong[298]

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294 See text accompanying notes 71-268 *supra*.

295 See, *e.g.*, Senator Ernest Gruening, *The Reality of Vietnam*, The Progressive, Feb. 1966, p. 15; Sevareid, *Why Our Foreign Policy Is Failing—An Exclusive Interview With Senator Fulbright*, Look, May 3, 1966, p. 23; N.Y. Times, Sept. 11, 1963, p. 1, col. 4 (Senator Frank Church); *id.*, Jan. 6, 1965, p. 8, col. 4 (Senator Wayne Morse); *id.*, Feb. 6, 1966, § 4, p. 1, col. 1 (Senator Robert Kennedy); *id.*, Feb. 16, 1966, p. 17, col. 1 (city ed.) (Senator George McGovern); *id.*, March 9, 1966, p. 15, col. 1 (city ed.) (Senator Eugene McCarthy).

296 See, *e.g.*, *id.*, Feb. 16, 1966, p. 6, col. 2 (city ed.); *id.*, Feb. 27, 1966, § 1, p. 33, col. 1.

297 *Id.*, Feb 9, 1966, p. 1, col. 7, p. 14, col. 1 (retired General James M. Gavin); *id.*, Feb. 11, 1966, p. 1, col. 8, p. 3, col. 1 (city ed.); *id.* at 2, cols. 1-6 (George F. Kennan, former ambassador and State Department official).

298 For the full text of Senator Kennedy's statement, see Capital Times (Madison, Wis.), Feb. 23, 1966, p. 11, cols. 1-8.

than for asserting the same ideas without this source of legitimacy. Moreover, the Johnson administration may have dignified dissent when it argued with its critics about the merits of the war. This may be true, for example, of McGeorge Bundy's agreement to participate in the Washington teach-in and his later television debate with professors who opposed the war.[299] It also may be true of the State Department's White Paper on Vietnam[300] and its brief on the legality of the war.[301] Then too, the public apparently agrees with many of the substantive positions taken by those who protest. Most people, for example, seem to favor negotiations with the Viet Cong, and, while rejecting any immediate withdrawal of American troops from South Vietnam, would accept the result of elections, even were the Viet Cong to win.[302] Protesters advocating these positions, rather than the more radical ones, are less likely to provoke public hostility.

Another operative factor is that the mass communications media generally have come to portray much of the opposition to the war as respectable. *Life* magazine, for example, although defending the administration's position, ran a long article which sympathetically discussed opposition to the war.[303] *Look* painted a sympathetic picture of Senator Fulbright's disagreement with American policy in Southeast Asia.[304] The way in which many major daily newspapers reacted to the nationwide protests of mid-October 1965 is also important. It will be recalled that not only were marches and rallies held then, but some men burned draft cards and some organizations announced plans to interfere with the draft.[305] Yet most papers we have been able to read[306] took stands similar to

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299 See text accompanying notes 135-40, 150 & 164-66 *supra*.

300 See note 33 *supra*.

301 See note 19 *supra*.

302 See N.Y. Times, March 15, 1966, p. 1, col. 6, p. 7, col. 2 (city ed.); *id.* at 6, cols. 1-3.

303 Life, Feb. 25, 1966, p 27.

304 Sevareid, *supra* note 295, at 23. The editor of the *Wall Street Journal* observed that Senator Fulbright "is debating the questions a Senator should. And he is bringing to that debate the kind of provocative thought that you always hope for, seldom expect and rarely find in the public forum." Royster, *Thinking Things Over*, Wall Street Journal, May 5, 1966, p. 16, col. 3.

305 See text accompanying notes 192-225 *supra*.

306 Our research assistants checked the editorial pages of twenty-five newspapers for the week before and the week after the October 15-16th weekend when the first of the nationwide protests was held. They looked at all the newspapers available in early November in the University of Wisconsin Library, the State Historical Society of Wisconsin Library, and the Madison and Milwaukee Public Libraries. The papers available were the *Atlanta Constitution*, the *Boston Globe*, the *Boston Herald*, the *Capital Times* (Madison, Wis.), the *Chicago Tribune*, the *Dallas Morning News*, the *Denver Post*, the *Detroit Free Press*, the *Jackson Daily News* (Jackson, Miss.), the *Los Angeles Times*, the *Milwaukee Journal*, the *Milwaukee Sentinel*, the *Minneapolis Star*, the *New York Herald Tribune*, the *New*

that of the *Boston Globe*:

> In the current hubbub over the demonstrations against United States military involvement in Viet Nam, the critical distinction between peaceful expression of opinion and affirmative illegal acts has been largely missed by zealous partisans on both sides of the ideological fence.
>
> To wear a beard and carry a sign saying, "Withdraw U.S. Troops from Viet Nam Now!" is simply an exercise of the constitutional rights of freedom of expression and assembly. Wrongheaded it certainly is, in view of Hanoi's persistent rejection of the United States' standing offer of unconditional peace talks.

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*York Times*, the *Philadelphia Inquirer*, the *Plain Dealer* (Cleveland), the *Raleigh News & Observer*, the *St. Louis Post Dispatch*, the *Salt Lake Tribune*, the *San Francisco Chronicle*, the *San Francisco Examiner*, the *Seattle Daily Times*, the *Washington Post*, and the *Wisconsin State Journal* (Madison, Wis.). Both the south and the southwest areas of the United States seem significantly under-represented.

It should be noted that while most editorials reflected the same views as those of the *Boston Globe* quoted in the text and the *New York Herald Tribune* quoted in note 307 *infra*, many deplored draft evasion and approved the Attorney General's investigation of Communist participation in the "beat-the-draft" movement. Only the three papers quoted in the text at notes 316, 317, and 319 *infra* suggested that all antiwar activity was improper, if not actually disloyal.

The research assistants also checked the editorial pages for the same two-week period of all twenty-nine daily newspapers published in Wisconsin cities other than Madison and Milwaukee. Of course, these cities are smaller than New York, Chicago, and even Madison, but they are large enough to support a daily paper. Fifteen of the Wisconsin papers ran editorials on the antiwar demonstrations. Three papers stressed the values of the antiwar protests. Beloit Daily News, Oct. 23, 1965, p. 8, col. 1; Chippewa Herald-Telegram, Oct. 20, 1965, p. 2, cols. 1-2; Portage Daily Register, Oct. 21, 1965, p. 10, col. 1. Three papers acknowledged the right of free speech but stressed negative aspects of the protests such as possible Communist involvement and the impact on Hanoi and Peking and on the morale of American servicemen. Green Bay Press-Gazette, Oct. 22, 1965, p. 4, col. 1; Monroe Evening Times, Oct. 22, 1965, p. 2, col. 1; Waukesha Freeman, Oct. 19, 1965, p. 8, col. 1. Seven editorials asserted only that the protests were improper. Baraboo News-Republic, Oct. 23, 1965, p. 1, col. 1, p. 2, cols. 2-3 (students who attempted to arrest the Commander of Truax Field should be "kicked out" of the University of Wisconsin); Fond du Lac Commonwealth Reporter, Oct. 21, 1965, p. 4, cols. 1-2 (Communists have infiltrated the antiwar movement and demonstrations will prolong the war); Janesville Daily Gazette, Oct. 19, 1965, p. 6, cols. 1-3 (protests against the war in Vietnam are treason and should be prosecuted); Marinette Eagle-Star, Oct. 22, 1965, p. 6, col. 1 (antiwar demonstrators should be allowed to go to North Vietnam to help fight poverty there); Oshkosh Daily Northwestern, Oct. 19, 1965, p. 6, cols. 2-3 (political cartoon defending a teacher's right to protest the war but stating that there is no requirement that he be paid to teach his views); Evening Telegram (Superior), Oct. 22, 1965, p. 6, col. 1 (demonstrations will prolong the war because they will arouse public opinion against negotiating with Communists); Wisconsin Rapids Daily Tribune, Oct. 22, 1965, p. 4, col. 1 (Communists may have infiltrated the antiwar movement and the demonstrations will prolong the war because Hanoi will misjudge our willingness to fight).

But treason it is not. The First Amendment is premised upon the notion that the truth can win out over wrongheadedness in the market place of ideas.

By the same token, it is simply an exercise of constitutional freedom to parade in a Legionnaire's uniform with a sign saying, "Draft These Punks Now!"

It is not anyone's right either to burn his draft card, as at least one demonstrator is now charged by the FBI with doing in New York, or to engage in vigilante assaults on peaceful demonstrators, as a member of the notorious Hell's Angels has been accused of doing in California.

It has been wisely observed that the "peace" demonstrators are working at cross purposes with their avowed aims, since their well-publicized activities strengthen Hanoi's resolve not to negotiate.

But domestic support for an immediate withdrawal is not, in fact, strong. Americans approve of the Johnson administration's handling of the Viet Nam situation by more than two to one—57 percent as against 25 percent, according to a recent poll. And few of those who do disapprove would have us pull out with our tail between our legs.

Public reaction toward the demonstrators should not be hysterical. Such a course can only dignify their views, for which the best antidote is sweet reasonableness. As for law violations, there is no reason to believe that the FBI is not capable of doing its job.[307]

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307 Boston Globe, Oct. 19, 1965, p. 36, cols. 1-2. Compare the following editorial:

> Little men in little numbers have had some success in making trouble only because they have been taken more seriously than they deserve in Washington, Hanoi, Peking and Moscow. The recent anti-war marches, teach-ins, sleep-ins and related branches of the bizarre in-fashion for out (way out) groups claimed about 100,000 participants—less than one-tenth of one per cent of the U.S. population. That's hardly enough to merit a sneeze, yet it has produced a minor storm.
>
> The President, through his press secretary, has unwisely honored them by expressing his concern; so have the Senators and the Congressmen who have been indulging in public expressions of outrage. . . .
>
> The anti-war movement is composed of two distinct aspects which should be kept clearly differentiated. The first is the criminal aspect, involving those who are breaking the laws of the land by evading or inciting others to evade the draft. The courts and the prisons can easily dispose of them. . . .
>
> The second relates to the right of any minority—however small, insignificant and vociferous—to demonstrate in public against the majority and against the foreign policy of the national government. This is a constitutional and a sacred right which we always have defended and should continue to uphold both at home and abroad. . . .
>
> What is cause for concern is the effect of these demonstrations not on the United States but on the Communist high commands, especially in Hanoi and Peking. . . .
>
> Thus the efforts of those who are demonstrating for peace may result only in prolonging the war—and prolonging it needlessly, foolishly and senselessly for both sides. They are deceiving not only

Finally, only a few protesters, relatively speaking, have suffered serious penalties for their actions.[308] Almost all of the professors who took part in teach-ins are still professors; and almost all of the students who demonstrated are still draft-deferred students, or have graduated.

While these indicators support the inference that there is great freedom to oppose the war in Vietnam, they tell only part of the story. Over the last year or so, there have been many events tending to suggest to the public that antiwar activity is improper, if not actually disloyal. These suggestions probably played a part in generating some hostile response to opposition to the war. And hostility can lead to widespread private punishment of those who actively protest, which, in turn, can silence those who might otherwise do so. Senator Fulbright commented:

> "The longer the Vietnamese war goes on without prospect of victory or negotiated peace, the war fever will rise, hopes will give way to fears, and tolerance and freedom of discussion will give way to a false and strident patriotism," he said.
>
> "In a contest between a hawk and dove, the hawk has a great advantage, not because it is a better bird but because it is a bigger bird with lethal talons and a highly developed will to use them."[309]

Various incidents suggest that the seeds of this process may already have taken root.

Private citizens have militantly supported the government's position.[310] Of course, this is no more than the exercise of free speech.

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> the Communist capitals but themselves. And that may be the most ironical and contemptible aspect of their performance.

N.Y. Herald Tribune, Oct. 20, 1965, p. 30, cols. 1-2.

[308] For a description of the private and governmental sanctions that have been invoked against protesters, see text accompanying notes 320-50 *infra*. Not everyone would agree with us. Some radical groups charge that free speech is only theory and not part of the reality of American society. For example:

> Civil liberties . . . are even enshrined in the political constitution of the society. But the actual exercise of civil liberties by dissidents (as opposed to their theoretical expostulation by establishment intellectuals) is . . . a revolutionary threat and is reacted to as such by the authorities.

Spartacist, *Pluralistic Society or Class Rule*, in THE BERKELEY STUDENT REVOLT 231 (Lipset & Wolin ed. 1965).

[309] Milwaukee Journal, April 22, 1966, p. 3, col. 4.

[310] Two weeks after the International Days of Protest, 25,000 people expressed their support for government policy by parading down Fifth Avenue in New York. N.Y. Times, Oct. 31, 1965, § 1, p. 1, col. 3. The parade had been endorsed by the city council, which declared the day to be "Support American Vietnam Effort Day." *Id.*, Oct. 27, 1965, p. 2, cols. 5-6 (city ed.). Veterans Day observances in 1965 became demonstrations in support of the war. Capital Times (Madison, Wis.), Nov. 11, 1965, p. 1, col. 6, p. 4, col. 6; N.Y. Times, Oct. 27, 1965, p. 2, cols. 5, 6 (city ed.); *id.*,

But such activities to some extent may carry the implication that those who oppose the war are behaving in a questionable manner. This implication has been made more explicit: three conservatives produced a thirty-minute film called "While Brave Men Die," intended to "alert America to the danger within"; the film included interviews with leaders of some of the groups opposed to the war and shots of the demonstrations.[311] Others have made comments about the opponents of the war in Vietnam in a more direct fashion. Counterpicketing has become fairly common; that is, when an antiwar group marches, supporters of the war effort march with their slogans too.[312] For example, people have carried signs such as "Pink College Students Make Yellow Reds,"[313] "When Will Students Demonstrate for America?,"[314] "Peace Yes, Appeasement No," "Don't Be Left, Be Right in Our Foreign Policy," and "Communism on the March."[315]

While most newspapers stressed free speech in their editorials in mid-October of 1965, a few took the view of the *Chicago Tribune*, which scored all demonstrations against the war in Vietnam:

> When the attorney general of the United States gets

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Nov. 12, 1965, p. 3, cols. 1-4 (city ed.). The American Legion has conducted a "Show Your Colors" campaign; American flag lapel buttons are distributed together with cards that proclaim the wearer's support for the men " 'serving the cause of freedom in Vietnam.' " *Id.*, Nov. 25, 1965, p. 10, col. 2 (city ed.). Governor Rockefeller called on New Yorkers to participate in the Legion's campaign. *Id.*, Jan. 5, 1966, p. 6, col. 1 (city ed.).

The AFL-CIO, at its national convention, endorsed President Johnson's policies. *Id.*, Dec. 16, 1965, p. 2, col. 3 (city ed.).

Students have conducted numerous rallies and parades expressing support for the government. See, *e.g.*, *id.*, Oct. 28, 1965, p. 1, col. 2 (city ed.) (600 students at Manhattan College; 1,500 at University of Pittsburgh); *id.*, Oct. 31, 1965, § 1, p. 1, col. 3, at 70, col. 4 (parade by one hundred students at Brigham Young University; parade by 200 at Michigan Technological University); *id.*, Nov. 14, 1965, § 1, p. 9, cols. 1, 3 (200 at Union Jr. College; 150 at Cornell); *id.*, Dec. 18, 1965, p. 3, col. 1 (city ed.) (750 at Purdue). Many thousands more have signed progovernment petitions. See, *e.g.*, Wisconsin State Journal (Madison, Wis.), Oct. 24, 1965, § 1, p. 1, cols. 3, 6 (Texas A. & M. students send sixty-foot telegram to President Johnson; 1,200 Yale students sign petition); N.Y. Times, Nov. 4, 1965, p. 9, col. 1 (city ed.) (1,500 students at Stanford University); *id.*, Nov. 6, 1965, p. 2, col. 3 (city ed.) (4,000 at Rutgers and Douglas); Wisconsin State Journal (Madison, Wis.), Nov. 15, 1965, § 1, p. 10, cols. 3, 5 (6,000 at University of Wisconsin); N.Y. Times, Nov. 20, 1965, p. 6, col. 3 (city ed.) (6,000 at Boston University); *id.*, Jan. 7, 1966, p. 1, col. 2 (city ed.) (National Student Committee for Defense of Vietnam presents Vice-President Humphrey with pledges of support by 477,000 students from 322 schools).

311 *Id.*, Dec. 30, 1965, p. 26, col. 2.

312 See, *e.g.*, *id.*, Oct. 17, 1965, § 1, col. 6, at 43, col. 1; *id.*, Nov. 28, 1965, § 1, p. 1, col. 3, at 86, col. 3; *id.*, Feb. 6, 1966, § 1, p. 4, col. 1; Wisconsin State Journal (Madison, Wis.), April 16, 1966, § 1, p. 4, col. 3; N.Y. Times, April 17, 1966, § 1, p. 1, col. 6, at 9, col. 1.

313 *Id.*, Oct. 17, 1965, § 1, p. 1, col. 6, at 43, col. 1.

314 *Ibid.*

315 *Id.*, April 17, 1966, § 1, p. 1, col. 6, at 9, col. 1.

around to conceding that there are Communists among the demonstrators who are stridently demanding that we bug out of the war in Viet Nam, that is not especially news to anyone who can tell a hawk from a handsaw. Nevertheless, the fact that Mr. Katzenbach has been able to make this obvious discovery encourages us to hope that he will act on it.

There have been so many "demonstrations" and "marches," beginning with the rash of civil rights processions and sit-ins, that the country has become inured to them and accepts the easy rationalization that this sort of thing is an exercise of the right of petition. Not enough attention has been paid to the fact that, all too often, these were exercises in provocation and incitement.

The development of anti-war and "beat the draft" demonstrations, organized usually from university centers and spreading out from there, represents a further refinement of the tactics of civil disobedience. The operation is intended to hamstring national policy, discourage the laws requiring patriotic duty in service of the flag, and impede the conduct of a war. To that degree it meets the constitutional definition of treason, which consists in making war against the United States or in "adhering" to its enemies, "giving them aid and comfort."

Communist propaganda mills all over the world are making the most of the opportunities afforded them by American student radicals, party-lining professors, and pacifists of all descriptions. . . .

It seems to us that this organized disloyalty verges on criminal syndicalism and should be prosecuted as such, for the ring-leaders of the movement are feeling chesty over how much they have already been able to get away with and are planning fresh excesses for the weeks ahead. As the attorney general mentioned, the government is not impotent in this situation, and we hope it will go to work.

. . . . . .

We have seen how far the young activists are willing to go—"demonstrations" which are more nearly riots; challenges to university and police authority; lying down in front of troop trains; seeking to immobilize the Oakland port of military embarkation; even trying to make a "citizens' arrest" of an air base commander. The President is called a murderer and a war criminal. The government itself is challenged and reviled.

A stop must be put to this business. The government must act, and it must act in the toughest way possible. For if this movement goes much farther, it will be insurrection and there will be violence in the streets.[316]

The *Dallas Morning News* talked of the "transparent motives be-

[316] Chicago Tribune, Oct. 19, 1965, p. 18, col. 1.

hind the demonstrations and the obvious use of them to offset Viet Cong military defeats . . . ."[317] It concluded that "as is usually the case, a handful of kooks and Communists on the American scene have been given publicity in the world press far out of proportion to their number or influence.[318] The *Jackson Daily News* called for direct action:

> U.S. citizens who burn . . . draft cards and march against everything that the country stands for should be punished more than by mere heckling and jeering from on-lookers. This is the time for "police" brutality if there ever was one.
>
> . . . We are most assuredly concerned over this threat of Communist sympathizers who parade around free and undisturbed.
>
> And we suggest that Lady Bird's "beautification" campaign should begin in a big way by wiping out the anti-war marchers in every city and planting dogwood trees instead.[319]

The formal actions of government, such as enacting statutes and enforcing laws (as well as making announcements of planned formal activity), probably have contributed to the atmosphere in which discussion and competition for adherents take place. Some of this formal action was clearly proper; some may not have been. Both the federal and state governments have taken such action in response to the antiwar movement. Congress, for example, responded to those who burned their draft cards as a means of protest by enacting a statute with strong penalties;[320] and there have been several prosecutions for violations which occurred after the effective date of the act.[321] A Negro who was elected to the Georgia Legislature was denied his seat[322] because he supported a statement of the Student Nonviolent Co-ordinating Committee which expressed sympathy for those "unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Vietnam in the name of the 'freedom' we find so false in this country."[323] Demonstrators have been arrested un-

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317 Dallas Morning News, Oct. 20, 1965, p. 1, cols. 1-2.

318 *Ibid.*

319 Jackson Daily News (Jackson, Miss.), Oct. 20, 1965, p. 8, cols. 1-2.

320 79 Stat. 586 (1965), 50 U.S.C.A. App. § 462(b) (Supp. 1965), amending 62 Stat. 622 (1948), 50 U.S.C. § 462(b) (1964). On August 5, 1965, the statute was introduced in the House. H.R. 10306, 98th Cong., 1st Sess. (1965). A slightly different version went to the Senate five days later. S. 2381, 98th Cong., 1st Sess. (1965). The House bill was accompanied by a two-page report, H.R. Rep. No. 747, 89th Cong., 1st Sess. (1965), and a briefer report went with the Senate bill. S. Rep. 589, 89th Cong., 1st Sess. (1965). The Senate approved the House version, which became law on August 30, 1965. Pub. L. No. 89-152, 89th Cong., 1st Sess. (Aug. 30, 1965).

321 See, *e.g.*, N.Y. Times, Oct. 19, 1965, p. 1, cols. 6-7, p. 4, cols. 4-5 (city ed.); *id.*, Nov. 4, 1966, p. 9, cols. 2-4 (city ed.).

322 *Id.*, Jan. 11, 1966, p. 1, col. 4, p. 8, cols. 3-8 (city ed.).

323 *Id.*, Jan. 8, 1966, p. 2, col. 5. For a biographical sketch of Julian Bond, the man in question, see *id.*, Jan. 12, 1966, p. 18, cols. 2-3 (city ed.).

der various "all-purpose" statutes and ordinances; typically the arrests were prompted by acts of civil disobedience.[324] High school students have been barred from attending classes when they wore black armbands to mourn the dead and protest the war.[325]

There have also been publicized threats to take formal legal action. One Congressman proposed a statute,[326] and a constitutional amendment to validate his statute,[327] which would have outlawed

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[324] See, *e.g.*, LUCE, THE NEW LEFT 112-13 (1966); Capital Times (Madison, Wis.), March 25, 1966, p. 4, col. 2; *id.*, March 31, 1966, p. 1, col. 8, p. 4, col. 4; N.Y. Times, Oct. 16, 1965, p. 1, col. 8, at 2, col. 2 (city ed.); *id.*, Nov. 9, 1965, p. 11, cols. 2, 4 (city ed.); *id.*, Nov. 12, 1965, p. 3, cols. 1, 2 (city ed.); *id.*, Dec. 21, 1965, p. 3, cols. 5-6 (city ed.).

Two men in the armed forces have been court-martialed because of their protest activities. One had refused to obey an order to remove a peace symbol from his uniform. *Ibid.* The other man, while he was off duty and dressed in civilian clothes, had participated in an antiwar demonstration carrying a sign which said "End Johnson's Facist Aggressions in Vietnam"; he was sentenced to two years' imprisonment at hard labor. *Id.*, Dec. 23, 1965, p. 5, col. 3 (city ed.).

[325] *Id.*, Dec. 18, 1965, p. 3, col. 2 (city ed.); *id.*, Jan. 5, 1966, p. 6, col. 1 (city ed.).

Two American students studying in India and receiving financial support from the federal government were placed on probation by their program director after they, along with thirteen others, demonstrated against United States policy. *Id.*, Dec. 10, 1965, p. 16, cols. 7-8 (city ed.). A Congressman who witnessed this demonstration said he planned to introduce legislation to withdraw financial support from such students. Milwaukee Journal, Dec. 14, 1965, § 1, p. 11, cols. 3-4.

In Wisconsin a resolution was introduced in the state senate calling for the expulsion from the University of Wisconsin of several students who had participated in a protest. N.Y. Times, Oct. 28, 1965, p. 1, col. 2, at 4, col. 5 (city ed.).

[326] H.R. 12775, 89th Cong., 2d Sess. (1966). The bill was introduced by Representative Teague of Texas. It provides that anyone who

> with intent to interfere with the successful prosecution by the United States of a declared war or of any armed conflict . . . shall give aid or encouragement to the enemies of the United States by opposing any lawful measure or policy . . . related to the conduct of such war or armed conflict by public speeches, lectures, or other public utterances, by written or printed matter displayed or otherwise disseminated to the public, or by public picketing, parades, rallies, or similar public demonstrations . . .

is punishable by imprisonment for up to ten years, by a fine up to $10,000, or by both.

See also H.R. 11864, 89th Cong., 2d Sess. (1966); H.R. 12047, 89th Cong., 2d Sess. (1966). Both are aimed at actions interfering with military operations either with or without a declaration of war. Thus H.R. 11864 applies whenever the United States is "at war or engaged in armed conflict with any nation," and strikes at persons who advise, counsel, or urge, or "distribute any written or printed matter which advises, counsels, or urges," interference with the operations of United States military forces. One provision of H.R. 12047 applies "whenever any element of the Armed Forces of the United States shall be engaged in hostilities abroad"; the other provision is applicable to persons who "interfere with the United States, or any member of the Armed Forces, in preparing for, or carrying on, any military duty or activity . . . ."

[327] H.R.J. Res. 833, 89th Cong., 2d Sess. (1966). See also H.R.J. Res. 795,

protests against American policy when American troops are fighting. Some legislators proposed legislative investigations of protesters.[328] Some state directors of selective service threatened reclassification of draft status as a penalty for protests.[329]

No one knows whether the publicity given to these matters has affected anyone's willingness to tolerate antiwar opposition. We do know that a variety of unpleasant consequences have been visited on some who have opposed the war. For example, there is interpersonal tension between some people who differ on the war. Perhaps the most famous broken friendship is that of President Johnson and Senator J. William Fulbright. Fulbright, Chairman of the Senate Foreign Relations Committee, is no longer on the White House guest list, even when dinners are held for visiting foreign officials.[330] In some circles, the war in Vietnam is not a subject for discussion; "hawks" and "doves" are not seated together or are not invited to the same affair. For many, such strains on social relations are significant enough to affect their expression of views or their response to those who take strong stands.[331]

Other private sanctions have also been invoked. An American Legion Post in Boston announced it would give a "good government" award to a rabbi for a sermon on the brotherhood of man. But when the rabbi became a sponsor of the march on Washington, the Legion Post publicly withdrew its award.[332] Several organizations opposing the war met hostility on the part of their landlords. The New York Committee to End the War in Vietnam had its rent raised from eighty to 250 dollars,[333] and the May 2nd Movement was given an eviction notice.[334] A Jesuit priest who protested the war was sent from New York City on a three-month tour of Latin

89th Cong., 2d Sess. (1966) (proposal to amend the constitutional definition of "treason" to include "giving aid and comfort to any foreign power, group, or organization engaged in armed opposition to, or hostilities with, the United States.").

328 See 111 CONG. REC. 26242 (daily ed. Oct. 18, 1965) (Congressman Bryan Dorn); *id.* at 26243 (Congressman Hugh Carey); N.Y. Times, Oct. 28, 1965, p. 1, col. 2 (Senator Thomas Dodd). There were other types of investigations, too. The Vice-President for Academic Affairs of the University of Michigan asked the United States Attorney to investigate a student group that had been selling Viet Cong stamps and lapel pins. *Id.*, Oct. 29, 1965, p. 3, cols. 2-3 (city ed.). In Georgia, shortly after the mid-October protests, Governor Carl Sanders ordered the state attorney general to investigate the protests that had occurred there to determine whether there had been a "subversive element involved." Atlanta Constitution, Oct. 19, 1965, p. 1, col. 5.

329 See, *e.g.*, N.Y. Times, Feb. 18, 1966, p. 10, cols. 6-8.

330 *Id.*, Feb. 6, 1966, § 1, p. 37, col. 1 (city ed.).

331 See Berkowitz & J.R. Macaulay, *Some Effects of Differences in Status Level and Status Stability*, 14 HUMAN RELATIONS 135, 136 (1961).

332 N.Y. Times, Dec. 4, 1965, p. 6, cols. 1-4.

333 *Id.*, Nov. 7, 1965, p. 67, cols. 1, 4 (city ed.).

334 *Id.* cols. 1, 4-5.

America.[335] A doctor was threatened with the loss of a research appointment at a psychiatric institute if he participated in a peace vigil near the LBJ Ranch in Texas.[336] Drew University, a Methodist-affiliated school, refused to renew the teaching contract of a Marxist instructor who stated at a teach-in that he favored a Viet Cong victory.[337]

Other private sanctions against opposition have been less genteel. Insults are common: at one march in New York City, onlookers yelled "traitors"[338] and "kill a commie for Christ!"[339] At a demonstration in Chicago the jeers were "chicken . . . scum . . . commies . . . cowards . . . sissies . . . punks . . . weirdos."[340] Some spectators have grabbed signs and banners from marchers opposing the war.[341] In Madison, Wisconsin, a local paper reported that police "stood by without interfering when counter-pickets kicked in the paper coffin" being carried by the opponents of the war.[342] Eggs, beer cans, rocks, and red paint are now regularly thrown at demonstrators who march in large cities.[343] At a march in Boston, the protesters were harassed by leather-jacketed motorcyclists who zigzagged their cycles through the line of march.[344] Some witnessing antiwar events have attempted to beat those who participated; some have succeeded. For example, during a march in Berkeley, California, on October 16, 1965, sixteen members of the Hell's Angels motorcycle club ran through a police line and attempted to seize the lead banner;[345] according to the *San Francisco Chronicle*, a "melee" followed.[346] In Boston, a group of pacifists held a demonstration on the steps of a courthouse, and four burned

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335 *Id.*, March 11, 1965, p. 15, col. 1 (city ed.).

336 *Id.*, Dec. 26, 1965, p. 52, cols. 1-2 (city ed.).

337 *Id.*, Oct. 16, 1965, p. 1, col. 8; *id.*, Oct. 25, 1965, p. 1, col. 6.

In New Jersey the Republican gubernatorial candidate called for the dismissal of a Rutgers University professor who had declared his support for the Viet Cong. However, since the professor's comments had not been made in the classroom, he had not violated the university's regulations, and the board of governors refused to take any action against him. The Republican candidate then called upon the incumbent, a Democrat, to take some action. He, too, refused, stating that he deplored the professor's remark but that any action by him would violate principles of academic freedom. Whether the professor should be fired became a central issue in the gubernatorial campaign, which the incumbent won in a landslide. *Id.*, July 6, 1965, p. 24, cols. 2-3; *id.*, Aug. 4, 1965, p. 14, col. 6; *id.*, Oct. 17, 1965, § 1, p. 84, cols. 5-8; *id.*, Nov. 3, 1965, p. 1, col. 5 (city ed.).

338 Milwaukee Journal, March 27, 1966, p. 1, col. 1.

339 *Ibid.*

340 *Ibid.*

341 See, *e.g.*, N.Y. Times, Nov. 28, 1965, p. 1, col. 3, at 86, col. 3 (city ed.).

342 Capital Times (Madison, Wis.), Nov. 29, 1965, p. 17, col. 3.

343 See, *e.g.*, Milwaukee Journal, March 27, 1966, p. 1, col. 1; N.Y. Times, Aug. 10, 1965, p. 3, cols. 2, 4.

344 Milwaukee Journal, March 27, 1966, p. 1, col. 1.

345 San Francisco Examiner, Oct. 17, 1965, § 1, p. 1, col. 8.

346 *Ibid.*

draft cards.[347] Twenty-five high school students then attacked, kicked, and pummelled the demonstrators, knocking at least seven of them to the ground.[348] In perhaps the most extreme case, forty New York City patrolmen were required to rescue one opponent of the war who had been knocked to the ground, kicked, and stripped of his clothing.[349] Several of the attackers were shouting "kill him" and "string him up."[350]

### 2. STATEMENTS OF GOVERNMENT OFFICIALS ABOUT DISSENT

Many government officials have commented on the protests against the war in Vietnam, and their words have received varying amounts of publicity. In some instances it is likely that the public perceived certain statements as representing the official or semi-official position of the government; at other times they appeared as the views of individuals who also held government posts. The statements have run the gamut from vigorous support of the right to criticize government policy to equally vigorous denunciation of those who offered criticisms.

Not surprisingly, both Senators Wayne Morse[351] and J. William Fulbright,[352] critics of American policy in Vietnam, have praised the antiwar activity. Fulbright said that criticism "is more than a right; it is an act of patriotism, a higher form of patriotism . . . than the familiar rituals of national adulation."[353] He added that the "wisdom and productivity of the protest movement of students, professors, clergy and others may well be questioned, but their courage, decency and patriotism cannot be doubted."[354] President Johnson on several occasions has also stressed the right to question his policies. In June 1965, speaking at his daughter's high school commencement, he said:

> I have disagreed with some of the views that have been expressed. I know the large majority of Americans support our efforts everywhere to stop aggression.
>
> But I also know that such discussion is one of the great strengths of American democracy. How rare is the land and extraordinary the people who freely allow, and really encourage, as I have on many occasions, the citizens of our

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347 Capital Times (Madison, Wis.), March 31, 1966, p. 1, col. 8, p. 4, col. 4.

348 *Ibid.*

349 N.Y. Times, Oct. 31, 1965, § 1, p. 70, col. 1.

350 *Ibid.*

351 See, *e.g.*, *id.*, Oct. 16, 1965, p. 1, col. 8, at 2, col. 2. Senator Morse, commenting on the October demonstrations, said he was glad that there were some people "who will not be cowed into submission by the intolerant bigots who believe that because our country is on an illegal course of action, we must support its illegality." *Ibid.*

352 *Id.*, April 22, 1966, p. 16, col. 1.

353 *Ibid.*

354 *Ibid.*

> nation to discuss and to debate their nation's policies in time of danger.
>
> . . . . .
>
> Nor should we forget that the purpose of liberty is not merely to allow error but to discover truth, not only to restrict the powers of government but to enrich the judgment of the nation. So, by testing ideas in the forum of the nation we discover their strength as well as their wisdom.
>
> Therefore, we welcome and we ask for new ideas from serious and concerned men and women, from universities and journals and public platforms all across this land. We are constantly searching for views and proposals which might strengthen and unite and help our government.
>
> . . . . .
>
> For even among those who do not support our Government policies, the very process of discussion rests on a broad and deeply set foundation of shared belief, principle, faith and experience.
>
> There are, first of all, the assumptions of American democracy. Thus, most of those who disagree are really trying to influence the democratic process and not rip it and tear it apart. They are really seeking to exercise their own freedom and not deny it to others. They try to affect the decisions of the nation—not flaunt or ignore them.[355]

A few weeks later, there was an affair at the White House honoring American artists.[356] The President, impliedly recognizing that many artists oppose his Vietnam policy, stated that "art flourishes most abundantly when it is fully free—when the artist can speak as he wishes and describe the world as he sees it without official direction."[357] A long excerpt from a play was presented at this affair despite the fact that the playwright had picketed the White House a month before.[358] In November, on the day before the march on Washington, President Johnson's press secretary said that the President, though convinced that the great majority of Americans supported his actions in Vietnam, also believed that those who opposed his policies had a basic right to criticize them.[359] Dissent, he said, was healthy for the nation because it showed that the majority's endorsement had been tested in "an atmosphere of prediscussion and openness";[360] endorsement by the majority should not deter dissent by the minority.[361]

However, the President has also challenged the dissenters in ways likely to discourage at least some people from questioning

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355 *Id.*, June 2, 1965, p. 52, cols. 1-3 (city ed.).
356 *Id.*, June 15, 1965, p. 1, cols. 3-6 (city ed.).
357 *Id.* at 48, col. 2.
358 *Id.* cols. 2-3.
359 *Id.*, Nov. 27, 1965, p. 1, col. 8.
360 *Id.* at 10, col. 4.
361 *Ibid.*

government policy. His response to the demonstrations of October 15th and 16th was very different from his other statements. In October his press secretary reported that the President was "dismayed" by the demonstrations.[362] First, he feared that the Communists in Hanoi and Peking would be misled by the protests, would think perhaps that they represented a sizable segment of American opinion, and would thus continue to fight on the theory that public opinion here would force an end to the war.[363] Second, he was disturbed by preliminary reports that Communists had infiltrated the peace movement.[364] His press secretary said that the President was concerned " 'that even well-meaning demonstrators can become the victims of Communist aggression.' "[365] Moreover, he was said to have expressed " 'surprise that any one citizen would feel toward his country in a way that is not consistent with the national interest.' "[366]

The President's concern with misleading the Viet Cong, Hanoi, and Peking, and thus giving them reason to continue the war, has been echoed by other government officials. In November Secretary of State Rusk, while noting that in "a vigorous and thriving democracy such as ours . . . we must have debate and an opportunity for dissent,"[367] also said that "evidences of dissent are used by Hanoi and Peiping, and undoubtedly these evidences bolster their morale, lead them into perhaps some miscalculations and misjudgments."[368] Senator Russell Long hit the Fulbright hearings by asserting:

> "Every time a Senator suggests that we retreat and accept defeat or surrender, that word goes right back to Ho Chi Minh and the powers at Peking, who say, 'If we just keep after those Americans, even though they are killing 10 of our men to every one of theirs, that great nation will lose courage and quit.' "[369]

Another charge is that the demonstrations hurt the morale of the troops in Vietnam;[370] perhaps this is what the President meant by conduct "inconsistent with the national interest."[371]

President Johnson's remarks about Communist infiltration have also been reiterated by other officials. The day before the President spoke, Attorney General Nicholas deB. Katzenbach announced that the Department of Justice would investigate groups seeking to at-

362 *Id.*, Oct. 19, 1965, p. 1, col. 8 (city ed.).
363 *Ibid.*
364 *Id.* at 1, col. 8, p. 5, col. 1.
365 *Id.* at 5, col. 1.
366 *Ibid.*
367 *Id.*, Nov. 6, 1965, p. 2, col. 7.
368 *Ibid.*
369 *Id.*, Feb. 17, 1966, p. 1, col. 5, at 5, col. 4.
370 See, *e.g.*, Dallas Morning News, Oct. 18, 1965, § A, p. 5, col. 3.
371 See note 366 *supra*.

tack the draft as a means of protest.[372] He was reported as saying that he would hesitate to call the demonstrations and related activities treason because of a "large bite of constitutional protection."[373] He disagreed "strongly and violently" with the antidraft demonstrators but upheld their right to express their views.[374] Asked about Communist influence, he replied that in groups such as Students for a Democratic Society "where people are saying things similar to what is being said by Peking, you are likely to find some Communists involved."[375] However, he said that Communists, "by and large," were not the leaders of SDS.[376] The *Denver Post* combined the report of the President's concern over misleading the Communists with the Attorney General's statement so that Katzenbach's charge apparently went to all demonstrators rather than just those who were in the "beat-the-draft" movement.[377]

The FBI and the Senate Internal Security Subcommittee made less ambiguous charges of Communist infiltration. J. Edgar Hoover stated that the Communist Party had played an "ever-increasing role in generating opposition to the United States position in Vietnam."[378] He charged that the party and other subversive groups "supported and participated" in most of the major antiwar demonstrations.[379] The Senate subcommittee issued a staff study on October 13, 1965, which charged more than support and participation[380]—it asserted that "the great majority of those who have participated in anti-Vietnam demonstrations and in teach-ins are loyal Americans who differ with administration policy in Vietnam for a variety of reasons, ranging from purely strategic considera-

372 N.Y. Times, Oct. 18, 1965, p. 1, col. 6 (city ed.).

373 *Id.* at 7, col. 1.

374 *Ibid.*

375 Dallas Morning News, Oct. 18, 1965, § A, p. 1, col. 6 (UPI story).

376 N.Y. Times, Oct. 18, 1965, p. 1, col. 6, at 7, col. 1 (city ed.).

377 President Johnson is deeply concerned about demonstrations against U.S. policy in Viet Nam because they might be misinterpreted by American adversaries as reflecting the nation's mood, the White House said Monday.

White House Press Secretary Bill D. Moyers said the President had conferred by telephone with Atty. Gen. Nicholas Katzenbach about his investigation into possible Communist involvement in the demonstrations.

Moyers said Johnson wants Katzenbach and the Justice Department to conclude the investigation as soon as possible.

"The President feels concerned . . . that even well-meaning demonstrators can become victims of exploitation," Moyers said.

Katzenbach telephoned the President at the Bethesda Naval Hospital during the weekend to report on his investigation. Johnson is recuperating from gall bladder surgery.

In Chicago on a speaking engagement Sunday, Katzenbach said, "There are some Communists involved" and "we may very well have some prosecutions."

Denver Post, Oct. 18, 1965, § 1, p. 1, cols. 7-8.

378 N.Y. Times, Jan. 7, 1966, p. 3, col. 4 (city ed.).

379 *Ibid.*

380 STAFF STUDY.

tions to pacifism."[381] However, it declared,

> The control of the anti-Vietnam movement has clearly passed from the hands of the moderate elements who may have controlled it, at one time, into the hands of Communists and extremist elements who are openly sympathetic to the Vietcong and openly hostile to the United States, and who call for massive civil disobedience, including the burning of draft cards and the stopping of troop trains. This is particularly true of the national Vietnam protest movement scheduled for October 15-16.[382]

Significantly, in the subcommittee's press release the conclusion about Communists and extremists controlling the movement appeared in the second paragraph, immediately after a short one-sentence initial paragraph.[383] The qualification concerning the loyalty of some of the participants was buried in the fourth paragraph.[384] Moreover, the language was changed. Instead of referring to the "great majority of those who have participated," the press release read, "it is no part of the purpose of this study . . . to suggest that *all* of those who disagree with the Administration's policy on Vietnam or who participate in demonstrations against this policy are Communists or Communist dupes."[385]

## II. CONSTITUTIONAL VALUES AND THE PROPRIETY OF PUBLIC STATEMENTS BY GOVERNMENT OFFICIALS

While the government's public pronouncements may deter dissent, this poses a problem only when one postulates an obligation to avoid such consequences. In the usual sense of the term, there is no "legal" obligation—no judicial restraints, no legislative or administrative rules that limit this sphere of governmental activity.[386] If there are to be controls on such activity, they will have to be self-imposed. Thus the obligation involved can appropriately be described as a "moral" or "ethical" one. The source of this duty is to be found not in personal preference, but in the Constitution of the United States; for we take it as axiomatic that government officials are obligated to uphold the values of the Constitution they have sworn to support.

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381 *Id.* at xiv.

382 *Id.* at xiv-xv.

383 Internal Security Subcomm., Senate Comm. on Judiciary, Press Release, Oct. 15, 1965, p. 1.

384 *Ibid.*

385 *Ibid.* (Emphasis added.)

386 Of course, in some instances the legal system provides restraints through the law of defamation. However, such controls are very limited, particularly in light of the defense of privilege which immunizes many statements from tort liability. See Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960).

More specifically, the thesis which we shall develop here is that in so far as the protests against the Vietnam war fall within the protection of the first amendment's free speech, petition, and assembly provisions,[387] the propriety of a government official's statements turns on whether he took due account of the values embodied in that amendment. So, an official who urged the public to impose private sanctions on anyone who opposed Medicare, for example, would have violated an obligation arising from his duty to support first amendment values. Moreover, since governmental declarations can lead to private sanctions, the propriety of an official's conduct depends also on whether he has acted in a manner consistent with the Constitution's due process guarantees.[388] On this ground, too, the official who urged that Medicare opponents be privately punished would have violated a constitutionally based obligation. Thus, given the principles stated above, we shall argue that a statement issued for the purpose of arousing public hostility toward dissenters may violate an official's obligation to the first amendment and clearly would violate his duty to uphold due process values. Of course, even when a speaker does not intend to prompt private penalties, his words may have this effect. In such cases, we shall contend that the propriety of the official's conduct depends, first, on whether the social value of his statement outweighs its harmful consequences, and second, on whether he did what he could in the circumstances to counteract the statement's repressive side effects.

### *A. The Relevant Constitutional Values*

#### 1. THE FIRST AMENDMENT

The purpose of the first amendment's free speech provisions is to protect speech, petition, and assembly against improper governmental restraint.[389] The amendment applies expressly only to

[387] U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[388] U.S. CONST. amend. V provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." Problems similar to those considered here are raised by questions concerning a public prosecutor's responsibilities in issuing statements concerning pending criminal prosecutions. There, of course, the official operates under a restraining influence that is not present here: the possibility that prejudicial pretrial publicity will lead a court to overturn a conviction on the ground that the defendant was denied due process of law. Apparently the spirit of the due process clause has also operated as a restraint, for in April 1965 the Department of Justice promulgated a set of rules designed to protect defendants against harmful publicity, and these rules probably go far beyond the restrictions required to avoid the reversal of a conviction. For the Department's rules, see 20 C.F.R. § 50.2 (Supp. 1965).

[389] Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Brennan, *The Supreme Court and the Meiklejohn Interpretation*

the government's use of formal legal sanctions. But enacting and enforcing laws are not the only ways in which government can impose restraints on speech, petition, and assembly. In particular, the public utterances of the President, Congressmen, and other high officials, can play a part in the development of an atmosphere in which informal sanctions—social ostracism, denial of employment, even private violence—operate to deter dissent and punish those who refuse to be dissuaded. Here, no less than when formal legal sanctions are used, the result is that society loses the values which the first amendment was designed to protect. Consequently, if a law prohibiting all or some protests against the government's policy in Vietnam would violate the letter of the first amendment, official statements similarly repressive in effect should be considered to violate its spirit. What government cannot accomplish directly, it ought not attempt indirectly.

The initial question, then, is whether antiprotest laws would be unconstitutional. This in turn depends on whether the protests are the kinds of activities entitled to first amendment protection, and, if so, whether they pose so grave a threat to other social interests as to warrant their suppression.[390] The first of these questions, one would suppose, could be briefly answered; after all, most of the protests seem to fall squarely within the first amendment's compass. But some people have suggested that certain antiwar activities do not promote the objectives of the first amendment protection.[391] And in any event, if one is to decide whether the

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*of the First Amendment*, 79 HARV. L. REV. 1 (1965); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-88 (1963); Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUPREME COURT REV. 191; Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A.L. REV. 1 (1965); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REV. 245.

390 At one time we could have talked of the "clear and present danger" test. See Schenck v. United States, 249 U.S. 47, 52 (1919). Today there is some doubt as to what is the test for laws challenged as infringing free speech. See Brennan, *supra* note 389, at 16-20; Emerson, *supra* note 389, at 908-16; Kalven, *supra* note 389, at 204-10, 213-19; Karst, *supra* note 389, at 6-13. However, we think the statement in the text sums up the kinds of considerations inherent in any approach likely to emerge. Compare Emerson, *supra* note 389, at 918-55.

391 Thus the *Wall Street Journal*, commenting on "illegal acts like burning . . . draft cards or indulging in 'peaceful' marches," said:

> By now this variety of "free speech"—which is devoid of intellectual content, invites no debate, tolerates no rebuttal, trades on emotion, bases its appeal on sheer numbers of demonstrators and beckons to exploitation—has become so accepted it is employed on the slightest impulse by dissatisfied groups of every description. In our opinion, it cannot be too strongly emphasized that most of the street action is not an expression but a debasement of honest public discussion of the issues, Vietnam or anything else, and in fact of the whole Constitutional concept of free assembly.

Wall Street Journal, Oct. 27, 1965, p. 16, cols. 1-2. See also STAFF STUDY at

protests pose a danger sufficient to justify the sacrifice of first amendment values, it is important that the roles which the protests play in furthering first amendment objectives be clearly perceived. Consequently the next few pages are taken up with an examination of the relationship between the protests and the purposes of the first amendment. Thereafter we shall consider their possible harmful effects.

*a. Freedom of Speech*

At the heart of the first amendment's protection of speech lies the conviction that free and open discussion promotes the testing of ideas and thus serves society's interest in the acquisition of knowledge.[392] Not the least important ideas tested are those which guide the formation of government policy. This point is of obvious pertinence here and deserves elaboration.

A governmental decision to follow one policy rather than another involves two kinds of premises.[393] Some premises deal with the likely consequences of alternative courses of action. Others involve the value judgment that one set of consequences is to be preferred over others. However, the adoption of a policy obviously

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xv; 111 CONG. REC. 26291 (daily ed. Oct. 18, 1965) (remarks of Senator Thomas Kuchel).

[392] Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prohecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Professor Emerson lists four functions of freedom of expression in a democratic society: individual self-fulfillment, attainment of truth, participation in decision-making, and balance between stability and change. Emerson, *supra* note 389, at 878-93. We believe we have treated the last three. Of course, we recognize the significance of the first and its application to Vietnam protests, but we have omitted it because of considerations of space and emphasis appropriate to this article.

[393] See Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1965).

does not mean that its premises are valid. The factual assumptions underlying it are based on prior observations of reality and inferences drawn from them. New observations (or new interpretations of old experiences) can indicate that those assumptions are erroneous: instead of the results anticipated, a policy may lead to consequences that are wholly unexpected; more commonly, things will work out partly as planned and partly otherwise. Value judgments can also change. Viewed in the light of its actual consequences, a policy may appear unwise. Moreover, even when initial expectations are fulfilled, we sometimes alter our views on whether a policy is a wise one. Thus, though the benefits of a policy may theoretically have seemed to outweigh its costs, this judgment may change when we actually experience these consequences.

Since experience is never ending, it is always possible that the premises of government policy may prove erroneous. Presumably it is desirable that such errors be discovered. The social utility of free speech is that it permits and encourages the exploration essential to discovery. However well entrenched a policy may be, by maintaining free speech we permit the challenges that can lead to the correction of error.

Given this rationale for free speech, the question is whether it is applicable to the various protests against the Vietnam war. The first point worth noting is that the need for continuing re-examination, and thus the importance of discussion of government policy, is especially high when, as here, the policies involve our relations with the Communist world. What strategy and tactics are best in dealing with China, the U.S.S.R., and the nations they influence is an incredibly complicated matter. Few, if any, of the relevant factual questions can be answered with certainty. Moreover, some of the critical factual conditions change with time: for example, the nuclear capacities of various nations, the relationship between China and Russia, and the attitudes of our allies and of unaligned nations. The critical value judgments are also prone to change. As developing circumstances cause variations in the costs and benefits of the policies we have been pursuing, judgments on their worth also shift. What seems intolerable (or insignificant) today may be of little moment (or crucial) tomorrow.

Assuming the importance, then, of foreign policy debate, are the Vietnam protests the kinds of activities that in some way contribute to thoughtful appraisal of policy? Most are; some may not be. The value of the National Teach-In in Washington,[394] where positions both *pro* and *contra* the government were presented, is clear. But it has been argued that rallies and teach-ins at which one side only was presented did not provide a basis for

[394] For a description of the National Teach-In, see text accompanying notes 147-63 *supra*.

rational assessment of government policy and thus did not further the purposes of the first amendment.[395] For two reasons, this argument is untenable. First, the government's policy was generally accepted by the public. If there was to be a re-examination, what was needed was not a statement of the grounds supporting the war, but a presentation of the reasons for questioning it. This was done at all the teach-ins and rallies, one-sided or not. Second, the government responded to its critics by setting forth the arguments supporting its policy,[396] and these were communicated to the public by newspapers, magazines, radio, and television.

While the presentation of one side of an argument does contribute to rationality, some protest activities—marches, picket lines, sit-ins, draftcard burnings, attempts to block troop trains, and so on—did little even to spell out the antigovernment position. At best, these presented slogans rather than arguments. But if activities of this sort seem puerile on the surface, they nevertheless can attract attention to the issues,[397] and this will involve more people in the debate. The wider the debate, the more ideas, especially as people possessing relevant kinds of expertise are drawn in. Broad public concern also promotes re-examination of policy within the offices of government itself. Some government officials who privately question the wisdom of a policy may be unwilling to voice their doubts publicly unless they detect some support among the citizenry. Moreover, widespread debate may cause government officials to reconsider policies whose wisdom they had previously taken for granted; for in the process of constructing a public justification for his policy, an official may re-examine its premises and find that he must modify his position.[398]

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395 See, *e.g.*, STAFF STUDY at xv; see also Wall Street Journal, Oct. 27, 1965, p. 16, cols. 1, 2; 111 CONG. REC. 26291 (daily ed. Oct. 18, 1965) (Senator Thomas Kuchel).

396 See note 33 *supra*.

397 Clearly this was what motivated some of the protesters. Thus a leaflet distributed by the Vietnam Day Committee proclaimed,

> Therefore, we must turn to new tactics to affect American public opinion. We must put our bodies on the line. The form of civil disobedience is undecided at this time, but consider this: if, for example . . . thousands of students and others block the gates of the Oakland Army Terminal . . . we think that attention will be focused dramatically on the issues in Vietnam . . . .

STAFF STUDY 43. Another protester said, "The government is not giving the people the facts. We have a lot to say but very little chance to say it where people will hear." Christian Science Monitor, Oct. 18, 1965, p. 3, cols. 3, 4-5. See also the statement of Professor Curti, Capital Times (Madison, Wis.), Nov. 19, 1965, p. 7, col. 4.

398 An analogous situation is one in which a prominent person challenges a government position and government officials feel that they must make some reply. Here, too, the process of constructing a public justification for the position can lead to modification of the original position. An example of this phenomena occurred in February 1966 when "Senator Robert Kennedy suggested . . . that the United States offer the Viet Cong

While provocative protests may attract attention, they are often annoying, and one may ask whether this attention getting is really necessary. Ideally a speaker whose ideas have merit should not need to resort to such tactics. In fact, however, he often must. The temptation to ignore difficult, complex problems like the war in Vietnam is great. Acceptance of the *status quo* is far simpler than trying to comprehend the mass of pertinent information and the many interrelated issues that are involved. Moreover, when it comes to foreign policy, many people feel powerless to influence the government and thus tend to ignore debate because they view it as futile. Additionally the anti-Communist character of the Vietnam struggle may give the government's policy special insulation against the charges of its critics. For these and perhaps other reasons, special measures to capture public attention may well be essential when one wants to stimulate widespread examination of a previously accepted government policy.

In this respect, it should be noted that the opponents of government policy may have no ready access to the mass media. This was true of most protesters against the war in Vietnam. Lacking the funds required for a national advertising campaign, they had to rely on the publicity that newsworthiness could buy. But at least in the early days, the people who were protesting were not newsworthy in themselves—they were neither prominent as individuals nor did they speak for prominent groups. And the message they expressed was not sufficiently shocking to command the attention of television, newspapers, and magazines.[399] Therefore the news-

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a share of power in South Vietnam as the best hope of reaching a negotiated settlement." N.Y. Times, Feb. 20, 1966, § 1, p. 1, col. 8. Initially, high administration officials (Vice-President Humphrey, Under Secretary of State George Ball, and McGeorge Bundy, special assistant to the President) attacked Kennedy's suggestion as completely untenable. *Id.*, Feb. 21, 1966, p. 1, col. 1, p. 30, col. 1 (city ed.). The discussion which followed indicated that two distinct issues were present: should the Viet Cong be permitted to participate in the interim government that would rule between negotiations and the holding of a free election; should they be permitted to participate in the elected government, assuming, of course, that they were entitled to do so on the basis of the election returns. *Id.*, Feb. 23, 1966, p. 1, col. 8, p. 12, cols. 3-6 (city ed.). On the first point, the administration's position came to be that the composition of the interim government was a matter for negotiations. *Id.* col. 3. Senator Kennedy expressed his agreement with this. *Id.* at 1, col. 8, p. 12, col. 3. On the second point, it became clear that the administration, like the Senator, believed that the results of a free election should be accepted even though this might mean that the Viet Cong would have a place in a coalition government. *Id.* at 12, col. 3. For the development of Vice-President Humphrey's views on this matter, see *id.*, Feb. 28, 1966, p. 1, col. 1, p. 5, cols. 3-5 (city ed.); *id.*, March 12, 1966, p. 1, cols. 2-3, p. 3, col. 5 (city ed.). For the views of others who participated in the debate, see *id.*, Feb. 21, 1966, p. 20, col. 1 (city ed.) (Senators Fulbright and Javits); *id.*, Feb. 22, 1966, p. 1, col. 6, p. 2, cols. 3-4 (city ed.) (Senator Fulbright and Congressman Samuel Stratton).

[399] By way of contrast, consider the publicity given to the now famous

worthiness of their *tactics* may have been especially important in determining how much of their position reached the public. Furthermore, the protesters needed not only to capture space in the mass media, but had also to arouse audience interest. Familiar devices such as a letter to the editor or a speech at a local auditorium are apt to be far less effective than a march through the center of town or a picket line around the White House. New ideas, like new products, require provocative and unusual forms of promotion to bring them to the consumer's attention. And in a market filled with competitors, a new product, especially a bitter pill, needs this vigorous promotion if it is ever to be noticed at all.

This promotional process, of course, is not a simple one; and not all forms of protest are effective in reaching all groups within the public. Indeed, something like a chain letter effect may operate. The early student protests, for example, with an initial impact confined to the academic community, may well have sparked the first teach-ins. The activities of the professors, in turn, somewhat more noteworthy, reached beyond the campus—to various nonacademic intellectuals and to some extent to the public at large. Religious leaders had also entered the discussion, and this led to a further involvement of the public. And while we cannot trace with confidence a direct causal connection, eventually open hearings were held in the Senate.

Dramatic and unusual forms of protest may have other effects conducive to heightened discussion and debate. Opposition to the war in Vietnam has been at times rather unpopular and some people, perhaps many, may in consequence have felt reluctant to express a questioning or dissident point of view. But by advertising the fact that there is a protest movement—by popularizing dissent, so to speak—the tactics of protest may have dispelled the notion that a position of dissent is necessarily a lonely or isolated one, and thus have encouraged some to speak out. Still other people may remain silent because they view the expression of dissent as radical or extreme, and hence for them, improper. But whether any given expression of dissent will be perceived as beyond the bounds of propriety often turns on the range of protest tactics currently in use; whatever lies at the far end of the spectrum has a way of being popularly equated with "radicalism." But when a new and provocative tactic appears, the range—subject to certain qualifications—may be extended; older tactics may shift toward the center and cease to be viewed as quite so shocking.[400] If writing

statement "God is dead." Though the person expounding this concept was not well known within the general public, his words were sufficiently startling to command mass media attention.

[400] Social psychologists have shown that a person's social judgments are influenced by what he sees as the range of possibilities. As one's range of experience widens, what once looked like an unacceptable extremist position may appear nearer the middle of the scale of possible positions. For

letters, signing petitions, and the like are the only modes of protest in use, some people inevitably will regard these acts as radical and shun them. But as different and more provocative tactics become common—picket lines, for example, or sit-ins—the over-all picture changes, and people previously unwilling to express themselves at all may now be willing to write their Congressman, or sign a petition, and so on. In brief, dramatic and unusual tactics may enhance the respectability of the more moderate forms of protest.

Conceding all we have said, it still can be argued that some of the protests discourage more discussion than they promote, and therefore that they fail to further the purposes of the first amendment. For example, while those who display the Viet Cong flag undoubtedly attract attention, they probably stimulate more public antipathy than rational thought. The same may be true of marchers who chant "Hey, hey, LBJ. How many kids have you killed today?" We find two difficulties with this argument.

For one thing, we suspect that it often rests on the use of an inappropriate criterion of efficacy.[401] When someone says that the Viet Cong flag-waver is ineffective, for example, he probably

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example, we are told that some Southerners who once viewed the National Association for the Advancement of Colored People as an undesirable extremist group now view it as a "responsible" organization in contrast to what they see as radical groups such as the Congress of Racial Equality and the Student Non-Violent Co-ordinating Committee.

Such a widening of the range of possibilities may lead to more tolerance of those who fall in the newly defined "moderate" section of the range. On one hand, a person who is not strongly committed to an opposite position may find these new moderates more convincing and may even move toward their position. On the other hand, even those who are extremists of the opposite stripe may be more willing to allow the new moderates to be heard—and may even be willing to listen to them. Nonetheless, the evidence indicates that experience with new, more extreme positions may make one who is strongly committed to a contrary view more firm in his beliefs and prompt him to redouble his efforts to combat "error." A member of a White Citizens' Council upon discovery of CORE and SNCC may well lump the NAACP with them and seek ways to run all three groups out of his community. See generally SHERIFF & HOVLAND, SOCIAL JUDGMENT 111, 124-26, 130, 157, 168-73, 174, 180, 190, 195-96 (1961). We are indebted to Dr. Jacqueline R. Macaulay for assistance in interpreting this material.

401 At a debate among some sixty scholars, critics, and artists in New York City, Arthur Schlesinger, Jr., responding to a question about the impact of the opposition to the war on government policy, said:

> I think some forms of the opposition did. I think that the senatorial opposition and a certain amount of the opposition in the intellectual community has had a genuine effect. I think the President's Johns Hopkins speech, which should have been given many months earlier, was given when it was in part because of that opposition.
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> I think the demonstrations have had very little effect . . . .
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> . . . If the point is to be effective, you don't carry Vietcong banners [though people have a right to protest in this fashion].

N.Y. Times, Feb. 6, 1966, § 6 (Magazine), p. 12, col. 1, at 79, cols. 1, 3.

means that this tactic will infuriate many people who might otherwise have listened to arguments concerning, say, the merits of negotiations. And if the flag-waver's purpose is to stimulate thought about *negotiations*, his efforts probably will yield a net loss. But if he believes that the Viet Cong, rather than the official government of South Vietnam, represent the best interests of the Vietnamese people, then displaying a Viet Cong flag is not an inappropriate method of symbolizing this position and urging others to consider it. Although the number of people so stimulated to reflect on the position may be small, the activity has served a first amendment purpose.

Second, whether a protest tactic will be effective is seldom clear. The time, place, and audience are important. More often than not, the contention that a tactic will backfire has no more basis than the contrary belief. Who, then, should control the choice of tactics? Since it is in the self-interest of dissenters to use effective techniques, and since government is seldom interested in promoting the effectiveness of its critics, it seems wise to leave control over protest tactics in the hands of the protesters. This means that the possible ineffectiveness of a protest should not constitute a basis for denial of first amendment protection.

### b. *Petition and Assembly*

The first amendment's protection of the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances" reflects a principle that is axiomatic in our system: control over government policy should rest ultimately with the people.[402] In determining whether an activity should be protected under this principle, there is no point in asking whether the activity promotes some *underlying* constitutional purpose, for there is no such underlying purpose. Democratic control—bringing public opinion to bear on government—is an end in itself. In this respect, as conventional political campaigns illustrate, an attempt to organize public opinion need not rely on rational argument in order to be part of the democratic tradition. It is also within this tradition for groups representing minority views to have an impact on government policy.[403] Indeed, specific policies are seldom supported by a clear-cut majority with strongly felt convictions; instead, various factions make divergent demands on government. Therefore a policy with enough support or acquiescence to make it

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[402] Of course, the first amendment and the other provisions of the Bill of Rights constitute an important limitation on popular control of government, for prohibiting criticism of government policy would be invalid even if favored by a majority of the electorate. Even here, however, a modified principle of democratic control operates: given sufficient popular support, the Constitution could be amended.

[403] See BUCHANAN & TULLOCK, THE CALCULUS OF CONSENT *passim* (1962).

viable is likely to represent a compromise that accommodates many points of view. In brief, the only appropriate standard for deciding whether an activity falls within the first amendment's assembly and petition clauses is whether it constitutes a lawful attempt to influence policy by bringing the persuasive power of public opinion to bear on government. Clearly this was a major purpose of most of the Vietnam protests. . .

Thus far we have assumed that all of the protests were aimed at mobilizing and expressing public opinion. But this, of course, may not have been true. The purpose of some protesters—those who attempted to block troop trains, for example—may have been to disrupt the government's policy rather than to change it democratically.[404] To the extent that this was true, these activities cannot be thought of as entitled to the protection of the first amendment.[405] But while it is undoubtedly convenient to think of "purpose" as a single undeviating and dominant motive, the fact is that purpose is far more likely to be an amalgam of motives, some proper, others not.

In any case, in so far as protesters attempt to exercise democratic control over government, the constitutional value of their activities is in a sense especially high. The practical significance of the right to "assemble, and to petition the Government" is related to

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404 The May 2nd Movement has conducted campaigns to have draft-age men sign pledges stating that they will refuse to fight in Vietnam. LUCE, THE NEW LEFT 114-15 (1966). While one purpose of these campaigns may be to advertise opposition to the war, it seems probable, when one considers the other activities and attitudes of the May 2nd Movement, that another purpose is to impede the war effort itself. See *id.* at 114-17.

405 Quite a different issue is whether an individual who believes his government is violating international law ought to refuse to participate in activities that further the nation's efforts or, to carry the matter one step further, ought to attempt to undermine his country's ability to carry out its policies. This is an issue that some opponents of the Vietnam war have raised. Thus, David H. Mitchell, III, who was convicted of refusing to report for induction into the armed forces, "charged that the United States is committing war crimes in Vietnam . . . ." N.Y. Times, March 17, p. 20, col. 4 (city ed.).

> The importance of the Mitchell case is that he, along with a growing number of the young, is not refusing service as a conscientious objector to all wars. It is the war in Vietnam in which he will not participate. And he bases his refusal on the Charter of the International Military Tribunal at Nuremberg—"Individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."

Hentoff, *Die Meistersingers Von the Free World*, The Village Voice (New York), March 24, 1966, p. 8, col. 1. It is beyond the scope of this article to consider whether an individual who believes that his country is acting immorally is therefore himself morally justified in violating the country's laws. It is sufficient for our purposes to note that the government is unlikely to accept such a theory as a legal excuse for violation of its laws.

the potential impact of government on the citizenry: as the impact increases, so does the interest of the citizenry in keeping a government responsive to its wishes. When, as here, the governmental decisions involve our military relationship with the Communist world, their potential impact is great. For such decisions may affect the protection of our liberties on the one hand, and the preservation of our lives on the other.

*c. Countervailing Social Interests*

While it is axiomatic that first amendment activities are highly valued and entitled to protection against governmental restraint, their immunity from attack is not complete.[406] Though the test for determining the constitutionality of restrictive legislation is far from clear, we do know that speech, petition, and assembly cannot be prohibited directly unless they pose a substantial threat to some significant social interest.[407] We must ask, then, whether the Vietnam protests pose such a threat.

All dissent has certain inherent costs. Energies are diverted from the implementation of policy to its discussion. Factional antagonisms are brought to the surface and possibly intensified. Decisions are delayed. Moreover, even when dissenters advocate an unwise or foolish policy, they may eventually gain the support of a majority of their countrymen and thus bring about an injurious change of policy. We do not discount these costs. But the decision that such a price should be paid was made long ago when the values of freedom of speech, petition, and assembly were embodied in the Constitution.[408]

Some of the Vietnam protests entail costs that arise not from the ideas expressed, but from the modes of expression. It has long been recognized that some speech tactics may be regulated, and others prohibited, in order to avoid their socially injurious consequences.[409] Reasonable regulation of parades and picket lines is permissible.[410] Sound trucks may be prohibited from operating at three o'clock in the morning.[411] Those who block traffic by sitting

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406 See, *e.g.*, Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Dennis v. United States, 341 U.S. 494 (1951).

407 See articles cited note 389 *supra*.

408 See Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329, 336-37 (1960).

409 See, *e.g.*, MEIKELJOHN, POLITICAL FREEDOM 24-25 (1960); Emerson, *supra* note 389, at 931-35.

410 International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957). *But see* Cox v. Louisiana, 379 U.S. 536 (1965).

411 In Mr. Justice Brennan's words, "government is not powerless to say that you cannot blare by loudspeaker the words of the first amendment in a residential neighborhood in the dead of night . . . ." Brennan, *supra* note 389, at 5. See, *e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

or lying in a busy intersection can be prosecuted.[412] Among other things, the citizen's daily routine may be protected against disruption as long as dissenters are not denied other avenues of protest. In some instances—attempts to block troop trains, for example—the demonstrators may have violated valid laws limiting modes of expression. To this extent, the protests do not fall within the sanctuary which first amendment values provide for speech, petition, and assembly.

It may also be that some protests, despite their character as speech, petition, or assembly, could be constitutionally prohibited because they urge people to engage in conduct that would impede the nation's fighting capacity. Possible examples are leaflets advocating draft evasion—refusal to serve or the fraudulent claiming of exemptions—and the leaflets that were sent to our soldiers in Vietnam urging them to cease fighting.[413] Whether such conduct could be prohibited would turn on the Supreme Court's assessment of the danger created at the time of occurrence. Suffice it to say here that the answer is by no means clear.

Quantitatively the activities noted in the last two paragraphs have little significance. The modes of communication used by all but a relatively few protesters, though sometimes irritating, have been entirely lawful. And with but few exceptions the message communicated has been that the government should change its policies rather than that the citizenry should engage in unlawful disruption of those policies. It has been argued, however, that *any* public dissent will hurt the morale of troops fighting in the field, and delude the North Vietnamese, Viet Cong, and Chinese leaders into thinking that domestic pressures will force a United States withdrawal, thereby stiffening their resistance to a negotiated settlement, and

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412 The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly.

Cox v. Louisiana, 379 U.S. 536, 554 (1965) (the case overturned the conviction of a leader of a civil rights demonstration for "obstructing public passages").

413 See, *e.g.*, Gara v. United States, 340 U.S. 857 (1950), *affirming by an equally divided Court* 178 F.2d 38 (6th Cir. 1949); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

prolonging the war.[414]

Whether the protests have hurt morale is difficult to say. We have no systematically gathered information concerning the reactions of servicemen in Vietnam. The evidence that exists consists of statements from the men in the field,[415] and the impressions of people who have visited Vietnam and talked with the men there.[416] If morale means psychological capacity to fight well, there is no direct evidence that this capacity has been impaired. The evidence does show, however, that the protests have evoked feelings of angry resentment.[417] The question, then, is whether such feelings decrease an individual's combatant capacity. The commander of the Veterans of Foreign Wars, after visiting Vietnam, offered his opinion. While noting antagonism toward the protests, he said that they "have 'not affected the fighting men in their decision to do their duty and win this war.' "[418]

The impact of the protests on the Chinese, North Vietnamese, and the Viet Cong leaders is also difficult to assess. In public statements they grossly exaggerate the size of the protests—picturing them as supported by large portions of the population—and state that the result will be to force our withdrawal from Vietnam.[419] The difficulty is that one does not know whether such statements are simply propaganda or whether they truly reflect the thinking of the Communist leaders; but it seems unlikely in our opinion that the leaders of China or North Vietnam have been so totally deluded. These men have reliable intelligence sources available to them: newspapers from all over the world, representatives of other nations assigned to Peking and Hanoi, and Chinese and North Vietnamese diplomats located abroad.[420] The leaders of the Viet Cong have more limited sources of information. There is some indication that they rely on the distorted statements the Chinese issue for public consumption.[421] But on the other hand, the Viet Cong have also sought and *obtained* information from other, more reliable sources.[422]

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414 See, *e.g.*, text accompanying notes 362-63 & 367-70 *supra*.

415 See, *e.g.*, N.Y. Times, Dec. 10, 1965, p. 18, col. 1 (city ed.).

416 See, *e.g.*, Capital Times (Madison, Wis.), Oct. 23, 1965, p. 2, col. 6; N.Y. Times, Oct. 31, 1965, § 1, p. 70, cols. 1-4.

417 See, *e.g.*, Capital Times (Madison, Wis.), Oct. 23, 1965, p. 2, col. 6; N.Y. Times, Dec. 10, 1965, p. 18, col. 1 (city ed.).

418 Capital Times (Madison, Wis.), Oct. 23, 1965, p. 2, col. 6.

419 See, *e.g.*, N.Y. Times, Oct. 20, 1965, p. 1, col. 6, p. 2, cols. 1-2; *id.*, Nov. 28, 1965, p. 1, col. 4, p. 87, col. 3 (city ed.).

420 China and North Vietnam have formal diplomatic relationships with the countries of Eastern Europe. In addition, China has formal diplomatic relationships with France and Great Britain, and Chinese officials in Poland hold informal talks with our Ambassador there.

421 N.Y. Times, Oct. 20, 1965, p. 1, col. 6, at 2, col. 1.

422 *Id.* cols. 1-2. A British writer who visited North Vietnam in late 1965 indicates that the North Vietnamese give a "dedicated over-evalua-

The protests could have other harmful consequences. Even if there is no misperception concerning the extent of the protests, the Communist leaders may take an unrealistic view of their probable impact on United States policy. And, if the Chinese and Vietnamese leaders are not wholly in agreement on what their policy ought to be, the protests may strengthen the hand of those who press for continued conflict rather than negotiation. Further, since even totalitarian regimes must take some account of public opinion, the protests, by providing a basis for propaganda, may help the leaders control their people.

All these comments on how the protests affect our troops or whether they have misled the Communist world are, of course, highly speculative. It is doubtful that anyone really knows the facts. And because we do not know, it must be assumed that the protests may have such consequences. But it should also be recognized that without suppressing dissent, steps can be taken to minimize this risk. We have ways of communicating with the Chinese and Vietnamese. The President's public statements and various demonstrations supporting government policy reach far beyond our borders. Private messages are also possible.[423] And the continued shipment of men and supplies to the battlefield speaks in terms that are difficult to misunderstand. Indeed, some of the protesters themselves have directly informed the North Vietnamese leaders that the protests should be interpreted not as support for the Viet Cong, but only as a demand that our government take steps to bring about negotiations.[424] Turning to the matter of morale, here, too, there are ways of minimizing whatever harmful side effects the protests may have. Numerous campaigns have been organized to send encouraging letters,[425] food packages,[426] and Christ-

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tion of the protest-movements in both the United States and Europe." CAMERON, HERE IS YOUR ENEMY 49 (1966). He noted that in "the public parks [in Hanoi] were picture-exhibitions with photographs of protest-meetings in Berkeley, in London, in Sofia, in Paris. 'Now, at least, the Americans will understand!' " *Id.* at 50. Of course, the question still remains whether this represents the views of the leaders of North Vietnam or is only propaganda to bolster the morale of a nation under attack from American bombers.

423 "We have had dozens upon dozens of contacts in every conceivable form, fashion and forum, in order to find out whether there is any interest on the part of the other side in a peaceful settlement. Those contacts continue. We would know very quickly if they had concluded that they are prepared to bring about peace in Southeast Asia and it is important that those contacts continue open, as I can assure you they are open."

VIETNAM PERSPECTIVE 23 (Comments of Secretary of State Rusk).

424 See note 237 *supra.*

425 See, *e.g.*, N.Y. Times, Nov. 5, p. 3, col. 5 (city ed.); Wisconsin State Journal (Madison, Wis.), Nov. 15, 1965, § 1, p. 10, cols. 3, 4.

426 See, *e.g.*, *id.* cols. 3, 5 ("The Pentagon announced a logistics problem had been caused by the great shipment of cookies, fruitcake, books and other presents for servicemen in Vietnam . . . .").

mas gifts[427] to the men in Vietnam; and it is reported that these efforts have transformed the initial resentment of the troops into "a glow of good feeling."[428]

*d. The Balance of Values and Costs*

Having noted the possible consequences of the protests, we come now to the question whether laws prohibiting them would be constitutional. We have previously commented on demonstrations which violate laws regulating modes of expression[429] and the advocacy of illegal action designed to disrupt the government's policies.[430] But what of the vast bulk of the protests—those that were lawful and urged only that the public petition government to change its policies? Given that these activities are covered by the first amendment's references to "freedom of speech" and "the right of the people peaceably to assemble, and to petition the Government," their value is axiomatic in our society. Indeed, it is the protection of these and related values that constitutes the ultimate justification for doing battle in distant countries. Thus, if the war in Vietnam causes the limiting of free discussion or democratic control in the United States, it will to that extent be self-defeating. Only a serious risk to the very survival of our society should cause us to impair its essential qualities. The evidence concerning the consequences of these protests hardly suggests that they involve a risk of that magnitude. It is not clear that they in fact have any harmful effects. Moreover, the harmful effects they *may* have do not endanger the life of the nation. Perhaps dissent in the United States will stiffen Communist resistance, and this in turn may prolong the war and increase our casualties. One can only view this possibility with deep regret—as, indeed, all casualties are viewed. Yet with or without the protests, we have already sacrificed thousands in this war alone to protect our freedoms against external threats. It would be ironic indeed if we held the value of those freedoms to be too small to outweigh the highly speculative additional risk to life entailed by the Vietnam protests.

At this point, it may be helpful to summarize briefly what has been said thus far and to indicate the direction of what remains. Our thesis began with the premise that government officials, in issuing public statements about the Vietnam protests, are obliged to take account of constitutional values. Thus, in so far as the protests are protected under the first amendment (and we believe almost all of them are), officials have an obligation to consider the possible deterrent effects of their public statements. We have pointed out

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427 N.Y. Times, Nov. 5, p. 3, col. 5 (city ed.); Wisconsin State Journal (Madison, Wis.), Nov. 15, 1965, § 1, p. 10, cols. 3, 5.

428 N.Y. Times, Dec. 10, 1965, p. 18, col. 1 (city ed.).

429 See pp. 688-89 *supra*.

430 See pp. 687, 689 *supra*.

that some of the antiwar activities could be prohibited, however, and so there is an area in which officials would have no obligation if only the first amendment were involved. But also to be considered are the values reflected in the Constitution's due process guarantees. We turn now to this point, after which we shall set forth and discuss the guidelines which, in our view, government officials ought to observe.

### 2. DUE PROCESS OF LAW

Though "due process of law" is in some senses an indefinable concept, in part its meaning is clear. The words "of law" imply a principle that lies at the heart of our system: government may impose criminal sanctions on a person only if his conduct, when committed, was prohibited by law.[431] Assuming a law, the imposition of criminal sanctions will nonetheless be improper unless certain procedures—those required by due process—are followed.[432] But if there were no limits on government's freedom to stimulate the public's use of private sanctions to punish "offenders," the purposes of these due process requirements could be largely circumvented.

The requirement that conduct be prohibited by law before it is punishable serves at least two purposes: it acts as a restraint on arbitrary government action, and it makes it possible for the citizen to determine, often with some precision, what conduct is prohibited.[433] When law is enacted by a legislature, those who are interested usually have an opportunity to express their views to individual legislators and to the appropriate legislative committee. This provides some assurance that the people responsible for making law will be exposed to divergent viewpoints. Moreover, the legislative process itself promotes some degree of thoughtful deliberation; and, in addition, the judiciary's power to strike down unconstitutional laws constitutes an independent check. Of course, these restraints do not always work; but the availability of these institutionalized processes often blocks or restrains arbitrary action. None of these restraints is operative when government officials issue statements which tend to activate a system of private sanctions. In addition, the potential "offender" has relatively little notice of what the privately made "rules" prohibit. He may know that the public is generally hostile toward antiwar demonstrations, but does he know whether marching on a picket line violates the

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431 The "very nature of our free republican governments" requires "that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit." Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). See also United States v. Brown, 381 U.S. 437 (1965). The obligation has been placed squarely on the requirements of due process. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938).

432 See, *e.g.*, Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346-47 (1957).

433 See FULLER, THE MORALITY OF LAW 33-94 (1964).

social definitions of acceptable conduct? What of a sit-in? What of carrying a sign vilifying the President? Moreover, the penalties for the commission of such "crimes" are uncertain. The protester, for example, who anticipates nothing more than verbal abuse may end up with a broken head. At the beginning of the civil rights movement, sit-ins and picketing were disapproved by many. Today these tactics are far more familiar, but still one cannot be sure in any particular situation whether they have now become acceptable to those who witness them or are still disapproved to the same or even a greater degree. Given this uncertainty, can anyone say that one who pickets or sits-in has assumed the risk and "has asked for it" if he is met with violence, jeers, or a lowered status in the eyes of his former friends?

The situation is quite different, obviously, when rules of conduct are established by the legislature. Those who wish to know can find and read the rule they are expected to follow. While there may be some ambiguities, the definition of the conduct prohibited is likely to be far more precise than that provided in unwritten private rules. This is especially true of restraints on speech, petition, and assembly, for here the courts have been especially insistent that the prohibited be clearly defined.[434] No similar pressure for precision operates in the private rule-making process.

"Due process of law" protects the citizen not only against arbitrary enactments, but also against unfair enforcement of the law. But all the safeguards afforded by due process—the neutral judge, a jury screened for bias, representation by counsel—are absent when the private sanction system enforces its rules. Consequently, to the extent that government power is used to stimulate private punishment, government is causing punishment to be imposed without observing the due process safeguards to which a person is supposed to be entitled when the government moves against him. To be sure, the informal sanctions are not the same as those that spring from the criminal law. Often they are trivial. But the fact that a sanction is informal does not necessarily detract from its severity. Loss of a job, for example, may entail greater economic deprivation than a fine. And isolation *within* society (ostracism) is not wholly unlike isolation *from* society (imprisonment). It follows, then, that in deciding what statements he will issue to the public, a government official ought to consider whether his words will tend to stimulate the private sanction system.

### *B. The Obligations of Government Officials Suggested by Constitutional Values*

In so far as the first amendment protects the Vietnam protesters

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434 See, *e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948). *Cf.* Aptheker v. Secretary of State, 378 U.S. 500 (1964).

against direct governmental restraint, the values of free speech, petition, and assembly would be equally violated if a government official urged the public to ostracize the protesters, deny them jobs, physically attack them, or otherwise use private sanctions to repress dissent. The sole purpose of thus addressing the public would be to impair processes which the Constitution seeks to protect against governmental attack. Such an appeal to private sanctions would also violate the spirit of due process, for the Constitution's purpose is to provide the individual with safeguards not available when punishment is privately imposed. Thus the first rule for evaluating governmental comment on the Vietnam protests is that statements issued for the purpose of provoking resort to private sanctions are improper.

No statements of which we are aware could fairly be held to have violated this rule. The statements that government officials have issued assert a proposition about the protests rather than specifically calling for their repression. Thus some officials have characterized the protests as Communist influenced; others have commented on their overseas effects, and so on. But whatever the speaker's intent, these statements can stimulate a system of private sanctions. It might be argued, of course, that in light of this such statements should never be issued; but this would impose greater restraints on government conduct than constitutional analogy requires. Even *laws* aimed at a proper purpose may be constitutional despite the fact that they tend to inhibit speech.[435] In passing on the validity of such laws, courts have weighed the loss of first amendment values against the social value of the law in question; social value, in turn, is a function of the importance of the social goal at which the law is aimed (avoiding strikes tending to cripple the nation's defense capabilities, for example) and of whether, in order to pursue that goal effectively, it is necessary to make the first amendment sacrifices entailed.[436] As a second criterion, then, we would suggest that governmental statements be similarly evaluated.

The starting point of such an evaluation, of course, should be recognition of the principle that government officials, no less than others, are entitled to the protection of the first amendment. Their public statements should not be controlled through formal legal sanctions. But self-control is another matter. Given their duty to respect constitutional values, government officials ought to weigh carefully the propriety of issuing any statement that might

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435 See note 436 *infra*.

436 See, *e.g.*, Konigsberg v. California, 366 U.S. 36 (1961); American Communications Ass'n v. Douds, 339 U.S. 382 (1950). See the survey of competing views on how this balance is to be struck in Brennan, *supra* note 389, at 5-18. See also Emerson, *supra* note 389, at 940-45; Karst, *supra* note 389, at 22-24.

impair those values. And the wisdom of their decisions is an appropriate matter for public concern.

In our view, propriety turns first on whether the official has taken care to avoid misstatements. Some degree of care is called for simply because officials should not misinform the public. But even more is involved. By hypothesis, issuing statements critical of dissenters has consequences adverse to free speech and due process values. And just as the constitutionality of a law that indirectly deters dissent depends in part on the value of the law's purpose, so too the propriety of an official's statements depends on whether his conduct has sufficient social value to offset its adverse consequences. The official himself may have had various reasons for speaking: to rally support for enactment of legislation or for vigorous enforcement of laws already on the books; to enhance his public image or that of his party or its candidates; to influence the public's view on the merits of the Vietnam war and on the wisdom of demonstrating against it; or simply to express himself. All of these objectives can be accomplished despite inaccuracies in the statements an official makes. (Indeed, misstatements may sometimes be helpful.) But erroneous statements are not likely to further rationality. And for us the prime social value of an official's statements—the value essential to counterbalance their adverse effects on free speech and due process—is the role they can play in promoting public understanding of, and hence wise response to, the problems to which he speaks. It is this view of the value of the official's conduct that constitutes the main basis for our contention that in commenting on dissent he should use care to avoid misstatements. We do not say that the only purpose for which he may properly speak is to educate the public. We do say, however, that whatever his objective, when he talks about those who disagree with official policy, he should behave in a manner calculated to promote rationality rather than error.

It follows that the official should restrict his comments to those that are justified by reliable data and sound reasoning. Moreover, since an official's views about dissent often are given great publicity, and since those who would dispute him are not likely to have equal time, the official should adopt the stance of an objective reporter, not a partisan advocate. Let us be clear. We do not mean that an official ought never to issue a statement about a doubtful matter. It may be quite appropriate and important for him to raise questions. But he should not assert as true a proposition that on the evidence is merely possible; his statements should contain whatever qualifications are required to make them accurate. Of course, the self-control we have called for goes considerably beyond the restraint usually exercised when government officials address the public. Arguments that appeal more to emotion than reason are often used. Facts are not always carefully handled. But surely

behavior of this sort ought not to serve as a model for government officials. In addition, there is a critical distinction between most governmental statements and those that concern us here. Usually the comments of government officials deal with the *merits* of substantive issues such as Medicare, urban renewal, and foreign aid. Such statements have little tendency to make the critics of government policy afraid to speak; thus while an official's irresponsibility may contribute to the adoption of an unwise policy, discussion of the wisdom of the policy is not likely to be suppressed. The process through which policy errors can be exposed and corrected is not impaired. But when, as here, government officials comment on the propriety of voicing dissent, they may endanger the corrective process itself. Given this risk, more than ordinary care is called for.

Even when an official frames his statement carefully, there will often be a significant risk of adverse side effects. But these effects can be minimized. The official can couple his criticism of dissent with a reminder that protest and dissent are a vital part of the American tradition. This may be an unpleasant task for an official who strongly dislikes the protesters' points of view; but it is a duty he should accept, and one whose appropriate discharge constitutes a measure of the propriety of his conduct.

Finally, there is an essential balancing process. Even if an official has been impeccable in his handling of evidence, has framed a statement no broader than the evidence warrants, and intends to couple that statement with appropriate cautionary language, the risks of suppressing dissent or inciting violence may be too great, when weighed against the purpose the statement might serve, to justify its issuance. How is such a balance to be struck in individual cases? Probably, we suspect, as it always has been, on the basis of one's personal sense of values. But this does not make the inquiry unimportant, for putting the question will at least alert a public official to the problem. Suppose, for example, that a certain group is generally known to be controlled by Communists, but that many of its members are non-Communists. The Attorney General is considering issuing a statement warning these non-Communists that they may be exploited for purposes with which they are not in sympathy. Assume also that because the non-Communist members of the group have taken a strong stand against what they view as "red baiting," there is almost no chance that they will listen to what the Attorney General says. Assume further that there have recently been many incidents of violence against people identified as Communists. In such a case, we would contend, the Attorney General should not issue the statement.

As a nation, when we confer governmental power on an individual, we assume that he will accept the responsibility commensurate with its exercise. It is clear, we believe, that a responsible

public official must take care to protect constitutional values, even when he is not subject to the check of the judicial process.

## III. THE STATEMENTS AND THEIR PROPRIETY

In all that government officials have said about the Vietnam protests, two themes predominate: first, that the various expressions of dissent have an adverse effect on the nation's attainment of its objectives in Vietnam; and second, that to some extent Communists are associated with the protest activities. We turn now to some of the specific statements in which these themes have been expressed. Using the guidelines we have suggested, we shall ask whether the officials who issued these statements took appropriate account of constitutional values.

### *A. Statements Concerning the Impact of the Protests*

To the extent that government officials believed that protests against the nation's policy in Vietnam impeded efforts to obtain a negotiated settlement or a military victory, or hurt the morale of the soldier in the field, their public statements to this effect clearly served a proper governmental purpose: they were communicating arguments which ought to have been considered by protesters in deciding whether, in their judgment, antiwar demonstrations served the best interests of the nation. Presumably the intent was to persuade, not to punish. They were seeking to influence conduct, not by threatening listeners with sanctions, but by appealing to their reason.

The problem, of course, is that despite benign intent, such statements could still have had adverse effects. After all, officials were stating that the actual results of protest were to lengthen the casualty lists, to aid those with whom the nation was doing battle, and, in effect, to aid and abet Communism.[437] Many people may not have realized that these consequences were probably not intended by the protesters. Moreover, the public may not have understood that dissent is part of a process having great social utility. In these circumstances, though they did not intend it, officials may nevertheless have silenced some dissenters by causing them to fear the consequences of an open expression of their views. Indeed, such comments may have caused private punishment to be inflicted on some people. In our view, during the period involved here these dangers were not *de minimis*. The violent attacks on protesters and the insults directed at them[438] are evidence enough of that.

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[437] Indeed, some have charged that the demonstrations were *intended* to aid and abet Communism. See, *e.g.*, 111 CONG. REC. 26242 (daily ed. Oct. 18, 1965) (remarks of Congressman Bryan Dorn).

[438] See text accompanying notes 338-50 *supra*.

However, it does not follow that officials should not have spoken during this period. Whatever the actual fact, the belief that demonstrations in the United States might be misconstrued in Hanoi was not frivolous. It was based on evidence and supported by reason.[439] In such a situation there was good reason to make the risks of protest known.[440] Therefore, the critical question in evaluating the conduct of the officials who commented on the dangers of the protests is whether they took appropriate steps to minimize the harmful consequences such commentary might entail.

Thus, if an official believed that the protests were within the first amendment's protection, he should have made this clear to his audience. A few words designed to put a damper on the private sanction system would also have been in order. Of course, officials who thought that the protests posed so great a threat that a law prohibiting them would be constitutional, could not have been expected to champion free speech. But their due process obligation would hold. Therefore, even while noting the harmful consequences of the protests—and perhaps calling for laws to suppress them—these officials should have warned against vigilante action.

At this point, a word about the effectiveness of such prophylactic statements is appropriate. Government officials are not without ways of getting such messages across to the public. Often they have close relationships with key men in the mass communications media and can influence what is reported and what is stressed. This is especially true of the President and those associated with him. And such lines of communication are also open to Congressmen and other officials. At the same time, no matter how careful he is, an official can never eliminate completely the speech-deterring consequences of his conduct. Inevitably some would-be dissenters will be silenced. But the effort should be made nevertheless. We turn now to an analysis of the statements that have in fact been made.

Many men in government have had something to say about the overseas impact of our domestic dissent. An examination of each and every remark would be pointless. Since the comments of President Johnson, Secretary of State Rusk, and Senator Long probably have been more publicized than any others—and thus had the greatest impact on the public—we shall focus on them.[441]

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439 See text accompanying notes 419-22 *supra*.

440 Such information could influence potential protesters in at least three ways: convince them to refrain from protest, cause them to modify the kinds of demonstrations in which they engaged, or lead them to take some action to minimize the risks that their actions would be misunderstood by the Communist leaders. Thus the message sent to Hanoi by the leaders of the November 1965 march on Washington may well have been prompted by earlier governmental comments on the risks of antiwar demonstrations. See note 237 *supra*.

441 Many other people in government made statements to the same

To our knowledge, no critic of the Vietnam protesters took greater care to avoid infringing constitutional values than Secretary of State Dean Rusk. At a news conference on November 5, 1965, he said that

> "evidences of dissent are used by Hanoi and by Peiping, and undoubtedly these evidences bolster their morale, lead them into perhaps some miscalculations and misjudgments."
>
> . . . "those who engage in such discussions [of government policy in Vietnam] should be aware of and take some responsibility for the fact that what they have in mind may be frustrated by the way in which they go about it.
>
> "If they want peace in Southeast Asia, then it's very important that Hanoi and Peiping not be misled about the determination of the American people and the American Government . . . ."[442]

But these were not his only words:

> In "a vigorous and thriving democracy such as ours," he said, "we must have debate and an opportunity for dissent" and "it would be wrong to try to restrict those opportunities in any way."
>
> "I certainly feel very strongly that Government should not interfere with the normal process of democratic discussion in our system," he said.[443]

There is some reason to believe that Secretary Rusk, in addition to stating his views on dissent, placed special emphasis on this matter so that it would be adequately reported in the newspapers. This, at least, was the result. Looking at the way in which ten papers from around the country covered the Rusk news conference, we find that in all but one paper his defense of dissent was featured in the text of the story;[444] in four it was noted in the story's head-

effect. See, *e.g.*, 111 CONG. REC. 26238-39 (daily ed. Oct. 18, 1965) (remarks of Congressman Clement Zablocki); *id.* at 26244 (remarks of Congressman Lionel Van Deerlin); *id.* at 26251-52 (remarks of Congressman Jeffrey Cohelan); *id.* at 26291-92 (remarks of Senator Michael Mansfield); *id.* at 26293 (remarks of Senator Richard Russell); *id.* at 26295 (remarks of Senator William Proxmire).

442 N.Y. Times, Nov. 6, 1965, p. 2, col. 7 (city ed.).

443 *Ibid.*

444 In seven papers Rusk's defense of dissent appeared in the first sentence of the story. See Atlanta Constitution, Nov. 6, 1965, § 1, p. 2, col. 2; Cleveland Press, Nov. 6, 1965, § 1, p. 2, cols. 3-4; Minneapolis Tribune, Nov. 6, 1965, § 1, p. 2, col. 4; N.Y. Times, Nov. 6, 1965, p. 2, col. 7 (city ed.); Providence Journal, Nov. 6, 1965, p. 4, col. 1; Raleigh News & Observer, Nov. 6, 1965, p. 1, col. 1; Wisconsin State Journal (Madison, Wis.), Nov. 6, 1965, § 1, p. 2, col. 4.

Two other papers carried the comments on dissent in the second sentence of their stories. See Portland Oregonian, Nov. 6, 1965, § 1, p. 1, col. 2; San Francisco Chronicle, Nov. 6, 1965, p. 5, col. 7.

line.[445]

President Johnson's record is mixed. In reporting his comments on the nationwide protests of mid-October 1965, Bill Moyers, White House press secretary, said that the President was disturbed on two counts:

> First, he fears that the protests may give American enemies a misleading picture . . . . As Mr. Moyers put it:
>
> "The President feels it is possible for our adversaries to misread events in this country and to take and put into these events greater and broader support for a particular position than is justified by the feeling of the American people at large."
>
> According to his aides, Mr. Johnson believes . . . this would result in the prolongation of the war the demonstrators seek to end.
>
> Second, Mr. Johnson is disturbed by preliminary reports of Communist infiltration of the peace movement. He is concerned, Mr. Moyers said, by the possibility "that even well-meaning demonstrators can become the victims of Communist aggression."
>
> . . . . .
>
> "One of the subjects he touched on this morning," Mr. Moyers said, "was to express surprise that any one citizen would feel toward his country in a way that is not consistent with the national interest."[446]

For a number of reasons, it should have been obvious at the time these comments were released that their potential impact was great. First, the President was speaking. Second, the nation had just experienced a week end filled with antiwar demonstrations, many of them quite provocative. Third, the protesters were being denounced in the halls of Congress[447] as well as in the columns of some newspapers.[448] Finally, President Johnson's statement that the demonstrations might mislead our battlefield enemies was coupled with two further comments, both of which had some tendency to arouse public antipathy toward, and the use of private

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In the tenth paper the protests were not mentioned until the sixth paragraph (approximately the middle) of the story. See Dallas Morning News, Nov. 6, 1965, § 1, p. 1, cols. 2-3.

445 See Atlanta Constitution, Nov. 6, 1965, § 1, p. 2, cols. 2-4 ("Rusk Defends Right To Protest American Policy in Viet Nam"); N.Y. Times, Nov. 6, 1965, p. 2, col. 7 (city ed.) ("Rusk Defends Right To Protest on War but Cautions Critics"); Providence Journal, Nov. 6, 1965, p. 4, cols. 2-3 ("Rusk Upholds Tactics of Demonstrators, Fears Their Effects"); Wisconsin State Journal (Madison, Wis.), Nov. 6, 1965, § 1, p. 2, cols. 4-6 ("Rusk Sees Viet Progress, More Fighting; Defends Protest Right"). See also Portland Oregonian, Nov. 6, 1965, § 1, p. 1, cols. 2-3 (subhead: "Secretary of State Defends Foes' Rights To Protest National Policy").

446 N.Y. Times, Oct. 19, 1965, p. 1, col. 8, p. 5, col. 1 (city ed.).

447 See, *e.g.*, note 441 *supra* & note 461 *infra*.

448 See text accompanying notes 316-19 *supra*.

sanctions against, the protesters: first, the mention of Communist infiltration of the peace movement; and second, the statement that a person who had protested the government's policies felt "toward his country in a way that is not consistent with the national interest." If these factors are all taken into account, the President's failure to remind the public that dissent plays an important role in our governmental process was especially unfortunate.

Interestingly, a little more than a month later, on the eve of the Washington protest march, the President (speaking through his press secretary) once more noted the danger that antiwar activities might mislead our adversaries; but this time he had more to say.

> President Johnson thinks that people have a basic right to criticize United States foreign policy . . . .
>
> This assessment of the President's views was given by his press secretary, Bill D. Moyers . . . .
>
> . . . . . .
>
> "I know he feels that the demonstration is a part of the freedom guaranteed all Americans," Mr. Moyers said. . . .
>
> . . . . . .
>
> . . . Mr. Moyers remarked, those who disagree [with the government's policy] should at least "weigh the consequences" of their actions.
>
> But, he said emphatically, "at the same time it should not cause them to fail to do what their conscience leads them to do."[449]

If the President's first statement may properly be criticized, the second entitles him to praise.

The last statement dealing with the impact of the protests to be considered here is Senator Russell B. Long's. Speaking on the Senate floor, he

> vehemently denounced senatorial critics of the [government's Vietnam] policy, accusing them of dividing and confusing the country and encouraging the Vietcong to prolong the war.
>
> Shouting, waving his arms and shaking his fists, the Louisiana Democrat barely stopped short of attributing lack of patriotism to the severest critics, Democratic Senators Wayne Morse of Oregon and Ernest Gruening of Alaska.
>
> "I maintain," Mr. Long said, "that speeches on the floor of the Senate and on television advocating that our boys not fight for their country and that the people back off from the effort to help their country, handcuff our fighting men and hold our country down when the going gets tough, do nothing but encourage the Communists to prolong the war."

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449 N.Y. Times, Nov. 27, 1965, p. 1, col. 8, p. 10, col. 4 (city ed.).

> "I swell with pride when I see Old Glory flying from the Capitol. I swell with pride when I see the flags around the Washington monument. I swell with pride when I see the American flag flying from the Senate Office Building.
>
> "I am proud of this country. I pray that no other flag will ever fly above it. My prayer is that there may never be a white flag of surrender up there."
>
> In his opening remarks, Senator Long said he had information from "very high sources" in the government that the Communist cause in Vietnam was being aided by speeches of critical Senators.
>
> . . . . . .
>
> Mr. Long conceded under questioning that Senators had a right to ask questions about Vietnam policy but added:
>
> "When our nation is committed and our men are fighting in the field, we have a responsibility not to do things that will divide and confuse the people and prolong the war."[450]

A number of difficult issues arise when one attempts to assess the propriety of these remarks. Though specifically dealing only with senatorial speech, Long's remarks might have been understood by the public as directed at all protests. If so, he may be criticized on the ground that he did nothing to protect against the risk that his comments might have silenced dissenters and, indeed, might have led to private punishment. On the other hand, if his remarks are viewed as limited to the speeches of his colleagues, the problem is not so simple. His purpose, presumably, was to convince other Senators that they should not publicly criticize government policy. One way for a Senator to do this would be to persuade his colleagues that criticism of the government's Vietnam policy was unwise because of its effects on the nation's war effort. But it seems unlikely that this is what Senator Long had in mind. He undoubtedly was aware that his colleagues must have heard and considered this argument.[451] Another way to silence colleagues is to threaten their chances of re-election by telling the voters that their speeches are helping the Communists. This, too, is proper. After all, discussion of whether Senators and Congressmen act wisely is part of the democratic process and should be valued as an aspect of free speech.

But there is something else to consider. The importance of open debate within the halls of Congress is of obvious importance. Policy is made there, and those who make it should feel as free as possible to debate the premises of the policies they must pass on.

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450 *Id.*, Feb. 17, 1966, p. 1, col. 5, p. 5, cols. 4-5 (city ed.).

451 The argument had been widely asserted. It appears to have been introduced in a column by James Reston of the *New York Times*. *Id.*, Oct. 17, 1965, § 4, p. 10, col. 3. It was repeated in Congress. See note 441 *supra*. President Johnson put his voice behind it. *Id.*, Oct. 19, p. 1, col. 8 (city ed.). And Secretary of State Dean Rusk raised the matter at a news conference. See text accompanying note 442 *supra*.

Of course, this freedom can never be complete. The legislator's knowledge that what he says may be turned against him and cause his defeat at the polls is an ever-present and unavoidable fetter on discussion. And this fetter could be removed only at the cost of prohibiting the argument that a legislator's publicly expressed views reflect unfavorably on his qualifications for office—clearly an unacceptable price. Consequently, a person who, like Senator Long, criticizes a legislator's speeches cannot be faulted merely because the criticism may to some extent deter that legislator, or others, from voicing their views. But this should not mean that anything goes. For example, in terms of first amendment values, it would be improper knowingly to make a false accusation that would deter a legislator's participation in legislative debate: the value of this false accusation would be nil, and therefore nothing would counterbalance its costs. Moreover, where criticism of a legislator's speeches can be misconstrued by the public, and the misconstruction would be especially damning to the legislator, it may be appropriate to ask that the critic do what he can to avoid this result. Of course if the critic is himself a legislator, we must not ask so much of him that his own freedom of debate will be restricted; and it is worth remembering that when the person criticized is a legislator, he has a ready-made forum in which to reply.

With these qualifications, however, we may say that the critic ought to exercise care. Whether Senator Long failed in this respect depends on how one would answer certain other questions. First, was there any significant risk that the public might have misconstrued his remarks? The obvious possibility is that the public might interpret Long as asserting that Senators who question government policy are not only unwise but are also willfully disloyal, that is, consciously seeking to aid the enemy. The way in which he described the speeches he was attacking makes such an interpretation at least possible. He referred to "speeches . . . advocating that our boys not fight for their country . . . ."[452] He also characterized his senatorial adversaries as "advocates of retreat, defeat, surrender, and national dishonor."[453] In addition Senator Long said that our soldiers "might be defeated, but they are not going to get whipped in Vietnam. If they are beaten, it will be in Washington."[454] In proclaiming "I swell with pride when I see Old Glory flying"[455] and "I am proud of this country,"[456] he may have suggested to the public that those he was attacking held different attitudes.

Second, assuming that the public might have misconstrued Long's

452 See text accompanying note 450 *supra*.
453 112 CONG. REC. 2911 (daily ed. Feb. 16, 1966).
454 *Id.* at 2912.
455 See text accompanying note 450 *supra*.
456 *Ibid.*

comments, and that this was apparent to other Senators, would this have deterred legislative debate? Some Senators were most unlikely to be deterred. Senators Morse and Gruening had long voiced their opposition to the war in Vietnam,[457] and Senator Long's comments probably had no effect on them. We do not know —indeed, cannot know—what impact the risk of being regarded as disloyal might have had on others.

Finally, if care was called for, did Senator Long exercise it? We think not. We have already noted the portions of his speech which created a danger of misconstruction. These in themselves reflect a lack of care. Indeed, in some respects they are clearly inaccurate. The men Senator Long was criticizing had not advocated "retreat, defeat, surrender, and national dishonor."[458] Nor had they urged that "our boys not fight for their country,"[459] though they had argued that the government should take steps to end the fight itself. Though Senator Long did concede that his colleagues had a right to "ask questions,"[460] he never said that they were entitled to criticize policy, and he never expressly disavowed the notion that his opponents were consciously and intentionally damaging the national interest.

### *B. Statements Charging Communist Involvement in the Protests*

The second common kind of official statement concerning the Vietnam protests is one charging that opposition to the war is in some way related to Communism.[461] In many ways and for various reasons Communism has come to be regarded in our society as the enemy, as the quintessential "they"—evil in and of itself. Without more, the label "Communist" attached to an individual, a group, or an idea is capable of closing minds and shutting off discussion. This in itself is unfortunate in light of first amendment values, for whatever the freedom of a speaker, there can be no testing of ideas unless others will listen and think. But the "Communist" label poses a further and even more serious danger: it may inhibit the speaker himself; those who espouse ideas that have been dubbed "Communist" expose themselves to a risk of serious private sanctions. It is not difficult to understand why this is so. Many American lives have been lost in combating an ideology militantly

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457 See 109 CONG. REC. 15744-45 (1963) (Senator Morse); 110 CONG. REC. 4831-35 (1964) (Senator Gruening).

458 See note 453 *supra*.

459 See text accompanying note 452 *supra*.

460 See text accompanying note 450 *supra*.

461 In addition to the statements discussed below there have been many others. See, e.g., 111 CONG. REC. 26180 (daily ed. Oct. 15, 1965) (remarks of Senator Harry Byrd); *id.* at 26242 (daily ed. Oct. 18, 1965) (remarks of Congressman Bryan Dorn); *id.* at 26243 (remarks of Congressman Hugh Carey); *id.* at 26292-93 (remarks of Senator Frank Lausche); *id.* at 26481 (daily ed. Oct. 19, 1965) (remarks of Congressman Hale Boggs).

antagonistic to our own, and it should not be surprising that some people are willing to take the law into their own hands to deal with those whom they view as Communists. But inciting a mob, even indirectly, is never an appropriate role for a public official.

In light of these risks, then, and with a proper regard for constitutional values, what should a public official consider in deciding whether to charge that some person, group, or idea is communistic? First, such a charge should be made only when it can further some social interest, for only then is there a counterbalance to its potentially harmful consequences. Thus we must inquire into the purposes that such statements might serve. Many reasons can be suggested for giving the public information about Communist involvement in a protest movement. We have already listed some reasons for making any statement about dissent, and they are all applicable here. One of them—influencing the public's response to the protests—deserves further elaboration.

The official who speaks about Communist involvement can be seeking to evoke a number of possible responses. If he is attempting to promote private sanctions in order to silence dissent, his conduct, of course, would be improper. But what if he believes that the members of a particular group are unaware of Communist influence within it and wishes to apprise them of this fact so that they may, if they desire, exclude the Communists, or, failing that, quit the organization themselves? In a similar vein, what if his purpose is to inform potential members of the true character of such an organization? Or suppose the official wants to warn the public of possible bias in an organization's positions and to encourage everyone to think carefully about what it says? Carrying this one step further, what if the official's objective is to advance the theory that anything said by a Communist group (or a group with Communist members) is necessarily invalid and should automatically be disregarded? We would question the propriety of conduct aimed at this last objective, for we consider it irrational to think that ideas are ipso facto bad simply because they are supported by Communists; thus we do not believe that the official who advances this theory is promoting public understanding. When the official's purpose is to prompt the non-Communists in an organization to expel the Communists, other problems arise: is governmental action aimed at limiting the freedom of association of Communists consistent with the first amendment? And will the private machinery which the government official seeks to put in motion afford the procedural safeguards that ought to be present when government acts to deprive the citizen of something he values? Will non-Communists be sufficiently protected against expulsion on the mistaken assumption that they are Communists? We do not intend to explore these problems further. As a practical matter, no further exploration is necessary, for all statements about Communist influence have as a

by-product, if not a purpose, the result of warning about a group's bias and could be defended on this ground. This objective—warning of bias—is not in itself inconsistent with free speech and due process values. Indeed, furnishing the public with information relevant to the reliability of the stands taken by a group is entirely in keeping with the purposes of open debate and discussion, for such information facilitates rational thought. The legal system, for example, has long considered the source of a statement to be pertinent to its credibility.

Whatever may be his motive, the official who carelessly charges "Communism" is endangering constitutional values without justification, for only care can provide some assurance that his statement will have the educational value needed to offset the risks involved in making it. Needless to say, an official can err despite the greatest care, and error is not itself proof of improper conduct. In our view, carelessness is. Additionally, an official can make his charge in such a way that the risks of unintended and repressive side effects are minimized. He can qualify his statement by indicating how people should react to it. If he asserts that a certain group is controlled by Communists, he can limit the danger that debate will be curtailed or private sanctions imposed by stating, for example, that his charge is made only so that others may consider the group's position in the light of possible bias. And he may also reduce these risks by expressly mentioning the importance of free speech and warning against harassment or violence.

We turn now to some specific statements charging Communist involvement or influence in the Vietnam protests. The most elaborately argued charges are found in a staff study of the Internal Security Subcommittee of the Senate Committee on the Judiciary and in the subcommittee's press release announcing its study. The report is entitled, *The Anti-Vietnam Agitation and the Teach-In Movement, The Problem of Communist Infiltration and Exploitation.* The first ten pages are devoted to an introduction by Senator Thomas J. Dodd, vice-chairman of the subcommittee.[462] Five of these pages reproduce the "findings" of the staff.[463] The study itself is ninety pages long, with chapter headings[464] as follows:

Chapter I. Communist Exploitation and Infiltration of Peace Movements—A Brief History [five pages];

Chapter II. Communist Policy in Vietnam—The Nature of the War in Vietnam [three pages];

Chapter III. The Anti-Vietnam Agitation [eight pages];

Chapter IV. The Origins of the Teach-In Movement [seventeen pages];

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462 STAFF STUDY at vii-xvi.

463 *Id.* at ix-xiv.

464 See the table of contents, *id.* at v.

Chapter V. The National Teach-In in Washington [five pages];

Chapter VI. The National Vietnam Protest, October 15-16 [three pages];

Chapter VII. Biographical Notes on Some of the Participants [forty-five pages].

In addition, there is a 145-page appendix reproducing a wide variety of materials.[465] At least 3,000 copies of the staff study were distributed,[466] and it received some notice in the press.[467] *Life* magazine based an editorial on its conclusions.[468]

Initially we turn to the purposes of this study. Senator Dodd's introduction explains why the subcommittee issued the report. First he classifies those who have participated in protests:

> The current surge of criticism about administration policy in Vietnam may be divided into four broad categories:
>
> (1) The honest criticism of loyal Americans who oppose communism but believe that the method we are using to fight it in Vietnam is wrong, and who urge a different method.
>
> (2) The honest criticism of those who believe communism is evolving into something less than a real threat, or who believe that Vietnam is outside our sphere of influence and that we are pursuing a course of folly in committing ground troops to a war in that area.
>
> (3) The honest criticism of convinced pacifists who believe that force is wrong in any and all circumstances.
>
> (4) The dishonest criticism of those who support the general aims of communism, who look upon America as the villain and regard Moscow or Peiping as the new Utopias, who hold that Western democracy is in fact a capitalist dictatorship while Communist totalitarianism is synonymous with people's democracy, who are all for so-called wars of national liberation, but who tell us that the free world sins when it uses force to defend itself against Communist aggression.
>
> The position of those in the first three categories commands respect, and their voices must be heard, no matter how much any of us may disagree with them, if the processes of democracy are not to be stultified.
>
> It is unfortunate that in the clamor and chaos of the anti-Vietnam agitation, the voices of many thousands of loyal Americans in the first three categories have become confused and blended with the voices of those pseudo-Americans in category No. 4.[469]

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465 *Id.* at 91-235.

466 Denver Post, Oct. 22, 1965, § 1, p. 1, col. 3, at 14, col. 1.

467 See, *e.g.*, N.Y. Times, Oct. 15, 1965, p. 3, col. 8 (city ed.); Christian Science Monitor, Oct. 18, 1965, p. 3, col. 3.

468 Life, Oct. 29, 1965, p. 40D.

469 STAFF STUDY at vii.

Then Senator Dodd states that the staff study was released to persuade those in the first three groups to clean their own house and expel those in the fourth:

> It is . . . the purpose of the study . . . to try to establish whether the Communist Party and its various affiliates have succeeded in infiltrating and manipulating and exploiting the so-called teach-in movement and the anti-Vietnam agitation in general, and, if so, to what extent and in what manner.
>
> I hope that the facts here set forth, will, among other things, assist loyal critics of administration policy to purge their ranks of the Communists and crypto-Communists, so that the national debate on Vietnam policy can be carried forward as a discussion between honest men, unencumbered by the participation of the Communists, who have been seeking to subvert the entire process of free debate, as they seek to subvert our society.[470]

Senator Dodd, in a speech to the Senate, said that still another purpose of the study was to give his colleagues "a new insight into" the protests of October 15th and 16th.[471] The subcommittee issued a press release indicating that it also intended to inform the public about Communist involvement.[472]

Though questions can be raised about Senator Dodd's suggested "purge" of "Communists and crypto-Communists," if the Vietnam protests were in fact controlled by Communists, there were proper reasons for making this known to Congress and to the public. But even so, the question must be asked, should the study *as written* have been published by responsible officials in October 1965? The risk that the side effects of a charge of Communist influence in the protest movement would deter discussion were not minimal. Given these risks, one thing seems clear: the charge of Communist control should have been made only if based on reliable data and supported by sound inferences. Only under these conditions would the report serve the educational goals whose values might justify the dangers generated by its charge. What, then, is the supporting argument? What are its premises? Are they adequately proven? And do they support the inference of Communist control?

The specific charge leveled by the committee is that "control of the anti-Vietnam movement has clearly passed from the hands of the moderate elements who may have controlled it at one time, into the hands of Communists and extremist elements who are openly sympathetic to the Vietcong and openly hostile to the Uni-

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470 *Id.* at ix.

471 111 CONG. REC. 26141 (daily ed. Oct. 15, 1965).

472 Internal Security Subcomm., Senate Comm. on Judiciary, Press Release, Oct. 15, 1965.

ted States . . . ."[473] This charge rests on two obvious premises: first, that there is a "movement" in the sense of a group with leadership positions, capable of identification and control; and second, that the Communists and extremists have in fact seized control of these leadership positions. The staff study does not indicate the basis for the first premise. To support the second, the study points to the following circumstances, presumably[474] on the ground that they provide a sound basis for inferring that Communists have taken control:[475] (1) Communists have a motive for taking control, and since they have not been barred from participation in the protests, they have an opportunity to try. (2) In the past, Communists have taken over other organizations, and the Communist Party is today urging its members to participate in antiwar groups. (3) The protests that took place in mid-October 1965 occured not only in the United States but also in several foreign countries.[476] (4) The tactics used to express opposition to the war are consistent with the tactics Communists would use: civil disobedience has been urged and practiced; at some meetings, Communist literature was distributed, and a movie made by the Viet Cong was shown; the teach-ins have been one-sided. (5) A "significant number" of those who sponsored the "teach-in movement" and "an even more significant percentage of the activists in the movement have persistent records of Communist sympathies and/or of association with known Communists and known Communist movement and front organizations."

The initial difficulty with the contention that Communists and extremists have taken control of the antiwar movement is the study's failure to indicate what it means by "controlling" a "movement." It may mean that there is some national antiwar organization which has power over local groups, and that Communists or extremists have taken over key positions in it. But the study points to only two such national organizations: the Inter-University Committee for a Public Hearing on Vietnam, a group formed by professors at the University of Michigan to promote the Washington, D.C., National Teach-In;[477] and the National Co-ordinating Committee to End the War in Vietnam, which played a major role in prompting the protests of mid-October 1965.[478] The study does

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473 STAFF STUDY at xiv-xv.

474 We say "presumably" because the study does not spell out its inferential theory, but merely refers to a series of conclusions and leaves the reader to construct his own theory.

475 See STAFF STUDY at xiv; 1-5, 39-41, 142-46; xiii, 42; xi, xv, 17-20; 45.

476 This fact was merely mentioned in the staff study. *Id.* at xiii, 42. But in a Senate speech Senator Dodd pointed to it as proof of Communist control. See text accompanying note 495 *infra.*

477 For the study's references to the Inter-University Committee, see STAFF STUDY 19, 32, 34, 35, 39, 40, 45, 51, 148, 151, 158, 159, 167, 171, 172.

478 The reference to the National Co-ordinating Committee consists of one of its newsletters reproduced in the study. *Id.* at 196-205.

not assert, nor does it offer any direct evidence, that these organizations were controlled by Communists.[479] The National Committee, moreover, was not formed until the teach-in movement was well underway,[480] and it could hardly have controlled that aspect of the antiwar protests. To be sure, among the numerous groups affiliated with the National Co-ordinating Committee, there were some Communist organizations;[481] yet the staff study does not deal with this.[482] And even if Communist control were established, still the question remains, what did this organization do that could be called "controlling" a movement? While it was a prime mover in urging the mid-October protests,[483] its announced authority extended only to asking that the local organizations join; to informing them through its newsletter of the activities others were planning; and to suggesting tactics that might be used.[484] At the most the National Co-ordinating Committee had the power to "influence" rather than to "control"; and it could exert its influence only with such affiliates as were receptive to its suggestions.[485] This is a far cry from "control" in this sense of the term.

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479 The study offers a series of biographical sketches of twenty-six sponsors of the National Teach-In, showing, so the study says, their "Communist sympathies." *Id.* at 45. Apparently the suggestion is that this shows some measure of Communist control. We deal with this matter at pp. 717-21 *infra*.

480 See text accompanying notes 93-110 & 171-78.

481 "We have been described as being infiltrated by Communists," he said. "That isn't true. The committee is open to any one in the country who feels like we do about Viet Nam and civil rights."

A 49-member steering committee is composed of representatives from 100 local Viet Nam committees through the country, he said. On the steering committee is the Communist party U.S.A. and the Young Socialist Alliance.

But . . . [the chairman] said, organizations such as the anti-Communist Women's Strike for Peace also are on the steering committee . . . .

Denver Post, Oct. 17, 1965, § 1, p. 6, col. 5 (UPI news story on statement by the chairman of the National Co-ordinating Committee to End the War in Vietnam).

482 There is no discussion of the National Committee. See note 478 *supra*. Some people have pointed to the fact that the father of the Committee's head was a member of the Communist Party; presumably the inference is supposed to be "like father, like son." See, *e.g.*, LUCE, THE NEW LEFT 156-57 (1966). For a critical review of this book see Newfield, *From Right & Left*, The Village Voice, May 12, 1966, p. 5, col. 1.

483 See text accompanying notes 179-88 *supra*. The staff study overlooks this fact. It seems to attribute the promotion of the mid-October protests entirely to the Berkeley Vietnam Day Committee. STAFF STUDY 42-44.

484 See the newsletter issued by the National Committee, stating its purposes and plans. STAFF STUDY 196. The chairman of the National Committee said, "While the committee coordinates efforts and supplies literature and advice, it does not dictate what each local unit should do . . . ." Denver Post, Oct. 17, 1965, § 1, p. 6, cols. 5-6.

485 A report of the meeting of the National Committee held in Washington, D.C., in November 1965 indicates that the delegates were almost totally unreceptive to any sort of organizational structure; they seemed to hold as

The study may mean that Communists and extremists were in control of the various local groups which collectively could be referred to as the "movement." The study offers no direct evidence of this. It seems an unlikely conclusion. One writer has described the lines of control in the peace movement in this way:

> If anything has characterized the movement, from its beginning and in all its parts, it has been a spirit of decentralization, local autonomy, personal choice, and freedom from dogma. On many campuses, even simple majority rule is regarded as coercive of the minority; policy decisions require a "consensus." As a result, very few policy decisions are made. In fact, it often appears that the movement may be, in the end, more right than left—that it may have picked up a dropped conservative stitch in the American political tradition. Individualism, privacy, personal initiative, even isolationism and a view of the federal government as oppressive—these elements of the right-wing consciousness have not been argued in such depth . . . since 1932.[486]

While the staff study fails to show that there was a Communist-controlled, national peace organization which in turn had nationwide control of the protests, it does point to some nationally organized radical student groups—the May 2nd Movement, the Young Socialist Alliance, Students for a Democratic Society, the DuBois Clubs, and others[487]—whose local chapters participated actively in antiwar demonstrations. Evidence is presented to show that the local chapters of these radical organizations sponsored their own activities.[488] But this still leaves the marches, rallies, picket lines, sit-ins, and other protests that were organized and directed by local peace groups whose only organizational relationship with one another, if any, was through affiliation with the National Co-ordinating Committee. And the material presented in the study suggests that these groups accounted for a significant portion of the demonstrations and protests. Thus, in describing the sponsors of the mid-October protests, the study notes that the march in New York was sponsored by "an ad hoc group known as the Committee for Fifth Avenue Peace Parade, representing the combined resources of almost 40 organizations including the Communist Party, and the

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a prime value the autonomy of the local groups and the independence of the individual members. This was not true of all the delegates. Members of the Young Socialist Alliance attempted to gain control of the Committee, but the attempt failed. The New Yorker, Dec. 11, 1965, p. 195.

[486] *Id.* at 195-96.

[487] For descriptions of these groups, see STAFF STUDY 214-23. The articles the study reproduces indicate considerable diversity and many differences of opinion among these "new left" organizations. See also, LUCE, THE NEW LEFT (1966).

[488] STAFF STUDY 11 (May 2nd Movement); *id.* at 21-22, 209 (Young Socialist Alliance); *id.* at 146, 167 (Students for a Democratic Society); *id.* at 21-22, 205 (DuBois Clubs).

Progressive Labor Movement";[489] that the protest in Philadelphia was organized by the "local committee to End the War in Vietnam";[490] and that the activities in Oakland and Berkeley were under the auspices of the Vietnam Day Committee, a group indigenous to that community.[491] And the groups whose activities are described in the National Co-ordinating Committee's newsletter (reproduced in the appendix of the study) also appear to be local and autonomous rather than chapters of any known national organization.[492] Thus, in order to show that "the anti-Vietnam movement" is controlled by Communists or extremists, it would be necessary to show that such people had assumed the leadership of the various independent local groups. Yet in only one instance does

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489 *Id.* at 42.

490 *Ibid.*

491 *Ibid.*

492 The groups shown in the newsletter are the Detroit Committee to End the War in Vietnam, *id.* at 198; Lancaster (Pa.) Committee for a Negotiated Peace in Vietnam, *id.* at 199, 204; Pittsburgh Committee to End the War in Vietnam, *id.* at 200, 204; a group of Milwaukee citizens not identified by specific name, *id.* at 201; Vietnam Day Committee (Berkeley), *id.* at 204; New York Committee to End the War in Vietnam, *ibid.*; Chicago Peace Council, *ibid.*; Chicago Committee to End the War in Vietnam, *ibid.*; New Haven-Yale Committee for Peace in Vietnam, *id.* at 205.

The staff study makes no claim that these and the many other similar groups are part of a national organization. At one point, in mentioning a march and rally sponsored by the Detroit group, the study refers to it as the "local Committee to End the War in Vietnam." *Id.* at 10. As we have previously noted, *supra* pp. 710-11, these various local groups are affiliated with the National Co-ordinating Committee, but the National Committee has no authority to control the activities of local groups.

Further evidence (not available at the time the staff study was composed) of the independent character of local groups is found in the following news story:

> The National Coordinating Committee to End the War in Vietnam, in a two-day policy meeting that ended today, voted against the immediate withdrawal of United States troops from South Vietnam.
>
> The 38-to-25 vote represented a victory for moderate elements within the peace organization.
>
> Moderates rejected immediate troop withdrawal for fear of losing the mass support they hope to develop. The moderates include the majority of the independent end-the-war committees that make up the national body.
>
> Favoring withdrawal were the Vietnam Day Committee of Berkeley, Calif., the Young Socialist Alliance, youth arm of the Socialist Workers party, and a few other organizations represented at the meeting on the University of Wisconsin campus here.
>
> Many national left-wing groups, such as the Communist party, the W.E.B. du Bois Clubs of America and Students for a Democratic Society, sent observers and were given speaking privileges. Only the local groups embraced by the National Coordinating Committee, however, such as Concerned Citizens of San Mateo (Calif.) County and Iowans for Peace in Vietnam, had voting delegates.
>
> In heated debate in the spacious Fireside Lounge of the Student Union Building, the moderates charged "radicals" with putting their own ideological views ahead of the organization's goal of peace in Vietnam.

N.Y. Times, Jan. 10, 1966, p. 2, cols. 7-8 (city ed.).

the study provide even a detailed description of a specific local group.[493]

Finally, one can speak of a "movement" in the sense of a very loosely structured group of people acquainted with one another and sharing sympathies for particular causes. The staff study may mean this. It does note that professors at the University of Michigan contacted friends at other campuses and in this way prompted teach-ins at some other schools.[494] But if this is what is meant by a movement, obviously the staff study would have an extremely difficult task in showing that particular people, either Communists or extremists, controlled it. Of course in any group persuasion among friends is a possibility, or a few may possess unusual influence because of their reputation or personality. But again the staff study makes no such charge expressly nor does it attempt to offer any evidence supporting it.

The study, in brief, fails to show that any national organization exercised control over local antiwar groups; it fails as well to show that any local peace groups were controlled by Communists or extremists. And it makes no attempt to show informal patterns of influence among enough people to justify characterizing the antiwar movement as monolithic. We are left, then, with nothing but the study's circumstantial case.

Some of the circumstances to which the study points to support the conclusion of Communist control are obviously true: the Communist Party had urged its members to take an active role in antiwar activities; the Communists were not barred from participation, they had the motivation to take over; and in the past they had taken over other organizations. But one can hardly infer from these facts that the Communists *had* taken over. Such an inference is contrary to experience. The Communist Party, for example, directs its members to participate in civil rights struggles; the Communists are not barred; and the Party probably would like to obtain control

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493 The group described is the Vietnam Day Committee of Berkeley, an affiliate of the National Co-ordinating Committee. See STAFF STUDY 11-12, 42-43, 206-08, 210, 212-13.

494 The teach-in movement had its beginning at the University of Michigan in March of this year.

> According to the Detroit News of March 25, 1965, the movement was launched by Eric J. Wolf, professor of anthropology; William A. Gamson, assistant professor of sociology; and Arnold S. Kaufman, associate professor of philosophy.
>
> Kaufman boasted that his group had contacted like-minded colleagues at the following universities: Stanford, Colorado, Syracuse, San Francisco State, California at Berkeley, and Wisconsin.

*Id.* at 17.

"The demonstration at the University of Oregon on April 23-24 originated with a phone call to Professor Aberle from Marshall Sahlins, an anthropologist at Michigan who had thought up the teach-in idea, and who knew Aberle as a former colleague at Ann Arbor." *Id.* at 28.

of the entire civil rights movement. But the fact is that no such control exists.

The study also points to the fact that the mid-October 1965 protests in the United States coincided with similar actions in several foreign countries. Senator Dodd, speaking in the Senate, indicated the significance that he, as vice-chairman of the committee, attributes to this circumstance: "Pacifists and liberals do not maintain a worldwide apparatus. Only the Communists have a worldwide apparatus capable of inspiring or contriving simultaneous demonstrations in many countries."[495] If we assume for the moment that international co-ordination, as Senator Dodd asserts, is an unmistakable sign of Communist control, it would follow that the United States antiwar group which initiated the foreign demonstrations was under Communist domination. And if this antiwar group controlled the entire protest movement in the United States, it would follow that the entire protest movement was Communist controlled. But the factual assumption essential to this theory is simply not supported by the evidence: the group which appears to have initiated the foreign demonstrations was the Berkeley Vietnam Day Committee,[496] and there is no evidence in the staff study to show that the Berkeley group controlled anything other than its own activities. The most, then, that could be inferred from the overseas protests is that the Berkeley group was run by Communists. Even this inference is something less than probable. The foreign protests can be explained on a number of theories other than the one Senator Dodd puts forth. One is that protest groups (the Vietnam Day Committee, for example) contacted student groups elsewhere, asking them to add their voices. One does not have to be a Communist to make such contacts. Another explanation is that the Communist Party here, knowing of the various activities scheduled for October 15-16, contacted Communist parties in other countries. Certainly the fact that the United States Communist Party had such knowledge does not establish its control over local protest groups. Rather than leading the movement, it may have only taken advantage of an opportunity to follow. We do not know what the true explanation is. But nothing in the staff study substantiates Senator Dodd's assertion that the simultaneous foreign protests were produced by an international Communist apparatus.

The study's reliance on a similarity between Communist tactics and those used in protesting the Vietnam war is objectionable because it is inaccurate; and even if accurate, it would not lead to the study's conclusion. Only a small proportion of the various protests that have occurred could be characterized as "civil disobedience."[497] The study cites a number of these, ignoring the innumer-

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495 See note 471 *supra*.

496 STAFF STUDY 204; N.Y. Times, Sept. 12, 1965, § 1, p. 6, cols. 1, 3.

497 See text accompanying notes 74-186 *supra*.

able rallies, marches, and other clearly lawful activities. The study's statement that it "would be possible to go on endlessly, listing attempts at stopping troop trains, the burning of draft cards, acts of 'civil disobedience,' and other manner of protests"[498] is accurate only because of the last five words. The study itself notes only two attempts to stop troop trains—the *New York Times* reports only two others[499]—and only a handful of other incidents in which the law may have been violated. And to the best of our knowledge the term that accurately describes the relative number of instances of civil disobedience is "handful," not "endless list." As for the screening of a Viet Cong movie and the distribution of Communist literature, here, too, only a relatively few reports of such activities are to be found.[500]

What can be inferred from such incidents? First of all, it is absurd to contend that civil disobedience is an exclusively Communist tactic. It has been most effectively used in the civil rights struggles, and it seems likely that this model, rather than Communist control, constitutes the explanation for the use of sit-ins and related demonstrations by student antiwar protesters.[501] The few instances in which Communist literature was distributed and the Viet Cong movie shown probably evidence the *presence* of Communists. But is this proof of Communist *control*? The alternative explanation, at last equally plausible, is that those who organized the events at which these actions occurred thought it appropriate to permit all ideas to be expressed. This is what they say,[502] and the study offers no reason to disbelieve them.

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498 STAFF STUDY 12.

499 See notes 182-83 *supra*.

500 The *New York Times Index for 1965* contains only a few references to stories about such events.

501 Since there has been, for good or for ill, no long-standing tradition of student protest in this country (as there is in France, and in other countries that do not regard college students as children), American students seem to have borrowed their tactics from several contemporary sources. From Aldermaston and, more recently, from the civil-rights movement comes the protest march. From the Johannesburg Negroes' burning of their identity cards stems, apparently, the American students' draft-card burning. And the extreme form of Buddhist protest against the Diem regime seems to have inspired at least one American student to burn himself to death.

The New Yorker, Dec. 11, 1965, p. 195.

502 As for the charge of Communist infiltration, the demonstrators tend to dismiss it (Students for a Democratic Society has dropped its anti-Communist clause) as "irrelevant." Post-Stalinist Communism no longer seems to these well-travelled children of prosperity a monolith, or even a particularly potent expansionist force. "If an American still wants to be a Communist, we think that's his business," says David Gilbert, a leader of the peace movement at Columbia.

Sidney Lens quotes two leaders of SDS as follows:

"We refuse to be anti-Communist. We insist that the term has lost all the specific content it once had. Instead it serves as the key category of abstract thought which Americans use to justify a foreign policy that often is no more sophisticated than rape. It also

We come finally to the contention that "a significant number of the sponsors and an even more significant percentage of the activists in the movement have persistent records of Communist sympathies and/or of association with known Communists and known Communist movement and front organizations."[503] The evidence which the study presents to substantiate this claim consists of biographical notes on some twenty-six persons whose names appear in the pamphlet, *National Teach-In on the Vietnam War*, as sponsors of that event.[504] Remember, this evidence presumably is offered to show Communist control of the entire antiwar movement. The first and most obvious point is that the control in question, if it were established, would relate only to one event, the National Teach-In. Even as thus limited, however, the list of twenty-six is not persuasive. If we assume that these twenty-six people were in control of the National Teach-In (or of any other protest activity), the question is whether their objective was to change United States policy because they thought a change would be in this nation's best interests, or whether their purpose was to promote the interests of international Communism or of some foreign country. What evidence is presented to show that these people pursued a wrongful purpose? On the assumption that Communist Party membership would show such a purpose, the staff study reports the following information about eight of the twenty-six. One refused to say in 1952 whether he had previously belonged to the party but denied that he was then a member.[505] Another, testifying at a legislative investigation in 1953, admitted that he had joined the Young Com-

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> serves as a deterent to building an open movement for change in this country. . . . Our feeling is that the anti-Communist organizations, such as the trade unions, are far less democratic than the organizations, such as SNCC and SDS, which refuse to be anti-Communist. We have confidence that movements can be built which are too strong to be 'used'; the anti-Communists do not have that confidence."

Lens, *The New Left—and the Old*, The Progressive, June 1966, pp. 19, 23. Lens continues by noting:

> the younger radicals refuse to lay emphasis on what they consider to be an outmoded rehash of the past. Ask . . . [one of the SDS leaders] what he thinks of the Soviet suppression of the Hungarian revolutionaries in 1956 and he makes clear that in his view it was a transgression of humanity—just as is the war in Vietnam. He does not, however, include anti-Communist statements in his program just to assuage the mood of a society which he does not consider great.
>
> Since the New Left does not accept the American definition, or practice, of democracy, it is not so horrified as are some Old Leftists over the one-party systems in the new revolutionary countries. It does not necessarily endorse them, but it refuses to castigate Castro, Nasser, and others as irremediable dictators. It sees them as part of a revolutionary development with all the weaknesses of revolutionary developments . . . .

*Ibid.*

503 STAFF STUDY 45.

504 *Id.* at 45-90.

505 *Id.* at 84.

munist League and later the party itself;[506] the staff study neglects to mention that the testimony it cites also shows that this individual left the Communist Party at about the end of 1942.[507] Three other people are identified in the staff study as having been party members in the late forties or early fifties, and two of them had invoked the fifth amendment when questioned about this matter during legislative investigations in 1952 and 1953.[508] As to two other sponsors, although no direct evidence of membership is presented, the study reports that in 1952 and 1953 they refused to testify when asked whether they were Communists.[509] Finally, one man's name appeared on a list of United Nations employees to whose employment the State Department objected in the belief that they were Communists or under Communist discipline.[510] In this respect it should be noted (although the staff study does not) that the State Department source on which the staff study relies for this information says that the

> information upon which the Department has had to proceed has not been as complete as the information available when the Department undertakes to pass upon the loyalty and security of one of its own employees. The conclusions of the Department have not been subject to appeal . . . nor has the Department been in a position to take sworn testimony.[511]

As for the other eighteen sponsors, the staff study presents no evidence to show either that they had ever been identified as party members or that they had refused to testify on this matter.

Aside from party membership, the study's basis for assuming that the named people were working for foreign interests is indicated by the statement which precedes the biographical notes: "one or two Communist front associations may be *joined* in innocence. But a record of 20 or 30 or 40 *associations* over a period of years cannot, even with the most liberal interpretation, be explained on the basis of innocence."[512] First, we would note that the staff study confuses the idea of joining an organization with the idea of associa-

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506 *Id.* at 78.

507 See *Hearings on Subversive Influence in the Educational Process Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 83rd Cong., 1st Sess., pt. 9, at 901-02 (1953) (Both the witness and the subcommittee counsel refer to the witness' membership in the party as having been prior to his work on the atomic bomb project, and that work began at the end of 1942 or in January 1943.).

508 STAFF STUDY 45-46, 76, 79-80.

509 *Id.* at 61, 86.

510 *Id.* at 82.

511 *Hearings on Activities of United States Citizens Employed by the United Nations Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess., pt. 1, at 385 (1952).

512 STAFF STUDY 45. (Emphasis added.)

tion in the sense of signing a petition circulated by it. Most of the biographies do not show twenty or thirty or forty memberships in alleged Communist fronts, or anything even approaching those numbers.[513] To be sure, a few of the biographies show that their subjects signed numerous petitions, letters, newspaper ads, and other statements supporting various civil libertarian positions on the rights of Communists, urging repeal of anti-Communist legislation and abolition of the House Un-American Activities Committee, advocating attempts to reach an accommodation with the Soviet Union, and so on.[514] Some of these statements were circulated by

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[513] In computing memberships in Communist front groups, we have counted as "membership" actual membership, sponsorship of an organization's conferences or meetings, and refusal on fifth amendment grounds to answer a question concerning membership; we have counted as a "Communist front" any group which the staff study indicated had been so identified by the Attorney General, the House Committee on Un-American Activities, the Subcommittee on Internal Security of the Senate Judiciary Committee, the Subversive Activities Control Board, and the California Committee on Un-American Activities. In so doing, we do not wish to be interpreted as endorsing such methods for determining the character of an organization or an individual; our intent is rather to give the staff study the benefit of the doubt. However, we have not construed the signing of statements issued by a group or speaking at one of its meetings as constituting membership in it. Using these ground rules, we find the following.

Five persons had no front-group memberships, though two of the five had claimed the fifth amendment in response to questions concerning Communist Party membership, and one had been identified as a member. *Id.* at 51-52, 52-54, 75-76, 76, 86.

Seven people were shown to have belonged to one or two front groups; one of these individuals had claimed the fifth amendment and had been identified as a party member. *Id.* at 52, 54-57, 65-66, 77-78, 79-80, 84-85, 87-90.

Five people had three or four front memberships; one had been identified as a Communist; another had claimed the fifth amendment. *Id.* at 45-49, 49-51, 61-62, 62-63, 63-64.

Five more people had been members of five or six front organizations; one of these had joined the Communist Party at about age 21, but left it at the end of 1942. *Id.* at 57-61, 66-69, 78-79, 80-81, 81-82; note 507 *supra.*

Two people had belonged to seven front groups. STAFF STUDY 69-70, 82-84.

Only two had belonged to twenty or more front groups. *Id.* at 70-74, 86-87.

To summarize, though the staff study speaks of "20 or 30 or 40" memberships in front groups, only two of the twenty-six people in question can be so classified. Twelve people, none of whom had been identified as Communists or claimed the fifth amendment, were members of four groups or fewer. And seven persons had belonged to between five and seven groups.

[514] Six of the persons covered in the biographies had signed ten or more such statements. *Id.* at 49-51, 54-57, 57-61, 66-69, 70-74, 77-78. One of these individuals also had belonged to some twenty front groups. *Id.* at 70-74. Also of note, though not noted by the staff study, is the fact that another one of these six, in the hearings to which the study refers, denied that he had ever been a Communist and pointed out that he had been critical of the Soviet Union and orthodox Marxism. See *Hearings on Castro's Network in the United States Before the Subcommittee To Investi-*

organizations which someone had cited as subversive,[515] but in many instances even this tinge is missing.[516] Moreover, signing statements issued by a group someone has called subversive hardly proves dedication to the interests of a foreign power. Many people will sign a statement when they agree with it without concerning themselves about the nature of the sponsoring organization. One of the people on the staff study's list, when asked at a legislative investigation whether he would work with Communists in expressing his views on public issues, stated that "I've worked with everyone who is willing to accept my position, to agree with me on the points I'm taking. I don't ask them their affiliation. I am not sure who they are."[517] Of course, in some instances the staff study does not rely on the statements an individual had signed but cites a different kind of "association." In one case, for example, the biographical notes show only that the individual talked with the editors of a Communist magazine, that he had been given a letter of introduction to the editors by a Communist, and that he called the magazine a "horrible rag."[518] Also considered damning is the fact that a subject's book was favorably reviewed in Communist magazines.[519]

Even if all twenty-six of these sponsors were conscious enemies of the United States, this fact would have significance only if it were further shown that these people were in control of the National Teach-In. The evidence of this is virtually nil. First of all, only seven of the twenty-six were among the original sponsors,[520] the people who presumably were in a position to exercise control. (Of these seven, not one is shown to have been, or to have refused to

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*gate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 8, at 571, 610-11 (1963). Compare STAFF STUDY 54-57.

515 See, *e.g.*, *id.* at 70-71. The most common sources of the "subversive" or "Communist front" label were the Attorney General and the House Committee on Un-American Activities. The Internal Security Subcommittee of the Senate Judiciary Committee, the Subversive Activities Control Board, the California Committee on Un-American Activities, and the attorney general of New Hampshire were also relied on.

516 See, *e.g.*, *id.* at 57-61 (about sixty per cent of items signed not alleged to have been sponsored by groups cited as subversive or as fronts).

517 *Hearings on Subversive Influence in the Educational Process Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 83rd Cong., 1st Sess., pt. 9, at 916 (1953).

518 STAFF STUDY 51.

519 *Id.* at 52-54, 78, 89-90.

520 The list of sponsors from which the staff study drew the names of the twenty-six people in question is divided into subdivisions. The first is a list of eighty-three persons entitled "Original Sponsors for the National Teach-In." More than 1,100 additional names appear on the list of "Additional Sponsors" and the "Supplementary List of Sponsors" that follow. NATIONAL TEACH-IN ON THE VIETNAM WAR 16-18, 19-29, 30-35 (undated pamphlet distributed as a program at the National Teach-In, May 15, 1965).

say whether he had been, a member of the Communist Party.)[521] Only one of these original sponsors—and none of the others—is shown to have been in any way connected with organizing the Teach-In: he rented the post office box of the Inter-University Committee for Public Hearings on Vietnam.[522] Four of the twenty-six are identified by the staff study as among the many speakers at the National Teach-In.[523] (None of these four are identified as Communists;[524] none refused to testify;[525] one is the individual who called a Communist magazine a "horrible rag";[526] the evidence against another is that a book he wrote was praised by Communists.)[527] The only other evidence of control is the fact that the individuals in question were sponsors of the National Teach-In. Of course, if these twenty-six people were the only sponsors, or constituted a significant proportion of the total number of sponsors, they probably would have been influential. This seems to be the theory of the staff study, for its introduction to the biographical sketches says that a "significant number of the sponsors" have "persistent records" of Communist connections.[528] What the staff study neglects to mention, however, is that the list of sponsors from which the twenty-six names were drawn contains over 1,200 other names.[529] To call these twenty-six "a significant number" is, to say the least, a gross misrepresentation.

In our view, the process by which the subcommittee sought to infer that Communists or extremists controlled "the anti-Vietnam movement" made the publication of the staff study an irresponsible act. Passing this point, however, we turn to the question whether the subcommittee made its charges in a way that minimized unintended side effects. In the study's introduction Senator Dodd did indicate that the appropriate response to its conclu-

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521 For the biographical sketches on the seven who were original sponsors, see STAFF STUDY 45-49, 63-64, 69-70, 70-74, 78-79, 80-81, 87-90.

522 *Id.* at 80. The individuals who began the teach-ins at the University of Michigan, *id.* at 17, and those apparently in charge of the National Teach-In, *id.* at 34, are not included in the twenty-six biographies.

523 *Id.* at 49, 51, 52, 87. The *New York Times* lists forty-two "principal participants" in the National Teach-In. N.Y. Times, May 16, 1965, § 1, p. 62, cols. 2-4. One of the persons the staff study cites as a speaker does not appear on this list. On the other hand, two of the people on the *New York Times* list were among the twenty-six staff study biographies but were not cited by the study as speakers.

524 STAFF STUDY 49-51, 51-52, 52-54, 87-90. The same holds for the additional speakers mentioned in note 523 *supra*. STAFF STUDY 75-76, 80-81.

525 See note 524 *supra*.

526 STAFF STUDY 51.

527 *Id.* at 52-54.

528 *Id.* at 45.

529 NATIONAL TEACH-IN ON THE VIETNAM WAR 16-36 (undated pamphlet distributed as a program at the National Teach-In, May 15, 1965). For whatever it may be worth, our research assistant reports that 119 of the sponsors appear in *Who's Who in America*.

sions would be for non-Communists to purge their ranks of Communists and crypto-Communists.[530] Whatever the doubts about this, he did not call for a broader purge. Also he said that honest critics, as he defined them, had a position that "commands respect, and their voices must be heard, no matter how much any of us may disagree with them, if the processes of democracy are not to be stultified."[531] Moreover, one of the staff study's conclusions was that the "great majority of those who have participated in anti-Vietnam demonstrations and in teach-ins are loyal Americans who differ with administration policy in Vietnam for a variety of reasons, ranging from purely strategic considerations to pacifism."[532] Shortly after the study was released, Senator Dodd reportedly denied as "completely untrue" the charges of critics that the study tarred all anti-Vietnam demonstration participants as Communists.[533] Nonetheless, as we have seen, one of the study's conclusions was that the "control of the anti-Vietnam movement has clearly passed from the hands of the moderate elements who may have controlled it, at one time, into the hands of Communists and extremist elements who are openly sympathetic to the Vietcong and openly hostile to the United States . . . ."[534] One can wonder to what extent this finding undercut all the cautionary words designed to lessen side effects. Moreover, the subcommittee issued a press release describing its study. It stressed the conclusion that control had passed to the Communists and extremists, and its cautionary words were only that not "*all* of those who disagree with the Administration's policy on Vietnam or who participate in demonstrations against this policy are Communists or Communist dupes."[535] Most people, of course, were likely to read not the study itself, but newspaper stories based on the press release; and while Senator Dodd is to be commended for making some attempt to blunt side effects, the staff study and press release probably did little to lessen the risks of deterring dissent and inducing punishment without due process.

Finally, we have argued that responsible officials ought to weigh the importance of making charges of Communist involvement against the risks of subverting constitutional values. However, in light of the fact that the staff study's purposes are to some extent of questionable legitimacy; that its handling of data and inference can at best be described as eccentric; and that its attempts to minimize the risks of subverting constitutional values are weak, it seems hard to conclude that any responsible government official would be justified in taking the risks in issuing it as written.

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530 STAFF STUDY at ix.
531 *Id.* at vii.
532 *Id.* at xiv.
533 Denver Post, Oct. 23, 1965, § 1, p. 3, cols. 4, 6-7.
534 STAFF STUDY at xiv-xv.
535 Internal Security Subcomm., Senate Comm. on Judiciary, Press Release, Oct. 15, 1965, p. 1.

Other assertions that Communists are involved in some part of the protest movement have been made by President Johnson,[536] Attorney General Katzenbach,[537] and Federal Bureau of Investigation Director J. Edgar Hoover.[538] Both Johnson and Hoover issued their statements without supporting arguments, and without stating why their assertions were significant or cautioning against infringing constitutional values. These do not seem to be responsible actions. The Attorney General's comments came at a press conference and were made to explain why the Department of Justice was investigating a particular group that had announced a program to undercut the Selective Service System. Moreover, when read in full, the Attorney General's comments were carefully qualified. Yet even here some papers ignored the qualifications in the interest of publishing a good story.[539] While an official, of course, cannot always control the way in which his words are reported, the risk of confusion and distortion by the press indicates still another reason for care in making charges of Communist influence in any movement.

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To some our position may seem extreme. Public officials are busy, and we ask for care; the political process is in many ways based on emotional factors, and we demand rationality. Yet we are talking about constitutional values that are of the essence of the American philosophy of the proper relation of a citizen to his government. The nation has fought international Communism in the name of preserving this philosophy. To tolerate its subversion at home while defending it abroad would be paradoxical indeed.

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536 See text accompanying notes 364-65 *supra*.
537 See text accompanying notes 372-76 *supra*.
538 See text accompanying notes 378-79 *supra*.
539 See, *e.g.*, note 377 *supra*.