

tions to pacifism."<sup>381</sup> 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.<sup>382</sup>

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.<sup>383</sup> The qualification concerning the loyalty of some of the participants was buried in the fourth paragraph.<sup>384</sup> 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."<sup>385</sup>

## 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.<sup>386</sup> 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.

<sup>381</sup> *Id.* at xiv.

<sup>382</sup> *Id.* at xiv-xv.

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

<sup>384</sup> *Ibid.*

<sup>385</sup> *Ibid.* (Emphasis added.)

<sup>386</sup> 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,<sup>387</sup> 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.<sup>388</sup> 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.<sup>389</sup> The amendment applies expressly only to

<sup>387</sup> 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."

<sup>388</sup> 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).

<sup>389</sup> *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.<sup>390</sup> 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 anti-war activities do not promote the objectives of the first amendment protection.<sup>391</sup> And in any event, if one is to decide whether the

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.

<sup>390</sup> 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.

<sup>391</sup> 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.<sup>392</sup> 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.<sup>393</sup> 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

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

<sup>392</sup> 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 prophecy 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.

<sup>393</sup> 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,<sup>394</sup> 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

<sup>394</sup> 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.<sup>395</sup> 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,<sup>396</sup> 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,<sup>397</sup> 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.<sup>398</sup>

<sup>395</sup> 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).

<sup>396</sup> See note 33 *supra*.

<sup>397</sup> 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.

<sup>398</sup> 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.<sup>399</sup> 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).

<sup>399</sup> 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.<sup>400</sup> If writing

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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.

<sup>400</sup> 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.<sup>401</sup> When someone says that the Viet Cong flag-waver is ineffective, for example, he probably

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 JUDGEMENT* 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.

<sup>401</sup> 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.

I think the demonstrations have had very little effect . . . .

. . . 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.<sup>402</sup> 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.<sup>403</sup> 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

<sup>402</sup> 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.

<sup>403</sup> 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.<sup>404</sup> To the extent that this was true, these activities cannot be thought of as entitled to the protection of the first amendment.<sup>405</sup> 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

<sup>404</sup> 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.

<sup>405</sup> 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.<sup>406</sup> 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.<sup>407</sup> 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.<sup>408</sup>

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.<sup>409</sup> Reasonable regulation of parades and picket lines is permissible.<sup>410</sup> Sound trucks may be prohibited from operating at three o'clock in the morning.<sup>411</sup> Those who block traffic by sitting

<sup>406</sup> 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).

<sup>407</sup> See articles cited note 389 *supra*.

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

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

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

<sup>411</sup> 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.<sup>412</sup> 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.<sup>413</sup> 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

<sup>412</sup> 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").

<sup>413</sup> 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.<sup>414</sup>

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,<sup>415</sup> and the impressions of people who have visited Vietnam and talked with the men there.<sup>416</sup> 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.<sup>417</sup> 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.'"<sup>418</sup>

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.<sup>419</sup> 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.<sup>420</sup> 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.<sup>421</sup> But on the other hand, the Viet Cong have also sought and obtained information from other, more reliable sources.<sup>422</sup>

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

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

<sup>416</sup> 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.

<sup>417</sup> 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.).

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

<sup>419</sup> 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.).

<sup>420</sup> 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.

<sup>421</sup> N.Y. Times, Oct. 20, 1965, p. 1, col. 6, at 2, col. 1.

<sup>422</sup> *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.<sup>423</sup> 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.<sup>424</sup> 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,<sup>425</sup> food packages,<sup>426</sup> and Christ-

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.

<sup>423</sup> "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).

<sup>424</sup> See note 237 *supra*.

<sup>425</sup> 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.

<sup>426</sup> 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<sup>427</sup> 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."<sup>428</sup>

#### 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<sup>429</sup> and the advocacy of illegal action designed to disrupt the government's policies.<sup>430</sup> 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

<sup>427</sup> 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.

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

<sup>429</sup> See pp. 688-89 *supra*.

<sup>430</sup> 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.<sup>431</sup> Assuming a law, the imposition of criminal sanctions will nonetheless be improper unless certain procedures—those required by due process—are followed.<sup>432</sup> 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.<sup>433</sup> 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

<sup>431</sup> 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).

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

<sup>433</sup> 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.<sup>434</sup> 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

<sup>434</sup> 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.<sup>435</sup> 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.<sup>436</sup> 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

<sup>435</sup> See note 436 *infra*.

<sup>436</sup> 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.<sup>437</sup> 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<sup>438</sup> are evidence enough of that.

<sup>437</sup> 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).

<sup>438</sup> 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.<sup>439</sup> In such a situation there was good reason to make the risks of protest known.<sup>440</sup> 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-detering 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.<sup>441</sup>

<sup>439</sup> See text accompanying notes 419-22 *supra*.

<sup>440</sup> 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*.

<sup>441</sup> 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 . . ."<sup>442</sup>

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.<sup>443</sup>

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;<sup>444</sup> 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).

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

<sup>443</sup> *Ibid.*

<sup>444</sup> 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.<sup>445</sup>

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."<sup>446</sup>

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<sup>447</sup> as well as in the columns of some newspapers.<sup>448</sup> 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

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.

<sup>445</sup> 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").

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

<sup>447</sup> See, e.g., note 441 *supra* & note 461 *infra*.

<sup>448</sup> 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."<sup>449</sup>

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."

<sup>449</sup> 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."<sup>450</sup>

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.<sup>451</sup> 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.

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

<sup>451</sup> 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 . . ."<sup>452</sup> He also characterized his senatorial adversaries as "advocates of retreat, defeat, surrender, and national dishonor."<sup>453</sup> 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."<sup>454</sup> In proclaiming "I swell with pride when I see Old Glory flying"<sup>455</sup> and "I am proud of this country,"<sup>456</sup> 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

<sup>452</sup> See text accompanying note 450 *supra*.

<sup>453</sup> 112 CONG. REC. 2911 (daily ed. Feb. 16, 1966).

<sup>454</sup> *Id.* at 2912.

<sup>455</sup> See text accompanying note 450 *supra*.

<sup>456</sup> *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,<sup>457</sup> 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."<sup>458</sup> Nor had they urged that "our boys not fight for their country,"<sup>459</sup> 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,"<sup>460</sup> 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.<sup>461</sup> 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

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

<sup>458</sup> See note 453 *supra*.

<sup>459</sup> See text accompanying note 452 *supra*.

<sup>460</sup> See text accompanying note 450 *supra*.

<sup>461</sup> 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.<sup>462</sup> Five of these pages reproduce the "findings" of the staff.<sup>463</sup> The study itself is ninety pages long, with chapter headings<sup>464</sup> 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];

<sup>462</sup> STAFF STUDY at vii-xvi.

<sup>463</sup> *Id.* at ix-xiv.

<sup>464</sup> 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.<sup>465</sup> At least 3,000 copies of the staff study were distributed,<sup>466</sup> and it received some notice in the press.<sup>467</sup> *Life* magazine based an editorial on its conclusions.<sup>468</sup>

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.<sup>469</sup>

<sup>465</sup> *Id.* at 91-235.

<sup>466</sup> Denver Post, Oct. 22, 1965, § 1, p. 1, col. 3, at 14, col. 1.

<sup>467</sup> 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.

<sup>468</sup> *Life*, Oct. 29, 1965, p. 40D.

<sup>469</sup> 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.<sup>470</sup>

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.<sup>471</sup> The subcommittee issued a press release indicating that it also intended to inform the public about Communist involvement.<sup>472</sup>

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-

<sup>470</sup> *Id.* at ix.

<sup>471</sup> 111 CONG. REC. 26141 (daily ed. Oct. 15, 1965).

<sup>472</sup> Internal Security Subcomm., Senate Comm. on Judiciary, Press Release, Oct. 15, 1965.

ted States . . ."<sup>473</sup> 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<sup>474</sup> on the ground that they provide a sound basis for inferring that Communists have taken control:<sup>475</sup> (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 occurred not only in the United States but also in several foreign countries.<sup>476</sup> (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;<sup>477</sup> 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.<sup>478</sup> The study does

<sup>473</sup> STAFF STUDY at xiv-xv.

<sup>474</sup> 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.

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

<sup>476</sup> 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*.

<sup>477</sup> 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.

<sup>478</sup> 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.<sup>479</sup> The National Committee, moreover, was not formed until the teach-in movement was well underway,<sup>480</sup> 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;<sup>481</sup> yet the staff study does not deal with this.<sup>482</sup> 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,<sup>483</sup> 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.<sup>484</sup> 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.<sup>485</sup> This is a far cry from "control" in this sense of the term.

<sup>479</sup> 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*.

<sup>480</sup> See text accompanying notes 93-110 & 171-78.

<sup>481</sup> "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).

<sup>482</sup> 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.

<sup>483</sup> 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.

<sup>484</sup> 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.

<sup>485</sup> A report of the meeting of the National Committee held in Washington, D.C., in November 1965 indicates that the delegates were almost totally unresponsive 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.<sup>486</sup>

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<sup>487</sup>—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.<sup>488</sup> 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

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.

<sup>486</sup> *Id.* at 195-96.

<sup>487</sup> 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).

<sup>488</sup> *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";<sup>489</sup> that the protest in Philadelphia was organized by the "local committee to End the War in Vietnam";<sup>490</sup> and that the activities in Oakland and Berkeley were under the auspices of the Vietnam Day Committee, a group indigenous to that community.<sup>491</sup> 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.<sup>492</sup> 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

<sup>489</sup> *Id.* at 42.

<sup>490</sup> *Ibid.*

<sup>491</sup> *Ibid.*

<sup>492</sup> 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.<sup>493</sup>

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.<sup>494</sup> 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

<sup>493</sup> 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.

<sup>494</sup> 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."<sup>495</sup> 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,<sup>496</sup> 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."<sup>497</sup> The study cites a number of these, ignoring the innum-

<sup>495</sup> See note 471 *supra*.

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

<sup>497</sup> 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"<sup>498</sup> 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<sup>499</sup>—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.<sup>500</sup>

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.<sup>501</sup> 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,<sup>502</sup> and the study offers no reason to disbelieve them.

<sup>498</sup> STAFF STUDY 12.

<sup>499</sup> See notes 182-83 *supra*.

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

<sup>501</sup> 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.

<sup>502</sup> 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."<sup>503</sup> 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.<sup>504</sup> 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.<sup>505</sup> Another, testifying at a legislative investigation in 1953, admitted that he had joined the Young Com-

serves as a deterrent 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.*

<sup>503</sup> STAFF STUDY 45.

<sup>504</sup> *Id.* at 45-90.

<sup>505</sup> *Id.* at 84.

munist League and later the party itself;<sup>506</sup> 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.<sup>507</sup> 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.<sup>508</sup> 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.<sup>509</sup> 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.<sup>510</sup> 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.<sup>511</sup>

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."<sup>512</sup> First, we would note that the staff study confuses the idea of joining an organization with the idea of associa-

<sup>506</sup> *Id.* at 78.

<sup>507</sup> 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.).

<sup>508</sup> STAFF STUDY 45-46, 76, 79-80.

<sup>509</sup> *Id.* at 61, 86.

<sup>510</sup> *Id.* at 82.

<sup>511</sup> *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).

<sup>512</sup> 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.<sup>513</sup> 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.<sup>514</sup> Some of these statements were circulated by

<sup>513</sup> 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 49-49, 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.

<sup>514</sup> 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,<sup>515</sup> but in many instances even this tinge is missing.<sup>516</sup> 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."<sup>517</sup> 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."<sup>518</sup> Also considered damning is the fact that a subject's book was favorably reviewed in Communist magazines.<sup>519</sup>

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,<sup>520</sup> 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

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.

<sup>515</sup> 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.

<sup>516</sup> 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).

<sup>517</sup> *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).

<sup>518</sup> STAFF STUDY 51.

<sup>519</sup> *Id.* at 52-54, 78, 89-90.

<sup>520</sup> 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.)<sup>521</sup> 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.<sup>522</sup> Four of the twenty-six are identified by the staff study as among the many speakers at the National Teach-In.<sup>523</sup> (None of these four are identified as Communists;<sup>524</sup> none refused to testify;<sup>525</sup> one is the individual who called a Communist magazine a “horrible rag”;<sup>526</sup> the evidence against another is that a book he wrote was praised by Communists.)<sup>527</sup> 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.<sup>528</sup> 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.<sup>529</sup> 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-

<sup>521</sup> 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.

<sup>522</sup> *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.

<sup>523</sup> *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.

<sup>524</sup> 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.

<sup>525</sup> See note 524 *supra*.

<sup>526</sup> STAFF STUDY 51.

<sup>527</sup> *Id.* at 52-54.

<sup>528</sup> *Id.* at 45.

<sup>529</sup> 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.<sup>530</sup> 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.”<sup>531</sup> 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.”<sup>532</sup> 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.<sup>533</sup> 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 . . . .”<sup>534</sup> 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.”<sup>535</sup> 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.

<sup>530</sup> STAFF STUDY at ix.

<sup>531</sup> *Id.* at vii.

<sup>532</sup> *Id.* at xiv.

<sup>533</sup> *Denver Post*, Oct. 23, 1965, § 1, p. 3, cols. 4, 6-7.

<sup>534</sup> STAFF STUDY at xiv-xv.

<sup>535</sup> 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,<sup>536</sup> Attorney General Katzenbach,<sup>537</sup> and Federal Bureau of Investigation Director J. Edgar Hoover.<sup>538</sup> 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.<sup>539</sup> 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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<sup>536</sup> See text accompanying notes 364-65 *supra*.

<sup>537</sup> See text accompanying notes 372-76 *supra*.

<sup>538</sup> See text accompanying notes 378-79 *supra*.

<sup>539</sup> See, e.g., note 377 *supra*.