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# Governmental Response to Campus Unrest

*Bruce R. Hopkins*  
*John H. Myers*

## I. CAMPUS UNREST: ITS CONTEMPORARY NATURE AND ORIGINS

**A**LTHOUGH the phenomenon of campus unrest has pervaded the United States in recent years, campus activism is not new to this country. Instances of student and faculty disturbances punctuate our history. As Julian H. Levi has written: "Neither

student unrest, nor political attack is novel . . . . These issues, as well as the existence of colleges and universities, antedate the founding of the republic itself."<sup>1</sup>

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Moreover, campus unrest has not been an uncommon occurrence in other countries.<sup>2</sup> As 1970 was the International Education Year,<sup>3</sup> there was considerable activity by various agencies of the United Nations,

the Inter-Parliamentary Union and the U.S. Department of State<sup>4</sup> that resulted in a sharing of the worldwide problems and solutions concerning student and faculty disturbances on college and university campuses.<sup>5</sup>

<sup>1</sup> Levi, *Legal Aspects of University Governance*, 50 EDUCATIONAL RECORD 405, 407-08 (1969).

<sup>2</sup> See *Student Power in University Affairs — A Symposium*, 17 AM. J. COMP. L. 331 (1969).

<sup>3</sup> The United Nations declared, and President Nixon proclaimed, 1970 as the International Education Year. U.N.G.A. Res. 2412, in 116 CONG. REC. E2188 (daily ed. Mar. 18, 1970); Proclamation 3962, Feb. 12, 1970, in 116 CONG. REC. E2190 (daily ed., Mar. 18, 1970).

<sup>4</sup> The Educational, Scientific, and Cultural Committee of the Inter-Parliamentary Union adopted a resolution on "The Student in the University and Society of Today," originally drafted and inserted in the *Congressional Record* by Representative Robert McClory (R-Ill.). 116 CONG. REC. H2726 (daily ed. April 7, 1970).

<sup>5</sup> The text of a report on this topic presented to the Educational, Scientific, and Cul-

Gone are the days when campus disorder meant panty raids, goldfish-swallowing, or food riots. During the past decade, the American citizenry has been forced to realize that campus unrest and disorders may be associated with violence and even death.

Campus unrest has become commonplace, and often involves the participation, or receives the condonation, of the sons and daughters of those who deplore the development. As a result — especially in light of this age of supercommunication — “[w]ith the advent of student unrest — of ‘student power’ — there has been a great erosion of the image of higher education in the public mind.”<sup>6</sup> Accordingly, campus unrest is now a major political issue in the United States.<sup>7</sup> Much of the public debate over campus unrest, however, is founded on a host of unfortunate misunderstandings. It has been expressed — and the authors concur — that “most political discussions of campus unrest bear almost no relationship to the known facts [and] are a mixture of misinformation, innuendo, stereotyping and falsification.”<sup>8</sup>

The term “campus unrest” is obviously a vague one, and it therefore means many things to many people. The term is that utilized by the President’s Commission on Campus Unrest, which conceded it has an “undifferentiated meaning” because the term “now embraces not only the intellectual ferment which should exist in the university but also all forms of protest, both peaceful and otherwise.”<sup>9</sup> The Commission categorized “campus unrest” as “peaceful and orderly manifestations of dissent,” as well as “[o]ther protest [which] is disorderly, that is, disruptive, violent or terroristic.”<sup>10</sup> This concept of dual modes of campus unrest was also suggested by authorities who, in reliance upon studies by the Office of Research of the American Council on Education, distinguished between nonviolent and violent protest. Nonviolent protest was defined as

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rural Committee of the Inter-Parliamentary Union appears at 116 CONG. REC. E2029 (daily ed. Mar. 16, 1970), and 116 CONG. REC. E2111 (daily ed. Mar. 17, 1970).

<sup>6</sup> Hatfield, *Public Pressures on Higher Education*, in *THE TROUBLED CAMPUS 75* (G. Smith ed. 1970).

<sup>7</sup> National concern over campus unrest, as reported by the Gallup Poll, probably peaked around March 1969. *Wash. Post*, Mar. 13, 1969, § H, at 1.

<sup>8</sup> Keniston & Lerner, *The Unholy Alliance Against The Campus*, *N.Y. Times*, Nov. 8, 1970 (Magazine), at 28, 83.

<sup>9</sup> *REPORT OF THE PRESIDENT’S COMMISSION ON CAMPUS UNREST* at ix (1970) [hereinafter cited as *CAMPUS UNREST REPORT*].

<sup>10</sup> *Id.* at x.

any campus incident during the year [1968-1969] which involved (a) occupation of building or section of building, (b) barring of entrance to building, (c) holding officials captive, (d) interruption of school function (e.g., classes, speech, or meetings), or (e) general campus strike or boycott of classes or of school function,

and violent protest was defined as

any campus incident during the year which involved (a) burning of building, (b) damage to building or furnishings, (c) destruction of records, files, papers, (d) campus march, picketing, or rally with physical violence, (e) one or more persons killed, or (f) some persons injured.<sup>11</sup>

Other modes of campus activism, involving nonphysical and non-disruptive protest (such as letters to the editor, individual threats, circulation of petitions, and nonviolent marches and rallies), have been deemed "a traditional part of the academic milieu" and consequently are not considered to be "campus unrest."<sup>12</sup>

Contemporary campus unrest is an evolutionary product of the civil rights movement and the anti-Indochina War movement. What was once a movement to protest for the right of free speech, typified by the University of California at Berkeley revolt in 1964, has developed into a radical, political-revolutionary movement, exemplified and perpetuated by the Columbia University episode in 1968. This article need not recite the history of the current student movement; the benchmarks are familiar to many: the Students for a Democratic Society's Port Huron Statement (1962), the Free Speech Movement (1964), the reaction to escalation of the Vietnam War (1965), the University of Michigan teach-in (1965), the Democratic National Convention and the "police riot" (1968), the Cambodian invasion and the nationwide student strike (1970), the Kent State University and Jackson State College tragedies (1970), and the bombing of the University of Wisconsin's mathematics research center (1970). Emphasis herein is deliberately placed on "contemporary" campus unrest, namely, events of the past decade.

Our concern is not so much with the form of behavior denominated as "campus unrest" or its contemporary genesis as with the responses of federal and state governments to its occurrence. Campus unrest, consisting of both civil discord and criminal misconduct,

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<sup>11</sup> Bayer & Astin, *Violence and Disruption on the Campus, 1968-1969*, in 50 EDUCATIONAL RECORD 337, 339 (1969) (relying upon various works of the Office of Research of the American Council on Education).

<sup>12</sup> *Id.*

has quite predictably engendered governmental responses designed to quell the uprisings and avoid their recurrence. These responses, for the most part, have been and continue to be reflections of the frustrations, emotions and sometimes angry reactions of many American citizens, resulting from 10 years of unrelenting exposure to protests, riots, property destruction, personal injuries, and killings associated with campus unrest.<sup>13</sup> Federal and state governments — principally the legislatures, where the national distress has been most dramatically reflected — have regarded campus unrest as a “problem” to be corrected by one or more “solutions.” To again quote Julian H. Levi, “Americans, of course, are gadget-minded people, legislatively inclined to believe that any public problem is capable of solution by change in method.”<sup>14</sup>

The legislative response to campus unrest has manifested itself in various fashions at both the federal and state levels. As a “solution” to the “problem,” legislators have most often advocated that additional proscribed activities or increased penalties for existing proscriptions be incorporated into their respective criminal codes. The Commission on Campus Unrest, however, strongly cautioned against and stressed the futility of viewing campus unrest as a “problem” solvable simply through increased legislative proscriptions:

The basic difficulty with [popular explanations of campus unrest] is that they begin by assuming that all campus unrest is a problem — a problem whose cause is a moral failure on the part of students or of society or of government, and which therefore has a specifiable solution. The search for causes is thus inseparable from the allocation of blame and advocacy of some course of public action. As a result, causes which are not within human control or which do not lay the mantle of culpability upon specific individuals or groups tend to be ignored. Such “explanations” do not really explain. They only make campus unrest more bewildering — and more polarizing — than it need be.<sup>15</sup>

Implicit in this statement, and explicitly propounded by the Com-

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<sup>13</sup> Speaking of the sentiment of the public at large and the federal government toward campus unrest, Senator Charles H. Percy (R-Ill.), in an open letter to college and university students, faculty, and administration in Illinois, wrote:

In my view, both the general public and public officials are, in words I have heard a thousand times, “fed up.” Their patience is exhausted. The majority wants order restored to our campuses, by whatever means, and it is no longer interested in what it considers to be esoteric debates over “responsiveness,” or “relevance” or “social consciousness.” 116 CONG. REC. S15,843 (daily ed. Sept. 17, 1970).

<sup>14</sup> Levi, *supra* note 1, at 409.

<sup>15</sup> CAMPUS UNREST REPORT, *supra* note 9, at 54.

mission elsewhere in its report,<sup>16</sup> is the conclusion that many aspects of campus unrest are not susceptible to traditional forms of governmental response.

Realizing that "no rational response to campus unrest is possible until its nature and causes have been fully understood,"<sup>17</sup> the Commission identified some root causes and what may be termed the "promotional" causes of campus unrest. The promotional causes are three: (1) racial injustice and denial of civil rights to minorities, (2) the seemingly incessant Indochina War, and (3) the contemporary mode of higher education, including the universities' impersonalization, rules and regulations, irrelevant curriculums, and purported complicity with the federal government. Most incidents of campus unrest have these promotional causes at the forefront as the "issues" which ostensibly precipitate the unrest.

The Commission found that while the promotional causes have given campus unrest "specific focus" and continue to provide its "special intensity,"<sup>18</sup> the root causes are much more important. These underlying causes of campus unrest were summarized by the Commission as "the advance of American society into the post-industrial era, the increasing affluence of American society, and the expansion and intergenerational evolution of liberal idealism."<sup>19</sup> "Together," added the Commission, these root causes have "prompted the formation of a new youth culture" which "rejects what it sees to be the operational ideals of American society."<sup>20</sup> Furthermore, "American student protest . . . signifies a broad and intense reaction against — and a possible future change in — modern Western society and its organizing institutions."<sup>21</sup>

Similarly, the Special Committee on Campus Tensions, initiated in June of 1969 by the American Council on Education, isolated five general theories of the underlying causes of student unrest:<sup>22</sup> (1) generational conflict, "in which youth rebel against the values and beliefs of their fathers and act out their disaffections by assaulting tradition and institutions, including universities" (but other findings, states the Special Committee, show that "student activists are likely

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<sup>16</sup> *Id.* at 55.

<sup>17</sup> *Id.* at 51.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 52.

<sup>21</sup> *Id.*

<sup>22</sup> REPORT OF THE SPECIAL COMM. ON CAMPUS TENSIONS OF THE AM. COUNCIL ON EDUC., CAMPUS TENSIONS: ANALYSIS AND RECOMMENDATIONS, 12-15 (1970).

to share [parental] beliefs and to enjoy close relationships with their parents"); (2) social "irrelevance" of youth, that is, that youth in affluent societies are "socially obsolescent, that they are kept too long in a state of dependence when what they most need is [an] opportunity to feel socially and personally useful and 'relevant' " and that "attending college is, for many youth, an unsought experience"; (3) obsolete educational practices, which, from a radical viewpoint, reveal that "colleges and universities are structurally incapable of providing effective education in the modern age," and which, from a more moderate stance, evince the need for "increased provision for independent learning, more student initiative in curriculum design, experimental education, and a reduction of formal course requirements for degrees"; (4) a breakdown of legitimate authority, that is, the situation whereby "[a]uthority, as it has been traditionally held and exercised, no longer commands respect," with the result that "traditional mechanisms of campus governance are no longer appreciated"; (5) the social malaise thesis, namely, the concept that "the university's troubles [are closely linked] to the troubles of the society at large."<sup>23</sup>

Kingman Brewster, President of Yale University, identifies two primary factors underlying campus unrest. First, he sees unrest stemming from the "involuntary campus," a condition produced by "distortion of the motivation for going to college," which, in an "excessive lockstep continuity of learning from age five to twenty-five," stultifies student motivation.<sup>24</sup> Second, he writes of the "manipulated society," in which people "sense that society is more manipulated than it is free, more closed than it is open," and in which economic power, the opinion industry, and politics are becoming unduly concentrated.<sup>25</sup>

Viewed in the above perspectives, campus unrest becomes an exceedingly perplexing, murky, and often viscerally disturbing social condition, beyond the bounds of legislative or federal administrative regulation. It is against this backdrop that we will be exploring recent legislative and administrative responses to campus unrest by the federal and state governments.

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<sup>23</sup> *Id.* See also REPORT OF THE ABA COMM'N ON CAMPUS GOVERNMENT AND STUDENT DISSENT, reprinted in 116 CONG. REC. E4594 (daily ed. May 21, 1970).

<sup>24</sup> Brewster, *The Involuntary Campus and the Manipulated Society*, 51 EDUCATIONAL RECORD 101, 102 (1970).

<sup>25</sup> *Id.* at 103. For another study of the issues over which campus disorders have occurred in the United States, see Stern, *Campus Environments and Student Unrest*, in AGONY AND PROMISE 123 (G. Smith ed. 1969).

Although, as has been noted, campus activism is not new to the United States, in recent years campus unrest has embodied a new dimension: politicization of the higher education community.<sup>26</sup> This aspect of campus unrest raises anew serious questions about the character of colleges and universities and their role in our society. Antecedent forms of campus unrest principally stressed the need for institutions of higher education to be more intellectually open and more politically neutral. Today, however, considerable emphasis is being placed on the use of colleges and universities as political instruments.<sup>27</sup>

Refinements of this theme permeate the literature of the higher education community. Some contend that colleges and universities are and always have been politicized, with, as one commentator writes, "the clear and present danger [being] . . . the misuse and abuse of the substantial power they have come to possess."<sup>28</sup> Somewhat the same view is reflected in the conviction that "the issue is no longer whether higher education organizations should attempt to influence public policy at all — but rather in what kinds of policy questions they should become actively involved in the future."<sup>29</sup> This latter distinction is a crucial one: The dichotomy between broad issues affecting society in general and the narrower issues relating directly to the higher education enterprise may prove to be the cardinal principle guiding the thrust of governmental response to the "political" manifestations of campus unrest during the coming years.

The Commission on Campus Unrest found this politicization of higher education to be manifest during the Columbia University revolt in 1968, where the radical students sought to "transform [the university] into a revolutionary political weapon with which they could attack the system."<sup>30</sup> This political involvement was

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<sup>26</sup> The phrase "politicization of the higher education community," as used throughout this article, essentially means the involvement of colleges and universities in "political" activities, principally through student and faculty activities, and, to an extent, through their associations. See Scully, *Academic Turmoil Grows Over Moves to "Politicize" Universities, Associations*, CHRONICLE OF HIGHER EDUCATION, Jan. 13, 1969, at 1.

<sup>27</sup> Keniston and Lerner point out that both rightwing and leftwing extremists deplore the politicization of higher education; to the former, the university has become "a launching pad for revolution," while to the latter, it has become "a tool of the military-industrial Establishment." Keniston & Lerner, *supra* note 8, at 29, col. 1.

<sup>28</sup> Birenbaum, *Lost Academic Souls*, in AGONY AND PROMISE 18, 20 (G. Smith ed. 1969).

<sup>29</sup> Boland, *Politicization of Higher Education Organizations*, in AGONY AND PROMISE 10, 11 (G. Smith ed. 1969).

<sup>30</sup> CAMPUS UNREST REPORT, *supra* note 9, at 37.



enhanced by the presidential campaign of former Senator Eugene McCarthy in 1968 (when many students seemed to be obeying the exhortations of the "establishment" to work within "the system"), and the congressional campaigns and student strike of 1970. As an outgrowth of the student strike, for example, Princeton University instituted what became known as the "Princeton Plan," whereby classes were rescheduled to enable university students and faculty to participate in political campaigns during the 2 weeks immediately preceding the November 1970 elections. In addition, the Movement for a New Congress was originated at Princeton to elect candidates that opposed the Indochina War. In response to the student strike, academic requirements were modified at many institutions to facilitate "political" activities.

Stating that "the student revolution has become the dominant instrument of social change," one observer wrote that "the protagonists are not students *qua* students but rather students as the most identifiable and best organized segment of the young people in our society."<sup>31</sup> The writer concluded: "The campus revolt represents a quest: a search for meaning in contemporary life, for identity and self-knowledge, for social justice and peace."<sup>32</sup> Others, however, are less enamored with the current manifestations of campus unrest. For example, Russell Kirk, writing of the "present plight of the educationist Establishment," advanced the conclusions that "it is not in the nature of a university to nurture political fanaticism and utopian designs" and that "[t]o demand that the university devote itself to the *libido dominandi* is to demand that the university commit intellectual and moral suicide."<sup>33</sup> Another, albeit less fervent, commentator shares Kirk's view:

Those who seek the transformation of our society will do well to choose means which unite us, which do not needlessly provoke more backlash, and which allow higher education to continue, for a major resource of the new America is the college-educated. Otherwise, we may destroy the university to facilitate the revolution — and, in the process lose both.<sup>34</sup>

In short, the extent to which politicization has occurred on the

<sup>31</sup> Johnston, *Student Revolt and Social Revolution*, 51 EDUCATIONAL RECORD 22, 23 (1970).

<sup>32</sup> *Id.* at 26.

<sup>33</sup> Kirk, *The University and Revolution: An Insane Conjunction*, in THE UNIVERSITY AND REVOLUTION 67, 68, 71 (G. Weaver & J. Weaver eds. 1969) (reprinted by permission of Prentice-Hall, Inc., Englewood Cliffs, New Jersey).

<sup>34</sup> Etzioni, *Universities: Strike, Strike, Strike?*, 51 EDUCATIONAL RECORD 219, 221 (1970).

campus may best be summed up by the following statement of the Commission on Campus Unrest:

For years, radicals had been working to politicize universities, and in May 1970 entire universities were, in effect, mobilized against the policies of the present national administration. Students, faculty members, and administrators united to turn their attention away from scholarship to what seemed to them the far more urgent demands of politics and of keeping protest activities nonviolent. In May 1970, students did not strike against their universities; they succeeded in making their universities strike against national policy.<sup>35</sup>

Despite the increasing politicization of higher education, colleges and universities, in their institutional capacity, have almost unanimously refrained from political involvement.<sup>36</sup> Politicization of higher education is instead being fostered by individuals — principally students and faculty members — largely through peaceful and orderly dissent and nonviolent protest. This distinction between institutional and individual political activity is essential, not only because the United States Constitution protects individual rights of free speech, dissent, and assembly, but also because significant involvement by the institutions in political processes would be contrary to the conditions of their federal tax status and could also be a violation of the Federal Corrupt Practices Act.<sup>37</sup>

Thus, at the close of the first decade of contemporary student unrest, many in the higher education community had turned to participation in national politics; however, the close of the decade also saw politics turning on the university.<sup>38</sup>

## II. CAMPUS UNREST AND THE ORGANIZED CRIME CONTROL ACT OF 1970

Legislatures, particularly the United States Congress, are most effective when they seek a definite legislative solution for a specific, identifiable problem. Congress rarely attempts to guide the devel-

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<sup>35</sup> CAMPUS UNREST REPORT, *supra* note 9, at 46.

<sup>36</sup> "[T]he evidence shows that extremely few American colleges or universities have taken institutional positions on anything except matters that directly affect their immediate self-interest." Keniston and Lerner, *supra* note 8, at 66, col. 2.

<sup>37</sup> 18 U.S.C. § 610 (1964). For a discussion of the Act's possible application to institutions of higher education, see section V *infra*.

<sup>38</sup> Senator Mark O. Hatfield (R-Ore.) wrote: "The general ploy of the public and political leadership has been to condemn the colleges and universities. The situation has become such that there is political advantage — shall we say, political capital — in attacking and exploiting the conditions of turbulence on the campuses of our nation." Hatfield, *supra* note 6, at 76.

opment of broad social policy and is even less likely to assume the task of changing the direction of social policy.<sup>39</sup> Short-range "answers" to domestic problems are usually the easiest to formulate and enact, and generally serve to satisfy public demands for immediate action by their elected representatives.

Thus, the suggestion of the Commission on Campus Unrest that it is futile to seek legislative "solutions" to many aspects of campus unrest went unheeded,<sup>40</sup> and the 91st Congress generally focused on the manifestations of campus unrest where the "mantle of culpability" is most easily placed: disruptive and violent behavior. The most striking example of this approach is the final version of the Organized Crime Control Act of 1970,<sup>41</sup> the legislative history of which exemplifies the ability of the Congress to rapidly mobilize in the aftermath of specific incidents of campus disorder and violence.<sup>42</sup>

The Act, which was signed into law by President Nixon on October 15, 1970,<sup>43</sup> is basically designed to combat and eradicate crime in the United States by authorizing special investigating grand juries, extending immunities and increasing protection of cooperative witnesses, widening federal authority to circumscribe illegal syndicated gambling, and prohibiting certain racketeering activities. However, of greater relevance to this discussion are the provisions added to curb incendiarism and govern the importation, manufacture, distribution, and storage of explosive materials.<sup>44</sup>

These latter provisions make it unlawful for anyone other than a

<sup>39</sup> Commenting on the insular nature of Congress, Samuel P. Huntington observed: During the twentieth century Congress has insulated itself from the new political forces which social change has generated and which are, in turn, generating more change. Hence the leadership of Congress has lacked the incentive to take the legislative initiative in handling emerging social problems. Within Congress power has become dispersed among many officials, committees, and subcommittees. Hence the central leadership of Congress has lacked the ability to establish national legislative priorities. Huntington, *Congressional Responses to the Twentieth Century*, in *THE CONGRESS AND AMERICA'S FUTURE* 5, 8 (D. Truman ed. 1965).

<sup>40</sup> *CAMPUS UNREST REPORT*, *supra* note 9, at 54-55.

<sup>41</sup> Pub. L. No. 91-452, 84 Stat. 922.

<sup>42</sup> During the Senate debate on the proposed bill [S. 3650, 91st Cong., 2d Sess. (1970)], Senator John L. McClellan (D-Ark.), Chairman of the Senate Permanent Subcommittee on Investigation, cited a United States Department of the Treasury survey revealing that during the period January 1, 1969 through April 13, 1970, there were more than 40,000 bombings, attempted bombings, or threats of bombings, at least 43 killings and 400 injuries due to bombings, and resulting property damage in excess of \$25 million. 116 CONG. REC. S17,493 (daily ed. Oct. 8, 1970).

<sup>43</sup> Pub. L. No. 91-452, 84 Stat. 922.

<sup>44</sup> 18 U.S.C. §§ 841-48 (Supp. V, 1970).

licensee to import, manufacture, or deal in explosive materials,<sup>45</sup> and for anyone other than a licensee or permittee to transport or receive any explosive materials in interstate or foreign commerce.<sup>46</sup> Also, licensees may not knowingly distribute explosive materials to minors, felons, fugitives from justice, mental defectives, or unlawful users of marihuana or drugs.<sup>47</sup> The Treasury Department is authorized to license and regulate explosives manufacturers, dealers, and importers.<sup>48</sup>

Of greatest importance to the higher education community is the provision which imposes severe penalties on anyone who

maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or *any institution or organization receiving Federal financial assistance . . .*<sup>49</sup>

The Federal Bureau of Investigation is empowered by the Act to investigate incendiarism on college and university campuses without an invitation from administrators of the institutions involved or from local law enforcement authorities.<sup>50</sup>

<sup>45</sup> *Id.* § 842(a)(1). The term "explosive materials" means "explosives, blasting agents, and detonators." *Id.* § 841(c). See also *id.* §§ 841(d)-(f).

<sup>46</sup> *Id.* § 842(a)(3).

<sup>47</sup> *Id.* § 842(d).

<sup>48</sup> *Id.* § 843.

<sup>49</sup> *Id.* § 844(f) (emphasis added).

<sup>50</sup> *Id.* § 846 provides:

The Secretary [of the Treasury] is authorized to inspect the site of any accident, or fire, in which there is reason to believe that explosive materials were involved, in order that if any such incident has been brought about by accidental means, precautions may be taken to prevent similar accidents from occurring. In order to carry out the purpose of this subsection, the Secretary is authorized to enter into or upon any property where explosive materials have been used, are suspected of having been used, or have been found in an otherwise unauthorized location. Nothing in this chapter shall be construed as modifying or otherwise affecting in any way the investigative authority of any other Federal agency. In addition to any other investigatory authority they have with respect to violations of provisions of this chapter, the Attorney General and the Federal Bureau of Investigation, together with the Secretary, shall have authority to conduct investigations with respect to violations of subsection (d), (e), (f), (g), (h), or (i) of section 844 of this title."

Among the several instances of campus bombings which gave rise to this provision and which the Act is designed to prevent, uppermost in the minds of Senators and Representatives was an incident which occurred at the University of Wisconsin on August 24, 1970. On that occasion, a bomb, directed at a Department of Defense-funded mathematics research center, resulted in the death of a graduate student and the destruction of an assemblage of cryogenic machinery representing a professor's life work. During the course of the Senate debate on the House amendments to the Act, Senator Paul J. Fannin (R-Ariz.) said: "The sooner we get tough with these terror-

The penalties imposed under the antibombing provision vary according to the degree of injury resulting from the explosion. For malicious damage or destruction of property by means of an explosive, the responsible person could receive a maximum fine of \$10,000 or imprisonment up to 10 years or both. If personal injury results, the penalties may be doubled, and should death result, the bomber would be subject to a maximum penalty of life imprisonment or death.<sup>51</sup>

Other prohibited activities include: the transportation or receipt of, or the attempt to transport or receive, any explosive in commerce with intent to kill, injure, or intimidate any individual, or to unlawfully damage or destroy any property;<sup>52</sup> the use of an explosive to commit any felony which could be prosecuted in a court of the United States;<sup>53</sup> and the use of an instrument of commerce (including the mail, telephone, or telegraph) to willfully threaten another, or to maliciously convey false information, knowing the same to be false, in connection with an attempt to kill, injure, or intimidate any individual, or to unlawfully damage or destroy any property by means of an explosive.<sup>54</sup>

The Organized Crime Control Act of 1970 can be traced in many substantive respects to the President's Commission on Law Enforcement and the Administration of Justice and specifically to its Task Force on Organized Crime. The original version of the Act,<sup>55</sup> which focused primarily upon organized crime and contained no provisions respecting the unlawful use of explosives, was introduced in the Senate on January 15, 1969. After consideration by the Senate Committee on the Judiciary,<sup>56</sup> the proposed act was passed by the Senate by a vote of 73 to 1 on January 23, 1970,<sup>57</sup> and sent to the House Committee on the Judiciary.

While the bill was being considered by the House Committee, President Nixon issued a statement on March 25, 1970, calling for

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ists, the sooner we can restore peace and security to our churches, our public buildings and our campuses." 116 CONG. REC. S17,776 (daily ed. Oct. 12, 1970).

<sup>51</sup> 18 U.S.C. § 844(f) (Supp. V, 1970).

<sup>52</sup> *Id.* § 844(d).

<sup>53</sup> *Id.* § 844(h) (1).

<sup>54</sup> *Id.* § 844(e).

<sup>55</sup> S. 30, 91st Cong., 1st Sess. (1969).

<sup>56</sup> See S. REP. NO. 91-617, 91st Cong., 1st Sess. (1969).

<sup>57</sup> 116 CONG. REC. 972 (1970). In addition, 22 absent Senators subsequently announced that, had they been present, they would have voted for passage; thus, a total of 95 Senators supported the measure. See 116 CONG. REC. S17,773 (daily ed. Oct. 12, 1970).

"extensive strengthening and expansion" of the federal laws relating to the interstate transportation of explosives.<sup>58</sup> Warning that "[r]e-cent months have brought an alarming increase in the number of criminal bombings in the cities of our country," the President recommended, among other things, that the penalties for unlawful transportation or receipt in commerce of explosives be greatly stiffened and that incendiary devices be brought within the purview of the existing antibombing provisions.<sup>59</sup>

In response to the President's recommendations, the House Committee inserted into the bill provisions that proscribed the use of, or the possession with intent to use, explosives to damage or destroy property owned by or leased to the federal government, increased the existing federal penalties for unlawful use of explosives, and included incendiary devices within the category of explosives.<sup>60</sup>

One week prior to the bill's reporting by the House Committee, the President requested that further provisions be inserted to curb the increasing incidence of bombings on college and university campuses.<sup>61</sup> The House Committee complied with the President's request and amended the bill to extend its penalties to anyone who uses explosives to damage or attempt to damage property owned by or leased to "any institution or organization receiving Federal financial assistance." The bill, as amended, was passed by the House on October 7, 1970,<sup>62</sup> and was agreed to by the Senate on October 12, 1970.<sup>63</sup>

Insight into the Senate controversy surrounding the inclusion of the provision relating to damage to institutions receiving federal aid can be gained from a review of a Senate bill<sup>64</sup> to amend

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<sup>58</sup> 116 CONG. REC. S17,502 (daily ed. Oct. 8, 1970).

<sup>59</sup> *Id.*

<sup>60</sup> The President's recommendations of March 25, 1970, were reflected in bills introduced in the House on March 26, 1970 [H.R. 16699 & H.R. 16700, 91st Cong., 2d Sess. (1970)], and on July 21, 1970 [HR. 18573, 91st Cong. 2d Sess. (1970)] by several Republican members, many of whom served on the House Judiciary Committee. The proposals in those bills led to the committee's adding to S. 30 [91st Cong., 1st Sess. (1969)] the provisions described in the text. *See* 116 CONG. REC. H9717 (daily ed. Oct. 7, 1970).

<sup>61</sup> In his request to the House Judiciary Committee, the President said: "In dealing with terror tactics in general and bombings in particular we must direct our attention specifically to those outrageous acts that occur in the colleges and universities of America." 116 CONG. REC. S17,501 (daily ed. Oct. 8, 1970).

<sup>62</sup> 116 CONG. REC. H9779 (daily ed. Oct. 7, 1970).

<sup>63</sup> 116 CONG. REC. S17,776 (daily ed. Oct. 12, 1970).

<sup>64</sup> S. 3650, 91st Cong., 2d Sess. (1970).

the existing law respecting the use of explosives.<sup>65</sup> That bill was passed by the Senate on October 8, 1970,<sup>66</sup> 4 days prior to Senate approval of the House version of the Organized Crime Control Act. The bill was virtually identical to the provisions which the House Judiciary Committee had added to the Organized Crime Control Act in that the bill increased the penalties for unlawful use of explosives, added incendiary devices to the category of explosives, and proscribed damage by means of explosives to property of the federal government or "an institution or organization receiving Federal financial assistance."<sup>67</sup> The quoted language was inserted into the bill by an amendment by Senator Roman Hruska (R-Neb.), the bill's sponsor, with the intent "to broaden the coverage of the bill principally to make malicious bombings on college campuses a Federal offense."<sup>68</sup>

Senator Sam J. Ervin, Jr. (D-N.C.), one of the original sponsors of the Organized Crime Control Act, spoke in opposition to Senator Hruska's floor amendment. His colloquy with Senators Hruska and John L. McClellan (D-Ark.) capsulize the debate over the appropriateness (legal and otherwise) and efficacy of this type of legislation.

Senator Ervin made it clear that he "abhor[s] these bombings . . . on the campuses of institutions of higher learning in this country," and, admitting that the Hruska amendment is not "necessarily" unconstitutional, he conceded that "[i]t is hardly a lack of due process for Congress to regulate what it subsidizes." However, he said, "The proposal to extend Federal jurisdiction solely upon the basis that Federal funds have gone into these institutions or other activities is not justified." And he said: "I believe the function of punishing people for these crimes which are committed wholly within the borders of the States is the function of State governments," and "I think [the amendment] would be a long step toward the destruction of the federal system of government, and the assumption by Congress of control over all the affairs of the States." Senator Ervin concluded: "I am unwilling to have jurisdiction of riots perpetrated on the college campuses given to the Federal Government, while

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<sup>65</sup> Civil Rights Act of 1960, Pub. L. No. 86-449, tit. II, § 203, 74 Stat. 87 (section 203 was codified in 18 U.S.C. § 837 (1964)).

<sup>66</sup> 116 CONG. REC. S17,513 (daily ed. Oct. 8, 1970).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at S17,501.

other riots on the public streets of a town are rightly left to the jurisdiction of the States."<sup>69</sup>

Senator Hruska then countered by saying that "the severity, volume, and the apparent pattern or scheme which has developed in these bombings and dynamitings . . . are something with which the country must come to grips."<sup>70</sup> Senator McClellan agreed, adding the observation that "crime, revolutionary tactics, anarchy, rebellion . . . have reached such proportions in this country that it is imperative that all forces, all legal instrumentalities that we can devise within the framework of the Constitution need to be inaugurated and brought into play against the forces that are creating this terroristic condition in our society."<sup>71</sup> Senator Ervin finished his unsuccessful attempt to defeat the amendment with this admonition: "I recognize . . . that we have a very critical situation with respect to activities of this nature on the campuses of our colleges, but . . . we should not . . . listen to the siren voice of necessity."<sup>72</sup>

### III. CAMPUS UNREST AND THE HIGHER EDUCATION APPROPRIATION AND AUTHORIZATION ACTS

The principal legislative effort of Congress to eradicate campus unrest is evidenced by provisions in various appropriation and authorization acts. These provisions deny assistance or compensation otherwise available under federal programs to individuals (students, instructors, other employees, and researchers) who have engaged in various forms of campus disruption, and they occasionally deny assistance to the institution itself. A typical provision of this nature reads as follows:

No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan, a grant, the salary of, or any remuneration whatever to any individual applying for admission, attending, employed by, teaching at or doing research at an institution of higher education who has engaged in conduct . . . which involves the use of (or the assistance to others in the use of) force or the threat of force of the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to prevent the faculty, ad-

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<sup>69</sup> *Id.* at S17,503.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at S17,504. Joseph Alsop had earlier predicted, somewhat by overstatement, the culmination of this view: "If relevant, meaningful arson continues in the universities, the Congress is going to respond with almost unrestrained ferocity." Alsop, *Hill Reprisals on Universities Pose Grave Danger for Nation*, Wash. Post, May 12, 1969, § A, at 25.

<sup>72</sup> 116 CONG. REC. S17,504 (daily ed. Oct. 8, 1970).



ministrative officials or students in such institution from engaging in their duties or pursuing their studies at such institution.<sup>73</sup>

While this approach antedates the recently concluded 91st Congress, that it was widely accepted by that Congress is evidenced by the 12 appropriation acts and five authorization acts containing anti-disruption clauses which were passed during its first and second sessions.

The first enactment specifically requiring denial of federal funds in response to campus unrest came in 1968, in the 90th Congress. In that instance, Congress decreed that the sanction should take the form of a threatened cutoff of institutional funding by the federal government.<sup>74</sup> Thus, the National Aeronautics and Space Administration (NASA) Authorization Act for 1969<sup>75</sup> provided:

No part of the funds appropriated [for research and development] may be used for grants to any nonprofit institution of higher learning unless the Administrator or his designee determines at the time of the grant that recruiting personnel of any of the Armed Forces of the United States are not being barred from the premises or property of such institution except that this subsection shall not apply if the Administrator or his designee determines that the grant is a continuation or renewal of a previous grant to such institution which is likely to make a significant contribution to the aeronautical and space activities of the United States.

Identical provisions have subsequently been incorporated into the

<sup>73</sup> Dept's of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1971, Act of Oct. 21, 1970, Pub. L. No. 91-472, § 705, 84 Stat. 1064.

<sup>74</sup> In June of 1969, a group of 22 House Republicans, led by then Representative William E. Brock (R-Tenn.), embarked on a tour of American campuses, which culminated in a report to the President on campus unrest, dated June 17, 1969. 115 CONG. REC. 17,409 (1969). The report contains "a series of ideas which [the Congressmen] believe merit urgent consideration," the first of which is, "no repressive legislation." They elaborated:

Any action by the Congress or others which would, for example, penalize innocent and guilty alike by cutting off all aid to any institution which has experienced difficulty would only serve to confirm the cry of the revolutionaries and compound the problem for each university. This holds, also, for any action which would establish mediation or conciliation on the part of the Federal government. In our opinion, the fundamental responsibility for order and conduct on the campus lies with the university community. *Id.* at 17,413.

<sup>75</sup> Act of July 3, 1968, Pub. L. No. 90-373, § 1(h), 82 Stat. 281. This section further provides:

The Secretary of Defense shall furnish to the Administrator or his designee within sixty days after the date of enactment of this Act and each January 30 and June 30 thereafter the names of any nonprofit institutions of higher learning which the Secretary of Defense determines on the date of each such report are barring such recruiting personnel from premises or property of any such institution.

NASA authorization acts for 1970<sup>76</sup> and 1971,<sup>77</sup> and will undoubtedly continue to appear in future acts. Whereas the first enactments were aimed at the institutions, the focus shifted to denial of federal funds to individuals allegedly involved in fomenting campus unrest. Initially, each individual institution of higher education bore the responsibility for establishing the rules which were to be obeyed, for determining whether a violation of such rules had taken place, and for denying the payment of federal funds to the violator. The first of such provisions appeared in the Independent Offices and Department of Housing and Urban Development Appropriation Act for 1969<sup>78</sup> in a proviso to the portion of the Act appropriating money for the National Science Foundation:

*And provided further,* That if an institution of higher education receiving funds hereunder determines after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has, after the date of enactment of this Act, willfully refused to obey a lawful regulation or order of such institution and that such refusal was of a serious nature and contributed to the disruption of the administration of such institution, then the institution shall deny any further payment to, or for the benefit of, such individual.<sup>79</sup>

Again, however, the emphasis shifted. Congress, guided by the House Committee on Appropriations, ceased to rely solely upon institutional judgment in denying federal funds and began to require that assistance be denied to individuals convicted in a court of law for their involvement in campus disorder. The genesis of this approach appeared in the Departments of Labor, and Health, Education, and Welfare Appropriation Act for 1969,<sup>80</sup> which provided:

No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan or a grant to any applicant who has been convicted by any court of general jurisdiction of any crime which involves the use of or the assistance to others in the

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<sup>76</sup> National Aeronautics and Space Administration Authorization Act, 1970, Act of Nov. 18, 1969, Pub. L. No. 91-119, § 1(h), 83 Stat. 197.

<sup>77</sup> National Aeronautics and Space Administration Authorization Act, 1971, Act of July 2, 1970, Pub. L. No. 91-303, § 1(h), 84 Stat. 375.

<sup>78</sup> Act of Oct. 4, 1968, Pub. L. No. 90-550, 82 Stat. 937.

<sup>79</sup> *Id.* at 946. The proviso was formulated by the Senate Committee on Labor and Public Welfare, although a similar version was adopted in the House in a floor amendment offered by Representative Louis C. Wyman (R-N.H.), 114 CONG. REC. 12,252 (1968).

<sup>80</sup> Act of Oct. 11, 1968, Pub. L. No. 90-557, § 411, 82 Stat. 995. In some states, students who have participated in campus disturbances are tried under county ordinances. A conviction under such an ordinance is not a conviction of a "crime" under state law and thus would not disqualify a student for aid under section 411.

use of force, trespass or the seizure of property under control of an institution of higher education to prevent officials or students at such an institution from engaging in their duties or pursuing their studies.

But of greater significance than the above-quoted provision is section 504 of the Higher Education Amendments of 1968,<sup>81</sup> which, with its increased scope and relative clarity, provided a model for many subsequent enactments. Section 504 is designed to deny federal funds under various individual assistance programs<sup>82</sup> to both fomenters of campus unrest and perpetrators of campus violence. To effect this purpose, the provision combines both of the approaches discussed above: that is, either a criminal conviction or an institutional determination of wrongdoing can result in a denial of federal assistance. Sections 504(a) and (b) read as follows:

(a) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has been convicted by any court of record of any crime which was committed after [the date of enactment of this Act] and which involved the use of (or assistance to others in the use of) force, disruption, or the seizure of property under control of any institution of higher education to prevent officials or students in such institution from engaging in their duties or pursuing their studies, and that such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution with respect to which such crime was committed, then the institution which such individual attends, or is employed by, shall deny for a period of two years any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this section. If an institution denies an individual assistance under the authority of the preceding sentence of this subsection, then any institution which such individual subsequently attends shall deny for the remainder of the two-year period any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this section.

(b) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has willfully refused to obey a lawful regulation or order of such institution after [the date of enactment of this Act], and that such refusal was of a serious nature and contributed to a substantial disruption of the administration of such institution, then such institution shall deny, for a period of two years, any further payment to,

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<sup>81</sup> 20 U.S.C. § 1060 (Supp. V, 1970).

<sup>82</sup> The programs are enumerated in section 504(c) of the Higher Education Amendments of 1968, 20 U.S.C. § 1060(c) (Supp. V, 1970).

or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this section.<sup>83</sup>

In addition, section 504(d) broadens the scope of the sanction by providing:

(1) Nothing in this Act, or any Act amended by this Act, shall be construed to prohibit any institution of higher education from refusing to award, continue, or extend any financial assistance under any such Act to any individual because of any misconduct which in its judgment bears adversely on his fitness for such assistance.

(2) Nothing in this section shall be construed as limiting or prejudicing the rights and prerogatives of any institution of higher education to institute and carry out an independent, disciplinary proceeding pursuant to existing authority, practice, and law.<sup>84</sup>

Administratively, it is difficult to terminate aid under sections 504(a) and (b). Under section 504(a) the institution, in addition to providing for a hearing, must find that the individual's conduct meets five tests: (1) the conduct must be such as to warrant court conviction for commission of a "crime"; (2) the "crime" must involve "the use of (or assistance to others in the use of) force, disruption, or the seizure of property under control of any institution of higher education"; (3) the conduct must "prevent officials or students in such institution from engaging in their duties or pursuing their studies"; (4) the "crime" must be "of a serious nature"; and (5) the "crime" must "contribute to a substantial disruption of the administration of the institution with respect to which such crime was committed."<sup>85</sup> Many institutions which have experienced campus unrest have not witnessed conduct which meets all five tests under section 504(a). Likewise, to have assistance terminated under section 504(b), an individual must engage in conduct meeting three tests: (1) he or she must have "willfully refused to obey a lawful regulation or order of [the] institution"; (2) such refusal must have been "serious"; and (3) it must have "contributed to a substantial disruption of the administration of [the] institution."<sup>86</sup> These requirements under sections 504(a) and 504(b) pose a significant burden for the institution desiring to penalize an individual involved in campus disruptions, and they at the same time afford an institution the opportunity to frustrate Congress' intended sanction by

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<sup>83</sup> *Id.* §§ 1060(a)-(b).

<sup>84</sup> *Id.* §§ 1060(d)(1)-(2).

<sup>85</sup> *Id.* § 1060(a).

<sup>86</sup> *Id.* § 1060(b).

finding that an individual's otherwise disruptive conduct does not meet all of the requirements for a denial of federal assistance.

In addition to its applicability to several federal assistance programs and its use of determinations by both institutions and local courts respecting an individual's conduct, section 504 is also noteworthy as the first campus unrest rider to recognize that many activities associated with campus unrest involve constitutionally-protected individual dissent. This fact is recognized in section 504(d)(3), which states "[n]othing in this section shall be construed to limit the freedom of any student to verbal expression of individual views or opinions."<sup>87</sup>

Congress concluded its 1968 efforts to curb campus unrest through denying federal assistance by writing into the Department of Defense Appropriation Act for 1969<sup>88</sup> a provision which was identical to the one inserted in the fiscal year 1969 appropriation measure for the Departments of Labor, and Health, Education, and Welfare.<sup>89</sup>

Thus, despite a House rule prohibiting legislation in appropriation bills,<sup>90</sup> during 1968 Congress enacted three regular appropriation measures<sup>91</sup> and two authorization acts containing specific provisions aimed at curbing campus unrest. Use of such legislative riders however, was not confined to campus unrest clauses; Congress — principally the House of Representatives — used them to achieve desired goals in other areas. For example, in 1968 the 90th Congress added the following provision to the Public Works for Water and Power Resources Development and Atomic Energy Commission Appropriation Act for 1969<sup>92</sup> (Public Works Appropriation Act for 1969):

No part of any appropriation herein shall be used to confer a fellowship on any person who advocates or who is a member of an organization or party that advocates the overthrow of the Government of the United States by force or violence or with respect to whom the Commission finds, upon investigation and report by

<sup>87</sup> *Id.* § 1060(d)(3).

<sup>88</sup> Act of Oct. 17, 1968, Pub. L. No. 90-580, § 640, 82 Stat. 1136.

<sup>89</sup> Act of Oct. 11, 1968, Pub. L. No. 90-557, § 411, 82 Stat. 995; see text accompanying note 80 *supra*.

<sup>90</sup> RULES OF THE HOUSE OF REPRESENTATIVES, Rule XXI, § 843 (90th Cong.).

<sup>91</sup> In addition to regular appropriation acts (of which 13 were enacted in 1968) which authorize funds for the various departments and agencies of the federal government, the Congress also enacts supplemental appropriation acts (to fund agencies or programs not covered in a regular appropriation act) and continuing appropriation acts (to continue funding at an established level when a regular appropriation act expires prior to the enactment of its successor).

<sup>92</sup> Act of Aug. 12, 1968, Pub. L. No. 90-479, 82 Stat. 705.

the Civil Service Commission on the character, associations, and loyalty of whom, that reasonable grounds exist for belief that such person is disloyal to the Government of the United States.<sup>93</sup>

The above provision focuses on the politicization of the campus rather than on campus violence and disruptions. And the Public Works Appropriation Act for 1969 and other acts contained additional provisions that could be used to stem the growing politicization of the higher education community. These provisions were designed to prohibit lobbying efforts underwritten by federal appropriations. Thus, in addition to the above-quoted provision, the Public Works Appropriation Act for 1969 contained the following language: "No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."<sup>94</sup>

<sup>93</sup> *Id.* at 716. This provision continues:

*Provided*, That any person who advocates or who is a member of an organization or party that advocates the overthrow of the Government of the United States by force or violence and accepts employment or a fellowship the salary, wages, stipend, grant, or expenses for which are paid from any appropriation contained herein shall be guilty of a felony, and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both: *Provided further*, That the above penal clause shall be in addition to, and not in substitution for any other provisions of existing law.

Identical provisions appear in the Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act for 1970 [Act of Dec. 11, 1969, Pub. L. No. 91-144, 83 Stat. 324-25] and 1971 [Act of Oct. 7, 1970, Pub. L. No. 91-439, 84 Stat. 891].

Still more general provisions were inserted in some of the other appropriation acts in 1968. For example, the Department of Agriculture and Related Agencies Appropriation Act for 1969 [Act of Aug. 8, 1968, Pub. L. No. 90-463, § 509, 82 Stat. 653] contained the following provision:

No part of the funds appropriated under this Act shall be used to pay salaries of any Federal employee who is convicted in any Federal, State, or local court of competent jurisdiction, of inciting, promoting, or carrying on a riot, or any group activity resulting in material damage to property or injury to persons, found to be in violation of Federal, State, or local laws designed to protect persons or property in the community concerned.

Somewhat similar provisions appear in the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act for 1969 [Act of Aug. 9, 1968, Pub. L. No. 90-470, § 705, 82 Stat. 692]; the Department of the Interior and Related Agencies Appropriation Act for 1969 [Act of July 26, 1968, Pub. L. No. 90-425, § 303, 82 Stat. 445]; the Independent Offices and Department of Housing and Urban Development Act for 1969 [Act of Oct. 4, 1968, Pub. L. No. 90-550, § 308, 82 Stat. 957]; and the Departments of Labor, and Health, Education, and Welfare Appropriation Act for 1969 [Act of Oct. 11, 1968, Pub. L. No. 90-557, § 411, 82 Stat. 995].

<sup>94</sup> Act of Aug. 12, 1968, Pub. L. No. 90-479, § 508, 82 Stat. 718. The Independent Offices [including the National Science Foundation] and Department of Housing and Urban Development Appropriation Act for 1969 [Act of Oct. 4, 1968, Pub. L. No. 90-500, § 301, 82 Stat. 956] contained language nearly identical to that quoted from

By the end of the second session of the 90th Congress six of the 13 regular appropriation acts contained provisions designed to curb campus unrest either by denying federal aid to individuals engaging in violent or disruptive conduct, or by proscribing the use of federal funds to support "political" activism.

As campus unrest became more widespread, notably in the academic years 1968-1969<sup>95</sup> and 1969-1970, Congress continued to utilize such provisions in appropriation and authorization acts to assure constituents that "something was being done," and to enable those Congressmen especially displeased with campus unrest to vent their anger. Accordingly, early in the first session of the 91st Congress, the following amendment, in the form of a proviso, accompanied the Second Supplemental Appropriations Act for 1969:

*Provided further,* That none of the funds appropriated by this Act for annual interest grants authorized by section 306 of the Higher Education Facilities Act, as amended by Public Law 90-575, shall be used to formulate or carry out any grant to any institution of higher education unless such institution is in full compliance with section 504 of such Act.<sup>96</sup>

The 91st Congress' concern over campus unrest, as initially evinced by the above amendment, is similarly reflected throughout the appropriation process of that Congress. Of the appropriation acts passed by the 91st Congress, five regular appropriations (out of 13) in the first session — plus the above supplemental appropriations act for fiscal year 1969 — and six (out of 14) from the second session contained provisions designed to reduce campus unrest.

Most of the provisions of the regular appropriation acts approved by the 91st Congress during its first session were the same as the provisions written by the 90th Congress. These reenactments included the proscriptive sections of the Independent Offices [including

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the Public Works Appropriation Act for 1969. And the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act for 1969 [Act of Aug. 9, 1968, Pub. L. No. 90-470, § 701, 82 Stat. 691] similarly stated that "[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."

<sup>95</sup> See Bayer & Astin, *supra* note 11, at 337.

<sup>96</sup> Act of July 22, 1969, Pub. L. No. 91-47, 83 Stat. 57. Before the House vote on this measure, an aide to Representative William J. Scherle (R-Iowa), the bill's sponsor, was quoted as saying that "[a]ll this [bill] does is put the colleges and universities on notice that Congress is reflecting the people, and is getting pretty tired of these guys [university officials] wishy-washing around." Wash. Post, May 20, 1969, § A, at 2.

See text accompanying notes 81-87 *supra* for a discussion of the provisions of section 504 of the Higher Education Amendments of 1968, 20 U.S.C. § 1060 (Supp. V, 1970).

the National Science Foundation] and Department of Housing and Urban Development Appropriation Act for 1970;<sup>97</sup> the Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act for 1970;<sup>98</sup> the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act for 1970;<sup>99</sup> and the Department of Defense Appropriation Act for 1970.<sup>100</sup>

The only two basic changes appearing in the fiscal year 1970 appropriation acts passed by the 91st Congress were effected during the second session. The first appeared in the Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriation Act for 1970.<sup>101</sup> The provision,<sup>102</sup> which is identical to that quoted at the outset of this section of the article,<sup>103</sup> contains language which is typical of that adopted during the second session of the 91st Congress to curb campus unrest. The 1970 proscription appears to eliminate the requirement of a criminal conviction, thus avoiding some of the administrative difficulties presented by its 1969 predecessor.<sup>104</sup>

<sup>97</sup> Act of Nov. 26, 1969, Pub. L. No. 91-126, §§ 404, 411, 83 Stat. 243, 244.

<sup>98</sup> Act of Dec. 11, 1969, Pub. L. No. 91-144, §§ 102, 508, 83 Stat. 324-25, 338.

<sup>99</sup> Act of Dec. 24, 1969, Pub. L. No. 91-153, §§ 701, 705, 83 Stat. 426, 427.

<sup>100</sup> Act of Dec. 29, 1969, Pub. L. No. 91-171, §§ 601, 640, 83 Stat. 479, 486. In addition, the Department of the Interior and Related Agencies Appropriation Act for 1970 [Act of Oct. 29, 1969, Pub. L. No. 91-98, § 303, 83 Stat. 166] and the Department of Agriculture and Related Agencies Appropriation Act for 1970 [Act of Nov. 26, 1969, Pub. L. No. 91-127, § 509, 83 Stat. 261] contained sections prohibiting the payment of salaries of federal employees convicted of engaging in illegal riotous activity. Likewise, the Foreign Assistance and Related Programs Appropriation Act for 1970 [Act of Feb. 9, 1970, Pub. L. No. 91-194, 84 Stat. 13] contained the provision banning appropriations for unauthorized publicity or propaganda purposes.

<sup>101</sup> Act of March 5, 1970, Pub. L. No. 91-204, 84 Stat. 23.

<sup>102</sup> *Id.* § 407, at 48.

<sup>103</sup> See text accompanying note 73 *supra*.

<sup>104</sup> See note 80 *supra* & accompanying text.

An earlier version of the Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriations Act for 1970 [H.R. 13111, 91st Cong., 1st Sess. (1969)], which was ultimately vetoed as being inflationary and misdirected, contained — as reported by the House Committee on Appropriations — a much stronger provision:

No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan, a grant, the salary of or any remuneration whatever to any individual applying for admission, attending, employed by, teaching at, or doing research at an institution of higher education who has engaged in conduct on or after October 13, 1968, which involves the use of (or the assistance to others in the use of) force or threat of force or the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to prevent the faculty, administrative officials, or students in such institution from engaging in their duties or pursuing their studies at such institution:



The other change in a fiscal year 1970 appropriation act came in the form of new section 706 of the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act for 1970.<sup>105</sup> The basic language of the campus unrest provision in section 706 is amplified by two provisos, which read as follows:

*Provided*, That such limitation upon the use of money appropriated in this Act shall not apply to a particular individual until the appropriate institution of higher education at which such conduct occurred shall have had an opportunity to initiate or has completed such proceedings as it deems appropriate but which are not dilatory in order to determine whether the provisions of this limitation upon the use of appropriated funds shall apply: *Provided further*, That such institution shall certify to the Secretary of Health, Education, and Welfare at quarterly or semester intervals that it is in compliance with this provision.

The 91st Congress' concern over campus unrest was also reflected in the July 1969 enactment of the National Aeronautics and Space Administration Authorization Act for 1970.<sup>106</sup> In addition to the provision carried forward from the 1969 version which denied research and development grants to institutions of higher education

*Provided Further*, That none of the funds appropriated by this Act shall be used to formulate or carry out any grant or loan or interest subsidy to any institution of higher education other than to such institutions certifying to the Secretary of Health, Education, and Welfare at quarterly or semester intervals that they are in compliance with this provision.

This provision would have required an institution of higher education to certify with the Department of Health, Education, and Welfare that it had withdrawn federal financial assistance from students or faculty members who had engaged in campus disruptions. Failure to submit such certification would have caused the delinquent college or university to forfeit federal grants, loans, and interest subsidies. Because of its strict enforcement provisions and its broad coverage of the educational community, the measure was the strongest campus unrest proposal to reach the House floor. This fact was evidenced in a letter to the late Senator Everett M. Dirksen on July 17, 1969, in which Attorney General John N. Mitchell and then-Secretary of the Department of Health, Education and Welfare, Robert H. Finch, wrote:

We realize that Congress is rightly concerned with the situation on college and university campuses. . . . In our studied judgment, however, such [fund cutoff] legislation would be counter-productive, and would seriously jeopardize the relationship between the academic community and the Federal government which has been of such inestimable benefit to our society. 115 CONG. REC. 39,551 (1969).

The provision was deleted on a point of order during House debate. 115 CONG. REC. 21,631 (1969). The point of order was that the provision constituted legislation in an appropriations bill, which is forbidden by House rules. RULES OF THE HOUSE OF REPRESENTATIVES, Rule XXI, § 843 (91st Cong.).

<sup>105</sup> Act of Dec. 24, 1969, Pub. L. No. 91-153, § 706, 83 Stat. 427.

<sup>106</sup> Act of Nov. 18, 1969, Pub. L. No. 91-119, 83 Stat. 196.

where Armed Forces recruiting personnel are banned,<sup>107</sup> the 1970 Act contained new provisions denying individual assistance under terms and conditions identical to those inserted in the Higher Education Amendments of 1968.<sup>108</sup>

During the year 1970 and the early weeks of 1971, when the appropriation acts for fiscal year 1971 were passed, the 91st Congress adhered to the now established pattern of inserting campus unrest provisions therein. As in the previous year, many of the enactments restated prior years' provisions.<sup>109</sup> In the new Office of Education Appropriation Act for 1971,<sup>110</sup> Congress included the now-standard campus unrest provision:

No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan, a grant, the salary of or any remuneration whatever to any individual applying for admission, attending, employed by, teaching at, or doing research at an institution of higher education who has engaged in conduct . . . which involves the use of (or the assistance to others in the use of) force or the threat of force or the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to prevent the faculty, administrative officials, or students in such institution from engaging in their duties or pursuing their studies at such institution.<sup>111</sup>

As the foregoing amply illustrates, recent Congresses have been quite prolific in attempting to curb campus unrest through the denial of federal support to institutions or individuals charged with condoning or fomenting campus violence or disruptions. But despite

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<sup>107</sup> See text accompanying note 75 *supra*.

<sup>108</sup> See text accompanying note 81-87 *supra*.

<sup>109</sup> E.g., Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act, 1971, Act of Oct. 7, 1970, Pub. L. No. 91-439, 84 Stat. 891, 903; Departments of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1971, Act of Oct. 21, 1970, Pub. L. No. 91-472, 84 Stat. 1064; Independent Offices [including the National Science Foundation] and Department of Housing and Urban Development Appropriation Act, 1971, Act of Dec. 17, 1970, Pub. L. No. 91-556, 84 Stat. 1450, 1463, 1464; Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriation Act of 1971, Act of Jan. 11, 1971, Pub. L. No. 91-667, 84 Stat. 2019; Department of Defense Appropriation Act, 1971, Act of Jan. 11, 1971, Pub. L. No. 91-668, 84 Stat. 2029.

<sup>110</sup> Act of Aug. 18, 1970, Pub. L. No. 91-380, 84 Stat. 800. In prior fiscal years, appropriations for the Office of Education were enacted as part of the funding for the Department of Health, Education, and Welfare.

<sup>111</sup> *Id.* at 804. Moreover, the National Science Foundation Authorization Act of 1971 [Act of July 24, 1970, Pub. L. No. 91-356, 84 Stat. 471] bears the same provisions as its predecessor [Act of Nov. 18, 1969, Pub. L. No. 91-120, 83 Stat. 203]. Also, the Armed Forces Appropriations Authorization Act for 1971 [Act of Oct. 7, 1970, Pub. L. No. 91-441, 84 Stat. 914] contains a provision forbidding the use of funds at institutions of higher learning which bar recruiting personnel from the campus, unless the grant is likely to make a significant contribution to national defense.

Congress' efforts, the effectiveness of these provisions and Congress' ability to enlist the institutions' cooperation in enforcing them remain matters of considerable question.

It was in the latter context that Representative Edith Green (D-Ore.), Chairman of the Special Education Subcommittee of the House Committee on Education and Labor, speaking before the House on September 23, 1970,<sup>112</sup> chastized most colleges and universities for disregarding the requirements of these provisions or otherwise acting in bad faith. She brandished a report compiled by the U.S. Office of Education showing that, during fiscal year 1970, 440 students had been the subject of college and university action taken in compliance or conjunction with the legislation passed by the Congress to terminate federal funds to students or faculty members who participate in a riot or other disruptive campus activities. Representative Green stated that "[i]t appears too many institutions of higher education have not taken the law seriously." She was highly distressed with the report's findings that during the fiscal year only three institutions of higher education terminated assistance to students (24) pursuant to the requirements of the Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriation Acts for 1969<sup>113</sup> and 1970.<sup>114</sup> She was further aggravated by the finding that only six institutions reported terminations of aid to students (16) under sections 504(a) and (b) of the Higher Education Amendments of 1968.<sup>115</sup> Finally, she was disturbed to report that only 76 institutions effected terminations (400) in conjunction with Section 504(d)(1) of the 1968 Amendments.<sup>116</sup>

Representative Green's displeasure was nurtured not only by the foregoing statistics, but also by the fact that most of the institutions reporting were small colleges, rather than, she said, the "major institutions of higher education in this country . . . [which] have experienced major disturbances of the sort that the Federal legislation was designed to reach."<sup>117</sup> For example, of the 24 reported terminations under the two appropriation acts mentioned above, 20 were made by the Virginia Polytechnic Institute and State University, and nine of the 16 students that were terminated in accordance with sections 504 (a) and (b) of the 1968 amendments were enrolled at

<sup>112</sup> 116 CONG. REC. H9138-40 (daily ed. Sept. 23, 1970).

<sup>113</sup> Act of Oct. 11, 1968, Pub. L. No. 90-557, § 411, 82 Stat. 995.

<sup>114</sup> Act of March 5, 1970, Pub. L. No. 91-204, 84 Stat. 23.

<sup>115</sup> 20 U.S.C. §§ 1060(a)-(b) (Supp. V, 1970).

<sup>116</sup> 20 U.S.C. § 1060(d)(1) (Supp. V, 1970).

<sup>117</sup> 116 CONG. REC. H9139 (daily ed. Sept. 28, 1970):

Miami University of Ohio. Representative Green observed that "the universities which have most distinguished themselves by violence by their students and faculty members are conspicuous by their absence on the list."<sup>118</sup>

Aside from questions raised by the Office of Education's survey — such as the degree of institutional cooperation and the accuracy of the survey itself<sup>119</sup> — other questions pertaining to the effectiveness and utility of the campus unrest provisions persist. Representative John E. Moss (D-Cal.), during the course of the debate on an abortive Department of Labor, and Health, Education, and Welfare, and Related Agencies Appropriations Act for 1970,<sup>120</sup> offered as advice to his colleagues his opinion that

we [the House] can kid ourselves that adopting something like [campus unrest riders] is going to cure basic problems, but it is not. We can write stronger and stronger and stronger laws, and it is not going to cure the underlying causes which are really symptomized by the unrest on the campuses.<sup>121</sup>

Even those who seriously advocate the provisions, such as Representative Green, admit that they appear to be generating few results at the principal institutions of higher education.

The reasons for the undramatic showing on the part of most institutions in effecting terminations are manifold:<sup>122</sup> (1) many individuals engaged in disruptive on-campus activity were not college or university students; (2) most of the students involved in disruptive activity have not enjoyed federal financial assistance; (3) many students engaging in disruptive activity failed to commit an act proscribed by the provisions; (4) some students had already received federal assistance antecedent to their hearing, thereby precluding termination; (5) some institutions either expelled or suspended students who committed serious disruptive acts, making termination of aid a moot sanction; and (6) many institutions have instituted extensive hearing procedures and processes for publicizing the exist-

<sup>118</sup> *Id.*

<sup>119</sup> It is possible, for example, that universities view nearly all of their terminations of federal assistance to students as falling under section 504(d) (1) if an infraction of the university's rules is involved.

<sup>120</sup> H.R. 13111, 91st Cong., 1st Sess. (1969).

<sup>121</sup> 115 CONG. REC. 21,636 (1969). Representing a contrary view, Representative William J. Scherle (R-Iowa) said: "I cannot for the life of me understand why the taxpayers of this country should be forced to finance the destruction and the disruption of our Nation's campuses." *Id.* at 21,634.

<sup>122</sup> These reasons have been digested from surveys and compilations made by the Association of American Universities.

tence of these provisions and the consequences of violating them, thus perhaps extending to the provisions a certain prophylactic effect.<sup>123</sup>

For institutions of higher education, the problem generated by campus unrest provisions is largely one of aggravation — a combination of questions of interpretation and difficulties of administration.<sup>124</sup> And more importantly, these provisions have not, for reasons noted earlier, deterred campus unrest to any significant degree and may in fact have exacerbated it.<sup>125</sup>

For students, faculty members, and others adversely affected by these provisions, more fundamental problems are presented, often generating constitutional issues of substantive and procedural due process.<sup>126</sup> Within the framework of substantive requirements lie the following questions: Are the provisions unconstitutionally vague, that is, are they explicit enough to inform those subject to them what conduct will render them liable to the penalties?<sup>127</sup> Do such provisions have a chilling effect on constitutionally protected dissent?<sup>128</sup> Do they broadly stifle fundamental personal liberties despite a legitimate and substantial governmental purpose?<sup>129</sup> Moreover, the provisions may be offensive to judicially developed concepts of academic freedom.<sup>130</sup>

From a purely administrative standpoint, a single federal statute imposing conditions on federal assistance to students, faculty, and even institutions would be considerably preferable to a host of differing, overlapping provisions adorning various appropriation and authorization acts. As one commentator wrote, "[t]he current un-

<sup>123</sup> For a survey of "positive steps" taken by state and land-grant universities to involve students and curtail campus disruptions, see CONSTRUCTIVE CHANGES TO EASE CAMPUS TENSIONS (comp. by Office of Institutional Research, National Ass'n of State Universities and Land-Grant Colleges 1970).

<sup>124</sup> See Comment, *Federal Aid to Education: Campus-Unrest Riders*, 22 STAN. L. REV. 1094, 1101-03 (1970). See generally Willingham, *Capitol Hill and Colleges Debate Value of Student Unrest Laws*, 2 NAT'L J. 2713 (1970).

<sup>125</sup> See Comment, *supra* note 124, at 1105-07.

<sup>126</sup> See generally Comment, *Higher Education and the Student Unrest Provisions*, 31 OHIO ST. L.J. 111 (1970).

<sup>127</sup> See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926); Note, *The Void-For-Vagueness Doctrine In The Supreme Court*, 109 U. PA. L. REV. 67 (1960).

<sup>128</sup> Cf. *Dombrowski v. Pfister*, 380 U. S. 479, 487 (1965); Schwartz, *The Student, The University and the First Amendment*, 31 OHIO ST. L.J. 635 (1970).

<sup>129</sup> See *Shelton v. Tucker*, 364 U. S. 479, 488 (1960).

<sup>130</sup> See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

rest riders are at best a cumbersome and ineffective way of dealing with campus unrest."<sup>131</sup>

A more practical and effective approach would be to leave the administration of campuses to the institutions involved, assisted by state and local authorities in extreme situations. This would relieve the federal government of the temptation to regulate in an area where its principal competence is to subsidize. In other words, Congress should revert to the policy enunciated in the Higher Education Act of 1965:

Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution . . .<sup>132</sup>

As the statutory authorization for the major programs by which the federal government contributes support to higher education — involving annual outlays of several billion dollars — expires at the close of the current fiscal year (June 30, 1971), an analysis of the effectiveness of campus unrest provisions in appropriation and authorization acts is appropriate. Most of these programs will be extended and some new ones will be inaugurated. As the legislation for these programs wends its way toward enactment, considerable pressure will be brought at numerous points along the legislative process to insert strong language denying federal assistance to individuals participating in (and perhaps to institutions that are condoning or not preventing) disruptive campus activity.<sup>133</sup> Indeed, it was the specter of repressive and unadministerable provisions being inserted in extension legislation which kept a higher education bill bottled up in the House Committee on Education and Labor in the 91st Congress.<sup>134</sup> Before the 92nd Congress begins enacting campus unrest

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<sup>131</sup> Comment, *supra* note 124, at 1107.

<sup>132</sup> Act of Nov. 8, 1965, Pub. L. No. 89-329, § 804(a), 79 Stat. 1270. See also Higher Education Facilities Act of 1963, Act of Dec. 16, 1963, Pub. L. No. 88-204, § 407, 77 Stat. 379.

<sup>133</sup> Joseph Kraft wrote that "once [campus unrest] legislation gets on the floor of the Congress, it will be worked over by the know-nothing demagogues in a way sure to do harm to the spirit of university life." Kraft, *Vast Progress Is Being Made In Cooling Off the Campus*, Wash. Post, June 10, 1969, § A, at 19.

<sup>134</sup> Early in 1970, Representative Edith Green (D-Ore.) readied an omnibus bill (H.R. 16098, 91st Cong., 2d Sess. (1970)) which would have extended the authorization for existing federal aid to higher education programs and added some major innovations. The bill was the subject of hearings before the House Special Subcommittee on Education, which initially planned to report the measure by May 1, 1970. See Wash. Post, Jan. 12, 1970, § A, at 2. But by the congressional summer recess, the subcommittee had agreed to finalize an alternative bill (H.R. 18849, 91st Cong., 2d Sess.

riders, it would be well advised to thoroughly explore the consequences, in terms of enforcability and productivity, of so doing.

#### IV. CAMPUS UNREST AND THE FEDERAL TAX STATUS OF INSTITUTIONS OF HIGHER EDUCATION

In May of 1970, officials of the United States Departments of Justice and the Treasury startled representatives of the higher education community with suggestions that the increasing politicization of the campus, resulting from activities of students, faculty, and others might be endangering the federal tax status of colleges and universities,<sup>135</sup> and, moreover, might be causing institutions of higher education that participate in or sanction such activities to violate the Federal Corrupt Practices Act.<sup>136</sup> These intimations generated considerable alarm throughout the higher education community, which immediately sought to ward off administrative responses from the federal government to campus unrest<sup>137</sup> by countering with a package of guidelines to be observed by colleges and universities in their efforts to preserve their federal tax status (and secondarily to avoid

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(1970)) which essentially would have extended the existing programs for 3 years. The deadlock continued — principally because of the issue of campus unrest — throughout the second session of the 91st Congress, which adjourned without consideration of a higher education bill, thus perpetuating the matter as a legacy for the 92nd Congress. See THE WASH. STATUS REP. No. 3, at 11 (1970) and No. 8, at 3 (1970).

Representative Green wrote:

Those connected with higher education and members of the Congress are compelled to ponder the critical funding problem, or loss of tax support, which may result from the reaction to the violent actions of this small minority on our campuses. The House Special Subcommittee on Education recently [July 1, 1969] agreed that it would be most unwise to try to bring to the floor this year a bill on higher education because campus violence had made the climate so unfavorable.

She added: "Wanton destruction by the beneficiaries of higher education does not make it easy to plead in committee, on the House floor, or before tax-paying constituents for more funds for higher education." Green, *A Congresswoman's Warning*, 51 EDUCATIONAL RECORD 222, 223 (1970).

<sup>135</sup> See Wall Street J., June 18, 1970, at 10, col. 1. "The [Federal] Government has warned colleges and universities to proceed carefully in encouraging their students and faculties to work in this fall's [1970] campaigns." *Id.*

<sup>136</sup> 18 U.S.C. § 610 (1964). The issues involving the Federal Corrupt Practices Act are discussed in full in section V *infra*.

<sup>137</sup> The tax status of a college or university under local law may also be jeopardized by incidents of campus activism. For example, New Haven, Connecticut, on Sept. 20, 1970, announced it would assess, for real property tax purposes, 11 parcels of property owned by Yale University on the ground that the property is not being used exclusively for educational purposes. Wash. Post, Sept. 21, 1970, § A, at 7. Similarly, *Time Magazine* reported that, in Waltham, Massachusetts, home of Brandeis University, the local board of assessors "threatened" the university with a \$10,000 tax assessment for a building used by a student-run strike information center. The group subsequently left the campus. TIME, Aug. 3, 1970, at 32.

prosecution under the Corrupt Practices Act). The guidelines,<sup>138</sup> issued on June 19, 1970, were denominated "fair and reasonable" by the Commissioner of Internal Revenue.<sup>139</sup>

Private institutions of higher education derive exemption from federal income taxation under section 501(a) of the Internal Revenue Code of 1954 (Code), pursuant to section 501(c)(3) of the Code.<sup>140</sup> In addition, contributions made to such organizations are deductible by the donors for income,<sup>141</sup> estate,<sup>142</sup> and gift<sup>143</sup> tax purposes. Organizations described in section 501(c)(3) and the contributions deduction sections are deemed to meet four basic criteria: (1) they must be "organized and operated *exclusively* for religious, charitable, scientific, testing for public safety, literary, or *educational purposes*,<sup>144</sup> or for the prevention of cruelty to children or animals"; (2) "no part of the net earnings" of such organizations may inure "to the benefit of any private shareholder or individual"; (3) "no *substantial part* of the activities" of such organizations may constitute "carrying on propaganda, or otherwise *attempting, to influence legislation*"; and (4) such organizations must "*not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.*"<sup>145</sup>

The federal government stressed the fourth criterion of section 501(c)(3) and the contributions deduction sections, and to some extent the third, in questioning the effect of campus political activities

<sup>138</sup> AMERICAN COUNCIL ON EDUCATION GUIDELINES (June 21, 1970), *excerpted in*, 4 CCH 1971 STAND. FED. TAX REP. ¶ 3033.197.

<sup>139</sup> 4 CCH 1971 STAND. FED. TAX REP. ¶ 3033.197. Presumably, these guidelines, unlike the guidelines announced by the Internal Revenue Service with respect to public interest groups engaged in litigation [7 CCH 1970 STAND. FED. TAX REP. ¶ 6943G], which were promulgated, rather than merely approved, by the Service, have no legal efficacy; nonetheless, prudence dictates adherence to them.

<sup>140</sup> State colleges and universities generally base their exemption on section 115(a) of the Code which excludes the income of state instrumentalities from the Code definition of gross income. See INT. REV. CODE OF 1954, § 61 [hereinafter cited as CODE].

<sup>141</sup> *Id.* § 170(c)(2).

<sup>142</sup> *Id.* § 2055(a)(2).

<sup>143</sup> *Id.* § 2522(a)(2).

<sup>144</sup> The term "educational" in this context relates to the "instruction or training of the individual for the purpose of improving or developing his capabilities" or the "instruction of the public on subjects useful to the individual and beneficial to the community." Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959). And the Supreme Court has held that the requirement that "an organization must be devoted to educational purposes exclusively. . . . plainly means that the presence of a single noneducational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes." Better Business Bureau of Wash., D.C., Inc. v. United States, 326 U.S. 279, 283 (1945).

<sup>145</sup> CODE § 501(c)(3); sections cited notes 141-43 *supra* (emphasis added).



on the tax status of colleges and universities. The third criterion, which generally limits the legislative activities of charitable and educational institutions, was appended to the Revenue Act of 1934<sup>146</sup> without any request being made therefor by the Treasury Department.<sup>147</sup> As originally drafted, this provision would have denied exemption to institutions that participated in partisan politics or substantial legislative activities. When the bill reached the Senate floor for debate, it was apparent that the amendment was intended, as expressed by its sponsor, Senator David A. Reed, to curb a specific maverick organization known as the National Economy League. During debate, Senator Reed made it clear that he did not wish to affect the legislative activities of "any of the worthy institutions."<sup>148</sup> After modification by the House-Senate Conference Committee, the amendment became law in its present form.

The fourth criterion, which proscribes participation or intervention in a political campaign on behalf of any candidate for public office, has a remarkably similar origin. It was added, during Senate debate, as a floor amendment offered by then-Senator Lyndon B. Johnson to the bill which subsequently became the Internal Revenue Code of 1954.<sup>149</sup> Although there is nothing in the record, it is understood that Senator Johnson's proposal was made to curb the activities of a private foundation in Texas that he believed had provided indirect financial support to his opponent in a recent election.<sup>150</sup>

The prohibition against an exempt institution's involving itself in a political campaign is generally supposed to be absolute, although the legislative history provides no clarification. The regulations accompanying section 501(c)(3) likewise provide no illumination; they basically track only the language of the statute.<sup>151</sup>

<sup>146</sup> Ch. 277, § 101(6), 48 Stat. 700.

<sup>147</sup> 78 CONG. REC. 5861, 7831 (1934). For an interesting discussion of the origins of this provision, see Lehrfeld, *The Taxation of Ideology*, 19 CATHOLIC U.L. REV. 50 (1969).

<sup>148</sup> 78 CONG. REC. 5861 (1934).

<sup>149</sup> H.R. 8300, 83d Cong., 2d Sess. (1954).

<sup>150</sup> See 100 CONG. REC. 9604 (1954). The Senate Finance Committee, without particular comment in its report [S. REP. NO. 91-552, 91st Cong., 1st Sess. (1969)], added a similar limitation to the estate and gift tax charitable contributions deductions sections in the Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 201(a), (d)(4), 83 Stat. 487 (CODE §§ 2055(a)(2), 2522(a)(2)).

<sup>151</sup> The regulations state that "[a]ctivities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such candidate." Treas. Reg. § 1.501(a)(3)-1(c)(3)(iii) (1959).

Since enactment of this fourth criterion, only the Court of Appeals for the Sixth Circuit has expanded on the nature of the prohibition of political involvement; but the court did so only within the context of prohibited legislative activities under the 1939 Internal Revenue Code.<sup>152</sup> In *Seasongood v. Commissioner*,<sup>153</sup> the sixth circuit, in allowing the deductibility of charitable contributions to the Hamilton County Good Government League (an organization exempt from tax as charitable or educational), found that although the league engaged in "political activities," such activities were "insubstantial" in relation to its other activities, and hence not grounds for denial of the deductibility of the contributions. The league endorsed candidates for political office and sponsored or opposed legislation through contacts with legislative officials. Finding that "something less than 5% of the time and effort of the League was devoted to "political activities," the court concluded that "the so-called 'political activities' of the League were not, in relation to all of its other activities, *substantial* within the meaning of the section."<sup>154</sup>

The *Seasongood* decision, however, should by no means be interpreted to mean that an educational organization may participate or intervene in a political campaign on behalf of a candidate and not run afoul of the fourth criterion of section 501(c)(3) solely because such political activities are "insubstantial." The language of section 501(c)(3) with respect to campaign intervention or participation does not contain qualifying language — as does the third criterion concerning legislative activities — and is, as noted above, generally considered an absolute prohibition.<sup>155</sup>

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<sup>152</sup> INT. REV. CODE OF 1939 § 101(6).

<sup>153</sup> 227 F.2d 907 (6th Cir. 1955).

<sup>154</sup> *Id.* at 912.

<sup>155</sup> The absoluteness of this fourth requirement, however, has never been directly pronounced upon by the federal judiciary. Indirect pronouncements have spawned theories of why an exception of insubstantiality might be engrafted by the courts on the prohibition on campaign involvement. Despite the express requirement of section 501(c)(3) of the Code that colleges and universities exempt thereunder be "operated exclusively for . . . educational purposes," both the regulations [Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959)], and the cases [St. Louis Union Trust Co. v. United States, 374 F.2d 427, 431 (9th Cir. 1967); *Seasongood v. Commissioner*, 227 F.2d 907, 910 (6th Cir. 1955)] indicate that an institution need only be operated *primarily* for such purposes. Cf. *Estate of Anita McCormick Blaine*, 22 T.C. 1195 (1954) (The Tax Court disallowed charitable contributions to the Foundation for World Government on the grounds that it was not organized and operated exclusively for educational purposes. The foundation's sole benefactor's interests "went beyond any mere academic or educational studies in relation to world government" and "the dominant aim was to organize a foundation to assist in bringing about a world government as rapidly as pos-

Less likely to be a factor in an allegation that an institution of higher education participated or was involved in "political activities" is an assertion that the institution forfeited its tax status by attempting to "influence legislation" as a substantial part of its activities. Aside from such key questions as whether a college or university has engaged in such activity in its institutional capacity, and what constitutes the influencing of legislation, revocation of an organization's tax exemption because of legislative activities must be preceded by a finding that such activities are "substantial."<sup>156</sup>

A determination whether a specific activity of an exempt organization constitutes a "substantial" portion of its total activities must always be a factual one, and the law offers no formula for computing "substantial" or "insubstantial" undertakings.<sup>157</sup> The Senate Finance Committee said in its report accompanying the Tax Reform Act of 1969<sup>158</sup> that "the standards as to the permissible level of activities [that is, lobbying] under the present law are so vague as to encourage subjective application of the sanction."<sup>159</sup> One approach for attempting to measure substantiality would be to determine what percentage of an institution's spending is devoted on an annual basis<sup>160</sup> to efforts to "influence legislation" (for example, as dues to organizations that engage in a substantial amount of lobbying). Yet the prohibition against legislative influencing is surely intended to involve more than simply an expenditure or diversion of funds, and should be read to include restrictions on certain activities. That portion of an institution's efforts and activities devoted to "political" (legislative) activities is likely to be regarded as more important than institutional expenditures.<sup>161</sup> And in the context of

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sible." *Id.* at 1212-13.). The Senate Finance Committee attempted to write into the Revenue Act of 1934 [ch. 277, § 101(6), 48 Stat. 700 (now INT. REV. CODE OF 1954, § 501(c)(3))] a provision prohibiting the deduction of contributions made to an organization, "a substantial part of whose activities is participation in partisan politics." S. REP. NO. 558, 73d Cong., 2d Sess. 26 (1934). This language was deleted in conference.

<sup>156</sup> CODE § 501(c)(3); *see* Treas. Regs. § 1.501(c)(3)-1(c)(3)(ii) (1959): "An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation."

<sup>157</sup> In *Seasongood v. Comm'r*, 227 F.2d 907, 912 (6th Cir. 1955), the court advanced a 5 percent guideline. *See* text accompanying notes 153-54 *supra*.

<sup>158</sup> Pub. L. No. 91-172, 83 Stat. 487.

<sup>159</sup> S. REP. NO. 91-552, 91st Cong., 1st Sess. 47 (1969).

<sup>160</sup> Actually, there is little authority to support reliance on a year-to-year test to determine substantiality. *Cf.* Treas. Reg. § 1.170-2(b)(5)(iii)(b) (1966), where a 4-year period test is used to ascertain whether a charitable organization "normally" receives a "substantial part" of its support from the general public or units of government.

<sup>161</sup> This was the approach taken by the Court of Claims in denying a deduction for

activities, a percentage standard is of less utility. An institution enjoying considerable prestige and influence might be considered as having a "substantial" impact in the legislative process solely on the basis of a single official position statement, an activity considered negligible when measured according to a percentage standard of time expended.

The regulations accompanying section 501(c)(3) state that an organization will be regarded as attempting to influence legislation if it: "(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation."<sup>162</sup> This regulation should not be interpreted as requiring as an essential element of an attempt to influence legislation that an organization explicitly advocate contacting members of a legislative body. Rather, it is sufficient that, as the *Internal Revenue Service Exempt Organizations Handbook* states, "the proscribed activity" involve any "appeals to the general public, not merely those that contain a request to contact a legislator or take other specific action." The *Handbook* concludes: "If the underlying purpose is the advocacy of particular legislation, then there has been an attempt to influence legislation within the meaning of the Code."<sup>163</sup>

The increasing tendency to involve institutions of higher education in political affairs underscores the need for more specific criteria as to what constitutes prohibited legislative or campaign-oriented activities by organizations exempt under section 501(c)(3).<sup>164</sup> Congress did not shy from specificity when dealing with private foundations in the Tax Reform Act of 1969.<sup>165</sup> In levying an excise tax on prohibited or "taxable" expenditures<sup>166</sup> — an obvious device

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a charitable bequest to an allegedly educational organization. *League of Women Voters v. United States*, 180 F. Supp. 379 (Ct. Cl. 1960).

<sup>162</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959). The regulation adds that the term "legislation" includes "action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in referendum, initiative, constitutional amendment, or similar procedure." *Id.*

<sup>163</sup> DEP'T OF THE TREASURY, INTERNAL REVENUE SERVICE, EXEMPT ORGANIZATIONS HANDBOOK § 762(2) (1970).

<sup>164</sup> "[I]t is reasonably clear that the opposition voiced to the use of university facilities by student groups for political campaigning, the widespread publicity concerning the increased politicization of campus life and the apparent increased degree of direct participation in political campaigns by active student groups, account for the present focus on the effect of these student activities on an institution's tax exempt status." Field, *Tax Exempt Status of Universities: Impact of Political Activities By Students*, 24 TAX LAW. 157, 173 (1970).

<sup>165</sup> CODE §§ 4940-48. The term "private foundation" is defined in *Id.* § 509.

<sup>166</sup> *Id.* § 4945.

for sanctioning the nonpayment or nonincurrence of such outlays — Congress was expansive in its proscription of attempts to influence legislation. Thus, a private foundation is “forbidden” to make any expenditure or incur any indebtedness for

any attempt to affect the opinion of the general public or any segment thereof [or] . . . any attempt to influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation (except technical advice or assistance provided to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be), other than through making available the results of nonpartisan analysis, study, or research.<sup>187</sup>

Likewise, a private foundation is “prohibited” from influencing “the outcome of any specific public election, or [carrying] on, directly or indirectly, any voter registration drive.”<sup>188</sup> The above example is not given to advocate the extension of such proscriptions to all the organizations described in section 501(c)(3), but solely to illustrate that precedent exists for more specificity in this area.

An important aspect of this matter of possible political involvement by colleges and universities where there have been manifestations of campus unrest is the question of the extent to which an institution may engage in “political activities” (largely efforts to influence legislation) related or incidental to its function as an educational organization.<sup>189</sup> In this context, the Internal Revenue Service

<sup>187</sup> *Id.* § 4945(e).

<sup>188</sup> *Id.* § 4945(d)(2). A private foundation is exempt from section 4945(d)(2), however, if it meets the requirements of section 4945(f).

<sup>189</sup> In *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930), the court, in holding gifts made to the American Birth Control League nondeductible for income tax purposes, said that attempts to influence legislation which relate to an organization's operations are not in violation of its tax exemption, but that attempts to influence other kinds of legislation are prohibited. The court stated:

[T]here are many charitable, literary and scientific ventures that as an incident to their success require changes in the law. A charity may need a special charter allowing it to receive larger gifts than the general laws allow. It would be strained to say that for this reason it became less exclusively charitable, though much might have to be done to convince legislators. A society to prevent cruelty to children, or animals, needs the positive support of law to accomplish its ends. It must have power to coerce parents and owners, and it does not lose its character when it seeks to strengthen its arm. A state university is constantly trying to get appropriations from the Legislature; for all that, it seems to us still an exclusively educational institution. *Id.* at 185.

In 1934, however, in the Revenue Act of 1934, ch. 277, § 23(o)(2), 48 Stat. 680, Congress prohibited deductions for contributions made to an organization a substantial part of whose activities is carrying on propaganda or otherwise attempting to influence legislation. This prohibition has generally been read as prohibiting *any* attempt to influence legislation which constitutes more than an insubstantial extent of an organi-

recently ruled that a university will not be considered engaged in prohibitive legislative activity if at the request of a congressional committee a representative of the institution testifies as an expert witness on pending legislation affecting the institution.<sup>170</sup> The university involved in the ruling maintains a prominent biology department and was asked by a congressional committee to furnish a representative to provide expert testimony on pending legislation bearing on biological research. The representative was specifically asked to advise the committee on how the proposed legislation would affect research being conducted by the university's biology department. He appeared before the committee and testified that the proposal would inhibit the institution's research program. The Internal Revenue Service, in finding no activity prohibited by section 501(c)(3), emphasized that the university "did not initiate any action with respect to pending legislation, but merely responded to an official request from a Congressional committee to testify."<sup>171</sup> Its ruling added: "The attempts to influence legislation as described in the regulations imply an affirmative act and require something more than a mere passive response to a Committee invitation."<sup>172</sup>

The import of this ruling is that passive influence on legislation is not a vice; but the ruling does not mean that participation in the legislative process with respect to legislation related to the institution's educational functions falls outside the pale of the standard of insubstantiality.<sup>173</sup> Congress has moved in this direction to a degree, however, in connection with the prohibitions on the activities

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zation's activities, regardless of whether such attempt was to influence legislation relating to the organization's exempt status. See, e.g., Rev. Rul. 70-449, 1970 INT. REV. BULL. NO. 9, at 35. Nevertheless, according to *Slee*, attempts to influence related legislation are not violative of the requirement that the organization be organized and operated "exclusively" for its exempt purpose: "All such activities are mediate to the primary purpose, and would not, we should think, unclass the promoters. The agitation is ancillary to the end in chief, which remains the exclusive purpose of the association." *Slee v. Commissioner*, *supra* at 185. Thus, it may be contended that Congress merely sought to reinforce the *Slee* holding by prohibiting substantial attempts to influence unrelated legislation, believing that attempts to influence related legislation were merely in furtherance of the purpose for which the organization was organized and operated.

<sup>170</sup> Rev. Rul. 70-449, 1970 INT. REV. BULL. No. 35, at 9.

<sup>171</sup> *Id.* at 10.

<sup>172</sup> *Id.*

<sup>173</sup> But one of the reasons stated in the ruling to support the finding of no institutional attempt to influence legislation contains the seeds of a theory which could germinate into a liberalization of the proscription on legislative activity by section 501(c)(3) organizations: "Moreover, while the legislative history of Section 501(c)(3) of the Code is silent on this subject, it is unlikely that Congress, in framing the language of this provision, intended to deny itself access to the best technical expertise available on any matter with which it concerns itself." *Id.* at 10.

of private foundations. It has tempered the prohibition on attempts to influence legislation through communication with individuals involved in the formulation of legislation with the following qualification:

[Such prohibition] shall not apply to any amount paid or incurred in connection with an appearance before, or communication to, any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation.<sup>174</sup>

Should a college or university be found to have engaged in political activities (campaign-oriented or legislative) to a prohibited extent, it would then be denominated an "action" organization. The regulations define an "action" organization as having at least one of three characteristics: (1) a "substantial part of its activities is attempting to influence legislation by propaganda or otherwise,"<sup>175</sup> (2) "it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office,"<sup>176</sup> and (3) its "main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation," and "it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public."<sup>177</sup>

Thus, the current state of the law in this area offers only the most general guidelines concerning the extent to which an attempt to "influence legislation," or the participation or intervention in any political campaign "on behalf of" any candidate for public office, might result in an institution of higher education being deemed in violation of section 501(c)(3). Certainly, since these restrictions extend to colleges and universities in their corporate or institutional capacity, a substantial expenditure of funds for lobbying efforts,<sup>178</sup> or an official proclamation of support for a candidate for public office by an institution in its own name, would violate section

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<sup>174</sup> CODE § 4945 (e).

<sup>175</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959).

<sup>176</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1959). The use of the phrase "directly or indirectly" seems to indicate that the Department of the Treasury intends to regard the fourth requirement of section 501(c)(3) as an absolute prohibition. See note 155 *supra*.

<sup>177</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (1959).

<sup>178</sup> See Rev. Rul. 67-293, 1967-2 CUM. BULL. 185.

501(c)(3). But in recent years, campus unrest has brought about increasing politicization of the higher education community, with the corresponding likelihood that the "political" or "legislative" undertakings of students, faculty, or other employees of a college or university will be interpreted by the Internal Revenue Service as the undertakings of the institution itself, thereby jeopardizing the institution's tax status.

Because of the particular focus of this article, the effect of an institution's involvement in "legislative" or "political" action on its federal tax status will be explored only within the context of the various manifestations of campus unrest. Throughout the late spring and summer and into the fall of 1970, students and faculty on college and university campuses engaged in a variety of efforts directed toward congressional elections. In particular, proponents of the Indochina War were largely opposed and antiwar candidates supported.<sup>179</sup> In varying degrees, college and university facilities and supplies (including classrooms, other buildings, research facilities, postage meters, telephones, mimeograph machines, and computers) were allegedly used in these campaign undertakings. Many nationwide coordinating groups, principally the Movement for a New Congress, were hastily born to channel the activities and energies of this form of campus activism.

Undoubtedly, the most well-known and accepted undertaking by institutions of higher education that was designed to effect the 1970 elections was a pre-November elections academic recess of approximately 2 weeks. This undertaking, known as the "Princeton Plan" (which triggered some congressional reaction about its propriety<sup>180</sup>), involved simply a rearrangement of the institution's academic calendar to enable students who wished to do so to participate in a political campaign. In most instances, the vacation time was made up elsewhere in the school calendar, and students and faculty were required to participate in the full academic pro-

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<sup>179</sup> See, e.g., Friedman, *Princeton Opens War on Congressional Hawks*, Detroit Free Press, May 8, 1970, at 1.

<sup>180</sup> For example, Senator Strom Thurmond (R-S.C.) said:

I feel that there is a serious question here as to whether or not Princeton can legally sponsor this project [the Princeton Movement for a New Congress] and provide facilities to aid in its success while maintaining a tax-exempt status under Section 501(c)(3). I intend to ask the Treasury Department to investigate this matter thoroughly to determine what action should be taken.

116 CONG. REC. S7099 (daily ed. May 13, 1970).

Cf. 116 CONG. REC. E6034 (daily ed. June 26, 1970) (remarks of Representative Thomas P. O'Neill, Jr. (D-Mass.)).



gram. Also, in nearly every case, the institution made no recommendations concerning candidates or issues.

Thus, the matter of what constitutes institutional as opposed to individual (and largely constitutionally protected) activity has become very relevant.

An excellent analysis prepared by the American Enterprise Institute for Public Policy Research on the subject of the implications of political activities of colleges and universities dwelled on the question of what political actions should be considered actions of the institution.<sup>181</sup> Unlike the situation with business corporations, the study observed, there is no clear understanding of what time belongs to the educational institution, especially where the faculty and students are concerned (the time expectations for administrators are of course more structured). Recognizing that it would not be feasible to fix the "time and effort that faculty and students owe to the university," the authors of the study express the opinion that the attempt should not be made: "The freedom and absence of structure that a university affords is not accidental; it is thought, probably correctly, to be conducive to scholarly effort."<sup>182</sup> The study also emphasized that "control of his time is one of the major items of compensation for the faculty member"<sup>183</sup> and that the vital areas of academic freedom and constitutionally-protected speech should not be infringed.

The study said that from the standpoint of the administration, it would be decidedly unfair to deprive an institution of its tax exemption on the basis of activities neither encouraged nor condoned by the institution and engaged in by individuals over whom it exercises little or no control. Indeed, the authors conclude, such a basis for deprivation of a tax exemption would also be "unwise" since then "the law would encourage political activism by students who wished to destroy the university's tax exemption."<sup>184</sup> And another commentator states: "If it is clear that the restrictions in section 501(c)(3) apply to the official acts of the university, it appears equally certain . . . that actions engaged in by members of the academic community, including students and faculty, in their individual

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<sup>181</sup> Bork, Krane, & Webster, *Political Activities of Colleges and Universities*, AM. ENTERPRISE INSTITUTE (Special Analysis No. 13, 1970).

<sup>182</sup> *Id.* at 13.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 14.

capacities and not on behalf of the institution cannot be attributed to the institution as an entity."<sup>185</sup>

Certainly the president, board of trustees, and administrative personnel of an institution of higher education are all in a position to officially commit the institution to a course of action aimed at influencing legislation or becoming involved in a political campaign. Recognizing this, the commentator quoted immediately above suggests:

So long as an educational institution does not expressly empower or otherwise authorize any student or faculty group to act for the institution and does not commit its resources in support of a partisan activity restricted by section 501(c)(3), the institution should be treated as acting in a partisan sense only through its official governing body (its board of trustees), its officers or administrative personnel acting at the direction of the governing body or other duly authorized bodies in accordance with the terms of the institution's governing charter.<sup>186</sup>

Nevertheless, the problem of whether students,<sup>187</sup> and particularly faculty,<sup>188</sup> can cause an otherwise unwilling institution to commit a proscribed act is a difficult one. One example is the issue of whether a student-operated newspaper may endanger the tax status of the sponsoring college or university by publicly endorsing a particular candidate for public office.<sup>189</sup> In this era of increasing politicization

<sup>185</sup> Field, *supra* note 164, at 164.

<sup>186</sup> *Id.* at 165.

<sup>187</sup> One of the approaches suggested to the President in the Brock report on student unrest (*see* note 74 *supra*) as a partial answer to campus unrest is to "encourage student participation in politics." The report states:

We found that the overwhelming majority of students with whom we visited hold little regard for either political party. The questioning of our system of government points to a loss of confidence in established institutions and that includes political parties. An increase in this loss of confidence poses a serious danger to the viable functioning of American government. Just as government must be responsive, so must political parties be responsive and open. 115 CONG. REC. 17,413 (1969).

<sup>188</sup> The authors of the American Enterprise Institute study apparently endorse the rule "that formal faculty political action [is] university action," on the ground that such a rule "would . . . contribute to one of the major policy objectives of Section 501(c)(3) by tending to keep universities out of partisan politics." Bork, Krane, & Webster, *supra* note 181, at 15. They admit, however, that such a policy presents difficulties.

<sup>189</sup> Representative Abner Mikva (D-Ill.), on February 2, 1971, introduced a bill that would eliminate any threat of an institution being denied tax exempt status because of editorial policies of its sponsored student newspaper. The bill, which would amend sections 501(c)(3) and 170(c)(2)(D) of the Code, states: "Provided, That for the purposes of this section, the editorial policy or activities of a student-operated school or college or university newspaper shall not be attributed to the educational institution to which the newspaper is related." H.R. 3300, 92d Cong., 1st Sess. (1971), *reprinted in* 117 CONG. REC. E378 (daily ed. Feb. 2, 1970). *See also* Abbott, *The Student Press: Some Second Thoughts*, 16 WAYNE L. REV. 989 (1970); Abbott, *The Student*

of the higher education community, the threat of such student activities endangering an institution's tax status becomes an issue of special significance.

The American Council on Education has issued guidelines in this area,<sup>190</sup> although their scope and purpose is limited. They constitute a warning to colleges and universities about the criteria of section 501(c)(3). Although most public institutions derive their exempt status from Code section 115(a) and thus technically are not subject to the restriction of section 501(c)(3),<sup>191</sup> the Council, acting upon the assumption that the restrictions should apply to public and private institutions alike insofar as political activities are concerned (particularly as the restrictions relate to intervention in political campaigns), issued the guidelines for all colleges and universities. In addition, because issuance of the guidelines would have been of little use unless approved in some manner by the Internal Revenue Service, the affirmative statements contained in the guidelines were limited to those in which the highest officials of the Internal Revenue Service could acquiesce. In situations where agreement was not possible, the guidelines call to the attention of the colleges and universities the possibility of problems.

Although the guidelines call attention to the general restriction on legislative activities, they were of necessity concerned principally with the proscription against an institution's intervention in any "campaign on behalf of a candidate for public office." This was primarily attributable to the public furor and congressional concern generated by campus activities in the fall campaigns of 1970.

The thrust of the American Council on Education guidelines is basically twofold: they sanction the so-called "Princeton Plan," which, as previously discussed, relates to the rearrangement of the academic calendar, and they recommend that colleges and universities be reimbursed by student and faculty groups that use facilities or services of the institutions in connection with off-campus election activities. The guidelines caution that extraordinary or prolonged use of university facilities, particularly by nonmembers of the university community, might raise questions; and they further advise against allowing off-campus groups to solicit funds in the name of

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*Press: Some First Impressions*, 16 WAYNE L. REV. 1 (1969); Hudgins, *Academic Freedom and the Student Press*, 6 WAKE FOREST INTR. L. REV. 40 (1969).

<sup>190</sup> AMERICAN COUNCIL ON EDUCATION GUIDELINES (June 21, 1970), excerpted in, 4 CCH 1971 STAND. FED. TAX REP. ¶ 3033.197.

<sup>191</sup> See Bork, Krane & Webster, *supra* note 181, at 48.

the institution which are to be used on behalf of candidates for public office.

Although the guidelines note that every member of the higher education community has a right to participate or not participate in the election process, they warn that those in a position to officially speak for a college or university should make it clear when expressing personal views that they are not speaking for their institution.

The basic problem faced in drafting the guidelines was the lack of any regulations, rulings, or legislative history which might suggest what Congress had in mind when enacting the restrictions relating to influencing legislation and participating in campaigns. It is clear that Congress had no specific "intent" as such with respect to either provision. Each resulted from the personal pique of an individual Senator to deal with a single private foundation whose activities were probably invalid under the law then in effect, and each was enacted without benefit of hearing or explanation.<sup>192</sup> There is not the slightest evidence that Congress realized it was dealing with the activities of public charities such as colleges or universities. And it is obvious that no thought was given to the possible constitutional implications of the strictures.

Neither the courts nor the Commissioner should attempt to build from such a weak foundation an interpretation "so burdensome (and discriminatory) as to place an unfair burden on the exercise of First Amendment freedoms."<sup>193</sup> Although it may be questioned whether colleges and universities have first amendment rights,<sup>194</sup> the government may not, in the guise of dealing with the tax exemption of the institution, curtail or limit the first amendment rights of the members of the educational community to speak, to publish, or to petition the Government. It is a mistake to argue that because a tax exemption is a "privilege," its denial may not infringe free speech.<sup>195</sup> The denial of a tax exemption to an educational institution is not the same, for example, as the denial of a deduction for legislative expenses, where the question is simply whether the taxpayer will pay for such activities out of his own pocket before or after taxes. The mere suggestion by the Internal Revenue Service that the tax-exempt status of a particular institution is subject to challenge could be dis-

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<sup>192</sup> See text accompanying notes 146-50 *supra*.

<sup>193</sup> Note, *Regulating The Political Activity Of Foundations*, 83 HARV. L. REV. 1843, 1863-64 (1970).

<sup>194</sup> See *Speiser v. Randall*, 357 U.S. 513 (1958).

<sup>195</sup> Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599-1600 (1960).

astrous, not only for that institution, but for all colleges and universities. Few institutions could exist without the unchallenged exempt status, dependent as they are on contributions and bequests. Thus, the possibility of infringement of constitutional freedoms is very real indeed. The very questioning of an exemption could cause an institution to restrict the activities of the members of the educational community. Moreover, although the proscription against participation or intervention in any political campaign on behalf of any candidate for public office is reasonably precise, the proviso that no substantial part of an exempt institution's activities may center on attempts to influence legislation is unconscionably vague. This raises an additional constitutional issue, namely, the first amendment "doctrine of overbreadth."<sup>196</sup>

No court should permit a vaguely worded provision to impose a penalty upon colleges and universities because of the exercise of rights guaranteed by the Constitution. This is particularly true where the penalty may endanger the very existence of the institution itself. Thus, in view of the vagueness of one of the provisions, the complete absence of any discernible legislative intent, and, especially, the failure of Congress to consider their constitutional implications, the politically restrictive provisions of section 501(c)(3) must be interpreted in a manner calculated to avoid first amendment problems.<sup>197</sup>

Read in light of the above, the American Council on Education guidelines must not be interpreted as suggesting restrictions on the activities of colleges and universities and the members of their communities. Rather, they must be viewed as a statement of clearly permissible activities with a warning about areas where a college or university in its institutional capacity should proceed with care and caution.

A clear distinction must be made between those activities which do not pertain to legislation (prospective or present), those activities which carry legislative implications, and those activities which involve intervention in "a political campaign on behalf of any candidate for public office." The first should not be affected by the restrictions of Section 501(c)(3). The second and third cannot be curtailed unless the institutional involvement is clearly established. Especially where the seemingly absolute prohibition against partici-

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<sup>196</sup> See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 871-75 (1970).

<sup>197</sup> See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

pation or intervention in a campaign for a candidate for office is concerned, the activities of members of the educational community cannot be attributed to the institution unless the institution's corporate involvement is established. Thus, as the guidelines indicate, the mere rearrangement of an academic schedule to make a vacation available immediately before an election is not institutional participation. Nor can the institution be charged with the activities of a political club located on the campus and provided with space and facilities, and whose members may engage in partisan politics and political campaigns. Nor can the institution be held accountable for the individual activities of its trustees, administrators, students, and faculty.

The collective activities of individuals making up the educational community cannot be attributed to the institution unless the institution permits them to speak for it. For this reason, the guidelines recommend that every institution should make it clear whether bodies purporting to speak in its name have authority to do so. Ordinarily, an institution should not be held accountable for making its facilities available on a nonpartisan basis with or without charge. And certainly, where campaigns are involved, a regular and usual charge should be made for facilities and services, particularly where those participating are not members of the academic community. The guidelines suggest, however, that the Internal Revenue Service is concerned that a seemingly neutral and impartial act may in fact constitute an endorsement of a candidate or candidates. Thus, an excessive and abnormal use of campus facilities (that would otherwise be devoted to educational activities) for political campaigns of candidates representing a single point of view could raise questions under the Code, even if a reasonable fee is charged. It is difficult, however, to conceive of a situation where such a massive use of facilities could give rise to a successful challenge of institutional involvement.

The great uncertainties attending interpretations of the Code in this area exemplify the pressing need for clarification of the applicable law. In this age of increasing individual activism, fairness dictates that the colleges and universities involuntarily caught up in activists' endeavors have a better appraisal of the laws that affect their functions and existence to such a considerable degree. The American Council on Education guidelines reflect the concern of institutions of higher education with these problems, and represent

an attempt to resolve some of the questions until the law itself is updated.

#### V. COLLEGES AND UNIVERSITIES AND THE FEDERAL CORRUPT PRACTICES ACT

The federal tax status of colleges and universities is always a matter of concern to them because exemption from taxation and support through private contributions is essential to their continued existence. Thus, the suggestion by the Department of the Treasury and the Internal Revenue Service that campus political activities might jeopardize a college or university's tax status could not be deemed totally unexpected within the higher education community. But the thought that student and faculty political activism might bring institutions within the proscriptions of the Federal Corrupt Practices Act<sup>198</sup> was a wholly alien concept.

The ostensibly applicable provision of the Act is section 610 of Title 18 of the *United States Code*, which reads in part as follows:

It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .<sup>199</sup>

Any corporation that violates section 610 is subject to a fine not in excess of \$5,000; every officer or director of a corporation who consents to such a violation may be fined up to \$1,000 or imprisoned up to 1 year, or both; and if an officer or director willfully violates section 610, he may be fined up to \$10,000 or imprisoned for 2 years, or both.<sup>200</sup>

The development of section 610 clearly reveals that its application to institutions of higher education was never a consideration in its enactment, and it has never been so applied. As an outgrowth of President Theodore Roosevelt's annual message to the Congress in 1906, a law prohibiting political contributions by corporations was first enacted in 1907. This statute<sup>201</sup> made unlawful "money contributions" by corporations in connection with any election involving the selection of Presidential and Vice-Presidential electors or

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<sup>198</sup> 18 U.S.C. § 610 (1964).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Act of Jan. 26, 1907, ch. 240, 34 Stat. 864.

House members, or any election by state legislatures of United States Senators. Eighteen years later, prompted by the Supreme Court's decision in *Newberry v. United States*<sup>202</sup> — which invalidated a federal ceiling on primary election expenditures by congressional candidates<sup>203</sup> — Congress, after reviewing existing legislation, enacted the Federal Corrupt Practices Act of 1925.<sup>204</sup> Present-day section 610 had its genesis in section 313 of that Act. The 1925 Act amended the term "money contributions," as used in the 1907 Act, to read simply "contribution." A contribution was defined as including a gift, subscription, loan, advance, or deposit of money or anything of value, and a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.<sup>205</sup>

Financial outlays by labor organizations in connection with federal elections throughout the 1940s generated further congressional action.<sup>206</sup> The Labor Management Relations Act of 1947<sup>207</sup> amended section 313 to include contributions by labor unions, and also to proscribe "expenditures" (as well as contributions) in connection with federal elections. During Senate debate on the bill, Senator Robert Taft stated that the latter expansion of section 313 was made "to plug up a loophole which obviously developed, and which, if the courts had permitted advantage to be taken of it, as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations."<sup>208</sup> The "loophole" to which Senator Taft made reference was the possibility that an indirect contribution might not be deemed a violation of Section 313.<sup>209</sup>

When Congress enacted Title 18 of the *United States Code* into

<sup>202</sup> 256 U.S. 232 (1921).

<sup>203</sup> Although the *Newberry* case did not directly concern itself with the Act of 1907, it was widely construed to have invalidated all federal corrupt practices legislation relating to nominations and primary elections. See, e.g., *United States v. CIO*, 335 U.S. 106, 114 (1948). Thus, Congress felt compelled to modify the 1907 Act, which had been applicable to nominating procedures, to expressly exclude primaries and conventions. See Federal Corrupt Practices Act of 1925, ch. 368, tit. III, § 302, 43 Stat. 1070 (now contained in 2 U.S.C. § 241 (Supp. V, 1970).

<sup>204</sup> Ch. 368, tit. III, §§ 301-18, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.).

<sup>205</sup> *Id.* § 302(d), at 1071.

<sup>206</sup> The War Labor Disputes Act of 1943, ch. 144, § 9, 57 Stat. 163, had made section 313 temporarily applicable to labor organizations during the continuation of the World War II hostilities and for 6 months after their cessation.

<sup>207</sup> Ch. 120, tit. III, 61 Stat. 136.

<sup>208</sup> 93 CONG. REC. 6439 (1947).

<sup>209</sup> Senator Taft stated: "If 'contribution' does not mean 'expenditure,' then a candidate for office could have his corporation friends publish an advertisement for him in the newspapers every day for a month before election." *Id.*



positive law in 1948,<sup>210</sup> section 313 was repealed and replaced with section 610. The judicial history of section 610 is as vacant as its legislative history with respect to its potential applicability to colleges and universities. Although a detailed overview of this judicial history<sup>211</sup> is outside the scope of this article, a gleaning of the cases indicates that section 610 embodies a twofold design: (1) to prevent powerful and wealthy corporations and labor unions from controlling elections, and (2) to prevent union officials from endorsing candidates or attempting to influence votes contrary to the wishes of individual union members.<sup>212</sup>

Most of the section 610 cases revolve around the question of what constitutes a prohibited "contribution or expenditure." Section 591 of Title 18<sup>213</sup> defines the term "contribution" to include: "a gift, subscription, loan, advance, or deposit, of money, or anything of value, and . . . a contract, promise, or agreement to make a contribution, whether or not legally enforceable." The same section defines "expenditure" to include: "a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and . . . a contract, promise, or agreement to make an expenditure, whether or not legally enforceable."<sup>214</sup>

In 1948, the Supreme Court, in *United States v. CIO*,<sup>215</sup> said that the term "expenditure" as employed in section 313 "is not a word of art. It has no definitely defined meaning and the applicability of the word to prohibition of particular acts must be determined from the circumstances surrounding its employment."<sup>216</sup> Stating that "the purpose of Congress is a dominant factor in determining meaning,"<sup>217</sup> the Court discussed the definition of "expenditure" as follows:

When Congress coupled the word "expenditure" with the word "contribution," it did so because the practical operation of § 313 in previous elections showed the need to strengthen the bars against the misuse of aggregated funds gathered into the control of a sin-

<sup>210</sup> Act of June 25, 1948, ch. 645, 62 Stat. 683.

<sup>211</sup> See Barton, *Corporations in Politics: How Far Can They Go Under the Law?*, 50 A.B.A.J. 228 (1964); Comment, *Constitutionality of Section 610 of the Federal Corrupt Practices Act*, 46 CALIF. L. REV. 439 (1958).

<sup>212</sup> See *United States v. Anchorage Cent. Labor Council*, 193 F. Supp. 504, 508 (D. Alas. 1961).

<sup>213</sup> 18 U.S.C. § 591 (1964).

<sup>214</sup> *Id.*

<sup>215</sup> 335 U.S. 106 (1948).

<sup>216</sup> *Id.* at 112.

<sup>217</sup> *Id.*

gle organization from many individual sources. Apparently "expenditure" was added to eradicate the doubt that had been raised as to the reach of "contribution," not to extend greatly the coverage of the section.<sup>218</sup>

Three years later, a federal district court, in *United States v. Construction Local 264*,<sup>219</sup> although conceding that "it is impossible to reconcile just exactly what the Congress intended by its definition of 'expenditure,'"<sup>220</sup> considered and rejected a construction of the term that would hold a corporation or labor organization in violation of section 610 whenever an officer or employee was permitted to "spend a few hours hauling voters to a place of registering, to vote, or to engage in any other type of political activity."<sup>221</sup>

In 1957, in *United States v. UAW*,<sup>222</sup> the Supreme Court reversed the dismissal of an indictment of a labor union charged with violating section 610 by using union dues to sponsor television broadcasts designed to influence the election of certain congressional candidates. The Court stated that "the evil at which Congress has struck in Section 313 is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party."<sup>223</sup>

As the preceding cases indicate, although the purposes of section 610 may be relatively clear, the question of what constitutes a prohibited "expenditure or contribution" has not been resolved and must be determined on a case by case basis. This absence of controlling precedents introduces considerable flexibility in the application of section 610. As a result, the issue is left open whether a college or university has made proscribed "indirect contributions" in connection with a federal election where "political activities" appear to be supported by the institution, either through statements of the administration or faculty, or through the provision of facilities or services in support of student or faculty groups actively engaged in political campaigns.

An obvious preliminary question, of course, is whether section 610 is even applicable to an institution of higher education. For

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<sup>218</sup> *Id.* at 122 (emphasis added). For further judicial interpretation of the interplay between the terms "expenditure" and "contribution," see *United States v. Painters Local 481*, 172 F.2d 854, 856 (2d Cir. 1949).

<sup>219</sup> 101 F. Supp. 869 (W.D. Mo. 1951).

<sup>220</sup> *Id.* at 876.

<sup>221</sup> *Id.*

<sup>222</sup> 352 U.S. 567 (1957).

<sup>223</sup> *Id.* at 589. See also *United States v. Lewis Food Co.*, 366 F.2d 710 (9th Cir. 1966).

section 610 to apply to an institution, the institution would have to be regarded as a "corporation." As noted earlier, there is little in the legislative history of section 610 and its predecessors, or in the relevant case law, to either support or rebut the assertion that an institution of higher education is a "corporation" for purposes of section 610.<sup>224</sup>

In *Sherman County v. Simons*,<sup>225</sup> decided in 1884, the Supreme Court indicated that, unless a contrary intent is expressly stated, the term "corporation" in the Nebraska constitution referred only to "private corporations," rather than to "municipal corporations" or "public corporations."<sup>226</sup> According to the weight of authority, state colleges and universities at least, assuming *arguendo* that they are corporate entities,<sup>227</sup> may be "public" rather than "private" corporations. For example, in *People ex rel. Board of Trustees of University of Illinois v. Barrett*,<sup>228</sup> decided in 1943, the Supreme Court of Illinois stated that although the University of Illinois was by statute a corporation, it was not a "private corporation," but rather was a "public corporation, organized for the sole purpose of conducting and operating the university as a state institution."<sup>229</sup> The court said that the university was a "public" corporation because private individuals had no interest or control over it and because it was entirely under the power of the state legislature.<sup>230</sup> And in *Kerr v. City of Louisville*,<sup>231</sup> decided in 1937, a Kentucky court of appeals held that a provision of the Kentucky state constitution prohibiting "corporations" from engaging in business unless authorized by charter or law to do so applied only to "private" corporations and not to the

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<sup>224</sup> There is some indication in the legislative history, however, that section 610 was not meant to be limited to profit-making corporations. During the Senate debate on section 304 of the Labor Management Relations Act of 1947, ch. 120, tit. III, § 304, 61 Stat. 159, Senator Robert Taft proffered his opinion that an incorporated religious organization "cannot take the church members' money and use it for the purpose of trying to elect a candidate or defeat a candidate, and they should not do so." 93 CONG. REC. 6550 (1947).

<sup>225</sup> 109 U.S. 735 (1884).

<sup>226</sup> *Id.* at 740.

<sup>227</sup> There is some question among the courts whether a state university can simultaneously exist as a separate corporate entity (that is, a "public corporation") and as an agent or instrumentality of the state. See, e.g., *Board of Regents of University of Wisconsin v. Illinois*, 404 Ill. 193, 88 N.E.2d 489 (1949), *appeal dismissed*, 339 U.S. 906 (1950).

<sup>228</sup> 382 Ill. 321, 46 N.E.2d 951 (1943).

<sup>229</sup> *Id.* at 338, 46 N.E.2d at 960.

<sup>230</sup> *Id.* at 339, 46 N.E.2d at 961.

<sup>231</sup> 271 Ky. 335, 111 S.W.2d 1046 (Ky. Ct. App. 1937).

University of Louisville.<sup>232</sup> Thus, the argument might be made that section 610 applies only to "private" corporations and thus is inapplicable to state colleges and universities.

That argument, however, would not benefit private colleges and universities. And it is doubtful that it would be of any benefit to most state institutions. By its own terms, section 610 is applicable to "any corporation whatever." The American Enterprise Institute study concluded: "The broad language of [section 610] and its legislative history leave little doubt that it covers incorporated colleges and universities with the exception of some institutions that may operate as integral parts of state governments."<sup>233</sup>

Assuming, then, that most colleges and universities, whether public or private, are "corporations" for purposes of section 610, what would constitute a prohibited "contribution or expenditure [by such an institution] in connection with" a federal election? Obviously, a direct contribution by an educational institution, in its own name, to a candidate for a federal elective office, or to one of the candidate's campaign committees, would violate section 610. And the legislative history<sup>234</sup> and case law surrounding section 610 indicates that the term "expenditure" should be read as "indirect contribution" in connection with federal elections. For example, in *United States v. UAW*,<sup>235</sup> the Supreme Court held that the use of union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress constituted "precisely the kind of indirect contribution" contemplated by the term "expenditure."<sup>236</sup> Besides encompassing "indirect contributions," section 610 "expenditures" include more than just cash outlays; an "expenditure" may be "anything of value."<sup>237</sup> Thus, the deployment of an educational institution's facilities, or members of its administration, faculty, students, or employees, on behalf of a political candidate for federal office, when done as an official act of

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<sup>232</sup> For other state institutions of higher education deemed "public corporations," see *Page v. Regents of Univ. Sys. of Georgia*, 93 F.2d 887 (5th Cir. 1937), *rev'd on other grounds sub nom. Allen v. Regents of the Univ. Sys. of Georgia*, 304 U.S. 439 (1938); *Moscow Hardware Co. v. Colson*, 158 F. 199 (C.C.N.D. Idaho 1907); *In re Royer's Estate*, 123 Cal. 614, 56 P. 461 (1899); *Todd v. Curators of the Univ. of Missouri*, 347 Mo. 460, 147 S.W.2d 1063 (1941); *State ex rel. Wyoming Agricultural College v. Irvine*, 14 Wyo. 318, 84 P. 90 (1906), *aff'd*, 206 U.S. 278 (1907).

<sup>233</sup> Bork, Krane & Webster, *supra* note 181, at 26.

<sup>234</sup> See notes 208-09 *supra* & accompanying text.

<sup>235</sup> 352 U.S. 567 (1957).

<sup>236</sup> *Id.* at 585.

<sup>237</sup> 18 U.S.C. § 591 (1964); see text accompanying note 214 *supra*.

the university, could be deemed a violation of section 610. Conversely, as long as an institution of higher education officially maintains neutrality on political issues, no violation of section 610 should result when members of the educational community, as individuals, engage in political activities without institutional sponsorship or financial support.<sup>238</sup>

There is also a question of how large a contribution or expenditure must be made before section 610 is violated. On its face, section 610 is absolute; it prohibits *any* contribution or expenditure. There is some indication, however, that some kind of a substantiality test might be read into section 610. In *United States v. Construction Local 264*,<sup>239</sup> a federal district court said in dictum: "[I]t is hard to conceive that the Congress had in mind when it enacted [section 610] that an uncertain, insignificant amount such as is involved here [\$350.45] should be considered as an expenditure and used as a basis for a criminal prosecution."<sup>240</sup>

At least one conclusion can be attempted in regard to the likelihood of an institution of higher education being found in violation of section 610 as a result of its own political activities or those of its members. Under Code section 501(c)(3) an educational institution will lose its tax-exempt status if it participates in or intervenes "in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." This provision is broader than section 610, which proscribes a "contribution or expenditure" by "any corporation whatever . . . in connection with" federal elections. Therefore, an institution of higher education which satisfies Code section 501(c)(3) will presumably be operating outside the interdictions of section 610. But, of course, there is no guarantee that the United States Attorney, or the courts, will be at all influenced by the position of the Commissioner of Internal Revenue.

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<sup>238</sup> This analysis raises anew questions confronted earlier (*see* notes 181-97 *supra* & accompanying text) as to which individuals speak and act officially for an institution, and when acts (often constitutionally protected) of administrators, faculty, students, and employees can be differentiated from official acts of the institution. *See* Haley, *Students, Politics, and Education: Notes on the Crisis*, 46 COLLEGE & U. 61 (1970).

<sup>239</sup> 101 F. Supp. 873 (W.D. Mo. 1951).

<sup>240</sup> *Id.* at 873. The court reached this conclusion, even after admitting that the maxim of *de minimus non curat lex* does not apply in criminal cases. *Id.* *See also* *United States v. Painters Local 481*, 172 F.2d 854, 856 (2d Cir. 1949), where expenditures totaling \$143.64 were characterized as "trifling."

## VI. PROPOSED CAMPUS UNREST LEGISLATION IN THE 91ST CONGRESS

As mentioned earlier,<sup>241</sup> one of Congress' prime responses to campus unrest has been to toughen existing, and write more expansive, federal criminal laws. Although thus far the sole product of this approach has been Title XI of the Organized Crime Control Act of 1970,<sup>242</sup> congressmen have authorized tens of proposals to further use the federal criminal laws in this area. Additionally, many civil penalties for campus disruptions have been advanced. None of these proposals came to fruition during the 91st Congress — largely because of the opposition of the committee leaders involved — but further activity in this regard may be anticipated in the 92nd Congress in direct proportion to the degree of campus unrest in 1971 and 1972. Also, amendments designed to curb campus unrest will almost assuredly be offered to the legislation authorizing existing federal support of higher education, which must be considered in 1971.

Among the most popular of the proposals considered by the 91st Congress were amendments to the federal criminal code designed to prohibit the disruption of the administration or operations of federally-assisted institutions of higher education.<sup>243</sup> The proposed amendments would have imposed criminal penalties for acts of appropriation, occupation, damage, or destruction of property of federally-assisted educational institutions, or acts of denial or abridgement of the right of any person to participate in or enjoy the benefits of activities conducted or provided by such institution, where such acts were committed with intent to prevent, obstruct, or interfere with the orderly administration or operation of such institution.<sup>244</sup>

Another heavily-sponsored proposal<sup>245</sup> would have made it a crime to deny any person the benefits of any educational program

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<sup>241</sup> See text accompanying notes 41-49 *supra*.

<sup>242</sup> Pub. L. No. 91-452, 84 Stat. 922.

<sup>243</sup> This approach was initiated in the 91st Congress by Senator Robert C. Byrd (D-W.Va.) and Representative William J. B. Dorn (D-S.C.), in legislation introduced on April 22, 1969, and April 24, 1969, respectively. S. 1929, H.R. 10544, 91st Cong., 1st Sess. (1969).

<sup>244</sup> See H.R. 10617, H.R. 10796, H.R. 10856, H.R. 10892, H.R. 10940, H.R. 11731, 91st Cong., 1st Sess. (1969); H.R. 19456, H.R. 19457, 91st Cong., 2d Sess. (1970).

<sup>245</sup> On June 2, 1969, 20 House members, led by former Representative William C. Cramer (R-Fla.), introduced the proposed Student Antiviolence Act of 1969. H.R. 11802, 91st Cong., 1st Sess. (1969). See also H.R. 12060, H.R. 12238, H.R. 13261, 91st Cong., 1st Sess. (1969); H.R. 18080, 91st Cong., 2d Sess. (1970) (the proposed First Amendment Freedoms Act).

or activity where federal financial support is involved. Other variations on this theme were: a bill to assure the safety of all students enrolled in institutions of higher learning;<sup>246</sup> the proposed Student Disturbances Act of 1969,<sup>247</sup> designed to assist those who desire to pursue their education in a disruption-free campus atmosphere and to assure reasonable protection of the federal investment in higher educational programs; and a new criminal statute to curb campus violence by making unlawful the carrying of a weapon in violation of any law, regulation, ordinance or rule, on the property of any institution of higher education that receives or disburses federal funds.<sup>248</sup>

Despite the emphasis by many members of Congress on the use of federal criminal statutes to counter campus unrest, the most widespread demand throughout the 91st Congress was that colleges and universities, under penalty of having their federal support suspended, formulate reasonable programs to curb student and faculty disorders. This approach was often coupled with a requirement that federal assistance to professors and instructors who foment disorders through violations of law be terminated.<sup>249</sup>

The legislation devoted solely to the subject of campus unrest that came closest to enactment in the 91st Congress, was the proposed Higher Education Protection and Freedom of Expression Act of 1969.<sup>250</sup> Introduced on June 9, 1969, and referred to the House

<sup>246</sup> H.R. 11830, 91st Cong., 1st Sess. (1969) (the proposed Safe Campus Act, introduced on June 3, 1969, by Representative James G. O'Hara (D-Mich.)).

<sup>247</sup> S. 2677, 91st Cong., 1st Sess. (1969) (introduced on July 22, 1969, by Senator John L. McClellan and four cosponsors). See also H.R. 11731, S. 1988, 91st Cong., 1st Sess. (1969) (the proposed Academic Freedom Protective Act of 1969).

<sup>248</sup> H.R. 10672, 91st Cong., 1st Sess. (1969) (introduced on April 29, 1969, by Representative Ed Foreman (R-N.M.)).

<sup>249</sup> See H.R. 10074, 91st Cong., 1st Sess. (1969), introduced on April 5, 1969, by Representative William M. Harsha (R-Ohio). Commenting later on his bill, Representative Harsha said that "he felt it would be more effective to go to the pocket-books of the administrators . . . We are trying to give [college and university officials] some guts." Wash Post, May 8, 1969, § A, at 12. Thus, H.R. 10074 would have required the suspension of federal financial assistance to colleges and universities that are experiencing campus unrest and fail to take appropriate corrective measures within a reasonable time. The measure would also have required the termination of federal financial assistance to teachers, instructors, and lecturers guilty of violation of any law in connection with such unrest. This concept was subsequently subscribed to by several representatives of both parties of the House. See H.R. 10136, H.R. 10806, H.R. 10821, H.R. 10848, H.R. 10895, H.R. 10911, H.R. 10929, H.R. 10970, H.R. 11010, H.R. 11018, H.R. 11029, H.R. 11043, H.R. 11065, H.R. 11837, H.R. 11972, 91st Cong., 1st Sess. (1969). See also S. 4514, H.R. 19455, 91st Cong., 2d Sess. (1970).

<sup>250</sup> H.R. 11941, H.R. 12102, 91st Cong., 1st Sess. (1969) (introduced on June 9, 1969, by Representative Edith Green (D-Ore.)). See also H.R. 17718, 91st Cong., 2d Sess. (1970). See generally H.R. 11491, H.R. 11589, H.R. 11653, 91st Cong.,

Special Subcommittee on Education, the thrust of the bill was a requirement that colleges and universities receiving federal financial assistance file with the United States Commissioner of Education "certificates of affirmation" certifying that they had adopted codes of campus conduct. These codes of conduct were to be developed through consultation among students, faculty, and administrators. "As a minimum," a code would have had to (1) assure adequate opportunity for free expression, consultation, and orderly discussion of educational and associated problems concerning trustees, administrators, faculty, and students; (2) govern administrative practice, and the conduct of students, faculty and other staff, and visitors on an institution's property and facilities; (3) assure that fair procedures would be adopted to deal with cases of administrative personnel, faculty and other staff, and students, charged with violation of an institution's rules and regulations, and (4) clearly set forth a table of penalties for violations of such rules and regulations. Under the proposed act, where an institution failed to file a certificate, the Commissioner of Education would have been obligated to "immediately give notice [of ineligibility] to all federal departments and agencies providing financial assistance for programs and activities at the institution." The bill also would have extended and expanded the provisions of the Higher Education Amendments of 1968, relating to the denial of federal assistance to students involved in serious campus disturbances.<sup>251</sup>

During the month of June, 1969, the subcommittee struggled with the legislation, often thwarted by procedural maneuvers effected by the bill's opponents. Representative John L. Erlenborn (R-Ill.), a cosponsor of the legislation, expressed the main problem the subcommittee faced in drafting a campus unrest bill: "On the one hand, we must stop violence and disruption in expressing dissent, and, on the other, we must make sure that peaceful means of free expression and demonstration are available."<sup>252</sup> When the bill was taken up by the parent committee, the provision that would have denied assistance to institutions failing to file a certificate was

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1st Sess. (1969), all of which were introduced by various Representatives to supplement Representative Green's initially proposed Act. The proposed Higher Education Protection and Freedom of Expression Act of 1969 was introduced in the Senate by Senator Robert C. Byrd (D.-W.Va.). S. 2055, 91st Cong., 1st Sess. (1969). The Act continued to receive support in the second session of the 91st Congress. See H.R. 19129, H.R. 19397, H.R. 19688, 91st Cong., 2d Sess. (1970). See also H.R. 19455, 91st Cong., 2d Sess. (1970).

<sup>251</sup> See notes 81-86 *supra* & accompanying text.

<sup>252</sup> Wash. Evening Star, June 4, 1969, § A, at 7.



struck down by a vote of 19 to 16. The parent committee then voted 18 to 17 to send the remainder of the bill back to the subcommittee, from which it never reemerged. Representative Edith Green (D-Ore.), chairman of the subcommittee, said that the bill was "quite moderate" compared with other measures being introduced in the House,<sup>253</sup> and correctly predicted that the effect of these votes would be to transfer the issue to the House floor where it would be translated into efforts to insert portions of the bill as riders in other legislation.<sup>254</sup>

A number of other proposals designed to cope with campus unrest were advanced in the 91st Congress. Injunctive relief to prevent serious disruption of federally-assisted colleges and universities was advocated.<sup>255</sup> A bill was offered to create a Federal Higher Education Mediation and Conciliation Service that would proffer its services in any dispute which may lead or had led to campus violence.<sup>256</sup> And a study of student unrest on American campuses was offered.<sup>257</sup>

Congressional response to incidents of campus unrest and disorder has generally been that of vindictiveness and anger. This fact is reflected not only in the provisions inserted in various appropriations and authorization bills,<sup>258</sup> but also in the numerous forms of proposed legislation dealing directly with campus unrest. Much of the campus unrest legislation introduced in the 91st Congress (and early in the 92nd<sup>259</sup>) has been largely punitive and frequently harshly repressive.<sup>260</sup> Perhaps the chief characteristic of these mea-

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<sup>253</sup> N. Y. Times, July 2, 1969, § 1, at 1, col. 8. An editorial in *The Washington Post* agreed: "Mrs. Green's proposals were 'moderate' — or at any rate more moderate than a number of recklessly punitive measures that have been suggested by some congressional disciplinarians untrammelled by any experience with or responsibility for education." Wash. Post, July 3, 1969, § A, at 14.

<sup>254</sup> Wash. Post, July 2, 1969, § A, at 1.

<sup>255</sup> S. 2520, S. 2827, and H.R. 13842, 91st Cong., 1st Sess. (1969). See also H.R. 13261, 91st Cong., 1st Sess. (1969).

<sup>256</sup> H.R. 10570, 91st Cong., 1st Sess. (1969).

<sup>257</sup> S.J. Res. 109, 91st Cong., 1st Sess. (1969). See also S. Res. 192, 91st Cong., 1st Sess. (1969), a resolution, submitted by the late Senator Everett M. Dirksen (R-Ill.), calling on the Committee on the Judiciary to investigate the impairment of the internal security of the United States arising from disorders at educational institutions.

<sup>258</sup> These bills are discussed in full in section III *supra*.

<sup>259</sup> See S. 14, H.R. 359, H.R. 825, H.R. 920, H.R. 1501, H.R. 1668, H.R. 1669, H.R. 2643, H.R. 3949, H.R. 5600, H.R. 6125, 92nd Cong., 1st Sess. (1971).

<sup>260</sup> Joseph Kraft has written unsparingly of "the political philistines now itching for all the usual rabble-rousing reasons to lay their murderous hands on the student dissenters." Kraft, *Vast Progress Is Being Made In Cooling Off the Campuses*, Wash. Post, June 10, 1969, § A, at 19.

asures is their unimaginativeness in coping with campus unrest — nearly all are set in a punishment mold — and their authors' inability or unwillingness to appreciate the extent to which campus unrest is outside the proper and, in most instances, effective reach of federal legislation. The various legislative proposals bear out the admonition of the Commission on Campus Unrest that legislative "solutions" to the "problem" of campus unrest are nonexistent.<sup>261</sup> Nonetheless, as has been stressed throughout, the American citizenry in general has been demanding an end to campus disturbances and violence. Thus Congress may be simply carrying out its function of mirroring public opinion and bringing it to bear on policy formulation. As Senator Mark O. Hatfield (R-Ore.) remarked:

I think it is interesting that most of the really strong and rather vindictive measures [on the subject of campus unrest] were found primarily in the House rather than the Senate. This more than likely reflects the fact that the House considers itself closer to general public sentiment than the Senate.<sup>262</sup>

## VII. CAMPUS UNREST AND THE STATE LEGISLATURES

The state legislatures have responded to the increased incidence of campus unrest<sup>263</sup> with unmitigated zeal. This section contains a brief survey of their various responses.<sup>264</sup>

The Commission on Campus Unrest estimated that by the time its report was completed in mid-1970, more than 30 states had enacted a total of nearly 80 laws on the subject of campus unrest.<sup>265</sup> More states have acted since that time. Glenn S. Dumke, Chancellor of the California State Colleges, wrote in 1969 that the "stirring among students and young people generally for change" is generating "repressive legislation" in many states.<sup>266</sup> These observations are

<sup>261</sup> CAMPUS UNREST REPORT, *supra* note 9, at 213.

<sup>262</sup> Hatfield, *Public Pressures on Higher Education*, in *THE TROUBLED CAMPUS* 75, 78 (G. Smith ed. 1970).

<sup>263</sup> See text accompanying notes 1-8 *supra*.

<sup>264</sup> For a comprehensive review of state legislative activity in this area during most of 1969 and 1970, see I EDUCATION COMM. OF THE STATES, *HIGHER EDUCATION IN THE STATES*, No. 7, Sept. 1970.

<sup>265</sup> CAMPUS UNREST REPORT, *supra* note 9, at 40.

<sup>266</sup> Dumke, *Bad Day at Generation Gap*, in *THE UNIVERSITY AND REVOLUTION* 121, 125 (G. Weaver & J. Weaver eds. 1969). Chancellor Dumke added that "[m]ore than seventy-five separate bills dealing with control of campus disturbances are currently pending in the two houses of the California Legislature." *Id.* Gary R. Weaver, an instructor in the School of International Service at The American University, Washington, D.C., and coeditor of *The University and Revolution*, writes that the "numer-

confirmed by surveys conducted under the direction of the Office of Research and Information of the National Association of State Universities and Land-Grant Colleges. The association's analyses show that in calendar year 1969, 64 statutes directly relating to campus unrest and disturbances were enacted in 32 states,<sup>267</sup> while in calendar 1970, 17 new laws on the subject were approved in 12 states.<sup>268</sup>

In terms of actual enactments, the most recurrent mode of legislative response to campus unrest in the state legislatures has been criminal code provisions which impose fines or imprisonment, or both, upon individuals convicted of preventing the free and normal use of college and university property and facilities by members of the higher education community. For example, the Michigan Legislature enacted a provision (effective August 1, 1970) proscribing as a misdemeanor the "unreasonable prevention or disruption of the customary and lawful functions" of a "publicly owned and operated institution of higher education" by "occupying space necessary therefor or by use of force or by threat of force" by any person who violates the "properly promulgated rules of the institution" and willfully refuses to "vacate the premises, building or other structure of the institution" after having been directed to do so by the institution's chief administrative officer or his designee.<sup>269</sup> Similarly, the Washington State Legislature, at the request of the University of Washington, passed an act (effective May 14, 1970) making it unlawful, as a gross misdemeanor, for "any person, singly or in concert with others, to interfere by force or violence with any admin-

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ous bills . . . being written to control the campus 'revolts' are reflections of "a very strong reactionary response in what might be termed the traditional middle class." *Introduction to id.* at 7 (reprinted by permission of Prentice-Hall, Inc., Englewood Cliffs, New Jersey). Joseph Alsop offered this opinion: "In all state legislatures, and in Congress, too, the troubles in the universities have . . . caused a perfect spate of generally ugly bills." Alsop, *Congress Has Whip It Can Use Against Student McCarthyism*, Wash. Post, Apr. 30, 1969, § A, at 27.

<sup>267</sup> J. Gonzalez, Jr., State Laws of 1969 Dealing with Student Unrest, Nov. 5, 1969 (memorandum of law prepared for the National Association of State Universities and Land-Grant Colleges). Mr. Gonzalez, who is a Special Assistant for Legislative Relations at Rutgers, the State University, has observed that "1969 has been a year of unusual legislative activity throughout the country in the area of student unrest and campus disorders" although the "judicious use of restraint by governors and legislative leaders has kept and will keep the number of laws enacted in 1969 in this area down to less than two per state."

<sup>268</sup> National Ass'n of State Univs. and Land-Grant Colleges, Circular No. 161, Feb. 12, 1971. One reason for the lower number of campus unrest statutes passed during 1970 is that 11 state legislatures did not convene during that year, and only three state legislatures were not in session in 1969.

<sup>269</sup> MICH. STAT. ANN. § 28.790(41) (Cum. Supp. 1971). See also *id.* § 28.790(42) (Cum. Supp. 1971) (a misdemeanor to intentionally enter a university building to injure another person or disrupt the customary function of the institution).

istrator, faculty member or student of any university, college, community college or public school who is in the peaceful discharge or conduct of his duties or studies," as well as for "any person, singly or in concert with others, to intimidate by threat of force or violence any administrator, faculty member or student of any university, college, community college or public school who is in the peaceful discharge or conduct of his duties or studies."<sup>270</sup> In 1969, the Nevada Legislature made unlawful the commission of "any act in a public building [including any 'component of the University of Nevada System used for any university purpose'] or on the public grounds surrounding such building which interferes with the peaceful conduct of activities normally carried on in such building or on such grounds" by any person who "refuses to leave such building or grounds upon request by the proper official."<sup>271</sup> Likewise, on July 2, 1969, the Governor of Florida approved a state legislative enactment making it a misdemeanor "for any person to intentionally act to disrupt or interfere with the lawful administration or functions of any educational institution in this state."<sup>272</sup> A 1966 Maryland statute provides that if any person refuses to leave a public building or grounds of a public institution, having been requested to do so by an authorized employee, and the "surrounding circumstances are such as to indicate to a reasonable man that such person . . . is acting in a manner disruptive of and disturbing to the conduct of normal business by such . . . institution," a fine or imprisonment shall result.<sup>273</sup>

Undoubtedly, the most extensive state legislation setting criminal penalties for the disturbance of or interference with the operations of an institution of higher education was passed by the Ohio General Assembly in 1970.<sup>274</sup> The new legislation added four types of proscribed disruptive acts to the Ohio Criminal Code, under the general heading of "Offenses Against Society." The acts, when committed on either public or private college or university campuses, are punishable as misdemeanors. The new provisions specify that no person, under circumstances "which create a substantial risk of disrupting the orderly conduct of lawful activities at a college or university" shall willfully or knowingly (1) enter upon the premises of a college or university without permission or refuse to depart such

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<sup>270</sup> WASH. REV. CODE § 28B.10.570-.571 (1970).

<sup>271</sup> NEV. REV. STAT. § 203.119 (1969).

<sup>272</sup> FLA. STAT. ANN. § 877.13 (Supp. 1971).

<sup>273</sup> MD. ANN. CODE art. 27, § 577A(2) (repl. vol., 1971).

<sup>274</sup> OHIO REV. CODE ANN. §§ 2923.61, 3345.22-.26 (Page Supp. 1970).

premises upon authorized request, (2) violate any condition imposed during a state of emergency as declared by an institution, (3) urge or incite others to violate any of the foregoing restrictions, or (4) disrupt, by force or violence, the orderly conduct of an institution's lawful activities or engage in any activity which threatens or involves serious injury to persons or property at an institution. In addition, public colleges and universities are now authorized, through their boards of trustees or presidents, to declare a state of emergency when there is a clear and present danger of disruption of orderly conduct of the institution through riot, mob action, or other substantial disorders, as well as to take action to preserve order and discipline during the emergency period. The legislation also institutes a special procedure (involving a hearing before a referee, possibly resulting in suspension, with automatic dismissal following a court conviction) for rapid suspension and dismissal of students, faculty, or staff from public universities for the commission of one or more of 20 public offenses, ranging from maiming or disfiguring a person to "campus disruption."

Other state enactments utilize or extend the law of criminal trespass as a means of preventing campus disturbances. In 1969, the Maryland General Assembly enacted the following provision:

Whoever shall trespass upon the grounds of the University of Maryland, any of the State colleges, any community college or public school or who refuses or fails to leave the buildings or grounds of these institutions after being requested to do so by an authorized employee of the institution, or who wilfully damages or defaces any of the buildings, furnishings, statues, monuments, memorials, trees, shrubs, grasses, or flowers on the grounds of such institutions shall be guilty of a misdemeanor . . . .<sup>275</sup>

In 1969, the Tennessee General Assembly wrote into law the following criminal trespass provision:

Any person who enters the campus, buildings, or facilities of a junior college, state university, or public school and is committing, or commits, any act which interferes with, or tends to interfere with, the normal, orderly, peaceful, or efficient conduct of the activities of such campus or facility may be directed by the chief administrative officer, or employee designated by him to maintain order on such campus or facility, to leave such campus, buildings, or facilities. If such person fails to do so, he shall be guilty of trespass . . . .<sup>276</sup>

In some states, criminal trespass, when committed in the course

<sup>275</sup> MD. ANN. CODE art. 27, § 577B (repl. vol., 1971).

<sup>276</sup> TENN. CODE ANN. § 39-1215 (Supp. 1970).

of engaging in other operative behavior, has been made a felony. Thus, a 1969 New York Legislature enactment provides:

A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a building, and when, in the course of committing such crime, he:

1. Possesses, or knows that another participant in the crime possesses, an explosive or a deadly weapon; or
2. Possesses a firearm, rifle or shotgun . . . and also possesses or has readily accessible a quantity of ammunition which is capable of being discharged from such firearm, rifle or shotgun; or
3. Knows that another participant in the crime possesses a firearm, rifle or shotgun under circumstances described in subdivision two [above].<sup>277</sup>

Campus unrest has also resulted in a number of antiloitering statutes, typified by an enactment of Tennessee's General Assembly, which makes it a misdemeanor "to loiter at night upon or about the grounds of any public school or the grounds of any church property."<sup>278</sup> Related statutes, such as that enacted in Oklahoma in 1970, attempt to cope with the campus activities of nonstudents by providing that any person not a student, officer, or employee who refuses to leave the campus facilities of any college, university, or public school upon request is guilty of a misdemeanor.<sup>279</sup>

Another form of criminal provision often resorted to by state legislatures to curb campus unrest has been an amplification of the concept of "disorderly conduct." A provision passed by the Tennessee General Assembly in 1970 makes it a misdemeanor for any person "to disturb the peace of others by violent, profane, indecent, offensive or boisterous conduct or language; or by conduct calculated to provoke violence or a violation of the law."<sup>280</sup> In 1969, the California Legislature made it a misdemeanor to maliciously and willfully disturb the peace or quiet of any junior college, state college, or state university by loud or unusual noise, offensive conduct, or threatening, quarreling, challenging to fight or fighting, or by using any vulgar, profane, or indecent language.<sup>281</sup>

Several states now impose criminal penalties on those who carry firearms on college or university property without authorization. As an illustration, a New York State statute (effective September 1, 1969) provides that "[a]ny person who knowingly has in his pos-

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<sup>277</sup> N.Y. PENAL LAW § 140.17 (McKinney Supp. 1971).

<sup>278</sup> TENN. CODE ANN. § 39-1211 (Supp. 1970).

<sup>279</sup> OKLA. STAT. ANN. tit. 21, § 1373 (Supp. 1971).

<sup>280</sup> TENN. CODE ANN. § 39-1213 (Supp. 1970).

<sup>281</sup> CAL. PENAL CODE § 415.5 (West Supp. 1971).

session a rifle, shotgun or firearm in or upon a building or the grounds, used for educational purposes, of any school, college or university without the written authorization of such educational institution . . . ." is guilty of a misdemeanor.<sup>282</sup> Similarly, an Alabama statute provides that any person possessing materials for assembling or manufacturing fire bombs, and intending to use such firebombs once assembled or manufactured for the purpose of violating any state or federal criminal law is guilty of a misdemeanor.<sup>283</sup>

Other newly enacted criminal statutes impose punishment for damaging property of any educational institution,<sup>284</sup> wrongfully entering public facilities,<sup>285</sup> and assembling unlawfully.<sup>286</sup>

In addition to criminal enactments, civil laws of various states have also been implemented in the hope of extinguishing student disturbances. These civil provisions often appear in the form of threatened revocation of state financial assistance, particularly the denial of individual assistance following conviction in a court of law. For example, a Tennessee enactment provides that "[a]ny part-time or full-time student who is convicted of any criminal offense growing out of any student riot, protest, or disturbance shall forfeit any further right to any student loan or financial assistance supported by state funds," and any aid being received by a student at the time of such a conviction "shall be immediately terminated."<sup>287</sup> A similar condition on student financial aid now exists in Oklahoma, where student loans, grants, fellowships, teaching fellowships, or other means of financial assistance from either state or federal funds may be revoked or terminated for such activities as rioting, and selling illegal drugs.<sup>288</sup> In California, any student convicted of a campus disruption charge is ineligible for state educational assistance for a period of at least one semester and up to 2 years.<sup>289</sup>

In apparent emulation of the United States Congress,<sup>290</sup> several states have added provisions to appropriation acts denying state aid thereunder to students engaging in various forms of campus unrest. For example, the Michigan Legislature added to its appropriation act

<sup>282</sup> N.Y. PENAL LAW § 265.05(10) (McKinney 1967).

<sup>283</sup> ALA. CODE tit. 14, § 125(16) (Supp. 1969).

<sup>284</sup> See, e.g., IND. ANN. STAT. § 10.4531 (Supp. 1970).

<sup>285</sup> See, e.g., S.C. CODE ANN. § 16-551(2) (Supp. 1969).

<sup>286</sup> See, e.g., TEX. PEN. CODE art. 295a (Supp. 1971).

<sup>287</sup> TENN. CODE ANN. § 49-4120 (Supp. 1970).

<sup>288</sup> OKLA. STAT. ANN. tit. 70, § 624 (Supp. 1970).

<sup>289</sup> CAL. EDUC. CODE § 31291 (West Supp. 1971).

<sup>290</sup> See section III *supra*.

for state institutions of higher education for fiscal year 1971 language prohibiting the use of state funds for "the education of students convicted of the offense of interference with normal operations of any public institution of higher education"<sup>291</sup> or for the education of students who possess any firearm or other dangerous weapon in any university unless the weapon is registered therewith.<sup>292</sup> Still another condition of this appropriation act provides "that a student who causes wilful damage to public property on a campus or other facility of a college or university and subject to all other legal penalties shall be expelled from the college or university."<sup>293</sup> Similarly, the Illinois State Legislature inserted in an appropriation measure for higher education a section denying payments to faculty members or other university employees convicted of interfering with a public institution of higher education and also proscribing the use of funds thereunder for the education of students convicted of that offense.<sup>294</sup>

Some state legislatures have enacted provisions which operate to revoke or deny assistance to institutions which fail to meet certain requirements. As an illustration, a New York statute (effective April 21, 1969) requires the governing board of "every college chartered by the regents or incorporated by special act of the legislature" to "adopt rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof." Such rules and regulations must then be filed with the regents and the commissioner of education; failure to do so renders such college ineligible "to receive any state aid or assistance until such rules and regulations are duly filed."<sup>295</sup>

Under a 1970 Florida statute, the Board of Regents of the state universities, in adopting regulations relating to admission of prospective students, must take into account any past actions of an applicant which have been determined to have disrupted or interfered with the orderly conduct, processes, functions or programs of any university, college or junior college.<sup>296</sup>

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<sup>291</sup> [1970] Mich. Pub. Act No. 83, § 9.

<sup>292</sup> *Id.* § 10.

<sup>293</sup> *Id.* § 11.

<sup>294</sup> See, e.g., [1970] Ill. Pub. Act § 76-2339 appropriation for the University of Illinois. This offense is defined in ILL. ANN. STAT. ch. 38, § 21.2-2 (Smith-Hurd 1970). See also proposed House Bills 822, 823, Ill. 77th Gen. Ass'y, Reg. Sess. (1971).

<sup>295</sup> N.Y. EDUC. LAW § 6450 (McKinney Supp. 1971).

<sup>296</sup> FLA. STAT. ANN. § 240.052(2)(c) (Supp. 1971).



Other approaches to campus unrest devised by state legislatures include mandatory adoption of campus regulations,<sup>297</sup> automatic suspension of students under certain circumstances (such as possession of drugs<sup>298</sup>), regulation of campus speakers,<sup>299</sup> increase in the out-of-state tuition,<sup>300</sup> bans on unauthorized sound equipment,<sup>301</sup> and, of course, investigative studies.<sup>302</sup>

From this overview it can be seen that state legislatures have matched or surpassed the efforts of Congress to curb campus unrest. The suspicion is, however, that the stringency of these state statutes, like that of their federal counterparts, will do as much to exacerbate campus unrest as to quell it. Overlooked by both the federal and state legislators is the fact that the burden of maintaining an appropriate academic climate lies with the colleges and universities themselves. And these institutions are best able to deal with most forms of campus unrest.

### VIII. CONCLUSION

Government response to contemporary campus unrest is manifested at all levels — federal, state, and local — and is involving all branches — legislative, executive, and judicial. Campus unrest is producing a variety of studies (both government and privately

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<sup>297</sup> *E.g.*, FLA. STAT. ANN. § 240.045 (Supp. 1971), which reads:

In addition to such other rules and regulations as are required for the management and operation of the state university system, the board of regents shall adopt rules and regulations for the lawful discipline of any student, faculty member, or member of the administrative staff who intentionally acts to impair, interfere with, or obstruct the orderly conduct, processes, and functions of a state university. Said rules and regulations may apply to acts conducted on or off campus when relevant to such orderly conduct, processes, and functions.

Similarly, in 1970, the Arizona Legislature ordered the governing boards of the state's educational institutions to establish rules and regulations governing the conduct of students, faculty, and other staff, and members of the public while on the institution's property. ARIZ. REV. STAT. § 13-1093 (Supp. 1970). *See also* id. § 13-1092 (containing substantial penalties for those who would interfere with the peaceful conduct of educational institutions).

<sup>298</sup> *See, e.g.*, FLA. STAT. ANN. § 239.582 (Supp. 1971).

<sup>299</sup> *See, e.g.*, H.R. Res. 74, Mo. 75th Gen. Ass'y, Reg. Sess. (1969).

<sup>300</sup> Out-of-state tuition was increased in Connecticut as a result of some incidents at the University of Connecticut. *See* J. Gonzalez, Jr., *supra* note 267.

<sup>301</sup> *See, e.g.*, N.C. GEN. STAT. § 116-213 (Supp. 1969).

<sup>302</sup> The Legislature of New Mexico attempted to establish a joint committee of the legislature to study the policies and administrative structure of state-supported institutions of higher education and related administrative agencies. Ch. 88, [1970] N.M. Laws. However, the act was vetoed by the Governor on March 5, 1970.

Commissions have been established by a state executive branch in New York, for example, where the Governor established the so-called Henderson Commission, which issued a report in early 1970.

sponsored<sup>303</sup>) and proposals, and is increasingly transforming the nature and goals of the American higher education system.<sup>304</sup> Campus unrest is also generating a multitude of new federal and state statutes, is affecting federal and state support of higher education, and is stimulating a rapid expansion in legal concepts of academic freedom.

This panorama of developments is not to be regarded lightly, for these developments raise profound issues of federal-state, university-government, and student/faculty-government relations. We shall not dwell on the oft-discussed question of which governmental responses to campus unrest are most appropriate,<sup>305</sup> we believe, however, that the answers lie in the realization that unrest on our campuses mirrors unrest in our society generally, or, more accurately perhaps, is but one component of domestic unrest.

Further governmental response to campus unrest will largely be a product of the nature and frequency of future manifestations of such unrest. The national assumption early into 1971 appears to be that campus disruptions and violence are receding, and that college and university students, more apathetic than angry, are returning to former academic pursuits. Thus, one commentator concludes that "[a]fter six years of mounting campus turmoil, students seem suddenly to have reverted to a quiet, private style of life."<sup>306</sup> The President of Yale University, Kingman Brewster, is quoted as saying that the new mood on the campuses is one of "eerie tranquillity."<sup>307</sup> And a February, 1971, Gallup Poll announced the discovery that college students now reject radical politics.<sup>308</sup> Countless other commentaries are perpetuating the same theme: that the campuses will remain serene because the students have rejected the ways of violence and "revolution."<sup>309</sup> Yet the likelihood of further campus disruption persists. "[E]arlier reports of student apathy, fatigue, passive alienation or rejection of mass protest may have been premature," writes one observer, but "the real test will come in the spring

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<sup>303</sup> See notes, 5, 9, 21, 22, 24, 74 *supra*.

<sup>304</sup> See S. HOOK, *ACADEMIC FREEDOM AND ACADEMIC ANARCHY*, chs. 1 & 7 (1970).

<sup>305</sup> See, e.g., *CAMPUS UNREST REPORT*, *supra* note 9, at 7-15, 213-31.

<sup>306</sup> *TIME*, Feb. 22, 1971, at 14.

<sup>307</sup> *Id.*

<sup>308</sup> *Wash. Post*, Feb. 17, 1971, § A, at 4.

<sup>309</sup> E.g., Childs, *Students Grow More Tolerant*, *Wash. Post*, Feb. 15, 1971, § A, at 19, col. 3; Karnow, *Campus Apathy on War*, *id.*; *Wall Street J.*, Feb. 10, 1971, at 1, col. 1 (Eastern ed.); cf. Stern, *'Kidology' — A Revival*, *Wash. Post*, Feb. 24, 1971 § A, at 19, col. 6.

when prospects for trouble reach a customary seasonal peak."<sup>310</sup> Changes on the domestic scene (including the next round of national elections) and in foreign affairs (particularly any escalation of the Indochina War<sup>311</sup>) could bring renewed campus disorders. Thus, whether the coming months will signal true campus calm or another cycle of student/faculty action and government reaction remains to be seen.

Relative quiet on the campus may well forestall the harsher varieties of governmental reaction. On the other hand, should the academic years ahead bear witness to disruptive and violent modes of campus unrest, more punitive legislation from Congress and state legislatures can be safely predicted. The latter development would increase the pressure on colleges and universities to promulgate and enforce stronger regulations governing campus behavior, and would add to the growing burdens on legislatures and courts to distinguish legitimate dissent and participation in policy formulation from illegal protest and violence.

Campus unrest is not a matter readily susceptible to federal control or "solution." Although there are certain efforts the federal government can undertake to indirectly minimize the more extreme forms of unrest — for example, regulation of interstate transportation of explosives and provision of assistance to state and local governments in improving law enforcement techniques<sup>312</sup> — its most effective response to campus unrest would be through the following twofold approach. First, Congress should reexamine the nature and levels of federal support of higher education and reevaluate the use of institutions of higher education as instruments of government policy. Second, the Administration should adhere to the advice of its Commission on Campus Unrest that "[c]ampus unrest, together with the unrest that exists throughout our society, frames issues that the American people cannot ignore,"<sup>313</sup> and devote itself to restoring faith throughout the American public that their national government is capable of coping with the large issues of domestic concern. With regard to the latter objective, Professor Kenneth Keniston has recommended that the federal government give particular attention to

major changes in national policies [including] (1) an end to the war in Vietnam and a change in foreign policy so that any other

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<sup>310</sup> Wash. Post, Feb. 16, 1971, § A, at 5, col. 3.

<sup>311</sup> Once again, teach-ins in protest of the Indochina War are being organized. See Wash. Post, Feb. 18, 1971, § A, at 12, col. 3.

<sup>312</sup> See CAMPUS UNREST REPORT, *supra* note 9, ch. 5.

<sup>313</sup> *Id.* at 214.

such war becomes impossible, (2) a reallocation of national resources to end structural racism and to begin to eliminate poverty, (3) a commitment to provide assistance to the impoverished nations of the world, (4) a sustained national effort to preserve a livable environment, and (5) an intensive examination of the adequacy of the existing political, social, and economic institutions of American society in light of the needs of the last third of the twentieth century.<sup>314</sup>

Governmental response to contemporary campus unrest has been largely couched in negativism. The challenge ahead for governmental leaders is to resist the temptation to play politics with campus unrest, and to pursue policies that advance the national interest, reduce unrest in our society at large, and, at the same time, enable college and university administrators to cope with campus disturbances by means of methods tailored to the needs of individual institutions. Senator William B. Saxbe (R-Ohio) has expressed the following view:

There is very little that the Federal Government can or ought to do about this danger [of student dissidents who advocate violence]. The answer lies in adequate law enforcement at the local level; but perhaps more important than that, it lies in the ability of the dissidents among the students and the faculty at each of these institutions [to make it] clear that tolerance of violence has ended, that the "crazies," as they have been colloquially dubbed, are endangering not only the reforms that are sought, but that they are perceived to be a menace by the peaceful dissidents. Until the campus revulsion drives the violent minority out, heavy-handed Federal reaction will only add fuel to the flame.<sup>315</sup>

As long as dissatisfaction with the policies and actions of our national government exists, there will be some degree of campus unrest. Thus, the higher education community must move to ward off harmful, repressive and often retaliatory governmental response. Colleges and universities must effectively "govern themselves [or] they will be governed by others."<sup>316</sup>

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<sup>314</sup> Keniston, *What's Bugging the Students?*, 51 EDUCATIONAL RECORD 116 (1970). President Nixon, in a letter responding to the report of the Commission on Campus Unrest, complimented Chairman William W. Scranton with the following remark: "[In] your report you have clearly avoided the cliché that the only way to end campus violence is to solve once and for all the social problems that beset our nation . . ." XIX HIGHER EDUCATION AND NATIONAL AFFAIRS, Dec. 18, 1970, at 7.

<sup>315</sup> Saxbe, *Student Unrest and the Law*, 18 CLEV. MAR. L. REV. 429, 435 (1969).

<sup>316</sup> AMERICAN COUNCIL ON EDUCATION, A DECLARATION ON CAMPUS UNREST (1969).