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## 'Lose in Vietnam, Bring Our Boys Home'

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# “LOSE IN VIETNAM, BRING THE BOYS HOME”

ROBERT N. STRASSFELD\*

*This Article examines the contest over dissent and loyalty during the Vietnam War. The Johnson and Nixon Administrations used an array of weapons to discourage or silence antiwar opposition. These included criminal prosecutions for “disloyal speech,” a tool that they used with less frequency than some other administrations in times of war; prosecutions for other “crimes” that served as pretext for prosecuting disloyal speech; infiltration and harassment; and an attempt to characterize their critics as disloyal. The antiwar movement, in turn, responded to allegations that dissent equaled disloyalty by offering an alternative vision of loyalty and patriotism. In so doing, they recast notions of allegiance, betrayal, support of the troops, and our obligations in the face of conflicting loyalties.*

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\* Professor of Law, Case Western Reserve University School of Law. B.A., 1976, Wesleyan University; M.A., 1980, University of Rochester; J.D., 1984, University of Virginia. The title of this Article comes from President Richard Nixon’s November 3, 1969, address to the nation on the Vietnam War, a speech that came to be known as the “silent majority” speech. Nixon stated: “In San Francisco a few weeks ago, I saw demonstrators carrying signs reading: ‘Lose in Vietnam, bring the boys home.’” I am grateful to the archival staff at the Wisconsin Historical Society for their assistance and to Mary Jane Finan at Case Western Reserve University School of Law, for her unwavering persistence in retrieving interlibrary loan materials for me. I thank Jonathan Entin for his comments on an earlier draft of this Article and my colleagues for their comments on a faculty workshop presentation of this Article as a work in progress. Thank you, also, to Dean Gerald Korngold and Case Western Reserve University School of Law for summer research support and to Tamia Collins for her research assistance. I am also grateful to David Connolly for giving me permission to quote in full his poem, *To the Irish Americans Who Fought the Last War*. Neither W.D. Ehrhart nor Marjorie Cohn knew me prior to my contacting them for help related to this Article. I am thankful for their gracious help to a stranger. I am especially thankful to the countless people throughout our history who have had the courage to risk their comfort, their security, their lives, their liberty, and their reputations to say “no” to demands for unquestioning acquiescence and obedience in the name of loyalty. The patriotic sacrifice of these dissenters inspires this work and has made us a better people. Regrettably, the need for patriotic dissent appears unending.

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### INTRODUCTION

Call it peace, or call it treason.

Call it love, or call it reason.

But I ain't marchin' anymore.

—Phil Ochs<sup>1</sup>

The Vietnam War was almost certainly America's most unpopular war. Our memories of the 1960s and 1970s are seared with images of angry protest. As has typically been true at times of war, those who made American foreign policy during the Vietnam War expected the nation to follow them unquestioningly. When those expectations were disappointed, they used the power of the state to try to enforce loyalty. Drawing on an array of weapons to discourage or silence antiwar opposition, the Johnson and Nixon Administrations sometimes responded to antiwar activity through the courts. Both Administrations also pressed the FBI, CIA, and military intelligence into service to spy on and disrupt antiwar activity. Beyond such exercises of licit and illicit prosecutorial and police power, both Administrations sought to win the war of public opinion. To that end, they invoked a number of interrelated ideas and images to suggest that opponents of the war were disloyal and that their criticism would hurt the country, the war effort, and our troops, while giving aid and comfort to the enemy.

By definition, a successful antiwar movement thwarts the declared military designs of a nation at war. Such success, in turn,

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1. PHIL OCHS, I AIN'T MARCHIN ANYMORE (Elektra Records 1965).

necessarily inures to the benefit of the nation's designated enemy. Of course, that does not mean that opposition in times of war is necessarily unpatriotic. In times of war and other national crisis, pressure to conform and to stifle doubts about the wisdom, morality, or legality of the nation's policy may be overwhelming, and antiwar dissent may reflect great patriotic sacrifice.<sup>2</sup> Nevertheless, because antiwar criticism puts the dissenter at odds with her government at a time when that government ardently demands unity and support, the antiwar critic may find herself struggling with issues of loyalty and the appropriate limits of dissent.

This Article examines the uses of loyalty and allegations of disloyalty during the Vietnam War. Not surprisingly, it finds that just as the nation was divided on the Vietnam War, it was also divided on the appropriateness of antiwar dissent.

This Article shows that in contrast to some of America's previous wartime governments, the Johnson and Nixon Administrations did not undertake a broad program of prosecution for "disloyal speech."<sup>3</sup> To be sure, they did use law as a sanction against individual antiwar critics and against antiwar organizations, but they used the model of prosecuting seditious speech infrequently, preferring often to pursue their critics on other, pretextual grounds. And they did not use law nearly as extensively as some of its predecessors had as a means of squelching dissent. Though they were less likely to prosecute dissenters for crimes of disloyal speech, both Administrations and their allies tried to discredit their critics with suggestions of disloyalty.<sup>4</sup> Opponents of the war, in turn, were forced to respond to

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2. Here and throughout this Article, my focus is on opposition to the war in Vietnam and its expansion to Laos and Cambodia. When I use the term "dissent" or such synonyms as "criticism" or "opposition," I am referring to criticism of U.S. policy in Southeast Asia. This focus is necessarily artificially narrow. The antiwar movement was but one of a number of important social movements in the approximately fifteen-year period that we often refer to as the "sixties." As some of the discussion below will show, it is not really possible to see the antiwar movement in isolation from the other great social issues of the day. Many of the war's opponents were not nearly so compartmentalized in their criticism, and as some of my examples will show, their criticism of American policy often pointed to the implications of the war for such other concerns as racial and economic justice.

3. Here and throughout this Article, I use the term "disloyal speech" as a shorthand to identify speech critical of American policy in Southeast Asia. I do not mean to imply a normative judgment about that speech, and, indeed, I believe that the critics of the Vietnam War that I describe here were both right in their criticism and motivated by, among other things, strong patriotic sentiments.

4. Both Administrations also resorted to unlawful means to suppress dissent by infiltrating and trying to disrupt antiwar groups. This Article touches on those efforts only briefly.

this criticism and to think about questions of dissent and loyalty. In so doing, they articulated an alternative vision of allegiance, betrayal, support for the troops, and our obligations in the face of conflicting loyalties. This Article examines the contest over the meanings of loyalty that resulted. Part II begins by examining the uses of legal sanctions against antiwar dissenters during the Vietnam War, after it describes, for purposes of contrast, the suppression of critical opposition to World War I. It then turns to the Johnson and Nixon Administrations' uses of the assertion of disloyalty in order to discredit and silence their antiwar critics. It traces how the allegation of disloyalty was refined and enhanced over time through the articulation of a number of interconnected themes regarding the harmfulness of antiwar dissent and the suspect sources of their criticism. Part III then turns to the response of the antiwar movement. Because the antiwar movement was so diverse, and because the character of antiwar dissent ranged from participation in marches or demonstrations or support of peace candidates to attempts to disrupt the country's ability to make war, or at least to raise the costs of doing so, it is impossible to capture a single response to the allegations of disloyalty. Instead, Part III draws on a diverse array of participants in the antiwar movement.<sup>5</sup>

## I. THE USES OF LOYALTY IN THE VIETNAM WAR ERA

In a striking departure from its practice in some of America's earlier wars, the federal government was generally reluctant to use law as a means of enforcing loyalty and protecting the home front from perceived subversion during the Vietnam War. The war prompted no treason prosecutions, as had World War II.<sup>6</sup> Nor did it result in anything that paralleled Japanese internment. Neither the federal government, nor any state, imposed martial law, and no

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5. Because the issue of loyalty was especially acute for those who did attempt to obstruct the war effort, this Part draws heavily on those whose dissent rose to that level. This group includes those who attempted to interfere with the military's ability to raise a fighting force by refusing induction and encouraging others to do the same, or by offering support and assistance to young men who resisted the draft. It also includes those within the military, and their supporters, whose dissent raised the stakes for the military as it tried to carry out its mission in Southeast Asia.

6. There were a number of World War II era treason prosecutions. *See, e.g.*, Haupt v. United States, 330 U.S. 631 (1947) (upholding the treason conviction of the father of one of the Nazi saboteurs caught in the United States); Cramer v. United States, 325 U.S. 1 (1945) (reversing treason conviction); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), (affirming treason conviction of so-called "Tokyo Rose"), *cert. denied*, 343 U.S. 935 (1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (affirming treason conviction of "Axis Sally").

sympathizers with the enemy cause were sentenced to death.<sup>7</sup> To be sure, the government did attack its opponents, both through the courts and through extralegal, often illegal, means. This pattern increased as the war dragged on. Nevertheless, seldom did the federal government rely on the available array of loyalty crimes, relying instead on other claimed criminal violations. Further, while the response to dissent became increasingly repressive, and it could be devastating to individuals and organizations that were singled out for the federal government's wrath, the scope and success of repression through the courts paled in comparison to prior wars. Despite the federal government's efforts, a vibrant, if highly fractured, peace movement grew and flourished.

#### A. *The Model of Legal Repression: The World War I Experience*

The contrast with World War I era repression is instructive. On the same evening that Congress declared war against Germany, Representative Edward Webb and Senator Charles Culberson introduced legislation intended to punish both espionage and disloyal speech that might undermine the war effort.<sup>8</sup> Amongst other things,

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7. The federal government and state or territorial governments have declared martial law a number of times during war or other crises. In his defense of New Orleans in the War of 1812, General Andrew Jackson imposed martial law. ROBERT V. REMINI, *THE BATTLE OF NEW ORLEANS* 58 (1999). A number of Copperheads, Northern Confederate sympathizers, were tried by military tribunals in the Midwest during the Civil War. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 4-7 (1866); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251-52 (1863). For a discussion of civil liberties during the Civil War, including the use of military tribunals, see generally MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998). During this same period, the United States also tried Native Americans from the Dakota tribe before military tribunals in Minnesota. Ultimately, thirty-eight Dakota Indians were hanged. Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 13 (1990). After the attack on Pearl Harbor, the Territorial Governor of Hawaii imposed martial law. See *Duncan v. Kahanamoku*, 327 U.S. 304, 307 (1946); Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawaii, 1941-1946*, 19 U. HAW. L. REV. 477, 478 (1997). States have also declared martial law in times of crisis or perceived crisis. For instance, during the Dorr Rebellion in 1842, the sitting government of Rhode Island declared martial law in order to subdue the challenge from a new government created pursuant to a constitutional convention that revised the state's constitution. The United States Supreme Court upheld this action in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Other states have declared martial law in the face of labor strife. See generally *THE COURT-MARTIAL OF MOTHER JONES* (Edward M. Steel ed., 1995). (describing the arrest and trial of labor organizer Mother Jones and others during the West Virginia coal wars of 1913 in Kanawha County).

8. PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 73-77 (1979).

the Espionage Act of 1917 made it a crime to:

[M]ake or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States . . . cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces . . . or . . . willfully obstruct the recruiting or enlistment service of the United States. . . .<sup>9</sup>

Violations of the Act were punishable by up to twenty years imprisonment and a \$10,000 fine.<sup>10</sup> The following year, Congress, at the behest of the Wilson Administration, strengthened the Espionage Act through the Sedition Act of 1918 amendments.<sup>11</sup> Amongst other things, the Act prohibited speaking or writing:

[A]ny disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring [any of the above] into contempt, scorn, contumely, or disrepute . . . .<sup>12</sup>

Under the Espionage and Sedition Acts, federal prosecutors initiated over 2,000 criminal cases against critics of the war. These prosecutions resulted in over a thousand convictions.<sup>13</sup> Attorney General Thomas W. Gregory pronounced of war critics, "May God have mercy on them for they need expect none from an outraged people and an avenging government."<sup>14</sup> Gregory's sentiments were widely shared within the Administration. Secretary of the Treasury, William Gibbs McAdoo asserted that "misguided people who talk inopportunity of peace . . . should be silenced . . . [since] every pacifist speech . . . is in effect traitorous."<sup>15</sup>

The Justice Department especially targeted the leadership of the Socialist Party and the militant Industrial Workers of the World ("IWW"). Most famously, the Justice Department targeted Socialist Party leader Eugene V. Debs, but many others were swept up in the

9. Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917).

10. *Id.*

11. Sedition Act, ch. 75, § 3, 40 Stat. 553, 553 (1918) (repealed 1921).

12. *Id.*

13. HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES*, 1917-21, at 46-47 (1960).

14. H.C. PETERSON & GILBERT C. FITE, *OPONENTS OF WAR, 1917-18*, at 14 (1968) (quoting a statement in the *New York Times*).

15. *Id.* at 149.

suppression of dissent, as well. While some prosecutions dealt specifically with attempts to persuade young men to resist conscription, a wide-range of critical comments fell under the Act's net. In Wisconsin, Louis Nagler faced prosecution for saying that the YMCA and the Red Cross "are nothing but a bunch of grafters" and that the war was being run by "[a] bunch of capitalists composed of the steel trust and munition makers."<sup>16</sup> Socialist Party official Rose Pastor Stokes was convicted and sentenced to ten years imprisonment for her statement, "I am for the people, while the government is for the profiteers."<sup>17</sup> Filmmaker Robert Goldstein ran afoul of the Espionage Act by depicting in his film, *The Spirit of '76*, British atrocities committed during the Revolutionary War.<sup>18</sup> The government seized the film and convicted Goldstein of violating the Espionage Act. In upholding the conviction, the United States Court of Appeals for the Ninth Circuit explained it was reasonable to conclude that Goldstein was motivated by a desire to "raise hatred . . . against the ally of the United States, and as a probable effect to [obstruct] the necessary cooperation between the allied countries against the enemy."<sup>19</sup> In a series of cases decided in 1919, *Debs v. United States*,<sup>20</sup> *Frohwerk v. United States*,<sup>21</sup> and *Schenck v. United States*,<sup>22</sup> the Court rejected First Amendment challenges to the Espionage Act and upheld convictions under the Act.

Repression during the period took other forms as well. The Espionage Act empowered the Postmaster General to seize from the mails materials deemed "nonmailable" because they violated the Act or because they encouraged "treason, insurrection, or forcible resistance to any law of the United States." Postmaster General Albert S. Burleson applied this provision aggressively.<sup>23</sup> Under Attorney General Gregory's direction, federal agents raided the

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16. *United States v. Nagler*, 252 F. 217, 218 (W.D. Wisc. 1918).

17. *Stokes v. United States*, 264 F. 18, 20 (8th Cir. 1920) (remanding for a new trial).

18. See *Goldstein v. United States*, 258 F. 908, 911 (9th Cir. 1919).

19. *Id.* at 910.

20. 249 U.S. 211 (1919).

21. 249 U.S. 204 (1919).

22. 249 U.S. 47 (1919).

23. In the first month after the enactment of the Act, Burleson censored fifteen newspapers. MURPHY, *supra* note 8, at 99. While his targets were mostly the radical press, such as the socialist *Milwaukee Leader*, he acted against other newspapers critical of the Administration's war policies, as well. DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 75-78 (1980). Most famously, this provision led to the *Masses* case, involving seizure of the literary and political journal *THE MASSES* and revocation of its second-class postage privilege. *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).



offices of the IWW.<sup>24</sup> Concerned that discontented African Americans might support the enemy, military intelligence began a program of surveillance of the African American community that would continue into the 1960s and 70s.<sup>25</sup> Further, the passions stirred up by the Wilson Administration in support of the war sparked vigilante actions against real and apparent opponents of the war.<sup>26</sup>

### B. *Criminal and Other Sanctions of Vietnam-Era Disloyal Speech*

The government brought far fewer prosecutions for disloyal speech during the Vietnam War, though the cases that the government pursued did have an impact beyond the individuals who were brought to trial.<sup>27</sup> Those prosecutions that did focus on antiwar speech tended to arise in the context of counseling or demonstrating resistance to the draft. Servicemen also found themselves subject to punishment for pure speech crimes. Other prosecutions, though motivated by the government's concern about the antiwar message of the targeted individuals and organizations, did not rely on crimes of disloyal speech. Instead, they focused on other, ostensible crimes and alleged conspiracies to commit crimes. The Nixon Administration, in particular, made substantial use of the conspiracy weapon.<sup>28</sup>

The case that bore the closest resemblance to the World War I era prosecutions was the conspiracy trial of the "Boston Five," Dr. Benjamin Spock, Michael Ferber, Mitchell Goodman, Reverend William Sloane Coffin, and Marcus Raskin. The five were indicted in January 1968 for engaging in a conspiracy to interfere with the operations of the Selective Service by counseling, aiding and abetting draft registrants to refuse or evade induction and to fail to have their

24. KENNEDY, *supra* note 23, at 171.

25. Stephen G. Tompkins, *In 1917, Spy Target Was Black America*, MEM. COM. APPEAL (Memphis, Tenn.), Mar. 21, 1993, at A7. Once launched, this practice of spying on African American organizations that were, or were perceived to be, militant continued beyond the war years. For a discussion of the early years of this practice, see generally THEODORE KORNWEIBEL, JR., "SEEING RED": FEDERAL CAMPAIGNS AGAINST BLACK MILITANCY, 1919-1925 (1998).

26. KENNEDY, *supra* note 23, at 68, 73-75; PETERSON & FITE, *supra* note 14, at 54-60.

27. Opposition took many forms that might prompt prosecution. Desertion from the military, refusal of induction into the military, blockading munitions trains and draft induction centers, firebombing ROTC buildings on campuses, and bombing the army mathematics research building at the University of Wisconsin at Madison, are all examples of behaviors that were motivated by opposition to the war. However, my focus in this Section is on "crimes" of disloyal speech and on prosecutions that, while ostensibly directed at behavior other than speech, used that purported behavior as a pretext for punishing disloyal speech.

28. *See infra* notes 51-57 and accompanying text.

draft registration materials in their possession.<sup>29</sup> The prosecution arose out of a series of events that were part of a fall 1967 offensive to encourage draft-age men to resist the draft. These events included publication of a document entitled “A Call to Resist Illegitimate Authority,” which pledged support for draft resisters, and they culminated in “Stop the Draft Week” in mid-October.<sup>30</sup> On October 16, Ferber and Coffin participated in a church service and turn-in ceremony at Boston’s Arlington Street Church.<sup>31</sup> That day, resisters turned in 214 draft cards and burned 67 others during the ceremony.<sup>32</sup> On October 20, all of the defendants participated in a demonstration in front of the Justice Department that included additional draft card turn-ins.<sup>33</sup> The demonstration culminated in a meeting in which several people, including all of the defendants except for Ferber, attempted to surrender 994 cards to Assistant Attorney General John McDonough and left them in the room when he refused to accept them.<sup>34</sup>

All of the defendants except for Raskin were convicted on the conspiracy charge. On appeal, the United States Court of Appeals

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29. MICHAEL S. FOLEY, *CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR* 227 (2003).

30. *See id.* at 90–109 (describing preparation for October 16 demonstrations). For a discussion of “Stop the Draft” Week beyond Foley’s New England focus, see NANCY ZAROULIS & GERALD SULLIVAN, *WHO SPOKE UP? AMERICAN PROTEST AGAINST THE WAR IN VIETNAM, 1963–1975*, at 129–35 (1984). The government alleged a number of overt acts. *See United States v. Spock*, 416 F.2d 165, 168 (1st Cir. 1969); FOLEY, *supra* note 29, at 227–28. Raskin, the director of the progressive think tank, the Institute for Policy Studies, had, along with Arthur Waskow and Robert Zevin authored “A Call to Resist Illegitimate Authority.” FOLEY, *supra* note 29, at 227–28. “A Call to Resist” was published in the *New Republic* and the *New York Review of Books* in October 1967 with 320 signatures and condemned the war as unconstitutional and a violation of the 1954 Geneva Accords. *A Call to Resist Illegitimate Authority*, N.Y. REV. BOOKS, Oct. 12, 1967, at 7. It further charged that the manner in which the United States was fighting the war involved crimes against humanity in violation of principles established by the Nuremberg Tribunals. *Id.* It pledged support for draft aged men who resisted the “illegitimate authority” of the military and Selective Service. *Id.* All but Ferber, the only draft-aged defendant among the five, had signed and circulated the Call to Resist in an effort to gather more signatures to the statement and to solicit financial support for its publication and for resistance efforts. *Spock*, 416 F. 2d at 174. The indictment also relied on Coffin’s, Go Goodman’s, and Spock’s participation in a news conference in early October 1967 to promote the Call to Resist and to announce a national draft card turn-in for the purposes of surrendering the draft cards to the Attorney General. *Id.* at 168.

31. FOLEY, *supra* note 29, at 102–06.

32. *Id.*

33. *Id.* at 131–32.

34. *Id.* at 133–34. On the *Spock* trial and the events leading up to it, see *Spock*, 416 F.2d at 165; JOHN F. BANNAN & ROSEMARY S. BANNAN, *LAW, MORALITY AND VIETNAM: THE PEACE MILITANTS AND THE COURTS* 87–106 (1974); FOLEY, *supra* note 29, at 90–109, 225–40, 282–95.

for the First Circuit set aside the convictions of Spock and Ferber on the basis of insufficiency of the evidence and ordered a new trial for Coffin and Goodman because of trial error.<sup>35</sup>

When the grand jury handed down the indictment, Raskin despaired that it was merely the first of what would be many prosecutions against the leadership of the antiwar movement, the beginning of a concerted "decimation of the intelligentsia."<sup>36</sup> Others shared his concern that many more indictments would follow, while some prominent opponents of the war, including Dr. Martin Luther King, Robert McAfee Brown, Noam Chomsky, Dwight McDonald, and Howard Zinn, invited prosecution and issued a statement stating that they would pick up the torch for the Boston Five.<sup>37</sup> The fear, or hope, that the indictment was just the first salvo in a broad campaign to prosecute disloyalty crimes was misplaced. The Johnson Administration did not launch such a campaign to punish disloyal speech.

There were, however, other instances of government sanction for the crimes of dissent and disloyalty. In particular, the Johnson Administration targeted men who actively and publicly resisted the draft. On March 31, 1966, David O'Brien, along with three other members of the New England chapter of the Committee for Non-Violent Action, burned their draft cards on the steps of the South Boston District Courthouse.<sup>38</sup> The federal government quickly responded by indicting the four for violating the recently added provision of the Selective Service law that prohibited destruction of a draft card.<sup>39</sup> Ultimately, in upholding O'Brien's conviction, the Supreme Court concluded that Congress had enacted the provision for reasons other than the suppression of symbolic acts critical of the draft and the war.<sup>40</sup> The Court's reading of the Act in light of its legislative history strains credulity, and it is fair to say that the prosecutions of O'Brien and other draft-card burners were intended

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35. See *Spock*, 416 F.2d at 183.

36. FOLEY, *supra* note 29, at 229.

37. *Id.* at 228-34. The expectation of the draft resistance movement had been that the resisters themselves would fill the jails, thus forcing Americans to look more closely at the costs of the war. They had not expected that the government would target mostly the "elder statesmen" of the movement. *Id.* at 231.

38. *Id.* at 19-20.

39. *Id.* at 42. The statutory provision applied to any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any other manner changes a draft card." *Id.* The 1965 amendments had inserted the "knowingly destroys, knowingly mutilates" language. See *United States v. O'Brien*, 391 U.S. 367, 370 (1968) (citing 50 U.S.C. app. § 462(b)).

40. See *O'Brien*, 391 U.S. at 377-86.

to punish the defendants for crimes of disloyal (and probably counter-productive) symbolic speech.<sup>41</sup>

In addition to prosecuting O'Brien and his fellow protesters, the Selective Service acted quickly to reclassify their draft status and accelerate their induction into the army. Reclassification, rather than prosecution, became the favored method for dealing with draft-aged men who burned or turned in their draft cards or otherwise "interfered with" the operation of the Selective Service.<sup>42</sup> Notwithstanding the popular image of "draft-card burners" as selfishly-motivated "draft-dodgers," until he resisted, the typical resister could be confident that the draft was not an imminent threat. As a result of his antiwar activity, however, he risked both jail and the loss of his draft deferment.<sup>43</sup> For instance, Director of the Selective Service General Lewis Hershey revoked the student deferments of thirteen protesters who sat in at the Ann Arbor, Michigan, draft board in October 1965.<sup>44</sup> In reclassifying them as available for the draft, Hershey proclaimed that he was putting them on "the belt that runs toward the induction station."<sup>45</sup>

After the events of Stop the Draft Week in October 1967, including the turn-in of draft cards at the Arlington Street Church

41. The Senate Report on the bill that amended the Selective Service Act to make the destruction or mutilation of a draft card a crime noted: "The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked, this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies." *Id.* at 387 (quoting S. REP. NO. 89-589). The author of the amendment, Congressman L. Mendel Rivers, explained that it was:

[A] straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards. . . . This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.

Tom Cornell, *Not the Smallest Grain of Incense*, in ALICE LYND, *WE WON'T GO: PERSONAL ACCOUNTS OF WAR OBJECTORS* 33 (1968).

42. LAWRENCE A. BASKIR & WILLIAM A. STRAUSS, *CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR AND THE VIETNAM GENERATION* 25 (1978).

43. The files kept by the New England Resistance showed that the vast majority of resisters involved in the October 1967 draft card surrender were either exempt from the draft or were classified in a deferred category, the biggest number holding student deferments. See FOLEY, *supra* note 29, at 122, 349 tbl. A-I. Only 17.5% of the resisters were classified I-A, available for service. See *id.*

44. BASKIR & STRAUSS, *supra* note 42, at 25; TOM WELLS, *THE WAR WITHIN: AMERICA'S BATTLE OVER VIETNAM* 57 (1994).

45. See GEORGE Q. FLYNN, *THE DRAFT, 1940-1973*, at 182-85 (1993); WELLS, *supra* note 44, at 57; see also *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817, 821-26 (2d Cir. 1967) (holding reviewable a challenge by two students whose draft statuses were reclassified after their participation in the Ann Arbor protest).

and the attempted surrender of cards to the Attorney General, Hershey issued a directive to local draft boards instructing them to declare such protesters delinquent under the draft laws for failure to have a draft card in their possession, and to reclassify them as available for service because of their delinquency.<sup>46</sup> One such resister, James Oestereich, was a divinity student at the Andover-Newton Theological School, and was therefore classified 4-D, the exemption for clergy and seminarians.<sup>47</sup> Because of his participation in the October 16 draft card surrender, his draft board revoked his exemption and reclassified him I-A.<sup>48</sup> His subsequent refusal of induction would result in his losing his position as a Youth Minister.<sup>49</sup> Ultimately, the United States Supreme Court in a series of cases including Oestereich's would strike down the reclassifications.<sup>50</sup>

The Nixon Administration was more willing than its predecessor to use law as a weapon against troublesome opponents of the war. It did not rely, however, on loyalty crimes. Rather, it relied on other pretextual grounds, ostensibly unrelated to disloyal speech, to punish its opponents. Its weapon of choice became the conspiracy prosecution against members of the antiwar movement. Beginning most notoriously with the trial of the Chicago Eight (then Seven), the federal government pursued dissenters, though never as pervasively

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46. FLYNN, *supra* note 45, at 215-18. Hershey's directive produced both a political firestorm and criticism from within the Administration, most notably from Attorney General Ramsey Clark. FOLEY, *supra* note 29, at 149-57.

47. FOLEY, *supra* note 29, at 247.

48. *Id.*

49. *Id.* at 252-53.

50. *See Breen v. Selective Service Local Bd. No. 16*, 396 U.S. 460, 463-68 (1970) (striking down punitive reclassification of registrant with student deferment status); *Gutknecht v. United States*, 396 U.S. 295, 301-08 (1970) (disallowing acceleration of induction); *Oestereich v. Selective Service System Local Bd. No. 11*, 393 U.S. 233, 237 (1968) (holding that Selective Service may not revoke ministerial deferment in response to turn-in of draft card).

In another non-criminal sanction for disloyal speech, the Georgia House of Representatives, in an action reminiscent of the New York Assembly's expulsion of five Socialist Party members from its ranks in 1920, refused to seat Julian Bond in January 1966. *See William M. Wiecek, The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 389. Bond, who had been elected to the seat the previous June, and who was then the communications director of the Student Nonviolent Coordinating Committee ("SNCC"), had refused to disavow a SNCC statement that was critical of U.S. policy in Vietnam and elsewhere, and that expressed "sympathy with and support" for draft resisters. *See Bond v. Floyd*, 385 U.S. 116, 118-22 (1966). Bond ultimately was seated after the United States Supreme Court ruled in his favor. *See id.* For discussions of Bond's case, see DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 458-59 (1986); CHARLES MORGAN, JR., ONE MAN, ONE VOICE 150-61 (1979).

as had the Wilson Administration during World War I.<sup>51</sup> Against the advice of the career lawyers in the Department of Justice, the government alleged a conspiracy to incite a riot at the 1968 Democratic Convention.<sup>52</sup> The conspiracy trial became a rallying point for the Nixon Administration's opponents, though in the end, the trial, which devolved into a circus, and which revealed a pattern of illegal wiretaps and infiltration into the antiwar movement, probably harmed both the Administration and the antiwar movement.

Vietnam Veterans Against the War ("VVAW") was another Nixon target. VVAW dramatized the growing opposition of GIs and veterans to the war. It thereby gave additional credibility to the antiwar movement and undermined the Administration's equation of support for its policy with support for the troops. The Administration responded by essentially declaring war on VVAW, flooding the organization with infiltrators and agents provocateurs.<sup>53</sup> In July 1972, several members of VVAW were indicted for a conspiracy to disrupt the Republican National Convention in Miami by staging an armed attack on the convention. The government's case against the Gainesville Eight collapsed when trial testimony revealed that virtually all of the talk of violence had come from a number of government agents who had infiltrated the leadership of VVAW. Though the Gainesville Eight were acquitted, the costs of mounting a

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51. The Chicago Eight defendants, David Dellinger, Rennie Davis, John Froines, Tom Hayden, Abbie Hoffman, Jerry Rubin, Bobby Seale, and Lee Weiner, represented a cross section of the opposition to the war. The Eight became Seven when Black Panther, Bobby Seale's trial was separated from that of the other defendants. The literature on the Chicago Seven Trial and on the 1968 Democratic Convention in Chicago is vast. For a discussion of the demonstrations at the 1968 Convention and the Chicago Seven Trial, see generally DAVE DELLINGER, *MORE POWER THAN WE KNOW: THE PEOPLE'S MOVEMENT TOWARD DEMOCRACY* (1975); DAVID FARBER, *CHICAGO '68 passim* (1988); TOM HAYDEN, *REUNION* 291-412 (1988); DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 100-28 (1999); J. ANTHONY LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES passim* (1970); DANIEL WALKER, *RIGHTS IN CONFLICT passim* (1968); JULES WITCOVER, *THE YEAR THE DREAM DIED: REVISITING 1968 IN AMERICA* (1997); James W. Ely, Jr., *The Chicago Conspiracy Case*, in *AMERICAN POLITICAL TRIALS* 263-85 (Michal R. Belknap ed., 1981).

52. WELLS, *supra* note 44, at 326. Attorney General John Mitchell's predecessor, Ramsey Clark, had concluded that there was no basis for indicting any of the leaders of the Chicago demonstrations, but that a number of Chicago police should be indicted for what was essentially described as a police riot. *Id.*

53. During the trial of the Gainesville Eight, it was revealed, for instance, that half of the VVAW membership in Louisiana were government agents. GERALD NICOSIA, *HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS' MOVEMENT* 276 (2001); see also RICHARD STACEWICZ, *WINTER SOLDIERS: AN ORAL HISTORY OF THE VIETNAM VETERANS AGAINST THE WAR* 319-45 (1997) (reporting participants' recollections of the Nixon Administration's war on the VVAW).

defense put the organization deeply in debt and further exacerbated strains within the leadership. The prosecution effectively destroyed the VVAW in the South.<sup>54</sup>

The Nixon Administration achieved similar results in its most bizarre conspiracy prosecution, the prosecution of the Harrisburg Seven, including Father Philip Berrigan and Sister Elizabeth McAlister, for an alleged plot to kidnap Secretary of State Henry Kissinger and to blow up heating tunnels under Washington, D.C.<sup>55</sup> The government failed to win a conviction on the conspiracy charges. One juror noted after trial, "I thought the whole thing was kind of funny, the idea of a bunch of priests and nuns zipping off with Henry Kissinger."<sup>56</sup> Nevertheless, the trial crippled the Catholic Left. Nancy Zaroulis and Gerald Sullivan observe that "for all practical purposes the Catholic left ended with the Harrisburg verdict."<sup>57</sup>

In addition to conspiracy prosecutions, the Nixon Administration used the prosecutorial tool of the grand jury as a weapon against the antiwar movement and other left-wing critics. Under the direction of Robert Mardian, the International Security Division of the Department of Justice convened over one hundred grand juries and subpoenaed between one and two thousand witnesses associated with antiwar and other left organizations.<sup>58</sup> As Frank Donner has written, "A dominant aim of such compelled testimony was to force a witness to name associates and friends in an ever-widening inquisition, a revival under a law enforcement cover of a practice made familiar by congressional anti-subversive committees under a legislative cover."<sup>59</sup> Uncooperative, or insufficiently cooperative witnesses would then be jailed for contempt.<sup>60</sup> These grand juries yielded a low number of

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54. For a discussion of the Gainesville Eight prosecution, see NICOSIA, *supra* note 53, at 229-33, 247-82; STACEWICZ, *supra* note 53, at 326-32, 334-45.

55. ZAROULIS & SULLIVAN, *supra* note 30, at 378.

56. *Id.* at 379-80. Berrigan and McAlister were found guilty, however, of smuggling letters in and out of Lewisburg Federal Penitentiary, where Berrigan was serving time for his conviction for destroying draft files in Catonsville, Maryland. *Id.* at 379.

57. *Id.* at 380. The trial undermined the Catholic left, in part because the letters between Berrigan and McAlister, which attested to deep feelings between the two of the sort not expected between a priest and a nun, were read in open court.

58. FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 355-56 (1980).

59. *Id.* at 356. Donner discusses grand jury abuse in an effort to suppress dissent generally. *Id.* at 353-85. My thanks to Marjorie Cohn for calling these practices to my attention.

60. Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Interment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1179-83 (1984). For one such case of grand jury abuse, see *Bacon v. United States*, 446 F.2d 667, 668-69 (9th Cir. 1971), *vacated by* 408 U.S. 915 (1972). See also DONNER, *supra* note 58, at 365-

indictments and a shockingly low number of convictions or guilty pleas.<sup>61</sup> The indictments yielded a conviction and plea rate below 15%, as compared to the normal rate of 65.2%.<sup>62</sup>

Pretextual repression could also occur on the local level. One such instance was the prosecution of the operators of the UFO coffeehouse, a GI coffeehouse in Columbia, South Carolina, near Fort Jackson. The UFO provided an alternative to the USO where GIs could talk openly about the war and other concerns and where GI organizing could take place. On April 27, 1970, Will Balk, Lenny Cohen, and Duane Ferre were convicted of the common-law misdemeanor of maintaining a public nuisance and sentenced to six-year prison terms.<sup>63</sup> Not content with closing down the UFO and convicting its operators, the prosecutor, John Foard, then offered the trial transcript to the local colleges in the hope that they would punish faculty members who had testified on behalf of the defendants. In response, Columbia College chose not to renew the contract of an untenured faculty member and to investigate, but ultimately not to discipline, a tenured professor.<sup>64</sup>

In contrast to this pattern, the military aggressively prosecuted crimes of disloyalty. For participating in an antiwar demonstration while off-duty and out of uniform in November 1965, Lieutenant Henry Howe was court-martialed and sentenced to two years at hard labor.<sup>65</sup> Howe, who had carried a sign calling President Johnson a fascist, was convicted of violating Uniform Code of Military Justice ("UCMJ") article 88 and UCMJ article 133.<sup>66</sup> Article 88 prohibited

68 (discussing the *Bacon* case).

61. See DONNER, *supra* note 58, at 356.

62. See *id.*

63. William Sheppard McAninch, *The UFO*, 46 S.C. L. REV. 363, 374 (1995). Two other people had been indicted, Merle Ferre, wife of Duane, and Chris Hannafan, who fled to New York. *Id.* Merle was eight-months pregnant and was not brought to trial. *Id.* Neither was Hannafan. *Id.* at 369. Similarly, both the Army and the city of Tacoma, Washington, acted against the Shelter Half Coffee House near Fort Lewis. See Undated and unsigned memorandum, United States Servicemen's Fund Papers ("USSF Papers") (on file with Wisconsin State Historical Society Madison, Wisc., Box 2, Folder 11) [hereinafter Repression Packet]. The Army declared the coffee house off limits and the city prosecuted two staff members for "contributing to the delinquency of a minor" when two boys were found by police playing a foosball game in the coffee house. *Id.* The city subsequently revoked the coffee house's license. *Id.* Staff and GIs associated with another coffee house located near Fort Knox were subject to a series of harassments beginning with the denial of a license to operate, and prosecutions for violating the sanitary code and disorderly conduct. *Id.*

64. McAninch, *supra* note 63, at 378.

65. United States v. Howe, 37 C.M.R. 429, 444-47 (1967).

66. *Id.*



speaking contemptuously of the President or other public officials, and UCMJ article 133 prohibited "conduct unbecoming an officer and a gentleman."<sup>67</sup>

In May 1967, Dr. Howard Levy, an army Captain, was court-martialed on a variety of charges, including four charges involving disloyal speech.<sup>68</sup> Levy was charged under UCMJ article 133, along with the "general article," UCMJ article 134, which prohibited, in pertinent part, "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital."<sup>69</sup> The charges related to statements Levy had made in opposition to the war, questioning whether black soldiers should serve in Vietnam and disparaging United States Special Forces, or Green Berets.<sup>70</sup> Convicted on one charge each of violating UCMJ articles 133 and 134 and on a charge of violating a commanding officer's order, Levy was sentenced to a three-year prison sentence.<sup>71</sup>

In some subsequent court-martial cases, the military relied on the statutory descendant of the Espionage Act of 1917. Concluding that

67. *Id.* Article 88 of the UCMJ provides:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

10 U.S.C. § 888 (2000).

Article 133 of the UCMJ provides: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." § 933. For a discussion of the Howe case, see ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 178-88 (1970).

68. *Parker v. Levy*, 417 U.S. 733, 736-41 (1974).

69. § 934.

70. *Parker*, 417 U.S. at 736-39. Justice Rehnquist's opinion for the Court reproduces the specifications for two of the charges against Levy. These contain some of the statements in question. Typical statements include, "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so," and "I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight."

*Id.* at 738-39 n.5 (quoting Specification to charge II under Article 134).

71. In addition to these four charges, Levy also faced court-martial for refusing to obey an order to teach dermatology to Green Beret aidmen. For a discussion of the Levy case, see generally Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839.

article 134 incorporated within it violations of 18 U.S.C. § 2387,<sup>72</sup> the Marines court-martialed Lance Corporal William Harvey and Private George Daniels, two African American Marines, for holding a meeting with other African American Marines in which they argued that Vietnam was a white man's war that they should not participate in and encouraged their fellow Marines to seek a meeting with their commander to discuss the issue further.<sup>73</sup> Similarly, Navy apprentice journalist Roger Priest was court-martialed under article 134 and section 2387 for publishing an antiwar newspaper.<sup>74</sup> In other instances, the court-martial charges did not specifically identify section 2387 as the basis for the violation of article 133 or 134, but the language of the court-martial specification closely resembled that of section 2387 and left no doubt that the prosecution was for disloyal speech.<sup>75</sup>

Short of a general court-martial, there were other ways in which the military punished dissent. Often, a commanding officer would impose nonjudicial punishment under UCMJ article 15, a more limited punishment, which did not require a court-martial proceeding, as a lesser sanction for antiwar or other irritating behavior.<sup>76</sup> As in civilian life, harassment also took the form of pretextual prosecutions in reaction to disloyal speech. GIs reported charges and threats of

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72. Section 2387(a) states:

(a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

(1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—  
Shall be fined under this title or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

18 U.S.C. §2387(a).

73. See *United States v. Daniels*, 19 C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Harvey*, 19 C.M.A. 539, 42 C.M.R. 141 (1970).

74. See *Priest v. Sec'y of the Navy*, 570 F.2d 1013, 1015-19 (D.C. Cir. 1977). On *Priest*, see SHERRILL, *supra* note 67, at 165-68.

75. See, e.g., *United States v. Gray*, 42 C.M.R. 255, 256-59 (1970) (discussing prosecution for among other things "uttering disloyal statements with design to promote disloyalty and disaffection among the troops and civilian populace"); *United States v. Bell*, 40 C.M.R. 807, 809 (1969) (same).

76. In increasing numbers, as the GI movement grew and became more sophisticated, GIs would call the military's bluff, insisting on their right to a court-martial, and the trial rights that went with it, rather than accepting punishment under Article 15.

charges for all sorts of petty infractions.<sup>77</sup> Finally, there was always the threat of transfer to Vietnam.<sup>78</sup>

The trajectory of the military's response to dissent followed the opposite pattern from that in civilian life. At the same time that the Nixon Administration was stepping up its assault on the antiwar movement, the Pentagon was instructing commanders that they must recognize that servicemen had certain constitutional rights. In the fall of 1969, the Pentagon instructed its commanders that they must respect the First Amendment rights of servicemen to possess dissident literature, unless that literature posed a clear and present danger of undermining "loyalty, discipline or morale."<sup>79</sup> Having found that crushing dissent by way of court-martials could be counterproductive, costly, and highly embarrassing, the military opted to eliminate problems through the liberal use of "for the good of the service" and "expeditious" discharges. Similarly, it became much more willing to grant conscientious objector status to servicemen who requested it.<sup>80</sup>

There are a number of reasons why the government did not prosecute disloyal speech more vigorously during the Vietnam War, and certainly did not prosecute it as disloyal speech, nearly to the extent that it had during World War I and the Civil War. President Johnson was deeply worried about provoking a right-wing McCarthyite backlash, having concluded that McCarthyism had been destructive of the Truman presidency and the health of the Democratic Party.<sup>81</sup> That this fear of a McCarthyite backlash would

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77. Interview with Skip DeLano, in New York, N.Y. (July 20, 1993). See generally United States Servicemen's Fund Papers, Box 2, Folder 11 (describing threats of court-martial and other lesser sanctions, along with other forms of harassment).

78. In response to his vigorous defense of the Presidio 27, Captain Brendan Sullivan (later famous as Oliver North's lawyer), received his orders to Vietnam. The orders were only rescinded after public and congressional outcry. See SHERRILL, *supra* note 67, at 89; see also JAMES E. WESTHEIDER, *FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR* 44-45 (1997) (describing punitive transfers to front-line combat units and to other undesirable bases); Terry H. Anderson, *The GI Movement and the Response from the Brass*, in *GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT* 93, 101 (Melvin Small & William D. Hoover eds., 1992) (describing punitive transfer to Vietnam of editor of GI underground paper, the GIGLINE).

79. Anderson, *supra* note 78, at 101-02. That did not mean that harassment stopped, but it did reflect a change in the overall culture, at least at the top.

80. *Id.* at 112-13.

81. On Johnson's concerns about his critics from the right and on the possibility of a new McCarthyism, see BRIAN VANDEMARK, *INTO THE QUAGMIRE: LYNDON JOHNSON AND THE ESCALATION OF THE VIETNAM WAR*, xiv-xv, 25, 75 (1991). This does not mean that Johnson, who was obsessed with "Communist control" of the antiwar movement, and

not have played out the same way for Richard Nixon may partly explain his Administration's greater aggressiveness in pursuing dissenters.

Additionally, the legal landscape had changed considerably. First Amendment jurisprudence had undergone dramatic revision since the days of *Debs*, *Frowherk*, and *Schenk*, a development that would culminate with *Brandenburg v. Ohio*<sup>82</sup> in 1969. The rights revolution of the 1960s had even constrained the military's ability to command unquestioning obedience. During the 1960s and early 1970s, a number of institutions that had some of the trappings of "total institutions," which had previously functioned largely autonomously of the Supreme Court's constitutional gaze, at least with regards to the rights of their occupants or clients, now came under the Court's more careful scrutiny. Such institutions as schools,<sup>83</sup> prisons,<sup>84</sup> state hospitals,<sup>85</sup> and juvenile courts,<sup>86</sup> were no longer free to operate under the radar of the Bill of Rights. The military did not escape this trend. As early as 1967, the United States Court of Military Appeals affirmed that some constitutional protections applied within the military justice system.<sup>87</sup> Two years later, in a case as notable for its strident tone as its holding, the United States Supreme Court indicated its willingness to intrude aggressively into the area of military justice in a case limiting the jurisdiction of courts-martial.<sup>88</sup>

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who repeatedly set the FBI and CIA to the task of proving that control, would not have used any damning evidence they might have found, if they had found any such evidence. This issue is discussed more fully in Part I.C. *infra*.

82. 395 U.S. 444 (1969).

83. See generally *Goss v. Lopez*, 419 U.S. 565 (1975) (holding public school children entitled to hearing-before-suspension-from-school); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (recognizing the right of public school children to protest the Vietnam War).

84. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (recognizing a prisoner's right to medical treatment).

85. See *Donaldson v. O'Connor*, 493 F.2d 507, 531 (C.A. Fla. 1975) (holding that an involuntarily committed patient in state mental hospital had a constitutional right to treatment), *vacated on other grounds*, 422 U.S. 563 (1975); DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS passim* (1984).

86. See *In re Gault*, 387 U.S. 1, 13-26 (1967) (establishing due process rights of children in juvenile court system).

87. *United States v. Tempia*, 16 C.M.A. 629, 635 (1967) (establishing Miranda rights apply in military justice system).

88. See *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969). For a discussion of *O'Callahan* that situates the case in the waxing and waning of Supreme Court willingness to assert the relevance of constitutional checks on the military's control of servicemen and their dependents, see Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 730-32 (2002).

In addition to legal sanctions, both direct and pretextual, the Johnson and Nixon Administrations used the surveillance agencies of the national security state to spy on and to disrupt the antiwar movement.<sup>89</sup> The FBI's COINTELPRO program targeted antiwar organizations along with various civil rights and black power organizations for infiltration and for an array of dirty tricks that helped frustrate these organizations' activities and stir bitter rivalries both within and among antiwar and other targeted organizations.<sup>90</sup> In 1967, in violation of its charter, the CIA also became involved in domestic spying, launching at Johnson's behest, operation CHAOS.<sup>91</sup> The Nixon Administration subsequently expanded the scope of the CIA's domestic spying.<sup>92</sup> In addition to the FBI and CIA, military intelligence and the Red Squads of various big city police departments became deeply involved in infiltrating groups engaged in domestic dissent.<sup>93</sup> The Nixon Administration also employed the IRS to attack its antiwar critics, though with limited success.<sup>94</sup> Richard Nixon's infamous plumbers, who would ultimately through the Watergate break-in bring down his presidency, targeted the antiwar

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89. For the best general histories of the FBI's assault on the left, see generally JAMES KIRKPATRICK DAVIS, *ASSAULT ON THE LEFT: THE FBI AND THE SIXTIES ANTIWAR MOVEMENT* (1997); ALAN THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN* (1978). On the CIA, see RHODRI JEFFREYS-JONES, *THE CIA AND AMERICAN DEMOCRACY* 156-215 (1989). For an account of military spying on civilian political groups, see CHRISTOPHER H. PYLE, *MILITARY SURVEILLANCE OF CIVILIAN POLITICS, 1967-1970*, *passim* (1986). For personal accounts of the experience of the assault on the antiwar movement, see BUD SCHULZ & RUTH SCHULZ, *THE PRICE OF DISSENT: TESTIMONIES TO POLITICAL REPRESSION IN AMERICA* 302-67 (2001). The abuses of the intelligence agencies were documented in a number of government reports, most notably, the six-volume report of a Senate committee that came to be known as the Church Committee Report, after Chairman Frank Church. See S. REP. NO. 755 (1976). The abuses of the intelligence agencies resulted in a variety of court cases ranging from civil rights actions against the agencies to fights under the Freedom of Information Act. For a description of a variety of illegal acts interfering with antiwar dissenters and organizations, see *Hobson v. Wilson*, 737 F.2d 1, 8-13 (D.C. Cir. 1984).

90. See JAMES KIRKPATRICK DAVIS, *SPYING ON AMERICA* 129-59 (1992); WELLS *supra* note 44, at 276. When Attorney General William Saxbe acknowledged the existence and abuses of COINTELPRO, he stated that some of the tactics employed were "abhorrent in a free society." See John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 795 (1984).

91. See DONNER, *supra* note 58, at 356.

92. JEFFREYS-JONES, *supra* note 89, at 183-84.

93. For a description of military spying on civilian antiwar and radical groups, see PYLE, *supra* note 89, *passim*. For a discussion of Red Squads and their interaction with other security agencies, see FRANK J. DONNER, *PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* 79-89 (1990).

94. JOHN DEAN, *BLIND AMBITION* 25-26 (1977); DONNER, *supra* note 58, at 331-45, 349-52.

movement, among other Nixon "enemies."

Though there were fewer prosecutions for crimes of disloyalty than in previous wars, questions of loyalty had an important place in the discourse about dissent and the war. Both the proponents and opponents of the war would have their say about loyalty and betrayal.

C. "*Vietniks and Peaceniks, Trotskyites and Potskyites*" v. "*The Silent Majority*"

This is a time when the criminal misfits of society are glamorized while our best men die in Asian rice paddies to preserve the freedoms those misfits abuse. This is a time when the charlatans of peace and freedom eulogize foreign dictators while desecrating the flag that keeps them free.<sup>95</sup>

Let us . . . be united against defeat. Because let us understand: North Vietnam cannot defeat or humiliate the United States. Only Americans can do that.<sup>96</sup>

Jail, break-ins, and harassment are not the only tools available to a government intent on muting criticism. In addition to the methods described above, both the Johnson and Nixon Administrations and their allies attempted to blunt the impact of their antiwar critics by questioning the loyalty of those critics. Over time the Johnson and Nixon Administrations articulated several interconnected themes regarding the danger of antiwar dissent and the questionable loyalty of the antiwar movement. Antiwar critics, they said, gave comfort to the enemy and endangered and sapped the morale of our troops. At best, they were naïve and at worst, they took direction from the enemy. They posed a grave threat to unity and democracy at home and to the war effort and American prestige abroad. These themes of the dangerousness and disloyalty of antiwar dissent grew increasingly strident over time and would receive their fullest articulation from the Nixon Administration.

President Johnson was convinced that the antiwar movement was directed and funded by foreign foes.<sup>97</sup> This belief was widely shared

95. Vice President Spiro Agnew, Speech to the Graduating Class, United States Military Academy, West Point (June 3, 1970), in SPIRO AGNEW, COLLECTED SPEECHES 149–50 (1971).

96. President Richard Nixon, Address to the Nation on the War in Vietnam (Nov. 3, 1969) [hereinafter Nixon Address on Vietnam], in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 1969, at 901, 909 (1969).

97. At times, however, he did attribute his woes to the manipulations of his old enemy, Robert Kennedy. While President Nixon would obsess about Moscow's hand in

among Johnson's advisors and within the military. As opposition grew, Johnson's obsession with the foreign origins of that opposition blossomed into a raging paranoia. Johnson believed that Senate opponents, William Fulbright, Chairman of the Senate Foreign Relations Committee, and Wayne Morse, one of the two Senate opponents of the Tonkin Gulf Resolution, were following "the 'Communist Party Line,'" and he ordered the FBI to monitor Senator Fulbright's hearings on the war in the winter of 1966 to establish those connections.<sup>98</sup> The networks, he believed, were all in the hands of the communists, as was much of the print media.<sup>99</sup> Journalists Walter Lippmann and Theodore White were, Johnson insisted, communists.<sup>100</sup> Indeed, as the press became more hostile to the White House in 1967, Johnson told his aides, "You can always find [Soviet Ambassador] Anatoly Dobrynin's car in front of a columnist's house the night before he blasts me on Vietnam."<sup>101</sup>

Repeatedly, he asked the FBI and the CIA to investigate the links between various antiwar groups and Moscow, Peking, and Hanoi.<sup>102</sup> The failure of those agencies to establish that link was a source of enormous frustration for Johnson.<sup>103</sup> At one point when CIA director Richard Helms once again reported that the agency had found no evidence of foreign funding and direction of the antiwar movement, Johnson exploded at him. According to one account, "Johnson shook that gigantic finger in Helms's face and said, 'I simply don't understand why it is that you can't find out about that foreign money.'<sup>104</sup>

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the antiwar movement, he also focused on Jews as the source of opposition to his policies. See, e.g., SEYMOUR M. HERSH, *THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE* 91-92 (1983) (describing Nixon's tirades to White House Counsel and then-Nixon assistant John Ehrlichman about "Jewish traitors, and the Eastern Jewish Establishment"); WELLS, *supra* note 44, at 326 (describing Nixon's fixation with Jewish involvement in the antiwar movement and quoting a conversation with H.R. Haldeman in which Nixon insisted that all of the Chicago Seven defendants and about half of the antiwar protesters then in Washington, D.C. were Jews); *id.* at 389 (recounting Nixon's lament to aide Alexander Butterfield, that "It's those dirty rotten Jews from New York who are behind [news reports of the My Lai massacre]").

98. WELLS, *supra* note 44, at 69.

99. *Id.* at 205.

100. *Id.*

101. *Id.*

102. RHODRI JEFFREYS-JONES, *PEACE NOW!: AMERICAN SOCIETY AND THE ENDING OF THE VIETNAM WAR 77-78* (1999); ZAROULIS & SULLIVAN, *supra* note 30, at 143-44, 221-22.

103. JEFFREYS-JONES, *supra* note 102, at 77.

104. MARILYN B. YOUNG, *THE VIETNAM WARS, 1945-1990*, at 153 (1991) (quoting MERLE MILLER, *LYNDON: AN ORAL BIOGRAPHY* 480 (1980)).

In general, the statements of Johnson and his aides on dissent were subtler than their actual beliefs. In the earliest years of the war, the Administration had little to say about the antiwar movement. There were two reasons for the Administration's reticence. First, in general, the Administration sought to minimize discussion of Vietnam.<sup>105</sup> The escalation of the war was managed to limit public awareness of the true costs, in money and manpower, to which the president was committing the country. Downplaying discussion of the war, and therefore, of its critics, was critical to that strategy. Also, the Administration was initially far more concerned about its critics on the right than it was those on the left. It did not recognize how strong the antiwar movement might become.<sup>106</sup>

By mid-1966, however, Johnson perceived the antiwar movement as a threat that merited comment, albeit through proxies. Speaking in Omaha, in July 1966, Undersecretary of State Averell Harriman asserted that dissent encouraged the enemy.<sup>107</sup> To the Administration, victory was inevitable, but antiwar protest would protract the fighting, compounding the loss of life. This theme, that protest gladdened the heart and strengthened the will of Hanoi, would become a mainstay of the Johnson and Nixon Administrations' responses to antiwar dissent. It was also a theme that the press, much of which felt strongly loyal to the Administration, was happy to echo.<sup>108</sup>

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105. As Historian George Herring has noted, "In typical Johnsonian style . . . the president relied primarily on stealth and subterfuge to implement his policies." GEORGE C. HERRING, *LBJ AND VIETNAM: A DIFFERENT KIND OF WAR* 126 (1994).

106. *Id.* at 134; GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM* 198 (3d ed. 1996).

107. HERRING, *supra* note 105, at 138.

108. Indeed, the press had already characterized antiwar protest as, at best, naïve and encouraging to the enemy. At worst, it was communist-inspired or directed. Writing after the International Days of Protest demonstrations of mid-October 1965, *Life Magazine*, under the caption, "Vox Vietnik Fires a Volley of Protest," acknowledged that many of the protesters had sincere concerns about the war, but it otherwise took a highly disparaging tone, from the dismissive label "vietniks" to its characterization of the protest weekend as "the weekend to heap abuse on the U.S." and its mention that "Radio Peking crowed its 'profound gratitude.'" *Vox Vietnik Fires a Volley of Protest*, LIFE MAG., Oct. 29, 1965, at 40B. The general tone of the coverage, as would be true of much of the coverage of antiwar demonstrations in the early years of the war, was an emphasis on the frivolousness of the protesters.

An opinion piece by John K. Jessup, which accompanied the October 1965 *Life Magazine* story, was far more corrosive in its treatment of the protesters. The antiwar movement's "annoying clamor," encouraged the enemy and "stiffened" their resistance just as the U.S. was beginning to make progress in Vietnam. See John K. Jessup, *The Answer to what Vietniks Call a Moral Issue*, LIFE MAG., Oct. 29, 1965, at 40D. Convinced of a lack of American resolve, "the Communists, since they have helped organize these



A second important theme to emerge in this period was the negative effect of demonstrations on the morale of our troops in Vietnam. Perhaps as early as 1965, but certainly by 1967, the Administration was involved behind the scene in staging demonstrations explicitly linked to support of the troops, such as the "Support Our Boys in Vietnam" parade in New York City on May 13, 1967.<sup>109</sup> The conflation of support for the war with support for the troops became a powerful theme in pro-war arguments throughout the era, as it has been in our subsequent wars.<sup>110</sup> Irresponsible dissent, Johnson asserted in a November 1967 news conference, posed a danger to the nation and to the men who were fighting on its

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demonstrations, are victims of their own propaganda." *Id.* Amongst the antiwar movement's leadership he contended, were communists and other anti-American extremists, along with those who were willing to partner with the communists. *Id.* Jessup suggested that war critics who allied themselves to communists might prompt a new McCarthyism, having failed to learn the lesson of what had happened when the "legitimate" left had thrown in with Stalin's Popular Front in the 1930s. *Id.* The rank and file, he argued were not communists, but merely foolish. Hoping to end the war, they would, instead, prolong it. "This seems so obvious," he wrote, "that one wonders whether the Vietnicks are all that stupid." *Id.* Notwithstanding his criticism, he acknowledged that some protesters had legitimate questions and concerns, though they were ones that he had resolved to his own satisfaction in favor of staying the course in the war. *Id.* These questions, however, were best left unspoken because of the impact that raising them would have on the enemy and the war. It was time, in other words, for the antiwar movement to shut up. *See id.*

As Melvin Small has shown in his study of the media and the antiwar movement, the media paid little attention to the substance of the arguments protesters made against the war, and, in the case of the *Life Magazine* story, none whatsoever. Instead of taking the movement's arguments seriously enough to present them clearly for their audience, they focused on the odd, the absurd, or the flamboyant (literally in the case of draft card burners). Protesters were generally characterized as young and scruffy, though the actual demographics of most demonstrations were far more varied. *See generally* MELVIN SMALL, *COVERING DISSENT: THE MEDIA AND THE ANTI-VIETNAM WAR MOVEMENT* (1994) (discussing the focus of media coverage during the Vietnam War). A *Time Magazine* article reporting on the April 1967 "Spring Mobilization" described the protesters in New York as mostly young, "Vietnicks and Peaceniks, Trotskyites and potskyites," who were "out for a spring housecleaning of their passions." *The Dilemma of Dissent*, *TIME*, Apr. 21 1967, at 20. It noted the "kooky costumes and painted faces of its psychedelic 'pot left' participants," and pictured prominently a demonstrator wearing a banana, apparently as a necklace. *Id.* "The end result," *Time* told its readers, "aside from probably delighting Hanoi's Ho Chi Minh was to demonstrate that Americans in the springtime like to have fun." *Id.*

109. WELLS, *supra* note 44, at 57, 144.

110. No doubt, antiwar demonstrations did have some impact on the morale of the troops in Vietnam, though disentangling the causes of low morale is probably a Sisyphean task. On the morale of U.S. servicemen in Vietnam and on their attitudes toward the antiwar movement, see CHRISTIAN G. APPY, *WORKING-CLASS WAR: AMERICAN COMBAT SOLDIERS & VIETNAM* 220-23, 234-42, 298-306 (1993); JERRY LEMBCKE, *THE SPITTING IMAGE: MYTH, MEMORY, AND THE LEGACY OF VIETNAM* 27-29 (1998).

behalf.<sup>111</sup> In a number of speeches, Johnson connected the performance of U.S. troops in Vietnam with domestic support and commitment to them.<sup>112</sup> Second to wrapping oneself in the flag, there is probably no more powerful image or association during times of national crisis than to claim affiliation with and support for the troops. Johnson drew a contrast between the soldiers serving in Vietnam and their counterparts who were protesting the war as a bludgeon to use against the antiwar movement. Speaking before a national television audience at the AFL-CIO convention in December 1967, Johnson compared antiwar demonstrators to the soldiers in Vietnam:

Oh, it is very easy to agonize over the television or to moralize or to pin your heart on your sleeve or a placard on your back—and think to yourself that you are helping somebody stop a war.

But I only wish that those who bewail war would bring me just one workable solution to end the war.

The peacemakers are out there in the field.<sup>113</sup>

By the fall of 1966, Johnson had begun speaking on his own behalf, rather than through proxies, further developing the theme that what was said at home had an impact on the enemy's resolve. Campaigning for Democratic congressional candidates, Johnson linked support for the country, support for our troops, and support for his leadership. Hanoi was watching the election results, he argued, and the best way to bring the enemy to the bargaining table was to show that support for the Administration was strong.<sup>114</sup> Johnson would repeat this theme during the 1968 New Hampshire primary in advertisements stating, "Hanoi is listening" to Eugene McCarthy's presidential campaign.<sup>115</sup>

As the situation worsened and Johnson's popularity plummeted,

111. KATHLEEN J. TURNER, *LYNDON JOHNSON'S DUAL WAR: VIETNAM AND THE PRESS* 205 (1985).

112. See, e.g., President Lyndon Johnson, Remarks in Rodney Square, Wilmington, Delaware (Oct. 13, 1966) [hereinafter Johnson Remarks], in 2 *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1966*, at 1157, 1161 (1967) [hereinafter *JOHNSON'S PUBLIC PAPERS*] (stating that American troops "do not shrink from their responsibility because they know their country keeps their promises").

113. President Lyndon Johnson, Remarks to the Delegates to the National Convention, AFL-CIO (Dec. 12, 1967), in *JOHNSON'S PUBLIC PAPERS*, *supra* note 112, at 1129.

114. Johnson Remarks, *supra* note 112, at 1161.

115. TURNER, *supra* note 111, at 240.

the Administration became more pugnacious. The allegation of communist control came out of the closet, despite the lack of proof.<sup>116</sup> On April 16, 1967, commenting on *Meet the Press* about the Spring Mobilization demonstrations, Dean Rusk asserted that the "Communist apparatus is very busy indeed in these operations all over the world and in our own country."<sup>117</sup> After the October 1967 Pentagon demonstration, Johnson met with congressional leaders to reveal the details of a "secret report" compiled by the CIA documenting a meeting between a group of non-communist American leftists and representatives of North Vietnam and the National Liberation Front in Bratislava, Czechoslovakia.<sup>118</sup> While the report did not establish that the Vietnamese had any role in planning U.S. demonstrations, and while Johnson refused to make the report public, several congressmen, including House Republican leader Gerald Ford, announced that the report had persuaded them that the enemy had orchestrated the fall demonstrations.<sup>119</sup>

Finally, the Administration suggested a stab-in-the-back theory of the war. This stronger version of the argument that antiwar protest encouraged the enemy, suggested that the antiwar movement might in the end commit the ultimate act of treachery, causing the loss of an otherwise winnable war. Speaking to a National Farmers Union convention in Minneapolis on March 18, 1968, just days after his disappointing showing in the New Hampshire primary, Johnson lashed out at the antiwar movement and his congressional critics.<sup>120</sup> Johnson called for national unity in support of "our leaders, our Government, our men, and our allies until aggression is stopped."<sup>121</sup> He added that "we ought not let them win something in Washington that they can't win in Hue, in the I Corps, or in Khe Sanh."<sup>122</sup> In other words, the enemy cannot defeat us, but the antiwar movement

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116. An earlier expression of the Administration's belief that there was communist involvement in the antiwar movement came in October 1965 from then Attorney General Nicholas Katzenbach, who indicated that the government might prosecute some movement members and was monitoring its inclinations "in the direction of treason." See WELLS, *supra* note 44, at 58.

117. *Id.* at 135; *Meet the Press* (NBC television broadcast, Apr. 16, 1967).

118. *Id.* at 204.

119. *Id.* at 204; ZAROULIS & SULLIVAN, *supra* note 30, at 142. On the Bratislava meeting, see *id.* at 130-31; MARY HERSHBERGER, TRAVELLING TO VIETNAM: AMERICAN PEACE ACTIVISTS AND THE WAR 138-42 (1998).

120. President Lyndon Johnson, Remarks to Delegates of the National Farmers Union Convention in Minneapolis (Mar. 18, 1968), in JOHNSON'S PUBLIC PAPERS, *supra* note 112, at 411.

121. *Id.* at 412.

122. *Id.* at 411.

and their congressional allies can.

The Nixon Administration repeated and refined these themes. Nixon came into office confronting an exhausted and highly splintered antiwar movement.<sup>123</sup> With peace negotiations ongoing, and with Nixon's promise of a "secret plan to end the war," the Administration enjoyed a honeymoon period of relative calm during the first half of 1969.<sup>124</sup> On the diplomatic and military fronts, in the meantime, Nixon discovered that he could not cajole, pound, or threaten the enemy into submission at the peace talks. The war dragged on.<sup>125</sup>

By fall, the antiwar movement had regrouped, staging the first of what was set to be a graduated series of moratoriums (in effect national strikes against the war) on October 15, 1969. The outpouring of millions of people across the U.S. for the October Moratorium stunned the Administration.<sup>126</sup> The numbers of people who participated in large and small gatherings throughout the country was staggering, as was the involvement of so many who had been silent up until that moment. Contemplating the prospect of an even more successful Second Moratorium in November, the Administration and its supporters struck back at the antiwar movement.

The Moratorium had little of the tone that the Administration would attribute to it in its attacks. It was overwhelmingly peaceful, with the few instances of violence often the work of counter demonstrators.<sup>127</sup> It had bipartisan support and had the feel of a mass civic and patriotic exercise. In their history of the antiwar movement, Nancy Zaroulis and Gerald Sullivan reflect on the Moratorium:

Historians at the Library of Congress told reporters what the young organizers of the event knew well, that it was unique in American history, the largest public protest ever on a national

123. CHARLES DEBENEDETTI, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA* 241-46 (1990).

124. ZAROULIS & SULLIVAN, *supra* note 30, at 216-17.

125. HERRING, *supra* note 106, at 247-51.

126. How many million participated in what was designed as a highly decentralized protest, is not knowable. Massachusetts businessman Jerome Grossman, who originally proposed the idea estimated optimistically that perhaps as many as ten million people participated. See ZAROULIS & SULLIVAN, *supra* note 30, at 270-71. Tom Wells puts the number more conservatively at "more than two million," see WELLS, *supra* note 44, at 371, and Melvin Small suggests that perhaps the number is as high as three million. See SMALL, *supra* note 108, at 93. Small does not believe that the Administration was as stunned by the events of the day as does Wells.

127. See ZAROULIS & SULLIVAN, *supra* note 30, at 269.

scale. But the special quality of the day went deeper. A Whitmanesque alchemy was at work; a gentle spirit of comradely acceptance pervaded gatherings large and small where every shade of dissent was represented. For some, long kept in silent restraint by radical usurpation of the ground they might have taken, it was, at last, a chance to be safely heard. . . . For one twenty-four-hour period the antiwar movement became as American as the Stars and Stripes. The mood of the day was not unlike an old-fashioned, small-town Memorial Day or Fourth of July celebration: solemn, joyous, and, for many, patriotic. Stewart Udall, former Secretary of the Interior, thought the day had the feeling of "a great town meeting."<sup>128</sup>

The Administration and its supporters repeated the themes advanced by the Johnson Administration, but the tone had become more shrill. In New York, Mayor John V. Lindsay supported the Moratorium by declaring October 15 a "day of mourning" and ordering that flags in the city be flown at half mast "as a patriotic tribute to the dead in Vietnam."<sup>129</sup> His Republican opponent in the impending mayoral election, John J. Marchi, responded by accusing Lindsay of having "planted a dagger in the back of American servicemen in Vietnam."<sup>130</sup> A week later, California Governor Ronald Reagan would say of the Moratorium that "some American will die tonight because of the activity in our streets."<sup>131</sup>

The Administration announced that President Nixon would give a major address on the subject of Vietnam on November 3.<sup>132</sup> However, the principal spokesman for the Administration on the subject of antiwar dissent, both before and after Nixon's speech, was Vice President Agnew. Even before October 15, the Administration seized the opportunity to discredit the Moratorium as aiding and abetting the enemy. Revealing a letter of support for the peace movement from North Vietnam's Premier, Pham Van Dong, which

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128. *Id.*

129. LEMBCKE, *supra* note 110, at 50.

130. *Id.* (quoting Homer Bigart, *Dissension in the City*, N.Y. TIMES, Oct. 16, 1969, at 1). New York City Councilman, Matthew Troy, Jr., climbed up the cupola of New York's city hall, in order to raise the flag from half-mast. ZAROULIS & SULLIVAN, *supra* note 30, at 270. Marchi, a State Senator from Staten Island, had defeated Lindsay in the Republican primary in June. VINCENT J. CANNATO, *THE UNGOVERNABLE CITY: JOHN LINDSAY AND HIS STRUGGLE TO SAVE NEW YORK* 401-03, 408-09 (2001). Lindsay won reelection as mayor running as an Independent and as the candidate of the Liberal Party. *Id.* at 414, 437-41.

131. LEMBCKE, *supra* note 110, at 50 (quoting Ronald Sullivan, *Cahill Gets an Enthusiastic Reception from Hudson Democrats*, N.Y. TIMES, Oct. 23, 1969, at 53).

132. ZAROULIS & SULLIVAN, *supra* note 30, at 272.

stated: "May your fall offensive succeed splendidly,"<sup>133</sup> Vice President Agnew demanded that the leadership of the Vietnam Moratorium Committee "repudiate the support of a totalitarian Government which has on its hands the blood of 40,000 Americans."<sup>134</sup> A skeptical press and public were not distracted.<sup>135</sup>

Immediately after the Moratorium, the Administration scrambled to devise a response. They sought, foremost, to hold Nixon's base of support. In addition, they hoped to gain support among those who were sympathetic to the Moratorium's message but who might be won over if convinced that Nixon really did have a plan for a peaceful resolution of the war, while isolating the leadership of the antiwar movement and undermining the upcoming November Moratorium. White House Chief of Staff H.R. Haldeman described this strategy as separating the "white sheep" from the "black sheep."<sup>136</sup> Nixon's allies immediately went on the attack, rehearsing the old themes of disloyalty and encouragement of the enemy.<sup>137</sup> And the White House set Vice President Agnew loose to attack the antiwar movement.

On October 19, 1969, Agnew gave the first of a series of speeches intended to rally the nation behind the Administration and to discredit the antiwar movement. Agnew bemoaned "[a] spirit of national masochism . . . encouraged by an effete corps of impudent snobs who characterize themselves as intellectuals."<sup>138</sup> These leaders and their gullible followers were guilty of a dangerous distortion of the situation in Vietnam.<sup>139</sup> Agnew followed with more speeches that were marked by a rising level of vituperation. He repeated the themes of the dangers of disloyal speech, which might prolong the war by encouraging the enemy, the need to support the troops and

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133. *Id.* at 273.

134. WELLS, *supra* note 44, at 366.

135. ZAROLIS & SULLIVAN, *supra* note 30, at 272-73. Daniel Patrick Moynihan would tell the President on the 16th that the Moratorium had been a blow to the Administration and that "we only have ourselves to blame for some of this damage." WELLS, *supra* note 44, at 366. He considered Vice President Agnew's statement trying to tie the protest to Premier Pham Van Dong, "a blunder of the first order." *Id.* He encouraged the Administration to stop its red-baiting as counterproductive. *Id.* at 376-77. His views did not prevail.

136. WELLS, *supra* note 44, at 381-82.

137. *Id.* at 382-83.

138. Vice President Spiro T. Agnew, Address at the Citizens' Testimonial Dinner, New Orleans, La: (Oct. 19, 1969), in SPIRO T. AGNEW, FRANKLY SPEAKING: A COLLECTION OF EXTRAORDINARY SPEECHES 25 (1970) [hereinafter, AGNEW, FRANKLY SPEAKING]. Agnew blamed youth, drugs, and the social sciences for the gullibility of the followership. *Id.*

139. *Id.* at 25-26.

not undermine their morale, and the equation of support for the President with loyalty to the nation. In addition, he emphasized two other themes. First, he argued that the movement and the protests not only threatened to sabotage the war effort and Nixon's diplomatic efforts to achieve "peace with honor," it also posed as great a threat at home by undermining democratic institutions, rational discourse, and the moral fiber of America. Additionally, notwithstanding the overwhelmingly peaceful character of the Moratorium, Agnew and the Administration emphasized the unruliness and violence of the movement in the hope of diminishing participation in the November Moratorium and the planned November march on Washington, and in driving a wedge between the antiwar movement and those who had not yet joined their ranks.<sup>140</sup>

The day after his "effete corps of impudent snobs" speech, Agnew said of the antiwar leadership and "their admirers in the Congress": "Their course is one of applause for our enemies and condemnation for our leaders. Their course is a course that will ultimately weaken and erode the very fiber of America. They have a masochistic compulsion to destroy their country's strength . . ." <sup>141</sup> He further told his audience of Mississippi Republicans that the New Left "would have us . . . repudiate the 400,000 American lives sacrificed to the cause of world peace during this century."<sup>142</sup> Soon thereafter, he simultaneously acknowledged and diminished Haldeman's white sheep. In a speech on October 30, 1969, Agnew stated that the "thousands," not millions, who had participated in the Moratorium did so because of their wish to express their hopes for peace, but they had been "used by the political hustlers who ran the event," on behalf of an objective that was "not only unsound but idiotic."<sup>143</sup> These "professional protesters . . . jeopardize[d] the peace efforts of the President of the United States."<sup>144</sup> Reverting to images of a fifth column, he warned that "freedom of protest is being exploited by avowed anarchists and communists who detest everything about this country and want to destroy it."<sup>145</sup> Reaching for the greatest fears of his audience, Agnew invoked the image of "convicted rapist [and Black Panther leader] Eldridge Cleaver"

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140. WELLS, *supra* note 44, at 382-85.

141. Vice President Spiro T. Agnew, Address at the Mississippi Republican Dinner, Jackson, Miss. (Oct. 20, 1969), in AGNEW, FRANKLY SPEAKING, *supra* note 138, at 37-38.

142. *Id.* at 39.

143. Vice President Spiro T. Agnew, Address at the Pennsylvania Republican Dinner, Harrisburg, Pa. (Oct. 30, 1969), in AGNEW, FRANKLY SPEAKING, *supra* note 138, at 45.

144. *Id.* at 46.

145. *Id.* at 49.

sitting in "his Moscow hotel room," predicting the demise of the United States during our lifetime.<sup>146</sup>

As the November Moratorium approached, Agnew linked "[t]he Mob, the Mobilization, [and] the Moratorium," and decried "carnival in the streets."<sup>147</sup> He faulted the media for its favorable coverage of the antiwar movement and its hostility toward the Administration.<sup>148</sup> Other Administration officials also raised the specter of violence at the November demonstrations.<sup>149</sup> In statements to the media they referred ominously to the expectation that the November protests would turn violent.<sup>150</sup>

On November 3, 1969, President Nixon addressed the nation in a nationally televised speech in which he described North Vietnam as the impediment to peace and rejected the "popular and easy course" of immediate withdrawal.<sup>151</sup> Nixon then explained his policy of Vietnamization, whereby American troops would be withdrawn as the South Vietnam military became capable of assuming the burden of the war.<sup>152</sup> It was, in Zaroulis's and Sullivan's words, "surely one of the most divisive [speeches] ever made by a sitting President of the United States."<sup>153</sup> Nixon contrasted the irrational and disloyal protesters with the "silent majority" of Americans to whom he turned for support.<sup>154</sup> He invoked the theme of disloyal adherence to the enemy, as he recounted seeing "demonstrators carrying signs reading: 'Lose in Vietnam, bring the boys home.'" <sup>155</sup> He warned that an irrational "vocal minority" had tried to dictate policy by "mounting demonstrations in the street," and posed a threat to the nation's "future as a free society."<sup>156</sup> Unity, by which he meant, support for the Administration and its Vietnam policy, was necessary to achieve peace, "for the more divided we are at home, the less likely the enemy is to negotiate at Paris."<sup>157</sup> Consequently, he invoked the patriotism and sense of "national destiny" of the "great silent

146. *Id.* at 50.

147. Vice President Spiro T. Agnew, Address Before the National Municipal League, Philadelphia, Pa. (Nov. 10, 1969), in AGNEW, FRANKLY SPEAKING, *supra* note 138, at 60.

148. LEMBCKE, *supra* note 110, at 96.

149. WELLS, *supra* note 44, at 383-84.

150. *See id.*

151. Nixon Address on Vietnam, *supra* note 96, at 901-02.

152. *Id.*

153. ZAROULIS & SULLIVAN, *supra* note 30, at 279.

154. Nixon Address on Vietnam, *supra* note 96, at 907.

155. *See id.* at 908.

156. *Id.*

157. *Id.* at 909.



majority" of Americans, and asked for their support.<sup>158</sup> United, we could achieve an honorable peace, and could not be defeated because, "North Vietnam cannot defeat or humiliate the United States. Only Americans can do that."<sup>159</sup>

## II. OTHER HEARTS AND MINDS

It is a hopeless task to try to capture *the response* of the antiwar movement, because, like the movement itself, the response was varied and reflected many voices. As John and Rosemary Bannan have noted, opponents of the war participated in an antiwar "movement" not an antiwar "organization."<sup>160</sup> As such, it did not have "an established structure, central leadership, agreed upon spokesmen, or a commonly accepted ideology."<sup>161</sup> Moreover, the character of the dissent engaged in by opponents of the war varied so greatly that it posed different questions regarding the balance between loyalty to one's country and one's conscience and the appropriate limits of dissent. The dilemma of the boundaries of dissent for someone who participated in marches and vigils was different from that of someone who seized draft files and destroyed them, or who attempted to keep war ships from sailing.

Antiwar activity took numerous forms beyond showing up at demonstrations or writing one's congressman. Defying the will of the U.S. government, over two hundred people traveled to North Vietnam.<sup>162</sup> Their missions varied from documenting the effects of the air war against the North, to retrieving prisoners of war, to bringing contraband medical aid.<sup>163</sup> Others counseled draft resistance, pledged to refuse induction, or raided draft boards to destroy thousands of draft files.<sup>164</sup> Returned Vietnam veterans tried to bring a taste of the war home by staging mock sweeps of American towns.<sup>165</sup> And to shake a nation from its denial of the brutality of the

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158. *Id.*

159. *Id.*

160. BANNAN & BANNAN, *supra* note 34, at 153.

161. *Id.*

162. HERSHBERGER, *supra* note 119, at xv.

163. On Americans in North Vietnam, see generally *id.*

164. For a discussion of the Catholic Left and raids on draft boards, see generally FRANCINE DU PLESSIX GRAY, *DISOBEDIENCE: PROFILES IN CATHOLIC RADICALISM* (1970); MURRY POLNER & JIM O'GRADY, *DISARMED AND DANGEROUS: THE RADICAL LIVES AND TIMES OF DANIEL AND PHILLIP BERRIGAN, 195-217, 233-50* (1997).

165. VVAW used guerilla theatre on a variety of occasions to try to bring a sense of the war home to American civilians. During Operation Rapid American Withdrawal ("RAW") on Labor Day weekend 1970, VVAW, along with actors from the Philadelphia

war we were fighting, they held hearings to expose war crimes that American soldiers had committed in our name.<sup>166</sup>

Within the military, GI resistance made it increasingly difficult for the U.S. to fight.<sup>167</sup> Combat refusals and mutinies increasingly became a problem, as did drug addiction and fragging, the murder of superior officers, typically for overzealousness.<sup>168</sup> Desertions and unauthorized absences reached record levels in 1971.<sup>169</sup> GIs engaged in a practice of “search and evade” rather than seeking to engage the enemy.<sup>170</sup> By 1971, Colonel Robert Heintz described the armed forces as on the brink of collapse.<sup>171</sup> Historian Christian Appy writes that: “In the latter years of the war . . . almost no effort to escape or avoid combat was condemned by enlisted men. By that time avoidance was,

Guerilla Theatre, “staged a successful search and destroy mission, clearing the road from Morristown, New Jersey, to Valley Forge, Pennsylvania, of enemy forces along the route.” NICOSIA, *supra* note 53, at 56 (quoting a VVAW press release). At times the mock sweeps and the interrogations of the “Viet Cong” captives became frighteningly realistic as veterans tapped into deep wells of anger from their Vietnam experience and actors found themselves frightened and bruised. *Id.* at 64–66. For descriptions of Operation RAW, see ANDREW E. HUNT, *THE TURNING: A HISTORY OF VIETNAM VETERANS AGAINST THE WAR* 46–54 (1999); NICOSIA, *supra* note 53, at 56–67.

166. Antiwar veterans sponsored two hearings on war crimes and crimes against humanity committed by American forces in Vietnam. THE DELLUMS COMMITTEE HEARINGS ON WAR CRIMES IN VIETNAM: AN INQUIRY INTO COMMAND RESPONSIBILITY IN SOUTHEAST ASIA (Citizens’ Comm’n of Inquiry eds., 1972); THE VIETNAM VETERANS AGAINST THE WAR, *THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES* (1972). For a discussion of the hearings, see HUNT, *supra* note 165, at 55–76; NICOSIA, *supra* note 53, at 73–93. A stark example of the unwillingness of Americans to acknowledge the brutality of the war was in the strong reaction of disbelief that the My Lai massacre actually occurred, or that American troops were responsible for it if it did. For a discussion of the American response to My Lai, see Edward M. Opton, Jr. & Robert Duckles, *It Didn’t Happen and Besides, They Deserved It*, in *CRIMES OF WAR* 441, 441–44 (Richard A. Falk et al. eds., 1971) (presenting a condensed version of a study published by the Wright Institute under the title MY LAI: IT NEVER HAPPENED AND BESIDES, THEY DESERVED IT (1970)).

167. On GI resistance, see generally DAVID CORTRIGHT, *SOLDIERS IN REVOLT: THE AMERICAN MILITARY TODAY* (1975) [hereinafter CORTRIGHT, *SOLDIERS IN REVOLT*]; David Cortright, *GI Resistance During the Vietnam War*, in *GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT* 116–28 (Melvin Small & William D. Hoover eds., 1992).

168. CORTRIGHT, *SOLDIERS IN REVOLT*, *supra* note 167, at 19–23.

169. *Id.* at 10–13.

170. According to historian Christian Appy, this practice of combat avoidance known as “sandbagging” was increasingly practiced, often with the acquiescence of officers, as the war dragged on. APPY, *supra* note 110, at 244–45; see also Donald Kirk, *Who Wants to Be the Last American Killed in Vietnam?*, N.Y. TIMES MAG., Sept. 19, 1971, reprinted in *REPORTING VIETNAM PART TWO: AMERICAN JOURNALISM 1969–1975*, at 217–34 (1998) (describing collapse of morale and desire to avoid combat).

171. Robert Heintz, *The Collapse of the Armed Forces*, 108 ARMED FORCES J. 30, 30 (1971). The term “search and evade” is Heintz’s. See *id.* at 31.

often enough, as much the collective pursuit as fighting."<sup>172</sup>

As Vietnamization shifted the focus of attention from a ground war to an air war, resistance grew within the Air Force and Navy.<sup>173</sup> In 1971 and 1972, a movement among seamen and their civilian allies calling itself S.O.S., for Stop Our Ships/Support Our Sailors, sought to keep the ships necessary to maintain the air war from sailing to the Tonkin Gulf.<sup>174</sup> Sailors petitioned, demanding not to sail, and large numbers of sailors went AWOL rather than sail.<sup>175</sup> In November 1971, for instance, over 250 men scheduled to sail on the aircraft carrier the U.S.S. *Coral Sea* let the ship depart without them.<sup>176</sup> Sabotage on the ships became a major problem for the Navy, as sailors tried to keep the ships from sailing. The House Armed Services Committee revealed in 1972 that there were hundreds of incidents of sabotage.<sup>177</sup> In the summer of 1972, sailors crippled two aircraft carriers, the U.S.S. *Forrestal*, whose deployment was delayed for two months, and the U.S.S. *Ranger*, whose deployment was delayed for three and a half months.<sup>178</sup> Those acts of sabotage led to the decision to send the U.S.S. *Kitty Hawk*, which was returning from a tour of duty in the Tonkin Gulf, back to Vietnam.<sup>179</sup> In response, sailors on the *Kitty Hawk* rioted.<sup>180</sup>

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172. APPY, *supra* note 110, at 244.

173. On resistance to the air war, see CORTRIGHT, *SOLDIERS IN REVOLT*, *supra* note 167, at 106-37.

174. *Id.* at 111-13.

175. *Id.* at 111-16; *1,000 on Ship Sign Antiwar Petition*, L.A. TIMES, Oct. 12, 1971, at A24.

176. Statement by Crewmembers of the USS *Coral Sea* (Dec. 9, 1991), in United States Servicemen's Fund Papers [hereinafter "SOS"] (on file with Wisconsin State Historical Society, Madison, Wisconsin Box 5, Folder 19). The Berkeley California City Council adopted a resolution supporting sanctuary for sailors who were unwilling to participate further in the war. It pledged facilities to provide sanctuary, encouraged Berkeley citizens to assist anyone seeking sanctuary, and prohibited city employees from interfering with established sanctuaries or assisting in arrest of AWOL sailors. "City Action Regarding The U.S.S. *Coral Sea*" (on file with the North Carolina Law Review). A project of the American Friends Service Committee, calling itself the People's Blockade, also tried to impede the efforts of ships bound to Vietnam from leaving harbor. Though they knew that realistically they could not keep the ships from sailing, they had some success publicizing the air war and inducing sailors to go AWOL. Letter of July 19, 1972, Peoples Blockade in United States Servicemen's Fund Papers (on file with Wisconsin State Historical Society, Madison, Wisconsin Box 5, Folder 18); Unsigned pamphlet, "Why The People's Blockade?" in United States Servicemen's Fund Papers (on file with Wisconsin State Historical Society, Madison, Wisconsin Box 5, Folder 18).

177. CORTRIGHT, *SOLDIERS IN REVOLT*, *supra* note 167, at 125-26.

178. *Id.*

179. *Id.* at 125.

180. *Id.* at 125-26. As a result of the riot, the *Kitty Hawk* also had to be taken out of service and was sent back to San Diego, thereby raising to three the number of aircraft

Capturing the response of the antiwar movement is a task akin to capturing water with a sieve. My aim is rather to provide a glimpse of some of the efforts to engage the allegations of the war's supporters that dissent was an act of disloyalty that gave aid and comfort to the enemy.

A. *Dissent and the American Tradition: The Patriotism of Protest*

I remember when I first came back from Vietnam, trying to talk to my father, who had served in the Second World War; trying to talk to my uncles, who had all served—but when I questioned my war, they thought I was questioning their war. . . . I'm saying to them, "I'm not questioning your war. What you taught me, believing in America, believing in the Bill of Rights, I still believe in. . . ." We did what we did because we loved our country and wanted our country to realize that it made mistakes. I am just as patriotic as my father or my uncle or anybody. Jack McCloskey, Medic, U.S. Army, Member VVAW.<sup>181</sup>

The antiwar movement rejected equating dissent with disloyalty. Instead, opponents of the war invoked a tradition of dissent that was older than the Republic itself. In his sermon at the October 16, 1967, draft card turn-in, William Sloane Coffin reminded his listeners that America's history was rooted in dissent beginning with the Puritan colonizers of New England.<sup>182</sup> He traced that tradition of dissent through the Quakers, the Patriots of the American Revolution, and the abolitionists.<sup>183</sup> This heritage of asserting the right of conscience in the face of wrongful government action was manifest in the actions

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carriers that had been kept out of the air war against North Vietnam. H. BRUCE FRANKLIN, *VIETNAM AND OTHER AMERICAN FANTASIES* 66 (2000). Other carriers were also kept out of the air war due to onboard dissent. Bruce Franklin writes, "Not since Pearl Harbor had the U.S. Navy been so crippled." *Id.* at 67.

181. Jack McCloskey, *I Made Promises to Dead People*, in STACEWICZ, *supra* note 53, at 99–100.

182. Rev. William Sloane Coffin, Jr., Sermon at the First Unitarian Church Boston (Oct. 16, 1967) [hereinafter, Coffin Sermon], in CLERGY AND LAYMEN CONCERNED ABOUT VIETNAM, TWO DECLARATIONS ON THE DRAFT [hereinafter CALCAV, TWO DECLARATIONS] (on file with Wisconsin State Historical Society, Social Action Collection, Box 11). The Arlington Street Church, where the draft card turn-in took place, had a history that was long intertwined with dissent. At the time a statement of opposition to the Mexican-American war, signed by its pastor and numerous members of the church, hung in its foyer. See FOLEY, *supra* note 29, at 92–93; see also Sergeant Lewis A. Delano, *Letter*, LEFT FACE, Dec. 1969, at 5 (linking dissent with the American revolutionary tradition).

183. Coffin Sermon, *supra* note 182.

of those who could not remain silent and could not submit in the face of the war and the draft.<sup>184</sup>

Indeed, the suppression of dissent was the truly un-American act. The organization Clergy and Laymen Concerned About Vietnam emerged in response to assertions of the disloyalty of dissent. At a news conference on October 25, 1965, the nascent organization proclaimed: "To characterize every act of protest as communist-inspired or traitorous is to subvert the very democracy which loyal Americans seek to protect."<sup>185</sup> Similarly, some draft card burners explained their act not simply as a protest against the war, but also as a protest against the transformation of the draft card into a sacred object and infringement of First Amendment rights by the burning ban.<sup>186</sup>

Opponents of the war insisted that their dissent grew out of a love of country and that their repudiation of its policies, especially in a time of war, was agonizing.<sup>187</sup> Yet they dissented because they felt that they must. In his April 4, 1967 address on Vietnam at the Riverside Church, Martin Luther King acknowledged the pain of dissent under these circumstances and its tendency to inhibit acts of conscience. Noting his own delays in speaking out forcefully against the war, King stated that "men do not easily assume the task of opposing their government's policy, especially in time of war."<sup>188</sup> He added that "the calling to speak is often a vocation of agony, but we must speak."<sup>189</sup> Similarly, in a published response to Vice President Spiro Agnew's attacks on the antiwar movement, Stanford University

184. *Id.*

185. MITCHELL K. HALL, *BECAUSE OF THEIR FAITH: CALCAV AND RELIGIOUS OPPOSITION TO THE VIETNAM WAR* 14 (1990).

186. *See, e.g.*, Cornell, *supra* note 41, at 36-42 (explaining free speech concerns of draft card burners and comparing ban on destroying draft cards with idolatry).

187. *See, e.g.*, Gus Anderson, *C.O.M., LIBERTY CALL* (San Diego, Cal.), Sept. 1971, at 4 (description of the Concerned Officers Movement relating the sense of compulsion to speak out and to "serve both our country and our conscience in a very troubled time."); Robert McAfee Brown, *Sermon at the Service of the Turning in of Draft Cards, in CALCAV, TWO DECLARATIONS*, *supra* note 182. Brown stated:

I believe that we are acting today not because we hate our nation and its processes, or hold them in contempt, but precisely because we love this land, because we love it so much that we cannot remain idle and complacent when we see it destroying its moral fibre, and in the process threatening the destruction of all mankind.

*Id.*

188. Martin Luther King, Jr., *Beyond Vietnam, in VIETNAM AND BLACK AMERICA: AN ANTHOLOGY OF PROTEST AND RESISTANCE* 79 (Clyde Taylor ed., 1973) [hereinafter *VIETNAM AND BLACK AMERICA*].

189. *Id.*

theologian Robert McAfee Brown acknowledged the acute dilemma of conscience faced by the young men that Agnew cavalierly ridiculed. Brown continued, "I wish that just once you would seriously entertain the possibility that such youths do in fact represent an immense source of moral health for our nation, rather than being rotten apples."<sup>190</sup>

Critics of the war also rejected the definition of loyalty and patriotism offered by the Johnson and Nixon Administrations by decoupling loyalty to nation from loyalty to its leaders. They refused to accept the notion that patriotism required acquiescence in American foreign policy and that criticism of the President necessarily impaired the nation. Instead, they depicted American policy in Vietnam as an executive policy from which the American people ought to dissociate themselves. In a variety of ways, they articulated these ideas that the government was responsible for the war and that their repudiation of the nation's leadership was consistent with patriotism.

Critics quickly dubbed the war "Johnson's War" or "Lyndon's War."<sup>191</sup> Richard Falk, a political scientist at Princeton University who had written extensively on the legality of the war, wrote in a letter to the editor of the *New York Times* upon returning from a trip to North Vietnam in 1972, "Americans in Hanoi have almost all felt shame over what their country has done and a strong patriotic impulse, in the best sense, to convey an impression to the people and leaders of Vietnam that we, as a nation, do not stand behind our Government's war policies."<sup>192</sup> Others also drew the distinction between the nation and the government in condemning the war.<sup>193</sup>

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190. Robert McAfee Brown, *An Open Letter to Spiro T. Agnew*, 87 CHRISTIAN CENTURY 1213, 1214 (1970).

191. See WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* 273 (3d ed. 1995); Thomas F. Eagleton, *Congress: Does it Abdicate Its Power?* 19 ST. LOUIS U. PUB. L. REV. 1, 3 (2000); Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial Presidency" Myth*, 19 HARV. J.L. & PUB. POL'Y 533, 584 (1996). Alternatively, however, it was frequently dubbed as McNamara's War. See John T. Correll, Editorial, *The Confessions of Robert S. McNamara*, A.F. MAG., June 1995, at 2.

192. HERSHBERGER, *supra* note 119, at xix (quoting Letter from Richard Falk to the Editor, N.Y. TIMES, Sept. 9, 1972, at 22).

193. See, e.g., Thomas Michaud, Court-Martial Statement (Sept. 19, 1972), in United States Servicemen's Fund, *supra* note 64, Box 5 Folder 12 (Free Tom Michaud Committee Files) ("We must recognize that the responsibility for this war and the crimes committed in the name of the American people, lies with the civilian and military policymakers. When individual soldiers, like myself, come to realize the truth about the war, we likewise have a responsibility to refuse continued participation."); We Are Everywhere, SOS, *supra* note 176 (reporting the shipboard statement of sailors on the U.S.S. *Coral Sea*).

Speaking at the rally before the October 16, 1967 draft card turn-in, Howard Zinn stated: "I don't believe we owe loyalty to a government that lies to us," but he added that "I do believe we owe loyalty to our fellow Americans who are in danger of being killed by the incompetence of this government."<sup>194</sup>

### B. *Betrayal and Allegiance*

#### The Whole Thing Was a Lie!<sup>195</sup>

We had taken an oath to defend the government of the United States and the Constitution. What do you do when the government of the United States is the enemy of the Constitution? Where does your allegiance lie?<sup>196</sup>

Just as opponents of the war recast the discussion of patriotism, they similarly reshaped the use of the language and images of "betrayal." The greatest betrayal was not to speak and act in the face of American lawlessness in Vietnam. In a position paper on "The Religious Community and the War in Vietnam," Clergy and Laymen Concerned About Vietnam proclaimed: "A time comes when silence is betrayal."<sup>197</sup> Responding to that theme, Martin Luther King sought to explain why he felt he must speak out against the war. He identified the "angry young men" of America's urban ghettos and the principle of nonviolence itself as the objects of his betrayal were he to fail to condemn the war clearly and vigorously.<sup>198</sup> King noted his experience of counseling nonviolence to these young men:

As I have walked among the desperate, rejected and angry young men I have told them that Molotov cocktails and rifles would not solve their problems. I have tried to offer them my deepest compassion while maintaining my conviction that social change comes most meaningfully through non-violent action. But they asked—and rightly so—what about Vietnam? They asked if our own nation wasn't using massive doses of violence to solve its problems . . . Their questions hit home, and I knew that I could never again raise my voice against the violence of

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194. See FOLEY, *supra* note 29, at 99-100 (quoting Howard Zinn). In his address at the Arlington Street Church on that occasion, William Sloane Coffin noted that "[t]o hundreds of history's most revered heroes, not to serve the state has appeared the best way to love one's neighbor." Coffin Sermon, *supra* note 182.

195. See Donald Duncan, *The Whole Thing Was a Lie!*, RAMPARTS, Feb. 1966, at 12.

196. See STACEWICZ, *supra* note 53, at 112 (quoting John Kniffin, U.S. Marine Corps, Three Tours of Duty in Vietnam, 1965-68, Member, VVAW).

197. See HALL, *supra* note 185, at 34.

198. King, *supra* note 188, at 82.

the oppressed in the ghettos without having first spoken clearly to the greatest purveyor of violence in the world today—my own government.<sup>199</sup>

Striking a similar note, though speaking of a different group of young men, William Sloane Coffin asked whether the churches could in good conscience abandon their young. Coffin asked, “Are we to raise conscientious men and then not stand by them in their hour of conscience?”<sup>200</sup> Returning antiwar veterans also saw themselves as compelled to speak on behalf of their generation. Bobby Muller, a Marine First Lieutenant who had been rendered paraplegic in the war, said he spoke in response to those who said that criticism of the war was a betrayal of those who had died or been wounded because it suggested that their sacrifice was meaningless.<sup>201</sup> For Muller, the use of the broken and dead soldiers as a way of silencing dissent was the real betrayal, and he argued that he had an obligation to speak on behalf of his comrades who knew that their sacrifice had been meaningless and on behalf of those who would be the war’s next victims if it did not end.<sup>202</sup>

Critics of the war spoke the language of betrayal most often in accusing the government of betraying its ideals and its people. Martin Luther King represented the war as a betrayal of the hopes of the poor in this country. Lyndon Johnson’s Great Society programs had produced a brief moment of hope for the nation’s poor, but Johnson had betrayed that hope by eviscerating the poverty program in order to maintain the war. Speaking in February 1967 in his first speech devoted entirely to the topic of Vietnam, King said: “The promises of the Great Society have been shot down on the battlefields of Vietnam.”<sup>203</sup> The war was “an enemy of the poor,” not only because it drained the resources necessary for a war on poverty, but because it was sending the poor, and especially young Black men, “to fight and to die in extraordinarily high proportions relative to the rest of the

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199. *Id.*

200. Coffin Sermon, *supra* note 182. A.J. Muste wrote that to acquiesce to calls to silence wartime dissent would have dire consequences for the nation and the world. Borrowing from the philosopher Martin Buber, he argued that one must speak out or condemn the nation to “the speechlessness of slaughter.” HERSHBERGER, *supra* note 119, at 58 (quoting A. J. Muste, *A Voice against the Speechlessness of Slaughter*, WIN, Apr. 29, 1966).

201. See JOHN KERRY & VIETNAM VETERANS AGAINST THE WAR, *THE NEW SOLDIER* 96, 102–04 (David Thorne & George Butler eds., 1971) [hereinafter *THE NEW SOLDIER*].

202. *See id.*

203. HALL, *supra* note 185, at 41.



population."<sup>204</sup>

Recalling his return from Vietnam, Marine veteran John Kniffin recounted: "Those of us who came back [and] took an antiwar position . . . felt very betrayed by the government."<sup>205</sup> Antiwar GIs and veterans consistently spoke of their anger and feelings of betrayal. They frequently recounted having gone to war strongly believing in the country, the military, and the cause. It is striking how many antiwar GIs described themselves as having been politically conservative and fervently anticommunist. Many had belonged to Young Americans for Freedom or supported and campaigned for Republican presidential candidate Barry Goldwater in 1964. Others were inspired to President Kennedy's call for sacrifice and service on behalf of the nation and freedom.<sup>206</sup> At some point, whether in Vietnam or after their return, they came to believe that they had been lied to and manipulated, that we were not at war to defend democracy and to help the people of Vietnam, and that the country had failed to live up to its stated ideals.<sup>207</sup>

John Kerry spoke eloquently of these feelings of anger and betrayal in his testimony to the Senate Foreign Relations Committee on April 22, 1971, during the VVAW's "Operation Dewey Canyon III."<sup>208</sup> Kerry warned that the war had produced a mass of returning veterans who had been "given the chance to die for the biggest nothing in history—men who have returned with a sense of anger and of betrayal that no one so far has been able to grasp."<sup>209</sup> The antiwar veterans believed that they had been cynically lied to, manipulated, and used, only to be abandoned, in so many instances, in Veterans Administration Hospitals or used as political symbols by a cynical

204. King, *supra* note 188, at 81–82.

205. See STACEWICZ, *supra* note 53, at 110 (quoting John Kniffin).

206. See, e.g., *id.* at 32–35 (statement of Barry Romo); *id.* at 35–38 (statement of Joe Urgo); *id.* at 79–80 (statement of Linda Alband); see also APPY, *supra* note 110, at 55–72 (discussing the range of reasons why Americans entered the military).

207. Recent interviews with Israeli refuseniks, soldiers, and reservists who have refused to serve in the occupied territories of the West Bank and the Gaza Strip, sound these themes of betrayal and the shattering of ideals in very similar language. See RONIT CHACHAM, *BREAKING RANKS: REFUSING TO SERVE IN THE WEST BANK AND GAZA STRIP passim* (2003).

208. VVAW dubbed the week of Washington lobbying and protest as Operation Dewey Canyon III to describe "a limited incursion into the country of Congress." Operations Dewey Canyon I and II had been invasions of Laos in 1969 (involving U.S. Marines) and 1971 (involving South Vietnam's army). See THE NEW SOLDIER, *supra* note 201, at 26. For a discussion of Operation Dewey Canyon III, see NICOSIA, *supra* note 53, at 98–157.

209. THE NEW SOLDIER, *supra* note 201, at 12 (quoting from John Kerry's statement before the Senate Foreign Relations Committee, on April 22, 1971).

Administration.

Kerry continued with a litany of the lies with which GIs had been sent off to war and the truths that they discovered in Vietnam:

We are probably angriest about all that we were told about Vietnam and about the mystical war against communism. We found that not only was it a civil war, an effort by a people who had for years been seeking their liberation from any colonial influence whatsoever, but also we found that the Vietnamese whom we had enthusiastically molded after our own image were hard put to take up the fight against the threat we were supposedly saving them from. We found most people didn't even know the difference between communism and democracy. They only wanted to work in rice paddies without helicopters strafing them and bombs with napalm burning their villages and tearing their country apart. . . .

We found all too often American men were dying in those rice paddies for want of support from their allies. We saw firsthand how monies from American taxes were used for a corrupt dictatorial regime. We saw that many people in this country had a one-sided idea of who was kept free by our flag, and blacks provided the highest percentage of casualties. We saw Vietnam ravaged equally by American bombs and search-and-destroy missions, as well as by Viet Cong terrorism, and yet we listened while this country tried to blame all of the havoc on the Viet Cong. We rationalized destroying villages in order to save them. We saw America lose her sense of morality as she accepted very coolly a My Lai and refused to give up the image of American soldiers who hand out chocolate bars and chewing gum. We learned the meaning of free-fire zones, shooting anything that moves, and we watched while America placed a cheapness on the lives of Orientals.

We watched the United States' falsification of body counts, in fact the glorification of body counts. We listened while month after month we were told the back of the enemy was about to break. We fought [with] weapons against those people which I do not believe this country would dream of using were we fighting in the European theater. We watched while men charged up hills because a general said that hill has to be taken, and after losing one platoon or two platoons, they marched away to leave the hill for reoccupation by the North Vietnamese. We watched pride allow the most unimportant battles to be blown into extravaganzas, because we couldn't lose, and we couldn't retreat, and because it didn't matter how

many American bodies were lost to prove that point. . . .<sup>210</sup>

Perhaps the biggest betrayal was the policy of Vietnamization. Kerry argued that the Administration had tried to deceive the American public into thinking that it was ending the war.<sup>211</sup> Vietnamization, however, merely substituted South Vietnamese ground troops for American and shifted American involvement from a ground war to an air war that was no less destructive than the war that was supposedly winding down. Moreover, Vietnamization protracted the war and killed American servicemen all for the sake of Nixon's pride, as he tried to stave off the inevitable, American defeat in the war, so that he would not be "the first President to lose a war."<sup>212</sup> Kerry continued: "We are asking Americans to think about that because how do you ask a man to be the last man to die in Vietnam? How do you ask a man to be the last man to die for a mistake?"<sup>213</sup>

### C. *Supporting Our Boys*

Is it we who are demoralizing our boys in Vietnam, or the administration which is asking them to do immoral things?  
William Sloane Coffin<sup>214</sup>

I most certainly want to "Back up our Boys." I want to back them right up to the continental limits of the U.S.<sup>215</sup>

The mere existence of a GI antiwar movement and of antiwar sentiment among a significant number of returning veterans undermined the claim that the antiwar movement had harmed or demoralized "our boys." The presence of a growing number of servicemen and veterans in antiwar demonstrations prompted President Nixon to suggest that many of the members of VVAW were fraudulent veterans, a charge that VVAW was happy to rebut.<sup>216</sup> To be sure, many soldiers were hostile to the antiwar movement, but the biggest threat to morale was the war itself.

Critics of the war emphasized its harm to American soldiers. Not

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210. *Id.* at 14-18.

211. *Id.* at 20-22.

212. *Id.* at 18.

213. *Id.*

214. Coffin Sermon, *supra* note 182.

215. Edythe Couey, Letter to Task Force (Apr. 7, 1969) (on file with Task Force Files, Wisconsin State Historical Society, Madison, Wisconsin).

216. See STACEWICZ, *supra* note 53, at 246; THE NEW SOLDIER, *supra* note 201, at 24.

only did the war take the obvious toll of lives and limbs, but it also brutalized and demoralized the troops. Linking the words morale and moral, William Sloane Coffin suggested that service in the name of an immoral task was inherently demoralizing.<sup>217</sup> Martin Luther King similarly noted the harmful effect on the troops of the realization that “none of the things we claim to be fighting for are really involved.”<sup>218</sup>

GI and veteran opponents of the war rejected the idea that the antiwar movement had hurt their morale and objected to their use as an icon for rallying support for the war and for denigrating the antiwar movement. A number of them specifically addressed Vice President Agnew’s attacks on the antiwar movement. In an “Open Letter to Spiro Agnew,” Ensign Gene Powers responded to Agnew’s allegation that the peace movement had undermined the morale of the troops in the field and scorned them upon their return home by telling them “they are fighting in a ‘worthless’ and ‘immoral’ cause.”<sup>219</sup> Powers, who was then stationed in Vietnam, had sent the letter to the National Peace Action Coalition with the request that they use the letter in any way that would be helpful.<sup>220</sup> Powers wrote that he agreed with the peace movement that American involvement in Vietnam was “worthless and immoral,” and he called for immediate withdrawal. Antiwar protest had not dispirited Powers.<sup>221</sup> Indeed, he continued:

[I]t bolsters my faith in the American people to hear this [criticism of the war]. . . . What does demoralize me is the feeling that I am being manipulated by the present Administration for political gains, and what is called ‘saving face.’ And I find your rhetoric frequently the most demoralizing of all.<sup>222</sup>

In his testimony before the Senate Foreign Relations Committee, John Kerry also responded to Agnew. Referring to Agnew’s commencement address at West Point, in which the Vice President had contrasted protesters, whom he described as “criminal misfits” and “charlatans of peace,” with America’s “best men” who were

217. See *supra* note 182 and accompanying text.

218. King, *supra* note 188, at 89.

219. Gene Powers, *An Open Letter to Spiro Agnew* (Apr. 10, 1971), reprinted in LEMBCKE, *supra* note 110, at 27–28.

220. See *id.*

221. See *id.*

222. *Id.* at 27–28, 46–47 (saying that the Moratorium had been a “morale builder” since the troops recognize that “the peace demonstrations are on their behalf”).

fighting and dying in Vietnam, Kerry asserted that those so-called best men "can only draw a very deep sense of revulsion" from Agnew's distortions.<sup>223</sup> The "misfits were standing up for us in a way that nobody else in this country dared to," and many of those who died would have joined their ranks upon return.<sup>224</sup> Nor did Kerry wish to claim the status of America's best men, for "we are ashamed of and hated for what we were called on to do in Southeast Asia."<sup>225</sup>

Finally, the GI opposition and antiwar veterans challenged the commitment of the government to their well-being. Vietnam Veterans Against the War highlighted the often scandalously wretched conditions that returning veterans endured in Veterans Administration Hospitals.<sup>226</sup> They mocked the Nixon Administration for characterizing protracting the war and increasing casualties as support for the troops. One GI antiwar newspaper, for instance, displayed a drawing of a dead soldier over the caption, "The Silent Majority."<sup>227</sup>

#### D. *Reconciling Conflicting Allegiances*

P.S. Let Whitey fight his own goddam war.<sup>228</sup>

I say justice to whoever did the Ranger in. And one question still lies unanswered in my mind "how many people were

223. THE NEW SOLDIER, *supra* note 201, at 12.

224. *Id.* at 14.

225. *Id.* at 12-14.

226. *See id.* at 14; STACEWICZ, *supra* note 53, at 209-10 (statement of Bobby Muller describing his efforts to publicize conditions of V.A. Hospitals).

227. LEFT FACE, Dec. 1969. In order to recapture the mantle of "supporting the troops," the Nixon Administration responded to the challenge of antiwar GIs and veterans by emphasizing the issue of prisoners of war and soldiers missing in action. On the manipulation of this issue, see generally H. BRUCE FRANKLIN, *M.I.A. OR MYTHMAKING IN AMERICA* (1992).

228. Letter from René Wright to Lawrence Hart (Mar. 1969), in *GIs United Against the War* (on file with Vietnam Files, Wisconsin State Historical Society, Madison, Wisconsin). Wright was a member of the seventh grade class at John M. Coleman Junior High School in Brooklyn, New York. Lawrence Hart was a serviceman stationed at the time at Fort Jackson, South Carolina, who was involved in GIs United against the War in Vietnam, a GI antiwar organization that originated at Fort Jackson. Seventh and eighth graders at the school wrote letters of support to various members of GIs United at Fort Jackson. *See* Letter from Alan C. Kellock, Student, to GIs United (Mar. 8, 1969) (serving as a cover letter for letters sent to three black GIs at Fort Jackson, Albert Madison, Andrew Pulley, and Lawrence Hart), in *id.*; *Interview with Tommie Woodfin*, in FRED HALSTEAD, *GIS SPEAK OUT AGAINST THE WAR: THE CASE OF THE FORT JACKSON 8*, at 58-9 (1970) ("[A]fter we were arrested down here, we got letters from those students at I.S. 271 . . . And when we were in confinement these were the letters, from these young students, that we cherished most. They made the walls of confinement bearable.").

spared by one person's actions against a war he did not believe in?"<sup>229</sup>

For many of the war's critics, questions of loyalty and allegiance went beyond whether wartime dissent was patriotic, or whether criticizing the war and trying to end it helped or harmed the troops and their morale. They, like all of us, belonged to many overlapping, and sometimes conflicting, communities. Membership in these communities led many of the war's critics to consider how to reconcile conflicting allegiances.

For many African American critics of the war, the civil rights struggle in America preempted any commitment to overseas military adventures. As early as 1965, the Mississippi Freedom Democratic Party had circulated a leaflet entitled, "HERE ARE FIVE reasons why Negroes should not be in any war fighting for America."<sup>230</sup> Among other things, the leaflet said that freedom must be obtained first in Mississippi before Mississippi Blacks should fight in Vietnam. Further, it linked the struggles of American Blacks with people of color throughout the world:

No one has a right to ask us to risk our lives and kill other Colored People in Santo Domingo and Viet Nam, so that the White American can get richer. We will be looked upon as traitors by all the Colored People of the world if the Negro people continue to fight and die without a cause.<sup>231</sup>

The following year, the Student Nonviolent Coordinating Committee ("SNCC") released a statement expressing sympathy for draft resisters and stating that "work in the civil rights movement and other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative."<sup>232</sup> By the summer of 1967, seventeen SNCC staff members faced prosecution for refusing induction.<sup>233</sup>

229. Anonymous Letter From Sailor Aboard the USS Constellation (Oct. 1972), in UP AGAINST THE BULKHEAD (Jan. 1973). This quotation appears, as well, on an undated newsletter published by the Patrick Chenoweth Defense Committee. Chenoweth was acquitted by a Navy court-martial on the charge of sabotage at time of war. Chenoweth, an anti-war sailor, asserted his innocence, though not his disappointment at the crippling of the U.S.S. Ranger. PATRICK CHENOWETH DEFENSE COMMITTEE, GRINDING TO A HALT (undated).

230. *The War on Vietnam: A McComb, Mississippi, Protest*, in BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 1619 TO THE PRESENT 415 (Joanne Grant ed., 1968) [hereinafter BLACK PROTEST].

231. *Id.*

232. *Statement on Vietnam*, in BLACK PROTEST, *supra* note 230, at 418.

233. MICHAEL FERBER & STAUGHTON LYND, THE RESISTANCE 127 (1971). For a

Increasingly, African American servicemen and civilians came to see the war as, at best, a distraction from the freedom struggle and the war on poverty at home, and at worst, another expression of American racism.<sup>234</sup> A survey conducted in 1969 showed that two-thirds of black enlisted men in Vietnam thought that "their fight is in the U.S."<sup>235</sup> Nearly a third of those surveyed thought that the United States should withdraw immediately.<sup>236</sup> One African American draft evader who had fled to Canada distanced himself emotionally, as well as literally, from the war in stating: "I'm not a draft evader, I'm a runaway slave. I left because I was not going to fight white America's war."<sup>237</sup>

If African American dissenters saw their commitment to the civil rights struggle as trumping any claims of allegiance that the United States might have compelling support for the Vietnam War, religiously motivated critics similarly claimed an allegiance that was stronger than loyalty to country. For these opponents of the war, dissent was a religious obligation. In their sermons on the occasions of draft card turn-ins, both Robert McAfee Brown and William Sloane Coffin invoked Martin Luther, noting that like Luther, the resisters had reached a point where they must proclaim, "Here I stand, I can do no other."<sup>238</sup> An allegiance to a higher law and to conscience required civil disobedience in the face of an unjust war.<sup>239</sup>

These religious commitments required that opponents of the war look beyond national allegiances and speak for all of God's children. In his Riverside Church address, Martin Luther King, Jr. explained that his Christian ministry obliged him to seek peace on behalf of all people, not only Americans. King stated:

I sometimes marvel at those who ask me why I am speaking against the war. Could it be that they do not know that the good news was meant for all men—for communist and capitalist, for their children and ours, for black and for white,

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discussion of SNCC and the war, see CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, at 183-89 (1981).

234. JEFFREYS-JONES, *supra* note 89, at 95-123.

235. Wallace Terry II, *Bringing the War Home*, in *VIETNAM AND BLACK AMERICA*, *supra* note 188, at 200, 204.

236. *Id.*

237. See WESTHEIDER, *supra* note 78, at 20. For further discussion of African American attitudes toward the Vietnam War, see Strassfeld, *supra* note 71, at 877 nn. 199-200.

238. Coffin Sermon, *supra* note 182.

239. Brown, *supra* note 187; Coffin Sermon, *supra* note 182.

for revolutionary and conservative?<sup>240</sup>

Nor was the commission to speak out merely for this generation. Explaining his path to civil disobedience in opposition to the war, Robert McAfee Brown wrote: "There comes a time when thinking people must give some indication for their children and their children's children that the national conscience was not totally numbed by Washington rhetoric into supporting a policy that is evil, vicious and morally intolerable."<sup>241</sup>

Seeing beyond national loyalty, some antiwar critics came to identify with the Vietnamese. As Bruce Franklin has noted, "Countless Americans came to see the people of Vietnam fighting against U.S. forces as anything but an enemy to be feared and hated. Tens of millions sympathized with their suffering, many came to identify with their two thousand-year struggle for independence, and some even found them an inspiration for their own lives."<sup>242</sup>

E. *Learning to See Ourselves in the Enemy*

Maybe the people in the Vietnam  
can't register to vote  
Just like us.<sup>243</sup>

In the moans of the dying Viet Cong,  
from my GranDa's tales, the *Bahn Sidhe*.

In the calmness of prisoners shot for spite,  
the brave James Connolly.

In the hit and run of those we fought,  
the "Flying Columns" of the IRA.

In Tet, so unmistakably,  
that fateful Easter day.

In the leaflets found in farmer's huts,  
the Proclamation of Pearse.

240. King, *supra* note 188, at 83.

241. Robert McAfee Brown, *Because of Vietnam . . . "In Conscience, I Must Break the Law,"* LOOK, Oct. 31, 1967, at 48, 52.

242. FRANKLIN, *supra* note 180, at 47-48.

243. These are the last three lines of a poem shown to a pair of civil rights workers by a woman in Rosedale, Mississippi in 1965. See FERBER & LYND, *supra* note 233, at 32 (quoting unknown author).



In all the senseless acts of racist hate,  
I felt the growing fears.

In the murder of unarmed peasants  
with our modern technology,

we became the hated Black and Tan,  
and we shamed our ancestry.<sup>244</sup>

Killing is repugnant to human instinct. Nations and their armies demonize and dehumanize the enemy in order to prepare soldiers to kill and to prepare their citizens to accept such killing.<sup>245</sup> Critics of the war asserted the humanity of the Vietnamese. For many, the allegiances described above that took them beyond blind allegiance to U.S. policy also led them to see a close kinship between themselves and the Vietnamese.

General William Westmoreland, who as commander of U.S. forces in Vietnam demonstrated clearly his valuation of Asian lives, infamously stated: "The Oriental doesn't put the same high price on life as does the Westerner. Life is plentiful, life is cheap in the Orient. As the philosophy of the Orient expresses it, life is not important."<sup>246</sup> By contrast, the antiwar movement invoked the devastating costs of the war to the land and people of Vietnam. They would not let the American people ignore the very human costs of the war for the Vietnamese. *Ramparts*, a left-wing magazine that was highly critical of the war, published horrifying pictures showing the effects of napalm on Vietnamese children.<sup>247</sup> Responding to Vice President Agnew's attack on liberal clergy, Robert McAfee Brown asked Agnew to understand that the belief in the fatherhood of God required that they care about all people, not just "white Americans."<sup>248</sup> He continued, "Can you not understand that when we protest the use of napalm in Vietnam, it is not because we are secret agents of the ghost of Uncle Ho, but because we deplore burning the flesh of innocent villagers who are created in God's image?"<sup>249</sup>

The ability to see the world through the eyes of the enemy

244. David Connolly, *To the Irish Americans Who Fought the Last War*, in *LOST IN AMERICA* 39 (1994) [hereinafter *LOST IN AMERICA*].

245. See Strassfeld, *supra* note 71, at 882-86.

246. APPY, *supra* note 110, at 254 (quoting from an interview of General William Westmoreland in the film *HEARTS AND MINDS* (1975)).

247. William F. Popper, *The Children of Vietnam*, *RAMPARTS*, Jan. 1967, at 45.

248. Brown, *supra* note 190, at 1215.

249. *Id.*

undermines the dehumanization of that enemy, increasing the psychic cost of war. In a remarkable portion of his Riverside Church speech, Martin Luther King described American behavior in Vietnam as it must be understood, first by the Vietnamese peasants, then by the National Liberation Front, and finally, by the North Vietnamese.<sup>250</sup>

For servicemen, the ability to see through Vietnamese eyes sometimes led to an ability to identify with the Vietnamese people and to recognize kinships and similarities of experience that ran contrary to the image of the enemy fostered by basic training. While African American soldiers referred to the Vietnamese as “gooks” and “slants,” some recognized with discomfort that the dehumanization of the Vietnamese resonated with their own experiences with American racism. A postwar study of veterans revealed that African American veterans tended to hold more positive and fewer negative feelings toward the Vietnamese than did their white counterparts.<sup>251</sup> And more than a few African American GIs came to recognize, as did Greg Payton, that “the gook is the same thing as a nigger.”<sup>252</sup> Some took the analysis further, like Private James Johnson, an African American and one of the Fort Hood Three who refused orders to go to Vietnam. In linking his opposition to the war with the civil rights struggle, Johnson acknowledged connections between the experience of the Vietnamese and that of African Americans. Johnson noted, “The South Vietnamese are fighting for representation, like we ourselves. . . . Therefore the Negro in Vietnam is just helping to defeat what his black brother is fighting for in the United States.”<sup>253</sup>

African American soldiers were not alone in coming to see themselves in the enemy. Many GIs and veterans drew a parallel between the Vietnamese struggle for independence and the American Revolution, and they frequently invoked images of the Revolution to justify dissent. A writer in one GI paper wondered, for instance, “Is it merely an accident that Ho Chi Minh modeled the Declaration of Independence of Vietnam after our own Declaration of Independence?” Continuing, he wrote, “It is difficult not to compare the NLF . . . with the people’s revolutionary organizations of the

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250. King, *supra* note 188, at 84–89.

251. APPY, *supra* note 110, at 224–25.

252. WILLA SEIDENBERG & WILLIAM SHORT, A MATTER OF CONSCIENCE: GI RESISTANCE DURING THE VIETNAM WAR 22 (1992) (statement of Greg Payton); see also *id.* at 10 (statement of Clarence Fitch) (“For the first time I was looking at the enemy, not so much as the enemy, but as another minority, brown people.”).

253. *Speech by PFC James Johnson, in THE SIXTIES PAPERS: DOCUMENTS OF A REBELLIOUS GENERATION* 308–09 (Judith C. & Stewart E. Albert eds., 1984).

American Revolution.”<sup>254</sup> Native American soldiers recounted recognizing their own past in the fate of the Vietnamese at the hands of the United States. One Native American soldier had described to John Kerry his experience of reaching a moment in Vietnam when he said, “My God, I am doing to these people the very same thing that was done to my people.”<sup>255</sup> David Connolly, a soldier of Irish descent drew on his family’s history for an understanding of the enemy, and America’s role in Vietnam. Connolly’s grandfather had fought on behalf of the IRA against the British, to whom Connolly likened American forces in Vietnam. In a poem entitled *The Guerilla*, Connolly observed:

If by some strange quirk of fate  
we had been in the same war  
I might have had to kill  
my GranDa.<sup>256</sup>

#### CONCLUSION

In support of its war effort, the United States government employed a variety of tools to suppress antiwar dissent including prosecution, surveillance and harassment, and denigration of antiwar activity. Unlike previous wars, however, there was no wholesale legal assault on antiwar speech. Marcus Raskin’s feared attack on the intelligentsia did not occur. Nevertheless, both the Johnson and Nixon Administrations asserted the importance of loyalty to the government and its policy in Southeast Asia, and both impugned the loyalty of their critics.

Americans were divided not only on the war itself, but also on the legitimacy of antiwar dissent. The government and its supporters contended that in a time of war, dissent gladdened the hearts and stiffened the resolve of the enemy, thereby undermining the war

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254. RICHARD MOSER, *THE NEW WINTER SOLDIERS: GI AND VETERAN DISSENT DURING THE VIETNAM ERA* 165–66 (1996) (quoting *Equality, Equality, WHERE IT’S AT* 2, no. 2 (undated)). Moser argues that the American Revolution “stands out as the primary historical reference point for the new winter soldiers” and that it “provided a critical metaphor that measured how far America had strayed from its original traditions.” *Id.* at 163. For additional examples of this connection, see *id.* at 163–69; Delano, *supra* note 182.

255. See DOUGLAS BRINKLEY, *TOUR OF DUTY: JOHN KERRY AND THE VIETNAM WAR* 12 (2004). In oral history interviews, other Native American soldiers made similar connections. See MOSER, *supra* note 254, at 161 (discussing the use of frontier analogies to help explain the meaning of Vietnam).

256. David Connolly, *The Guerilla*, in *LOST IN AMERICA*, *supra* note 244, at 62.

effort. By encouraging the enemy, and thus prolonging the war, and by undercutting the morale of our troops, dissent, they argued, harmed American servicemen. Moreover, dissent weakened democratic institutions by bypassing the government and taking the argument to the streets. It encouraged anarchy and sapped the moral fiber of America. While both Administrations described the sources of such harmful behavior variously, they both suggested that at least a portion of the antiwar movement was motivated by a stronger allegiance to the enemy than to the United States.

Participants in the antiwar movement responded by reframing notions of loyalty and allegiance. Distinguishing allegiance to the nation from allegiance to its leadership, they refused to surrender the mantle of patriotism, and they situated dissent at the core of the American tradition. They recast the issues of allegiance and betrayal by arguing that it was the government, not its critics, who had betrayed American ideals, the American people, and the soldiers who had been sent to fight in America's name. They claimed that they, not the government, had the best interests of the troops in mind. But they also embraced a concept of loyalty that went beyond love of country to a sense of obligation to all of humankind.

The question of how successful was the antiwar movement is controversial and not easily resolved.<sup>257</sup> Over time, a growing number

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257. For an insightful discussion of the debate, see Marilyn Young, *Ho, Ho, Ho Chi Minh, Ho Chi Minh is Gonna Win*, in *WHY THE NORTH WON THE VIETNAM WAR* 219–32 (Marc Jason Gilbert ed., 2002). My own view, which is similar to Young's and that of a number of other historians of the sixties and the antiwar movement, is that it is naive and arrogant to suggest that we would have won the war but for the antiwar movement. This contention utterly disregards that the Vietnamese had endured more than a generation of independence struggle, and were motivated to continue that struggle with or without an American-antiwar movement. America lost the Vietnam War because the National Liberation Front and the North Vietnamese won it. The tendency to credit or blame the antiwar movement bespeaks of an American arrogance that believes there must be an American source for America's defeat because it cannot accept the possibility that the Vietnamese could have accomplished that task. This, in turn, reflects a tendency then and now to make the Vietnamese invisible in their own country and history. See Strassfeld, *supra* note 71, at 884–85 (discussing American tendency during the Vietnam War to make the Vietnamese invisible); Robert Strassfeld, *Robert McNamara and the Art and Law of Confession: "A Simple Desultory Philippic" (Or How I Was Robert McNamara'd into Submission)*, 47 *DUKE L.J.* 491, 560 (1997) (discussing the continuing tendency, at least among some, to render the Vietnamese invisible). Nevertheless, the antiwar movement played a very important role both in limiting the kind of war that the government was willing to wage and by making it so costly and difficult to continue to wage war that the war ended sooner than it might otherwise have. I saw someone, somewhere, I can no longer remember who or where, contend that the antiwar movement was the most effective antiwar movement since the Bolshevik Revolution. I suspect that the instances of a more successful antiwar movement are few throughout history.

of Americans came to see the war at least as a costly mistake, if not as illegal and immoral, as the antiwar movement contended. Yet, although an increasing number of Americans came to agree with the antiwar movement that we should not be in Vietnam, many Americans continued to hold antiwar critics in disregard. Powerful images of the antiwar movement as disloyal and hostile to the troops remain today and are sometimes employed to blunt contemporary dissent.<sup>258</sup> For Americans, the war ended with a whimper more than with a bang, and the contest over how to define loyalty went unresolved. Recent events suggest that we may be fated to refight this old battle. Karl Marx once observed, "Hegel remarks somewhere that all facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce."<sup>259</sup> Though his witticism was apt regarding Louis Bonaparte, I suspect that he gets it wrong with regard to any replay that we might see of the debate over the legitimacy of dissent in a time of national crisis, for it is more likely to play out as tragedy again.

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258. See generally FRANKLIN, *supra* note 180, at 47-70 (describing the caricatured images of the antiwar movement that proliferate in popular culture and contrasting the myth of the antiwar movement with a far more complicated and ennobling reality); LEMBCKE, *supra* note 110, *passim* (exploring the image of the spat-upon veteran and the political uses for which that image is employed).

259. KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 15 (International Publishers Co. paperback ed. 1963) (1852).