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SPECIAL COMMENT

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BY

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I. INTRODUCTION

In 1963 the General Assembly of North Carolina passed a statute restricting Communists and certain others from speaking at the University of North Carolina and the campuses of other state-supported institutions of higher learning. The Act was amended in 1965 in such a way as to leave the specific content of such restrictions to the Trustees of the various institutions. The regulations which were adopted by the Trustees of the University of North Carolina were then used in the Spring of 1966 as a basis for contramanding student invitations to Herbert Aptheker and Frank Wilkinson to speak on the University's campus at Chapel Hill. The incident gained national attention through television coverage and gave rise to a pending three-judge federal court test of the law's constitutionality.

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The case is complicated as to its history and its issues. The purpose of this study is (1) to give a summary presentation of this history in order to record what might otherwise be lost in voluminous public records, and (2) to show the doubtful legislative wisdom of such laws beyond the questionable constitutionality which may be settled in the court case. The research which follows thus represents an interdisciplinary attempt to describe the social and political background of a current constitutional issue. It has been prepared with the hope that, from it, friends of higher education throughout the country will be able to gain meaningful insight in dealing with an important contemporary problem.[1]

II. PROLOGUE TO THE 1963 ACT

With numerous national and domestic problems confronting the legislators, the 1963 Session of the North Carolina General Assembly was one of the longest and most trying in the history of the state. The United States Supreme Court had just handed down decisions prohibiting Bible readings in the schools and requiring legislative reapportionment; both of these aroused even moderate politicians, and caused special rancor in the South. The reapportionment dilemma was the central issue throughout the session. At the same time, President Kennedy announced his far-reaching civil rights program as a preface to another "long hot summer" of racial conflict. In addition, the legislature had to deal with a large number of domestic proposals from the vigorous Democratic Governor, Terry Sanford, a friend and supporter of President Kennedy. Sanford was asking for aid to

[1] Similar laws or administrative regulations have been put into effect or seriously considered in several states. A speaker ban law was put into effect in California in 1953. Bills appeared in Ohio in 1963, in New Hampshire and Virginia in 1964, and in Alabama in 1965. Each of these failed to pass. Serious discussion of such a law among legislators has taken place during the mid-1960's in Kentucky, Michigan, and South Carolina. Newspaper searches and court records show various administrative bans on Communist speakers at the University of Illinois, Ohio State University, Indiana University, the University of Washington, and the State University of New York at Buffalo. For comments on such cases and competent reviews of the constitutional issues involved see Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations,* 111 U. PA. L. REV. 328 (1963); Pollitt, *Campus Censorship: Statute Banning Speakers from State Educational Institutions,* 42 N.C.L. REV. 179 (1963); Van Alstyne, *Memorandum on the North Carolina Speaker Ban Law* (Hearing Before Speaker Ban Study Commission, State Legislative Building, Raleigh, N.C., in North Carolina Collection, Louis Round Wilson Library, University of North Carolina at Chapel Hill).

higher education, an increase in the minimum wage, compulsory motor vehicle inspection, and improvements in the secondary schools.

The mood of the legislature is best demonstrated by the fact that, in mid-June, the North Carolina House of Representatives approved, by a vote of 64-51, a petition requesting Congress to call a constitutional convention to establish a Super Supreme Court of the United States.[2] On June 20 the Senate defeated this House measure. It is significant that the defeat came by a large vote of 28 to 12 and over the strong objections of the President of the Senate, Clarence Stone. Stone had used his extensive powers on behalf of the House Bill and had attempted unsuccessfully to force the resolution through without discussion by including it with routine legislation. The *Charlotte Observer's* Raleigh correspondent reported Stone's remarks while he presided over the Senate deliberations. After initial praise for the bill, Stone commented that the Supreme Court "is a disgrace to any civilized people." During the debate, when a speaker who favored the bill asked the membership of the Senate in a rhetorical manner what rights Americans had left, Stone, speaking from the presiding officer's chair, replied, "None." When an opponent of the bill remarked that everyone, after all, has disagreed with the Supreme Court at some time or another, Stone said from the chair, "Vote with us, then." Despite Stone's strong efforts on behalf of the proposed bill, it was defeated.[3] This occurence, however, indicates something of the strained conditions under which the 1963 legislature was operating as it drew to the close of its session.

On what was supposed to have been the last day of the session, June 21st, the legislature approved the creation of a state school for the performing arts, and the Senate yielded to a House proposal which would permit electrical cooperatives in North Carolina to build generating facilities without the approval of the Utilities Commission.[4] On the same day, Stone and the Speaker of the House, Clifton Blue, feeling that they could not adjourn without one last attempt to face the most difficult problem of the

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[2] This would be composed of all state chief justices and would have power to review all decisions of the United States Supreme Court.

[3] *The Charlotte Observer*, June 21, 1963, p. 3-C.

[4] This was the climax of a long struggle between the private power companies and the rural cooperatives.

session, namely Senate redistricting, designated June 25 as the final adjournment date. In the June 25th issue of the *Charlotte Observer,* the editors had begun to wrap up the legislative session, listing its merits and demerits. As yet there had been no mention in the press of a speaker ban law.

The passage of the law was sudden and surprising. On the afternoon of the last scheduled day of the session, Representative Phil Godwin, of Gates County, under suspension of the rules, introduced House Bill 1395 which was to become the Speaker Ban Law. It was declared by Speaker Blue to have passed by a voice vote. The bill was transmitted immediately to the Senate, where President Stone read it, called for a voice vote under suspended rules, and declared it passed. The *Charlotte Observer* reported: "In the Senate galleries, the vote sounded extremely close, but Stone's ruling prohibited a nosecount. He left the dais shortly afterward, clasping a hand to his forehead." Stone "ignored several protesting colleagues as he declared that [the bill] . . . had been enacted into law. Some of the senators were left standing at their seats in a vain effort to get recognition when Stone, on the final voice vote, shouted 'The ayes have it.' " Senator Luther Hamilton, of Cartaret County, protested that he had not been recognized before the vote, although he had been trying to get the chair's attention. Stone said, "I didn't see you." Hamilton replied, "Sometimes we see what we want to see," and added that the "bill is not worthy of the Senate of North Carolina." Stone, according to the *Charlotte Observer,* "threw down his gavel and turned to glower at Hamilton," and "in a voice shaken with emotion," said, "Do you want to overrule me?"[5] On the next and last day of the session, Senator Hamilton, with the support of several of his colleagues, attempted to have the Senate resolution recalled. The motion to recall was defeated by a vote of 25 to 19. Since there is no gubernatorial veto power in North Carolina, the following thereby became law:

> AN ACT TO REGULATE VISITING SPEAKERS AT STATE SUPPORTED COLLEGES AND UNIVERSITIES
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> Section 1. No college or university, which receives any state funds in support thereof, shall permit any person to use

[5] *The Charlotte Observer,* June 26, 1963, p. 1-A.

the facilities of such college or university for speaking purposes, who:

(A) Is a known member of the Communist Party;

(B) Is known to advocate the overthrow of the Constitution of the United States or the State of North Carolina;

(C) Has pleaded the Fifth Amendment of the Constitution of the United States in refusing to answer any question, with respect to communist or subversive connections, or activities, before any duly constituted legislative committee, any judicial tribunal, or any executive or administrative board of the United States or any state.

Section 2. This act shall be enforced by the Board of Trustees, or other governing authority, of such college or university, or by such administrative personnel as may be appointed therefor by the Board of Trustees or other governing authority of such college or university.[6]

It is often argued by opponents of the law that its passage was an irrational outgrowth of various factors: the frustrating issues facing the 1963 Assembly, the traditionally weak public relations of the University at Chapel Hill, together with generally poor communications between the University and the legislature, and the participation by some University of North Carolina students and faculty in the civil rights movement.[7] Representative Godwin denied these assertions, and stated that there was no sinister intent in the timing of the bill's introduction and that it was a national security measure which he had not considered controversial.

Following a last minute attempt to iron out the still serious differences between the House and Senate re-districting bills, the Assembly finally adjourned on the afternoon of Wednesday, June 26. Almost immediately, several newspapers, as well as educators throughout the state, began to protest the Speaker Ban Law. On

[6] N. C. GEN. STAT. ch. 1207, §§ 116-199, 200 (1963).
A third section of this law stated that it was not to be construed as repealing or amending N. C. GEN STAT. ch. 14, § 14-11 (1941) (Little Smith Act), which banned advocacy of violent overthrow of the government or form of government in the United States and the use of tax-supported facilities for such advocacy. For some reason this third section of the Speaker Ban Law does not appear in the North Carolina General Statutes, although an editor's note in the 1965 supplement (vol. 3A) describes its content.

[7] It has even been speculated that some rather rowdy demonstrations by Negroes at the Hotel Sir Walter in Raleigh during the last week of the session stimulated the appearance of the bill in the first place or at least helped in its passage.

June 27th, the *Charlotte Observer* in its lead editorial attacked the statute on several grounds, calling it "a questionable breach of parliamentary procedure and legislative fairness."[8] On the same day, North Carolina Attorney General Wade Bruton announced his opinion that the act was consistent with the federal and state constitutions.[9] On June 29th, the Presidents of Davidson, Meredith, and East Carolina Colleges joined the University of North Carolina's President William C. Friday in public opposition to the law. In the weeks and months which followed, many educators and most of the leading newspapers in the state worked to show the public the objectionable character of the Act.

III. IMPACT ON THE SCHOOLS: JUNE, 1963, THROUGH OCT. 1965

North Carolina educators soon began to see concrete harmful effects of the Act upon professional meetings, speaking invitations, faculty recruitment, and accreditation. Some professional organizations refused to hold meetings on the campuses of the state institutions, partly in protest of the law, and partly because of the impossibility of arranging programs around speakers chosen purely for their contributions to their disciplines. Among these organizations were the Southern Political Science Association and a member organization of the American Institute of Physics.

Because of their objections to the law, a number of scholars, including some faculty members of neighboring schools, declined invitations to speak on the campuses of the state institutions. In a widely publicized case, one of the most eminent geneticists, the late J. B. S. Haldane of Great Britain, accepted an invitation to speak at the University, but his appearance was cancelled when he refused to answer questions submitted to him under requirements of the law, though he was presumed eligible to appear and speak. He lectured several times elsewhere in the United States during his visit. Subsequent to the withdrawal of the Chapel Hill invitation, a footnote to an article by him in *Perspectives in Biology and Medicine*,[10] which is read by scientists all over the world, called attention to the fact that he was not permitted to lecture at the University of North Carolina.

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[8] *The Charlotte Observer*, June 29, 1963, p. 2-B.

[9] This opinion was later supported in a lengthy brief by Deputy Attorney General Ralph Moody.

[10] Spring 1964, p. 344.

Because of restrictions in the law, staff members of the state institutions were unable to invite various scholars to speak before their colleagues and students. One example concerned a sociologist from an eastern European nation, who had been given a key role in drafting a new constitution for that nation, and who was visiting the United States under the auspices of the State Department to study the relationship between the legislative and executive branches of federal, state, and local governments. A member of the faculty at North Carolina, who had been associated with the visitor in Europe and considered it desirable to invite him to the campus, could not extend the invitation because there was reason to believe that the visitor was a member of the Communist party in his country. However, this did not prevent his speaking at other universities in the United States. In another instance, the State Department arranged for an eastern European figure to visit the Department of Dramatic Arts at the Chapel Hill branch of the University, but the regulations prevented the University community's benefiting from his experience and knowledge of dramatic techniques because of his presumed Communist connections. The Department of Applied Mathematics at the Raleigh branch of the University was advised that a Soviet scientist who was an authority in elasticity, plasticity, soil mechanics, and applied mathematics could not give seminar lectures at that institution, though he was able to do so at Brown, M.I.T., Harvard, Duke and elsewhere. A scientist on the faculty at Raleigh was advised that he should not apply to the National Academy of Sciences of the National Research Council of the United States to participate in the US-USSR Inter-Academy Exchange Program, because it was questionable whether the Academy could select American scientists who work in institutions unable to receive Soviet scientists for short visits. Members of the medical faculty at Chapel Hill, organizing an annual Medical Sciences Lecture Series for 1965 in an area undergoing revolutionary change, wished to invite as a lecturer the chief American figure in the field, the head of his department at an Ivy League institution. It was learned, however, that he had once taken the fifth amendment in connection with a House Un-American Activities Committee investigation and hence could not be invited.

Problems related to faculty attrition and recruitment increased

at a time when there was strong competition for faculty members of high quality in the nationwide market. While it is difficult to obtain information about the reasons for resignations from faculties and refusals to accept appointments, there was evidence that the law had damaging effects in these areas from the beginning. A statement unanimously adopted by the Faculty Council of the University of North Carolina at Chapel Hill declared in October, 1963, that it was an inescapable fact that, in the eyes of the overwhelming majority of the best university teachers in America, any legislative curtailment of free expression on a campus was a black mark against the institution.

One of the most serious effects of the law was that it threatened the accreditation of the state colleges and universities. That the question of accreditation was even raised by the Southern Association of Colleges and Schools did considerable harm to the reputation of the University. Actual loss of accreditation would have had a great many ramifications. It could have affected the state institutions' participation in sports events sponsored by the National Collegiate Athletic Association. Students enrolled in state institutions could have lost National Defense Education Act loans which enabled them to attend college. Even the threat of such a loss had serious consequences. Many graduate and undergraduate students became apprehensive about the status of their academic credits and degrees if accreditation were withdrawn, and some had begun considering transferring while it was still possible. Enrollment pressures throughout the nation were such that it was likely that only the better students would be able to transfer to comparable institutions. In addition, beliefs were voiced that applications for admision to both undergraduate and graduate schools from superior students would decline substantially.

IV. THE POLITICAL ARENA: JUNE, 1963, TO OCTOBER, 1965

Since the North Carolina General Assembly meets only every other year, it was not until 1965 that the question of amendment or repeal could be considered formally by the legislature. In the interim between the two sessions, North Carolina experienced a bitter and intense struggle within the Democratic party for the gubernatorial nomination. The major candidates were a former

federal judge, L. Richardson Preyer, a former state Superior Court judge, Dan K. Moore, and an attorney and former law professor, Dr. I. Beverly Lake. Although the Speaker Ban Law was not the central issue in the Democratic primary, it was an important one. Dr. Lake openly advocated the law, Judge Moore gingerly supported it, and Judge Preyer equivocated on the issue, although some who studied his record and were sympathetic to his candidacy were certain that he shared Governor Sanford's opposition to the measure. The decisive defeat of Judge Preyer in the primary runoff with Judge Moore was interpreted by many as a popular endorsement of the Speaker Ban Law. The later endorsement of the statute in 1965 by the American Legion and the Veterans of Foreign Wars strengthened the impression of popular support for the Act.

Throughout the 1965 Session of the General Assembly, numerous efforts were made by legislators, educators, and other groups to develop an effective legislative movement for repeal or amendment of the statute. Their proposals usually focused on removing the fifth amendment category, on granting exemptions for non-political speeches, or on giving school administrators broad discretionary powers. These opponents of the law hopefully looked for some decisive statement from Governor Moore. Moore had stated on several occasions that he would not oppose, and might even support, certain modifications of the law, but he had never pursued the issue with any vigor. Meanwhile, the Speaker Ban Law remained a major moral and political issue with the people of North Carolina, as evidenced by continuous and widespread television, newspaper and radio coverage during the 1965 session.

On May 19, a few weeks before the end of the 1965 Session, the movement to change the law was given a boost by a telegram to Moore from the principal accrediting agency for the region, the Southern Association of Colleges and Schools. The Association stated that, if the North Carolina Speaker Ban Law remained in effect, it might adversely affect the accreditation of the state-supported universities and colleges. A little more than a week later, on May 28, 175 members of the faculty at the University of North Carolina at Chapel Hill issued a statement criticizing political interference in the affairs of the University and saying that, "if current patterns persist . . . we would feel compelled to seek

positions in settings conducive to our academic pursuits."[11] A few days later, on June 3, 113 members of the faculty of the University of North Carolina at Greensboro issued a statement declaring that they would resign if the accreditation of the University were withdrawn.[12]

On June 1, Governor Moore said in a public statement that he did "not believe it would be in the best interests of higher education for the General Assembly to consider repeal of the Spaker Ban Law at this time." The Governor also said, "The Speaker Ban Law has become a symbol of resistance to communism in North Carolina. . . . the General Assembly would not be receptive to any move to repeal this law or substantially amend it."[13] He then recommended the creation of a nine-member commission to be composed of five persons appointed by himself and two each by the House and Senate to study the Speaker Ban Law at length and to formulate recommendations. Before it adjourned on June 15, the Assembly approved Moore's proposal to establish this commission.

Hearings were held by the Governor's Study Commission[14] on August 11-12 and September 8-9, 1965, at the State Legislative Building in Raleigh. Speaking in favor of the law were Representative Phil Godwin, who had co-sponsored the bill in the House of Representatives, and Senator Tom White, who had supported it in the Senate. Representatives of the American Legion and of the Veterans of Foreign Wars also spoke in favor of the law. Among those who urged that the law be repealed or amended were Watts Hill, Jr., Chairman of the North Carolina Board of Higher Education, Emmett B. Fields, Chairman of the Commission on Colleges of the Southern Association of Colleges and Schools, and John P. Dawson, First Vice-President of the American Association of University Professors. Opposition to the law was also expressed by representatives of the alumni associations of the state institutions, the American Association of University Women, the League of

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[11] *The Charlotte Observer*, June 1, 1965, p. 1-A.
[12] *Id.*, June 4, 1965, p. 1-A.
[13] *Id.*, June 2, 1965, p. 1-A.
[14] Commission to Study the Statutes Relating to Visiting Speakers at State-Supported Educational Institutions. (The title of the complete transcript is *Hearing Before Speaker Ban Study Commission, State Legislative Building, Raleigh, North Carolina.* It may be found in the North Carolina Collection, Louis Bond Wilson Library, University of North Carolina at Chapel Hill).

Women Voters, Phi Beta Kappa, and other organizations. The President of the Consolidated University of North Carolina, William C. Friday, the chancellors of the branches of the university, and the presidents of the state colleges described the injurious effects which the law had caused or could be expected to cause. In addition, a statement questioning the constitutionality of the law was presented by Professor William Van Alstyne of the Duke University Law School. At the conclusion of the hearings it was announced that the Commission's findings and recommendations would be presented to the governor at an early date.

V. THE COMMISSION'S REPORT

The Study Commission Report on the Speaker Ban Law was delivered to Governor Dan Moore on November 5. It contained two interlocked recommendations. First, the 1963 Speaker Ban Law should be amended so as to vest the trustees of each institution with the authority and responsibility of adopting and publishing rules and precautionary measures, and, second, this amendment would be made only on the proviso that the trustees first adopt a statement of policy contained in the Commission Report.[15] On November 6, Governor Moore called a special session of the legislature for November 15, and, at the same time, asked the trustees of state-supported colleges and universities to meet on or before November 12, 1965 and adopt the speaker policy that had been recommended by the Study Commission's Report. By November 12, the last of the state-supported institutions, the University of North Carolina, had approved the policy statement without change. The text of this policy statement is as follows:

SPEAKER POLICY

> The trustees recognize that this institution, and every part thereof, is owned by the people of North Carolina; that

[15] The Commission's Report recommended that: "1. Subject to Recommendation No. 2, we recommend that chapter 1207 of the 1963 Session Laws be amended so as to vest the trustees of the institutions affected by it not only with the authority but also with the responsibility of adopting and publishing rules and precautionary measures relating to visiting speakers covered by said act on the campuses of said institutions. . . . 2. We recommend that each of the boards of trustees of said institutions adopt the speaker policy hereto attached and made a part of this report. . . ." The report also included a proposed legislative bill to accomplish the amendment.

it is operated by duly selected representatives and personnel for the benefit of the people of our state.

The trustees of this institution are unalterably opposed to communism and any other ideology or form of government which has as its goal the destruction of our basic democratic institutions.

We recognize that the total program of a college or university is committed to an orderly process of inquiry and discussion, ethical and moral excellence, objective instruction, and respect for the law. An essential part of the education of each student at this institution is the opportunity to hear diverse viewpoints expressed by speakers properly invited to the campus. It is highly desirable that students have the opportunity to question, review and discuss the opinions of speakers representing a wide range of viewpoints.

It is vital to our success in supporting our free society against all forms of totalitarianism that institutions remain free to examine these ideologies to any extent that will serve the educational purposes of our institutions and not serve the purposes of the enemies of our free society.

We feel that the appearance as a visiting speaker on our campus of one who was prohibited under Chapter 1207 of the 1963 session laws (the speaker ban law) or who advocates any ideology or form of government which is wholly alien to our basic democratic institutions should be infrequent and then only when it would clearly serve the advantage of education; and on such rare occasions reasonable and proper care should be exercised by the institution. The campuses shall not be exploited as convenient outlets of discord and strife.

We therefore provide that we the trustees together with the administration of this institution shall be held responsible and accountable for visiting speakers on our campuses. And to that end the administration will adopt rules and precautionary measures consistent with the policy herein set forth regarding the invitations to and appearance of visiting speakers. These rules and precautionary measures shall be subject to the approval of the trustees.[16]

From the time the Commission submitted its report to the Governor, there was little doubt that the legislature would ap-

[16] This policy has been interpreted, and so stated by Governor Moore on February 11, 1966, to mean that each prospective speaker must be judged on four conditions: (1) the frequency of this type of speaker on campus must be considered; (2) the appearance must clearly serve the advantages of education; (3) when permission is granted on "such rare occasions," reasonable and proper care must be exercised by the institution; (4) campuses must not be exploited as convenient outlets of discord and strife. *Charlotte Observer*, Feb. 11, 1966.

prove the proposed amendment. The opponents of the original law were numerous and prestigious.[17] Earlier, on September 19, the *Charlotte Observer* had published a newspaper poll showing that a majority of the legislators in both houses would probably accept the Commission's proposal. The special session met for only two and a half days. On November 17, shortly after noon, the session adjourned, having amended the law in the manner recommended in the Report.

The legislature had quickly voted down several resolutions designed to retain as much as possible of the original Act. One of these was a resolution which would have referred the Report to the people of North Carolina in a public referendum. This tempting 'pass-the-buck' device was defeated, owing in no small measure to the efforts of Governor Moore who had put the power of his office behind the Commission's recommendations, as was made evident in his speech before the joint session on its first day. In the Senate debate, several amendments to the Commission's recommendations were introduced by proponents of the Speaker Ban Law. A proposal introduced by Senator Morgan would have required that the administration of each state college and university submit a monthly list of all visiting speakers to its board of trustees. This proposal apparently had wide support among those Senators seeking a way to appease the supporters of the original law. Former Governor Luther Hodges entered the fray at this point and is reported to have urged several legislators on Tuesday evening and again on Wednesday morning, while the Senate was in session, to reject the amendment and to accept the Report in toto.

The text of the amended law is as follows:

> 116-199. Use of Facilities for speaking purposes. — The Board of Trustees of each college or university, which receives any state funds in support thereof, shall adopt and publish regulations governing the use of facilities of such college or university for speaking purposes by any person who:
>
> (1) Is a known member of the Communist Party;
>
> (2) Is known to advocate the overthrow the Constitution of the United States or the State of North Carolina;

[17] Senator Barry Goldwater made a public statement which was generally construed to be in opposition to the 1963 Speaker Ban Law.

(3) Has pleaded the Fifth Amendment of the Constitution of the United States in refusing to answer any question, with respect to Communist or subversive connections, or activities, before any duly constituted legislative committee, any judicial tribunal, or any executive or administrative board of the United States or any state.

116-200. Enforcement of article. — Any such regulations shall be enforced by the board of trustees, or other governing authority, of such college or university, or by such administrative personnel as may be appointed therefor by the board of trustees or other governing authority of such college or university.

There were two important reasons for the successful campaign to amend the Speaker Ban Law. The first was the massive effort made to sway public opinion through persistent newspaper editorial attacks on the Act coupled with constant pressures on legislators by some of the most influential organizations and leaders in the state. The second, and perhaps decisive factor, was Governor Moore's decision to put the political power of his position behind the Commission's recommendations. Without the Governor's support, which had been lacking in all previous attempts to amend or repeal the law, it seems doubtful that the crucial moderate wing of the legislature would have supported the Report. While it is risky to assess the motives of high public officials, it seems likely that a most important factor was the Governor's need to support the Commission which he himself had appointed. The North Carolina Speaker Ban controversy, like all difficult political issues, descended from the lofty regions of moral debate and entered the arena of political gamesmanship. One of the rules of the game in American state politics is that chief executives must not lose the initiative to legislatures on important issues. Another tactical reason for the expeditious legislative approval of the Report was that the Chairman of the Commission, who presented the Report for legislative action, was also Speaker-Elect of the House. The fact that Representative Britt would as House Speaker soon wield great power over legislative committee assignments added considerable political force to his moral defense of the Report.

The 1965 amendment represents a compromise. Neither pro-

ponents nor opponents of the original law are satisfied. There is still a Speaker Ban Law under which the administrations at state colleges and universities are required to formulate a policy for visiting speakers and to submit it for the approval of their boards of trustees. On the other hand, the politically sensitive state legislature is no longer empowered to formulate or pass judgment on the policies of state schools regarding speakers. Nevertheless, since trustees are selected by the state legislature, that body still has an indirect control over matters touching academic freedom.

On December 1, 1965, following a two-hour closed-door testimony from Chairman Watts Hill, Jr., of the North Carolina Board of Higher Education, it was announced by the Commission on Colleges of the Southern Association of Colleges and Schools that academic accreditation of North Carolina colleges and universities would be continued.

VI. THE REGULATIONS ADOPTED UNDER THE AMENDED LAW

On January 14, 1966, the Executive Committee of the Board of Trustees of the University of North Carolina adopted the following regulations governing visiting speakers on the four campuses:

> 1. All statutes of the state relating to speakers and the use of facilities for speaking purposes are to be obeyed.
>
> 2. Only recognized student, faculty and university organizations are authorized to invite speakers.
>
> 3. Non-university organizations authorized through official channels, *e.g.*, extension division, to meet on the campus are to be routinely informed that the use of facilities must conform to state laws.
>
> 4. Student attendance at campuswide occasions is not compulsory.
>
> 5. The appearance of speakers on campus does not imply approval or disapproval of them or what is said by the speaker.
>
> 6. As a further precaution and to assure free and open discussion as essential to the safe-guarding of free institutions, each chancellor, when he considers it appropriate, will require any or all of the following:
>
> A. That a meeting be chaired by an officer of the university or a ranking member of the faculty.
>
> B. That speakers at the meeting be subject to questions from the audience.

C. That the opportunity be provided at the meeting or later to present speakers of different points of view.[18]

VII. THE APTHEKER-WILKINSON INCIDENTS

Meanwhile, Herbert Aptheker, Director of the Institute of Marxist Studies, and Frank Wilkinson, head of a committee seeking abolition of the House Committee on Un-American Activities, were invited by students to speak at the University of North Carolina at Chapel Hill. On February 7, 1966, the Executive Committee of the Board of Trustees met with Governor Moore and voted, 8-3, to prohibit Aptheker and Wilkinson from speaking on campus.

On February 11 approximately 400 University of North Carolina students and faculty, representing a newly formed Committee for Free Inquiry, asked Governor Moore to appear and explain the justification for University censorship and why the cancellation of the invitations had been made. On March 2, Frank Wilkinson made two off-campus speeches in Chapel Hill. Acting Chancellor J. Carlyle Sitterson,[19] relying on the Executive Committee ruling of February 7, ruled that a tape recording of Wilkinson's speech could not be played on campus and that his speech could not be read by someone else on campus. On March 8, Herbert Aptheker spoke on the nearby Duke University campus, and on March 9 he spoke to approximately 2,000 students across a stone wall which marked the boundary of the Chapel Hill campus.

On March 10, it was announced that Vladimir Alexanrov, a professor from Moscow University, had been invited by Dr. Gordon Cleveland to speak on the campus on March 22, and that an invitation had also been issued to another Communist scholar, R. Honus Papousek, a professor from Prague, Czechoslovakia, who was already in the United States for a year's study. It was also announced that Acting Chancellor Sitterson had approved the appearance of Alexanrov on the campus. These invitations had been issued on February 28. Then, on March 31, Chancellor John T. Caldwell of North Carolina State University announced that

[18] On February 28, at the request of Governor Moore, the Board of Trustees met and adopted substantially the same regulations.

[19] Chancellor Sharp had resigned to accept the presidency at Drake University.

Communist Party Chairman Gus Hall would receive an invitation to speak at North Carolina State University, and also that Ku Klux Klan Grand Dragon J. Robert Jones would be invited. Both Hall and Jones had taken the fifth amendment in Congressional hearings.

VIII. THE CASE PENDING

On March 31, 1966, a suit was filed by fourteen plaintiffs in the United States District Court in Greensboro, North Carolina, seeking to enjoin the University Trustees from enforcing the amended Speaker Ban Law as it had been applied to Wilkinson and Aptheker. The suit named Consolidated University President William C. Friday, the Board of Trustees, and Acting Chancellor Sitterson as defendants. In addition to Herbert Aptheker and Frank Wilkinson, the plaintiffs included the president and the president-elect of the student body, the presidents of the Young Men's Christian Association and of the Young Women's Christian Association, the Chairman of the Carolina Forum, the president of the Di-Phi Society, and the editor of *The Daily Tar Heel*.[20]

If the three-judge federal court reaches the merits of the cases, two major issues will probably be developed. First, whether the amended statute and regulations are unconstitutional on their face, primarily because they employ a speaker's prior use of the fifth amendment as a criterion for prohibiting present speaking engagements, and secondly, whether they are unconstitutional as applied to the two invited speakers. There are two threshold defenses.

[20] According to *The Daily Tar Heel*, April 1, 1966, p. 4, "the complaint, which is 25 pages long, says the student plaintiffs individually and on behalf of the student organizations represented by them and students at the University have met all conditions and 'have done all things reasonable and constitutionally proper and required, as a prerequisite to an invitation' to Wilkinson and Aptheker to speak here. The plaintiffs ask that: (1) A permanent injunction be issued by the court enjoining each of the defendants from enforcement, execution, operation or application of N.C.G.S. 116-199, 116-200 (Speaker Ban Law and Amendment), and any policies, rules, or regulations adopted by the Board of Trustees, directing the defendants to accept and process without regard to said statute and policy, rules and regulations, the plaintiffs' requests for permission to invite Aptheker and Wilkinson to speak at reasonable times and on subjects of choice between the plaintiffs and the speakers; (2) The court declare the speaker ban law to be illegal and void on the surface, and as applied, for contravention of the First and Fourteenth Amendments to the U.S. Constitution; (3) The complaint asks for immediate injunction restraining the defendants from enforcing the law pending the filing of answer and the hearing and determination of this action; (4) The plaintiffs also ask that the defendants pay for the cost of the action."

First, the claim of mootness has been made on the theory that the regulations established by the Executive Committee were adversely applied only in the cases of Aptheker and Wilkinson and were subsequently modified. Secondly, the argument is made that the particular plaintiffs have no standing to question the constitutionality of the restriction based on the fifth amendment. The case is an important one in North Carolina; should it reach the Supreme Court, it will be an important one for the nation. It appears at this writing that the three-judge federal court hearing the case in Greensboro will render its decision early in 1967.

IX. CONSTITUTIONAL CONSIDERATIONS

There was substantial legal opinion that the original 1963 Act was unconstitutional on its face on multiple grounds. The 1965 amendment has made the constitutional issue more subtle by eliminating the absolute prohibition and by transfering to the University Trustees the responsibility for promulgating and enforcing regulations concerning the banning of certain persons, specifically, known communists, persons known to advocate the overthrow of the United States or North Carolina governments, and persons who have pleaded the fifth amendment. Whether this shift from absolute legislative prohibition to discretionary University banning has saved the constitutionality of the law remains to be seen. The more intricate constitutional objections to the 1965 amended law await full development in the pending court case, but can be best understood within the framework of the clear objections to the 1963 law.

Few declarations have been drafted in words less ambiguous than those of the first amendment that: "Congress shall make no law . . . abridging the freedom of speech. . . ." The freedom to express an idea, however unpopular, is a privilege basic to the continuation of American constitutional democracy. So important is this guarantee that the Supreme Court, through the fourteenth amendment, has applied it to the state legislatures as well as to Congress.[21] The amendment is also applicable to officials of state universities since they are state officers.[22]

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[21] Whitney v. California, 274 U.S. 357 (1927).
[22] Cooper v. Aaron, 358 U.S. 1 (1958).

Freedom of speech, however, is not an absolute freedom. One may not falsely yell "fire" in a crowded theatre.[23] Nor may one with impunity advocate forcible overthrow of the government, when that speech may be expected to result in violent action.[24] To be suspended, however, the speech must be more than just unpopular, un-American, or undemocratic; there must be criminal conduct associated with the speaking. The most recent Court standard, incorporating the traditional balancing of interests, seems to be "whether the gravity of the evil, discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger."[25] In applying this standard, it is well to remember that the 1965 Speaker Ban Amendment denies a forum, not because the speaker has advocated an undesirable position, but because he is known to be a Communist or to have taken the fifth amendment. This type of prohibition is untenable since it is virtually impossible to predict what evil would flow from a speech yet ungiven. It thus operates as an unconstitutional prior restraint upon free speech.[26]

There is another constitutional issue under the first amendment centering on freedom of association. The Act clearly contemplates restriction of a speaker because of his association with an organization known to advocate the overthrow of the United States. The Supreme Court has ruled that convictions are unconstitutional if they are based on proof of membership alone without proof that the defendant intended to accomplish the aims of the organization by resort to violence.[27] A similar policy may apply to the Speaker Ban.

Proponents of the Speaker Ban Law have argued that the first amendment is not violated by denying certain speakers access to the University. They argue that it is a tax-supported forum and that these people are free to speak off-campus. However, such a theory might deny equal protection of the laws to the

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[23] Schenck v. United States, 249 U.S. 47, 52 (1919).
[24] Yates v. United States, 354 U.S. 298 (1957).
[25] Dennis v. United States, 341 U.S. 494, 499 (1951).
[26] Near v. Minnesota, 283 U.S. 697 (1931).
[27] Noto v. United States, 367 U.S. 290 (1961). In January, 1967, the Supreme Court invalidated portions of the New York Education and Civil Service Laws which required dismissal of public employes who were members of certain communist organizations on the grounds that the sections were too broad. Keyishian v. Board of Regents of the Univ. of the State of N.Y., 35 U.S.L. WEEK 4152 (U.S. Jan. 24, 1967).

disfavored speakers. But more importantly, the argument lumps all public property into one category and fails to recognize that the University, unlike a jail house alleyway, is a place that has been publicly dedicated to the purpose of pursuing truth through freedom of expression.

There are good reasons to believe that, because of the 1963 Act's vagueness, it violated the fourteenth and fifth amendment due process clauses. A criminal statute, for example, must be sufficiently clear that persons of common intelligence may know whether their activities fall within the scope of the prohibition. A crime may not be described in such broad terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."[28] There is little difference between being punished under no law and being punished under one so vague as to give no specific rule of proscribed conduct to the accused, the judge, the jury, or the enforcement agency. In the debates on the 1963 Act, it was described, attacked, defended, and analyzed in such differing ways that numerous reasonable men disagreed as to its meaning and application. What, for example, is meant by a "known member of the Communist Party?" Known to the F.B.I., the North Carolina Legislature, or the University Trustees? Would the unsupported charge of a politician that a citizen was a member of the Communist Party be sufficient to force the University Trustees either to deny a forum to him or to risk criminal prosecution for dereliction of duty? To which Communist Party does the Act pertain? Does it matter whether an individual has active or passive membership within the party? Furthermore, it was not clear who should be punished if the Act was violated. The visitor? The Administration? The Trustees? The host? Certainly reasonable men could differ widely as to the requirements of the statute. Whether these objections have been overcome by the delegation of power to the Trustees and their adoption of regulations and procedures remains to be settled.

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[28] Lanzatta v. New Jersey, 306 U.S. 451, 453 (1939). In Kevishian v. Board of Regents of the Univ. of the State of N.Y., 35 U.S.L. WEEK 4152 (U.S. Jan. 24, 1967), the Court also invalidated portions of the New York Education and Civil Service Laws requiring dismissal for seditious or treasonable acts or utterances, finding them unconstitutionally vague.

A fourth objection to the Speaker Ban Law centers around the requirements of the fifth amendment that, "no person . . . shall be compelled . . . to be a witness against himself." The State of North Carolina has altered this constitutional protection by making a person's use of the fifth amendment reason for denying him his rights under the first amendment. The Supreme Court has said, "We must condemn the practice of imputing a sinister meaning to the exercise of a person's Constitutional right under the Fifth Amendment"[29] and has consistently upheld the use of this valuable perogative. No less an admonition should be directed to a law relying on a person's former exercise of the privilege as a means of prohibiting him from presently speaking at a state university.

X. LEGISLATIVE WISDOM: ACADEMIC FREEDOM V. NATIONAL SECURITY

A. The Claims of Academic Freedom

Aside from the constitutional questions, evaluators of such legislation need to ask whether the Act violates commonly accepted principles of academic freedom and to what extent the law would affect the basic nature of the educational process at state schools.

A university is often considered to have two main functions, which are to transmit an intellectual heritage and, in so doing, to enrich it. The advocates of such laws insist that the university does not owe Communists the right to promote their cause from its platforms. But more important than what a university does not owe Communists is what it does owe its students. It owes them the evidence of a conviction that there has been found no better means of ascertaining truth than the response of the public to the open forum. That response is by no means infallible, but democracy is based on the assumption that it is far less fallible than any authoritarian judge. The Speaker Ban Law suggests that one is not to trust freedom of inquiry and is to prefer authority over the open forum. Equipping students to improve their society does not consist wholly in building on what already exists without disturbing any foundations. New knowledge requires modification of old concepts. It is not wise to try to specify in advance which

[29] Slochower v. Board of Higher Educ., 350 U.S. 551, 557 (1956).

part of the knowledge from the past should be questioned. Nor is it true that nothing can be learned from Communists. Most obviously in science, but also in other fields, the validity of a Communist's claims can be tested against experience.

While the Speaker Ban does not apply to classroom discussion or faculty research, it affects the academic environment in a negative way. The free flow of ideas is inherent in the very functioning of a university. The Act was designed to inhibit this flow, a fact which prompted its passage in the first place. In thus demoralizing the faculty, the Act also impedes the effectiveness of their educational effort and the student's learning process. An educational environment can be markedly improved by exposure to spokesmen of communistic and other alien ideologies, by an opportunity to hear these spokesmen taken to task by the faculty, and, what is most important of all, by the opportunity for the student to sharpen and enlarge his mental faculties in personal dialogue with these spokesmen. The 1963 Law would deny these opportunities to the students.

B. The Claims Of National Security

In spite of the extraneous political considerations which were involved in the passage of the 1963 Speaker Ban Law, it was, in fact, a national security measure. Making a valid judgment on the effects of a speaker ban law on national security involves two questions: first, whether or not the American Communist Party has a vigorous program to place speakers on college campuses for the specific purpose of mobilizing opinion for an overthrow of the present constitutional system in the United States; second, whether there is any good reason to expect such a program to be effective.

Consider the first question. While most politically active Communists in America would surely favor a vigorous speaker-supply program, and while native and foreign Communists do in fact accept speaking engagements, there is little evidence for the existence of a speaker-supply program within the American Communist Party, or any of its true "front" organizations, of a sufficient scope to constitute a significant national threat. In 1963, J. Edgar Hoover reported that during the preceding two years "Communist spokesmen" had "appeared on nearly 100 campuses from coast to

coast."[30] He was no doubt trying to make the point that their impact was substantial, but since there are about two thousand accredited four-year colleges and universities in the United States, the number of campuses visited by Communist speakers amounted to about five percent of the total. The percentage of the total student population actually reached can only be speculated. His figure may further be diluted by the fact that some of the "Communist spokesmen" who have appeared, in North Carolina at least, have spoken on non-political subjects. Others have spoken, not at campus convocations or in lecture programs, but before already-organized clubs with a leftist orientation. It is important to note that none of these left-wing organizations appear to have been formed as a result of the appearance of visiting speakers using official college facilities.[31] On the other hand it can only be speculated as to how many Communist spokesmen were kept off of campuses because of restrictive regulation and pressure.

The mere fact that the American Communist Party has a speaker-supply program[32] does not mean that it is of sufficient scope to constitute a threat to national security. In order for such a program to constitute a serious threat it would have to be extensive or carried out at a time when there were such fundamental discontents that Communist ideology would have probability of widespread appeal. In the latter event, however, a threat to security would already exist, and that does not seem to be the case today.

The second question, namely, what would it take for a speaker-supply program to be a "success," that is, to constitute a threat to national security, has already been partially answered. There are, however, some further relevant aspects concerning student attitude-formation, as it is affected by exposure to or prohibition from Communistic political speeches.

The legal restrictions upon the appearance of Communist speakers may actually make Communism more difficult to combat or could even lend positive assistance to the cause of Communism. The first supposition is based on the fact that such laws tend to

[30] Hoover. *Challenge—Not Compromise,* America's Future, New Rochelle, N.Y., p. 2. (1963).

[31] See generally Raleigh, N.C. Post #1 of the American Legion, *Academic Freedom and the Communist Speaker Ban Law,* pp. 12-14.

[32] Hoover, *supra* note 30.

push the Communist Party's educational and organizational efforts underground and thus tend to make them less susceptible to scrutiny. The second is based on the fact that such laws seem to give communism the aura of excitement which goes with the prohibited and the mysterious, thus making it more appealing to students.

Communism is not intrinsically appealing to most American youth nor is the average college student dangerously naive. This is crucial to the issue of national security. It is unfortunate that no reliable empirical evidence exists to substantiate or refute these observations since conflicting judgments about them are a large part of what divides the antagonists on the Speaker Ban Law. It does seem fair to say, however, that educators generally believe that an atmosphere of completely free inquiry is more conducive to the eradication of infantile excitability and intellectual naivete than is an environment characterized by restrictions upon dialogue, and that ideas which are unexamined and untested will have difficulty standing in the face of clever propaganda.

More importantly, the fundamental threat to every nation's security and a necessary condition for revolution or war is the breakdown of creative dialogue between human beings. In its own small way the Speaker Ban Law contributes to this breakdown. As seen from this point of view, the law is contrary to proper public policy for national security. Thus in measuring the highly negative impact on academic freedom against the very questionable and possibly detrimental gain for national security, the unwisdom of the law appears to be clear.

XI. CONCLUSION

The Speaker Ban Law, even in its amended form, constitutes a serious threat to the academic integrity of both the state-supported and privately-supported colleges and universities in North Carolina. In particular, the law is unwise for the following reasons. First, although it does not necessarily prohibit speakers, the amendment transfers to the trustees of the institutions involved the responsibility for implementing and enforcing the restrictions imposed in the original act. Second, the amended law constitutes unwarranted legislative dictation of academic policy to the school

administrations. As an apparent condition for the passage of the amended Speaker Ban Law, the boards of trustees were advised by the Britt Commission to adopt a specific statement of policy governing the appearance of speakers at these institutions. The governor, moreover, called upon each board of trustees to adopt these regulations before the meeting of the special session of the legislature and each board did so. Third, these regulations, which spell out the policies presupposed by the amended law, place severe restrictions on speakers, as well as the students and faculty members who might invite them, and thus constitute a serious limitation of academic freedom. Fourth, the amended law continues to do incalculable damage to the academic reputation of North Carolina schools by suggesting that they are no longer centers for free inquiry, open discussion, and the honest search for truth. Fifth, an atmosphere of anti-intellectualism has been fostered which affects the privately supported as well as the state-supported schools and, indeed, every citizen of North Carolina. An atmosphere favorable to real freedom of discussion and inquiry cannot be maintained in North Carolina while the Speaker Ban Law stands.

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