

“A New Kind of War”:
The Vietnam War and
The Nuremberg Principles, 1964-1968

by

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A thesis
presented to the University of Waterloo
in fulfillment of the
thesis requirement for the degree of
Doctor of Philosophy
in
History

Waterloo, Ontario, Canada, 2014

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AUTHOR'S DECLARATION

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract

This thesis explores what Telford Taylor called the “ethos of Nuremberg” and how it shaped antiwar resistance during the Vietnam War in the United States. The Vietnam War was a monumental event in the twentieth century and the conflict provided lawyers, academics, activists, and soldiers the ability to question the legality of the war through the prism of the Nuremberg Principles, the various international treaties and U.S. Constitutional law. As many legal scholars and historians have lamented, the Cold War destroyed hopes for the solidification of an international court empowered to preside over questions of war crimes, crimes against humanity and crimes against peace. In the absence of cooperation among the international community, the antiwar movements in the United States and around the world during the Vietnam War utilized these legal instruments to form what I call a war crimes movement from below. A significant component of this challenge was the notion that individual citizens – draft noncooperators, military resisters, tax resisters, and the like – had a responsibility under the Nuremberg Principles to resist an illegal war. In the numerous United States military interventions after World War II, none had been challenged as openly and aggressively as the war in Vietnam. As this thesis will demonstrate, the ideas that crystallized into action at Nuremberg played a major role in this resistance.

Acknowledgements

It is difficult to know when this thesis began. The task of acknowledging everyone who helped along the way has prompted me to remember these amazing people and the journey I've undertaken. The past decade and more has been a rewarding, challenging, unsettling, and enlightening experience. While the writing process has been a solitary one, the process of researching the below thesis has taken me all over North America and, eventually, landing in France.

First and foremost, I would like to thank my advisory committee: Dr. Andrew Hunt, Dr. Michael Foley, Dr. John Sbardellati, Dr. James Walker, and Dr. Jasmine Habib. Their support, encouragement, criticism and feedback challenged me and enabled this dissertation to move to the next level of intellectual inquiry.

I wrote my first essay on the anti-Vietnam War movement back in grade 11 U.S. history class at Assumption College high school in Brantford, Ontario. It was here that I had a group of wonderful teachers who allowed me to pursue the subjects which interested me the most. Invariably, almost all of my essays in the humanities and social sciences explored some aspect of the Sixties in the United States. Thank you to Mr. Comiskey, Mrs. Fergus, Mr. Armstrong, Mr. O'Donoghue, and others.

I continued researching and writing throughout my undergraduate and graduate studies at Wilfrid Laurier University in Waterloo between September 2003 and May 2009 where I obtained degrees in History and Global Studies. It was here where my interest and eventual decision to study history seriously was nurtured and thrived. Without the dedication and support of Dr. David Monod, Dr. Jeff Grischow, Dr. Len Friesen, Dr. Adam Davidson-Harden, and many others I would not have continued into graduate school. Most importantly, Dr. Monod's years of patience, advice and support in my academic endeavors and the guidance I received was invaluable to my development as an historian.

I started the doctoral program at the University of Waterloo in September 2009. Without the help and support of the faculty and staff in the Department of History, I would still be completing my PhD. The wonderful Donna Hayes was always available to help with any little or big problem I encountered (and there were many). Donna was usually the first person and often the last person I would see in the department on any given day and she always had a warm smile and always put the students' needs first. We would all be so lucky to have such a helpful and knowledgeable graduate secretary.

Dr. Andrew Hunt is my intrepid thesis supervisor. I heard about the legendary Dr. Hunt while I was still at WLU doing my undergraduate work. Somehow, I caught wind that Dr. Hunt

was offering a senior seminar in the history of American rock 'n' roll at UW in the winter of 2008. Although I had already completed my fourth year seminars at WLU, I nonetheless registered and developed a relationship with Dr. Hunt which has blossomed over the years. I eventually was able to teach HIST 105 with Dr. Hunt as part of the Tri-University mentored teaching program in the winter of 2013. It was a hit. Without the dedication, support, and, most importantly, belief in me and my work, this thesis never would have been completed. While I pushed Dr. Hunt in the last year of the PhD, he pushed back and with his keen eye and critical engagement with the task at hand, our collaboration has produced the best result possible.

Researching my thesis, the core of my work, would not have been possible without the support of many friends and knowledgeable archivists. While the research for this project began while I was still in high school, my first major research trip was to the Lyndon Baines Johnson Presidential Library in Austin, Texas. I would like to thank the Lyndon Baines Johnson Foundation for their generous financial support through the Moody Grant which gave me the privilege of researching at the LBJ Library in February 2009. I have also incurred a debt of gratitude to John Wilson, the Vietnam archivist at the LBJ Library for his correspondence and consultation at the Library as well as to the Reading Room staff: Will Clements, Liza Banks, Caitlin Bumford, Laura Eggert, and Eric Cuellar who were extremely kind, knowledgeable and courteous.

While I traveled to the LBJ Library during my Master's work, I also ordered documents from two archives. I would like to thank Cara Gilgenbach, the Head of Special Collections and Archives at Kent State University for sending all of the relevant materials from the Staughton Lynd papers as well as Elspeth Olson and Mattie Taormina from the Department of Special Collections at Stanford University for sending the relevant materials from the Herbert Aptheker Papers.

After completing my Masters in History, I was able to spend three amazing weeks in Washington, D.C., at the National Archives I and II in downtown Washington and College Park, Maryland, in August 2009. Without the support and accommodation of my friend and comrade Jesse Freeston, I would not have had the opportunity to conduct a central part of the research for this study. I also wish to thank the staff and archivists at the National Archives for their advice and help during my three week stay there.

I have been extremely lucky to travel at least three times in 2008, 2010, and 2013 to the Bertrand Russell Archives at McMaster University in Hamilton, Ontario. The staff and archivists were always extremely courteous and helpful in finding material related to the Bertrand Russell Peace Foundation and the International War Crimes Tribunal.

In June 2011, I spent a beautiful week in Ithaca, New York, at Cornell University. Here I was able to explore material related to the International War Crimes Tribunal as well as the papers of the Citizens Commission of Inquiry into U.S. War Crimes in Vietnam. Thanks to colleagues Jonathan Crossen for helping me find accommodations through a family member who worked at Cornell and to Geoff Keelan for letting me borrow his car for the trip.

In late-May and early-June 2012, I spent an unforgettable week at the Swarthmore College Peace Collection exploring the Staughton and Alice Lynd papers, the Clergy and Laymen Concerned About Vietnam papers, the Fellowship of Reconciliation Papers, and many others. Before traveling to Swarthmore, Pennsylvania, I spent a weekend in Niles, Ohio, with Staughton and Alice Lynd. I first met Staughton at the Organization of American Historians (OAH) in Washington, D.C., in April 2010 where he was speaking at the Historians Against the War (HAW) sponsored memorial for Howard Zinn. Zinn had passed away in January and I embarked to Washington, D.C., a young historian in search of a purpose. I had prearranged meeting up with Lynd and we had breakfast together. At that time, after our conversation, he said I was welcome to visit Alice and him anytime. Traveling to the Lynds' house just outside of Youngstown, Ohio, in 2012 was a life changing experience. At the Lynds, I spent the weekend discussing everything from contemporary politics to their activism during the Vietnam War. I decided not to interview them because I was more interested in having a dialogue and developing a relationship as we both are members of the Historians Against the War steering committee.

In 2013 and 2014, during three separate trips, I was able to explore New York City. Here, I traveled to the Tamiment Library at New York University in April 2013, August 2013, and April 2014, and the Butler Library at Columbia University in August 2013 and April 2014. With the help of amazing staff and archivists at the Tamiment, I was able to explore the papers of radical historian Howard Zinn and End The Draft's newsletter *downdraft*. Moreover, despite some minor setbacks with ordering papers at the Butler Library, I was able to find invaluable materials within the Lawyers Committee on American Policy Towards Vietnam papers, the Harrison Salisbury papers, the Seymour Melman Papers, and the Telford Taylor papers. These three trips would not have been possible without the wonderful accommodation of friends Laura Zinn and Omar El Shafei. My wife Ambre and I were also able to spend a wonderful weekend on Long Island with Carl and Eneida Mirra in August 2013.

A special word of appreciation goes to my family in Brantford, Ontario. Without the support of my mother Nancy, father Scott, and two brothers Jordan and Chris, I would not be where I am today. You've always been there for me.

Finally, to the love of my life, Ambre. Without your patience, encouragement, and uncanny ability to say the right things at the right time, the final year of the PhD would have been unbearable. This thesis is as much for you as for anyone else.

Dedication

For my family

Table of Contents

AUTHOR'S DECLARATION	ii
Abstract	iii
Acknowledgements	iv
Dedication	viii
Table of Contents	ix
Abbreviations	x
Introduction	1
Chapter 1	
<i>Challenging Aggression: The Radical Critique of the Americanization of the War in Vietnam</i>	52
Chapter 2	
<i>End the Draft: David Mitchell, the Early Draft Resistance Movement, and the War in Vietnam, 1964-1967</i>	98
Chapter 3	
<i>Three American Heroes: The Fort Hood Three, Movement Defense Committees, and Military Resistance, 1966-1967</i>	139
Chapter 4	
<i>The Little Nuremberg: Dr. Howard Levy, the Nuremberg Principles and Medical Ethics in the American Military, 1965-1967</i>	187
Chapter 5	
<i>Too Loud to Rise Above the Silence: The Johnson Administration versus the International War Crimes Tribunal</i>	230
Chapter 6	
<i>Movement Books: The Radical Challenge to the Vietnam War</i>	285
Conclusion	349
Bibliography	365

Abbreviations

ABA	American Bar Association
ACLU	American Civil Liberties Union
AFSC	American Friends Service Committee
ARVN	Army of the Republic of Vietnam
BRPF	Bertrand Russell Peace Foundation
CALCAV	Clergy and Laymen Concerned About Vietnam
CCCO	Central Committee for Conscientious Objectors
CCI	Citizens' Commission of Inquiry into U.S. War Crimes in Vietnam
CO	Conscientious Objector
CIA	Central Intelligence Agency
CNVA	Committee for Non-Violent Action
CORE	Congress on Racial Equality
DRV	Democratic Republic of Vietnam (North Vietnam)
FBI	Federal Bureau of Investigation
FOR	Fellowship of Reconciliation
M2M	May Second Movement
NLF	National Liberation Front (of South Vietnam)
NLG	National Lawyers Guild
NSA	National Security Agency
PLAF	People's Liberation Armed Forces (National Liberation Front)
POW	Prisoner of War
SANE	National Committee for a Sane Nuclear Policy
SDS	Students for a Democratic Society
SNCC	Student Nonviolent Coordinating Committee
SWP	Socialist Workers Party
VVAW	Vietnam Veterans Against the War
WRL	War Resisters League
WSP	Women Strike for Peace

Introduction

Telford Taylor, former Chief Prosecutor during the Nuremberg Trials, wrote in his influential *Nuremberg and Vietnam: An American Tragedy* that the trials “cast a long shadow into the future.” “Today,” Taylor wrote, “‘Nuremberg’ is both what actually happened there and what people think happened, and the second is more important than the first.” While Taylor would write much “to set the record straight” about the Nazi trials, in 1970, after the revelations of the My Lai massacre, he had recognized “sea change is itself a reality, and it is not the bare record but the ethos of Nuremberg with which we must reckon today.”¹

My thesis focuses on how the “ethos of Nuremberg” developed during the Vietnam War. Despite the fact that the Nuremberg Trials were spearheaded in large part by the United States, the Principles formulated after World War II and ratified by the United Nations General Assembly quickly disappeared from discussion until the Vietnam War. The National Lawyers Guild (NLG) recognized this reality at its November 1966 conference “Nuremberg – 20 Years After.” The president of the National Lawyers Guild, Ernest Goodman, wrote to attendees that there was “an upsurge of public interest in the meaning of that trial” both in the United States and around the world. “It may appear ironic,” Goodman writes, “that the first serious effort to revitalize Nuremberg into a binding legal and moral precedent has been undertaken by citizens of this country who assert that their own government has engaged in an illegal war in Viet Nam in violation of international law and morality.” Goodman called on the United States to follow the precepts established by itself at Nuremberg.² Covering the conference, independent journalist I.F. Stone wrote in his *Weekly* that the NLG hosted “the only conference of its kind in the world” and that “it was clear that this was an anniversary

¹ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), 11, 13-14.

² “Ernest Goodman, “Purpose of the Conference,” in “Nuremberg – 20 Years After,” National Lawyers Guild Conference Program, 5 November 1966, in Lawyers Committee on American Policy Toward Vietnam Papers, Butler Library, Columbia University Manuscript Collections, Box 4.

about which the country could not care less.”³ What was it about Vietnam that brought the Nuremberg Principles into public discussion? Why did it take twenty years for a rekindling of the Nuremberg Principles in the United States? And, perhaps most importantly, who forced this discussion onto the table for legitimate debate?

Far from a radical antiwar activist, Telford Taylor believed that the Nuremberg Principles and international treaties governing the laws of war mattered during the Vietnam War. The former prosecutor and brigadier general observed that not only the U.S. government, but the Democratic Republic of Vietnam, and the American peace movement all invoked the Nuremberg Principles and international law to condemn the war. Members of the Kennedy and Johnson administration argued that they were intervening in Indochina because North Vietnam had waged a war of aggression against South Vietnam; the Democratic Republic of Vietnam (variously referred to at the time as North Vietnam or Hanoi) argued that downed U.S. air force and navy pilots were war criminals and would be tried by the government as such; and the peace movement invoked the principles to resist conscription and military service. Despite “these wildly divergent views,” Taylor found “a common denominator: that there are some universal standards of human behavior that transcend the duty of obedience to national laws.” Specifically, Taylor quoted an antiwar leaflet he recently acquired that argued: “Your country, the United States, has established that a citizen must *not* go along with policies he believes to be wrong ... *That’s what the Nuremberg Trials were all about!*” Feeling that such a statement was “grossly overstated” and “an exaggeration,” Taylor nonetheless found that such a view was one that was “frequently expressed, especially by young people.” He concluded that despite the oversimplification, it was not “a total fabrication; the notion of individual accountability ... lies at the heart of the Nuremberg Judgments.”⁴ Despite this admission, Taylor took a much more restrained, conservative approach to the applicability of the Nuremberg Principles by draft and military resisters than

³ “It’s Become Dangerous to Mention What Happened 20 Yrs. Ago in Nuremberg,” *I.F. Stone’s Weekly*, 14 November 1966, 3. See also “Nuremberg Conference Airs Past, Present Problems of Curbing War,” *National Lawyers Guild Newsletter*, December 1966, 1.

⁴ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, 15.

other legal scholars explored here.⁵ This account will emphasize that, despite recent scholarship on the Principles, international law, and the laws of war, the post-World War II legal mechanisms were a core part of the anti-Vietnam War movement and, especially, an integral part of disseminating what is now a widely held view in the twenty-first century within antiwar movements.

The challenge of coming to grips with the legacy of the Nuremberg Principles is a difficult task for historians and legal scholars. Reflecting fifty years after the Nuremberg Trials, international legal scholar M. Cherif Bassiouni wrote of what he called Nuremberg's "intangible" legacy. In his brief sketch, he argued the central notion of individual responsibility during wartime has "permeated social values since 1945," despite the fact this reality is hard to quantify. At the end of the Cold War, the trials had too few international mechanisms and legal accomplishments since the early 1950s to be considered an institutional success. Pointing to the growth of the international peace movement, for instance, Bassiouni looks to the "moral-ethical" impact of Nuremberg on "individual and collective values" toward war and peace during and after the Cold War and argues that "moral-ethical considerations shape social consciousness and social consciousness impacts on the development of law and legal institutions." After nearly a half-century of global conflict after World War II and the slow development of international legal regimes, he found that the most important legacy was the "impact of moral-ethical factors on social consciousness" as these may in fact "be more significant in terms of prevention of harmful conduct than the presumed general deterrence of the law."⁶ Similarly, historian Elizabeth Borgwardt notes that "the Nuremberg Principles are so familiar they are regularly invoked to the point of being taken for granted in legal and even popular cultures, especially in the

⁵ International legal scholar Richard Falk, civil liberties lawyer Leonard Boudin, and the activist-scholar Noam Chomsky criticized Taylor's conservative approach to examining U.S. war crimes in Vietnam. See for instance: Richard A. Falk, "Nuremberg: Past, Present, and Future," *The Yale Law Journal* Vol. 80, No. 7 (Jun., 1971): 1501-1528; Noam Chomsky, "The Rule of Force in International Affairs," *The Yale Law Journal* Vol. 80, No. 7 (Jun., 1971): 1456-1491; and Leonard Boudin, "War Crimes and Vietnam: The Mote in Whose Eye?," *Harvard Law Review* Vol. 84, No. 8 (Jun., 1971): 1940-1959.

⁶ M. Cherif Bassiouni, "The Nuremberg Legacy: Historical Assessment Fifty Years Later," in Belinda Cooper, ed., *War crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 301-303.

West.”⁷ While these are excellent assessments, little attention is paid by these authors on *how* the Nuremberg Principles became “so familiar” as to be “taken for granted.” What was the process by which the Nuremberg Principles were debated and taken seriously in the United States? And what bearing did this have on the Vietnam War?

Three important court cases during the Vietnam War explored in the following thesis all invoked the Nuremberg Principles as the basis of their refusal to fight in Vietnam. In each case, the “ethos of Nuremberg” was disseminated via movement flyers, newsletters, books, court cases and in the reprinting of legal briefs and arguments. Most importantly, the ideas were disseminated through the actions of individual or collective resistance. David Mitchell, a non-pacifist draft noncooperator, utilized the Nuremberg Principles as well as the legacy of Henry David Thoreau in his refusal to cooperate with the Selective Service System. In November 1966, on the eve of an appeal in the Federal Courts in New York City, a flyer titled, “Nuremberg vs. U.S.: Mass Demonstration at Mitchell Appeal Hearing,” was distributed to coincide with the national November 5-8 Mobilization for Peace in Vietnam, Economic Justice and Human Rights. The flyer quoted from the appellant’s brief that “the issue here is ... the application of international law and the responsibilities imposed by law upon the individual.”⁸ Moreover, in the military resistance case of David Samas, James Johnson and Dennis Mora – better known as the Fort Hood Three – the Fort Hood Three Defense Committee sponsored a full-page advertisement in the *New York Times* in March 1967 after the trio was court-martialed for refusing orders to deploy to Vietnam. The advertisement, titled, “Three American Heroes,” read: “In light of the American position at Nuremberg Trials, men in the Armed Services confronted with orders which oblige them to commit what they regard as criminal and inhuman acts, still carry the obligation to act in accordance with their judgment and conscience as civilized human beings.” Moreover, the advertisement went on to argue that “the war against the Vietnamese people is an undeclared war. The grave questions involving the U.N. Charter, the Nuremberg Trials, the U.S.

⁷ Elizabeth Borgwardt, “‘Constitutionalizing’ Human Rights: The Rise and Rise of the Nuremberg Principles,” in Iriye, Goedde, and Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 74.

⁸ Robert Waters, “Judges Weigh Draft Conviction Appeal,” *Hartford Courant*, 8 November 1966, 31.

Constitution, and the Army Field Manual” had been ignored in the military justice system as well as in the civilian courts.⁹ Finally, in the case of Dr. Howard Levy (who was a Captain in the Army medical corps) refused to teach dermatology to the Special Forces because the medical skills would be used as a political weapon to win the “hearts and minds” of Vietnamese peasants. The ensuing court case received nationwide and international media coverage. Dr. Levy’s court-martial was an historic attempt to use the Nuremberg Principles as well as the Hippocratic Oath and the Geneva Conventions of 1949 to argue that medical doctors in the military had a right to refuse orders which were illegal. Homer Bigart, the famed war correspondent for the *New York Times*, dubbed the court-martial the “little Nuremberg.” Through the trial, Levy was able to spread the “ethos of Nuremberg” wide and far and sparked a nationwide debate amongst the medical profession.

The use of the Nuremberg Principles and other international laws by the U.S. peace movement was no simple task. It took a concerted campaign by individuals and disparate acts of conscience to challenge the American war effort by invoking the Principles and international laws in very public ways. The Johnson administration, on the other hand, sold its war to the American people by invoking analogies to the Second World War. The administration invoked the “Munich Analogy” which drew a straight line from appeasement of Hitler’s Germany in 1938 to the threat of appeasing Ho Chi Minh and Soviet and Chinese Communism in Southeast Asia. In response, a solid core of organizers, many from the World War II era – including A.J. Muste, Dave Dellinger, Staughton Lynd, Donald Duncan, Howard Zinn as well as many others – helped a younger generation of war resisters to publicize the evils of modern war by incorporating the Nuremberg Principles into their war resistance. The contrast between the arguments of the Johnson administration and those of the American peace movement was more than symbolic. Munich and Nuremberg, two German cities, are sites where the Second World War began and ended in Europe. The U.S. government attempted to argue that appeasement failed to hold off Nazi aggression in Europe and therefore it needed to intervene in Vietnam to stop another total war; the peace movement used the Nuremberg Principles and international law adopted after that

⁹ “Three American Heroes,” *New York Times*, 26 March 1967, 149.

catastrophic war to stop another disastrous conflict. Utilizing modern international treaties agreed to – and insisted upon by countries such as the United States – after the horrors of World War II was a radical idea at the time and required a radical approach that eventually challenged not only the Vietnam War, but the entire Cold War anti-communist consensus.

A core argument here is that the Nuremberg Principles and the other legal instruments created in the aftermath of World War II helped to create a whole new category of war resister. The American war in Southeast Asia was a fundamentally different kind of war – “a new kind of war” as the State Department argued in its February 1965 White Paper on Vietnam – unlike any other modern wars within recent memory. Unlike World Wars I and II, which saw not only the formation of the pacifist movement against war, but ideas of legal conscientious objection based on pacifist belief; the Vietnam War and the “ethos of Nuremberg” created a whole new category of war resister: the selective war objector. Whereas absolute pacifists had the ability to apply for conscientious objector status in the United States military, draft and military resisters such as David Mitchell, the Fort Hood Three, and Captain Howard Levy did not apply for conscientious objector status. They were not pacifists, “opposed to participation in war in any form,” but rather they argued that the war in Vietnam specifically was illegal, war crimes were being committed and therefore they were not going to participate in it. These resisters said they may have fought in World War II, that there was such a thing as legal and moral uses of force in international affairs and these were defined in the international treaties and principles adopted before and after World War II. Whether the Defense Department, the Selective Service System or the civilian and military legal systems agreed with their position mattered very little to this approach. This caused much confusion amongst commentators struggling to explain the unprecedented growth of the antiwar movement and the rise of another category of resister: the selective conscientious objector.¹⁰ Surprisingly little has been written in the anti-Vietnam War

¹⁰ In this thesis, I refer to those resisters who were not pacifists and who did not apply for conscientious objector status to be selective war objectors. The term selective conscientious objector will be applied those resisters who are either pacifists or non-pacifists who did apply for conscientious objector status. The former category was a new breed of war resister in that they bypassed the system of conscientious objection to war set-up in the United States during World War I. The latter category were also new, but relied on the systems of exemption based on conscientious objection although they did not fit into the narrow definition provided under the various

literature, as the last section of the introduction will demonstrate, on the question of the status of the non-pacifist war objector in the military or in the Selective Service System. In the pages which follow, the place of the non-pacifist resisters, the arguments they advanced, and the actions they took in resisting service in Vietnam are explored. It is with these individuals or their collective actions where we see the importance of the ethos of Nuremberg. This is not to somehow delegitimize the positions and actions of the pacifist resisters. However, those who were not pacifists but refused to participate in the particular war in Vietnam because it was illegal or because war crimes or crimes against humanity were being committed is a movement away from the actions of the radical pacifists and of those associated with the traditional peace churches.

As Telford Taylor demonstrates, there was, and is, some ambiguity about how the Nuremberg Principles informed war resistance during the Vietnam War. However, this allegedly confused use of the Nuremberg Principles is a result of the new legal landscape which was created during the Cold War for conscientious objectors and a response to unprecedented challenges to the survival of humanity in the nuclear age. The Selective Service Act of 1948 enacted a peacetime draft for the first time in U.S. history and included within it the legal definition of a conscientious objector (CO) as someone “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”¹¹ By and large, this was the same piece of legislation which governed the Selective Service System and conscientious objection during the Vietnam War. The definition was extremely limited and none of the various amendments took into consideration post-WWII international laws such as the Nuremberg Principles. Historian and lawyer Staughton Lynd

Selective Service Acts. By the end of the decade, the controversial idea of challenging the war based on domestic and international law caused much confusion among commentators and was debated in the national media, Congress, and in the movement. As a result various labels were attached to this new phenomenon and the new war resisters. Alice Lynd in her edited collection *We Won't Go: Personal Accounts of War Objectors* labeled those who employed the tactic “selective war objectors.” The term more commonly employed by pacifist and religious groups such as Clergy and Laymen Concerned About Vietnam and the National Council of Churches was selective conscientious objection. The majority opinion of the National Advisory Commission on the Selective Service System in 1967, however, called it “selective pacifism” as a way to delegitimize the concept. By the end of the Johnson administration, there was no consensus on what these terms meant as increasing numbers of soldiers were refusing orders and draftees refusing induction into the military.

¹¹ Quoted in James Finn, ed., *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (New York: Pegasus, 1968), viii.

has called this a perfect example of what Herbert Marcuse called “repressive tolerance” because it was a definition “written to accommodate the tender consciences of members of certain small Christian sects” such as the Mennonites, Quakers, Amish, Hutterites, Brethren, and Jehovah’s Witness. “Conscientious objection thus defined exists because the powers that be know that it will never be the world view of more than a handful of persons,” Lynd argues.¹²

Charles C. Moskos and John Whiteclay Chambers II observe that after World War II, and during the Vietnam War in particular, a rapid transformation in the definition of conscientious objection occurred in the United States. They attribute this shift to “the secularization of conscience” and show that centuries of primarily religious motivations for refusing military service were challenged by an adherence to non-religious moral and humanitarian motives.¹³ Chambers points to two important Supreme Court cases which effectively secularized CO status: *United States v. Seeger* (1965) and *Welsh v. United States* (1970). In *Seeger*, the court dropped the need for belief in a “Supreme Being” and in *Welsh* the court held that even an atheist could be a conscientious objector if these beliefs were “ethical and moral.”¹⁴ This was an important shift in the legal definition of a conscientious objector, moving the requirement from a purely religious belief to one that opened the door to non-religious individuals and effectively secularized the requirements. They convincingly demonstrate that this led in the last years of the Vietnam War to more draft-age men “being exempted as conscientious objectors ... than were being inducted into the army” and conclude that resistance to the Selective Service System “was one of the reasons for the withdrawal of American forces from Southeast Asia and for the end of the draft in the United States in 1973.”¹⁵ While the two authors offer a concise history of conscientious objection since Roman times and the move from religious to

¹² Staughton Lynd, “Someday They’ll Have a War and Nobody Will Come,” in Andrej Grubacic, ed., *From Here to There: The Staughton Lynd Reader* (Oakland: PM Press, 2010), 267.

¹³ Charles C. Moskos and John Whiteclay Chambers II, “The Secularization of Conscience,” in Charles C. Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993), 3-8.

¹⁴ John Whiteclay Chambers II, “Conscientious Objection and the American State from Colonial Times to the Present,” in Charles C. Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993), 42.

¹⁵ Charles C. Moskos and John Whiteclay Chambers II, “The Secularization of Conscience,” in Charles C. Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993), 4, 8.

non-religious conscientious objection, their analysis leaves out a fundamental rationale for this shift which is both moral and humanitarian, but also legal. During the Vietnam War the Nuremberg Principles were applied by draft and military resisters when they argued they had a moral and legal obligation to refuse induction or military orders. This challenged traditional definitions of conscientious objection and the United States' ability to raise and maintain an armed force capable of fighting in Southeast Asia. The veritable pacifist leader A.J. Muste captured a common sentiment within the peace movement, expressing the view that selective war objectors should be given the legal weight to refuse the war in Vietnam. Writing to Senator Robert F. Kennedy in November 1966 concerning the case of the Fort Hood Three, Muste observed:

It seems to me that one way to look at the problem is to reflect that if in Germany during World War II there had been a large number of young German soldiers who refused to participate in the atrocities perpetrated at the concentration camps or in some of the episodes of mass destruction of civilians in the course of military action, and who had either taken the consequences in Germany or perhaps had attempted to flee to other countries, they would be regarded as heroes and as witnesses to conscience and humanity, even though under other circumstances they might not have taken a pacifist position.¹⁶

Between 1965 and 1972, of the roughly 100,000 Selective Service Act offenders - people who burned or returned their draft cards, those who did not sign up for the draft on their eighteenth birthday, or others who failed to report for induction - 22,500 were indicted, 8,000 of them were convicted in the courts and 4,000 subsequently went to prison. A clear majority of those who were indicted, seventy-two percent, were not pacifists nor were they members of the historic peace churches. This was unprecedented in U.S. history.¹⁷

Despite the hostile approach to selective objection by the Selective Service and the military, growing segments of the American peace movement began to defend this position despite its subversion of hard won gains for traditional conscientious objectors from the two

¹⁶ A.J. Muste to Robert F. Kennedy, 10 November 1966, in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 - correspondence.

¹⁷ John Whiteclay Chambers II, "Conscientious Objection and the American State from Colonial Times to the Present," in Charles C. Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993), 41.

world wars. In fact, the previously mentioned seasoned antiwar activists – Dave Dellinger, A.J. Muste, Ralph DiGia and others – actively supported these new resisters.

The use of the Nuremberg Principles by the anti-draft movement, the GI movement and the American peace movement more broadly had an additional, practical application. There need not be any grand theory, sweeping psychoanalysis, or understanding of the intricacies of international and national laws. For those who were of draft age or those who had enlisted in the military, the Nuremberg Principles were a way for people to practically use legal mechanisms in their moral, conscientious struggle against the war. Dennis Mora of the Fort Hood Three told Rosemary Bannan in July 1969: “My act was not civil disobedience ... it was an act of conscience – but more importantly it was a method, the only means of political struggle at the time for me, as a soldier in the army. I used it only as an instrumentality ... the only way to put content into any kind of law.”¹⁸ The important point here is that the use of the Nuremberg Principles by the peace movement did not just emerge by accident and a central part of the anti-Vietnam War movement was the practical application of this new approach to war resistance. Moreover, it was not so much that soldiers like Mora or draftees like Mitchell invoked the Nuremberg Principles and the war’s legality, it was that they acted on these ideas and forced others in the peace movement to confront the same questions.

David McReynolds, staffer for the War Resisters League in New York during the Vietnam War, argued years later that the pacifist movement in the United States – represented by the War Resisters League (WRL), Fellowship of Reconciliation (FOR), American Friends Service Committee (AFSC), and the Committee for Non-Violent Action (CNVA) – actively defended the rights of traditional conscientious objectors to oppose the war in Vietnam. However, the war produced a large number of men “who were ‘selective objectors. ... We found ourselves defending, with no great legal success, the right to selective objection. We also found that for the first time in our history pacifist organizations

¹⁸ Dennis Mora interview with Rosemary Bannan, 19 July 1969, quoted in John F. Rosemary and Rosemary S. Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 159.

had members of the military on their current and active lists.”¹⁹ The war in Southeast Asia and the unprecedented use of American firepower on a primarily rural, peasant population, the use of the peacetime draft to fill the ranks of the U.S. forces, and the wasteful loss of life and national resources forced many Americans to confront accepted Cold War anti-communist consensus and the pillars of post-war American exceptionalism. The open and defiant challenge to the draft, the military, the U.S. government, and modern warfare based on the illegality of the war in Vietnam contributed to an unprecedented attack on the role of the nation-state in international affairs.

This thesis explores the foundational links of the nascent anti-Vietnam War movement and the establishment of what I call a war crimes movement from below. Coalescing around the disparate acts of individuals and small collectives, a network of committed activists was formed to challenge the legality and morality of the Vietnam War by invoking the Nuremberg Principles, international and domestic law. While draft and military resisters challenged the Vietnam War by refusing to participate in it; also central to this story is the role of adult supporters who were too old to be drafted. Without the advocacy, counseling, solidarity, and day-to-day organizing of the adult supporters, the younger generation of resisters would have lacked the crucial support networks and perhaps even the temerity to continue in their struggle against the war. While much of this story is centered around the actions of men, due to the fact the Selective Service drafted males aged 18-26 into the U.S. armed forces, the role of women was nonetheless integral in creating the culture of resistance which spearheaded the growth of a mass antiwar movement. Before the emergence of the women’s liberation movement in 1967-1968, women faced both alienation in the antiwar movement and also gained valuable organizing skills despite the fact they were often left out of important decision-making processes. While older women activists such as Alice Lynd and organizers in Women Strike for Peace acted in solidarity with the draft and military resisters working as draft counselors or acted as lead organizers in the male-centric movement; younger women in the new left who participated in the civil rights movement, the

¹⁹ David McReynolds, “Pacifists and the Vietnam Antiwar Movement,” in Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992), 61-62.

student movement and the antiwar movement performed the crucial, but mundane tasks such as responding to the mail, answering the phones, running the mimeograph machines, and other day-to-day tasks which held their organizations together.²⁰

I will argue what has been commonly called the “Nuremberg Idea” or the “ethos of Nuremberg” was a powerful force in the nascent antiwar movement of 1964 and 1967. The use of international law by draftees and military personnel was unprecedented in U.S. history. In each of the cases that I explore in civilian and military courts, the resisters were unsuccessful and faced jail time. However, the publicity helped to disseminate the ideas they utilized in their resistance and the power that the Principles lent to the movement is immeasurable. Most importantly, the actions by draft and military resisters who were not pacifists but were opposed to the Vietnam War in particular raised many important questions to which the Nuremberg Principles offered guidelines to follow. The resisters forced into the open questions about the nature of modern warfare in the post-Nuremberg era, about the Selective Service Act and conscientious objection, and whether only those who are religious pacifists can legally oppose the military interventionism of the state. These questions and the ethos of Nuremberg were disseminated in various movement materials that were produced to support the early resisters. In petitions, pamphlets, booklets, newsletters, flyers, and in newspaper advertisements, the American public was educated about what the Nuremberg Principles were in practice. This message was reinforced by the many movement books that were published from 1966 onward and it was in reaction to how the Johnson administration sold the war.

The Nuremberg Idea and the Vietnam War

Before the trial of top Nazi war criminals in front of the International Military Tribunal in Nuremberg, Germany, in 1945 and 1946, never before in the history of warfare or international law had a set of principles or guidelines been elucidated for an individual’s responsibility or guilt for actions taken during war. Responsibility was always conferred on

²⁰ See, for instance, Sara Evans, *Personal Politics: The Roots of Women’s Liberation in the Civil Rights Movement and the New Left* (New York: Vintage Books, 1980).

the nation-state in question. There were a series of attempts between the late nineteenth century and the outbreak of World War II to define certain limitations on the waging of war and the methods with which wars could be fought. The Kellogg-Briand Pact of 1928, or the Hague Conventions of 1899 and 1907, addressed such concerns.²¹ The aftermath of World War II witnessed a wave of advances in international law as well as the codification of human rights law and the laws of war.²² As most legal scholars observe, the immediate post-World War II period ushered in a new era, a revolution, in the international system. Not only were top Nazi and Japanese leaders put on trial by the Allies, but the United Nations was formed in 1945 and the U. N. Charter was adopted followed by the ratification of the Universal Declaration of Human Rights of 1948, the Genocide Convention of 1948, the Geneva Conventions of 1949, and the Nuremberg Principles of 1950. These were all achieved in a relatively short period of time.

The Nuremberg Trials created a whole new category of crimes and responsibilities for nation-states and soldiers to follow, such as the outlawing of aggressive war and the defense of following superior orders. Now it was possible to hold individuals accountable for war crimes, crimes against humanity and crimes against peace (the waging of an aggressive war). These principles were at the heart of the Vietnam War resistance in the United States. While much has been written on the landmark Nuremberg and Tokyo trials, I explore what

²¹ Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898-1922* (Durham: Duke University Press, 1999) and Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), Chapters 1-3.

²² There is a distinction to be made between the three types of laws mentioned here: international law, the laws of war, and human rights law. International law is composed of a body of treaties or customary international laws between states such as the United Nations Charter or the Kellogg-Briand Pact. These international laws governing the resort to force in international affairs are called *jus ad bellum*. The laws of war, also referred to as international humanitarian law, are treaties or customary international laws that prohibit certain types of military tactics or behaviors on the battlefield such as the torturing of prisoners of war. The Geneva Conventions of 1949 or the Hague Conventions of 1899 and 1907 are representative of the laws of war, or what are called the *jus in bello*. Human rights law are a new set of treaties that confer rights upon individuals and are new to the post-WWII era. The Universal Declaration on Human Rights of 1948 is an example of human rights law. See, for example, Michael Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005), 2-9, and, William I. Hitchcock, "Human Rights and the Laws of War: The Geneva Conventions of 1949," in Iriye, Goedde, and Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 93-94.

happened after the adoption of the Nuremberg Principles.²³ How did the Nuremberg legacy, or what Telford Taylor called the “ethos of Nuremberg,” shape the international landscape after World War II?

It was not until the Vietnam War that significant debates emerged about the efficacy and legalistic use of the Nuremberg Principles in the United States. At the urging of the United States, the newly formed United Nations General Assembly unanimously affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal” in Resolution 95(I). The International Law Commission, an official body of the United Nations composed of international legal experts from around the world, was commissioned to draft principles of international law consummate to the development of the United Nations itself. In 1950, the Commission formulated the Principles of Nuremberg.²⁴ The principles (commonly referred to as the Nuremberg Principles) were the culmination of the London Charter of August 1945, the indictment of major Nazi war criminals, and the judgment from the International Military Tribunal. The seven principles read:

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

²³ For the Nuremberg Trials, see for instance: Belinda Cooper, ed., *War crimes: The Legacy of Nuremberg* (New York: TV Books, 1999); Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge: The Belknap Press of Harvard University Press, 2005), Chapter 7 “The Limits of Law”; Eugene Davidson, *The Nuremberg Fallacy: Wars and War Crimes since World War II* (New York: Macmillan, 1973); Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (New York: Palgrave Macmillan, 2007); Michael Robert Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Boston: Bedford Books, 1997); Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York : Alfred A. Knopf, 1992); Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970); Ann Tusa and John Tusa, *Nuremberg Trial* (New York : Atheneum, 1984). For the Tokyo Tribunal, see: Madoka Futamura, *War crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (New York: Routledge, 2008); Allan A. Ryan, *Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability* (Lawrence: University Press of Kansas, 2012); and, Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Asia Center, 2008).

²⁴ See Elizabeth Borgwardt, “‘Constitutionalizing’ Human Rights: The Rise and Rise of the Nuremberg Principles,” in Iriye, Goedde, and Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 73-92.

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious

grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.²⁵

These Principles are a classic example of what is known as customary international law. There are two forms of international law: treaties and customary law. Treaties – such as the United Nations Charter or the Geneva Conventions of 1949 – are contractual agreements that are signed and ratified by nation-states. Customary international law is a set of “informal” or “unwritten” rules that are binding and apply universally to all nation-states.²⁶ The Nuremberg Principles, the United Nations Charter, the Geneva Conventions of 1949 are all part of U.S. law. The “Supremacy Clause” – Article VI, paragraph 2 – of the United States Constitution states that: “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” According to both international law scholar Richard Falk and the Assistant General Counsel for International Affairs at the Department of Defense, Benjamin Forman, this includes customary international law and therefore the Nuremberg Principles.²⁷

The Principles were so profound, and because they were part of international customary law, they were adopted and codified in the United States Army Field Manual

²⁵ The Principles, quoted from “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,” available online: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf. For the United Nations’ official history of the Nuremberg Principles, see: Antonio Cassese, “Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I), New York, 11 December 1946,” *United Nations Audiovisual Library of International Law*, 2009, available online: http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html. See also: Richard Falk, “Song My: War Crimes and Individual Responsibility: A Legal Memorandum,” *Trans-Action* 7 (3), January 1970, 33-40.

²⁶ For the two types of international law – treaty law and customary law – see: Michael Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005), 3-6.

²⁷ Richard Falk, “The Nuremberg Defense in the Pentagon Papers Case,” *Columbia Journal of Transnational Law*, 13, 2 (1974), 211, and, Benjamin Forman, “The Nuremberg Trials and Conscientious Objection to War: Justiciability Under United States Municipal Law,” *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, vol. 63, pp. 157-181. American Society of International Law, 1969, 160-161.

(FM) 27-10 or *The Law of Land Warfare* in 1956. Chapter VIII, Section II, Paragraphs 498 and 499 of the Field Manual state explicitly:

498. Crimes Under International Law

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise:

- a. Crimes against peace
- b. Crimes against humanity
- c. War crimes

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting “war crimes.”

499. War Crime

The term “war crime” is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.²⁸

Therefore, the U.S. Army Field manual would become a powerful tool that was utilized in the various military resister court-martials during the Vietnam War.

After the revolutionary changes in international law brought about by the Nuremberg and Tokyo Tribunals, a significant precedent had been set. Despite the very real and serious criticisms of the tribunals – that they were merely victor’s justice or that the only crimes that were considered were those crimes the Allies did not themselves commit – there was no going back. The belief that global wars such as World Wars I and II could be averted in the future gained a tidal wave of momentum within the international community after World War II. Moreover, the Genocide Convention of 1948 and Geneva Conventions of 1949 were more proof that the international community could work together to prevent “the scourge of war” from rearing its ugly head. The United States refused to ratify the Genocide Convention, however, until 1988.

²⁸ Quoted in Seymour Melman, ed., *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 53-54.

One of the main questions I seek to answer is whether international law and the laws of war could actually prevent or deter the use of violence in the international sphere. Would hardened realism defeat the previous one hundred years of international legal positivism and the attempts at codifying international laws outlawing the waging of aggressive war such as the Kellogg-Briand Pact of 1928 or the U.N. Charter?²⁹ Despite these monumental achievements in international law and the laws of war after World War II, the intensification of the Cold War stymied the efforts of the international community to create binding international mechanisms to prevent future global wars within the international community. Whatever country was to blame for the outbreak of tensions between “East and West” – the United States, the Soviet Union, or a combination of the two – is irrelevant to this study. The effect was that the movement towards establishing the International Court of Justice capable of enforcing its mandate was stifled as the world was quickly divided by the very sort of Great Power rivalries the United Nations and other international mechanisms sought to prevent. As many legal scholars and historians have lamented, the Cold War destroyed hopes for the solidification of an international court empowered to preside over questions of war crimes, crimes against humanity and crimes against peace. Some real headway was made in this direction in the early 1950s. In 1950, for instance, the Council of Europe created the European Court of Human Rights. However, the efforts to create an international court imbued with these new principles ran aground against differing arguments of what constitutes the crime against peace. In 1953 the revised United Nations Draft Statute for an International Criminal Court “remains a draft resting on a shelf while the major powers intermittently wrangle about the definition of aggression,” Benjamin Ferencz, a prosecutor at Nuremberg, wrote in 1968.³⁰ When the large-scale introduction of American combat forces

²⁹ For a history of international legal positivism, or the codification of international law and the laws of war, see: Francis A. Boyle, *Foundations of World Order: The Legalist Approach to International Relations (1898-1922)* (Durham: Duke University Press, 1999); Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), Chapter 1-4; and, Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge: The Belknap Press of Harvard University Press, 2005), 213-217.

³⁰ Benjamin B. Ferencz, “War Crimes Law and the Vietnam War,” *The American University Law Review* Vol. 77, No. 3 (June 1968): 422-423. See also: Beverly Woodward, “Nuremberg Law and U.S. Courts,” *Dissent*, (March-April 1969): 132-133; and Telford Taylor in Erwin Knoll and Judith Nies McFadden, eds., *War Crimes and the American Conscience* (New York: Holt, Reinhart and Winston, 1970), 34-35. When asked in the

in South Vietnam occurred in the mid-1960s, the International Court of Justice was impotent and unable to render an impartial verdict on American claims it was defending South Vietnam against the aggression of North Vietnam.

In the absence of cooperation among the international community, the antiwar movements in the United States and around the world during the Vietnam War utilized these legal instruments to form a war crimes movement from below. This movement was organized within a vacuum after early postwar attempts by the international community to codify rules of war evaporated with the intensification of the Cold War.

The Vietnam War was a monumental event in the twentieth century and the conflict provided lawyers, academics, activists, and soldiers around the world the ability to question the legality of the war through the prism of the Nuremberg Principles and the various international treaties and U.S. Constitutional law. The legacy of the Nuremberg Trials plays a large role in this development. The war provoked a debate within the peace movement and American society about the legacy of World War II and the legal instruments created to stop disastrous wars. A significant component of this challenge was the notion that individual citizens – draft noncooperators, military resisters, tax resisters, and the like – had a responsibility under the Nuremberg Principles to resist an illegal war. These resisters challenged the war on the basis that it was illegal under international and domestic law. In the numerous United States military interventions after World War II, none had been challenged as openly and aggressively as the war in Vietnam. As this thesis will demonstrate, the ideas that crystallized into action at Nuremberg played a major role in this resistance.

The Nuremberg Principles were applied for legal, political, and moral reasons and were employed by a variety of individuals and groups for different reasons for which there is no unifying theory other than the war in Vietnam so offended American and world opinion that this sense of outrage needed to be communicated to the broader public. In many

congressional conference on “War and National Responsibility” in February 1970, Telford Taylor was asked about an international body that could assess the role of the United States in Vietnam. Taylor responded: “In the years since Nuremberg, quite a few efforts have been made to codify the laws of war through the International Law Commission and other agencies. By and large, these have been halting efforts and not very fruitful. I don’t mean to denigrate them completely, but I am afraid my feeling is, at this time, one of limited confidence in the creation of international bodies that could operate in a very meaningful way.”

instances, these strands overlapped, like Telford Taylor explained at the outset, in ways that were contradictory and confusing. The Principles were applied by pacifists and non-pacifists, intellectuals, lawyers, draft resisters, soldiers who volunteered or were drafted, and a host of others. Writing on the twentieth anniversary of the Nuremberg Trials, John H.E. Fried, staffer with the American delegation to Nuremberg and volunteer with the Lawyers Committee on American Policy Towards Vietnam, observed, “The major significance of the Nuremberg principles [is] the emphasis which they put on the moral responsibility of all those who, by virtue of their official position or otherwise, are conducting or influencing the international relations of nations.” Moreover, the Principles “emphasize the moral responsibility of the citizens of all countries to follow their conscience” in order “to strengthen respect for the world legal order.”³¹ Seymour Melman argued in the groundbreaking war crimes study sponsored by Clergy and Laymen Concern About Vietnam entitled *In the Name of America* that “it should be appreciated that the United States ... took a leading role” in drafting the Nuremberg Charter, prosecuting and convicting Nazi war criminals, and producing the Nuremberg judgment. The formulation of the Principles by the International Law Commission of the United Nations and their ratification by the U.N. General Assembly “makes these principles highly authoritative guides as to the character of the relevant legal obligations of citizens and leaders.”³²

The significance of the Nuremberg Principles, however, extended beyond questions of morality and the individual’s conscience. They subverted the modern nation-state system based on the sovereign’s right to rule and make national policy subservient to the dictates of international law. After reviewing the cases of David Mitchell, the Fort Hood Three and Dr. Howard Levy, the political theorist Beverly Woodward asserted, “if read carefully, these principles can only be viewed as ‘subversive’ of the authority of the nation-state.” Moreover, “These principles in effect assert the supremacy of international law over national law. Consequently, the failure of national authorities to take the steps necessary to render these

³¹ John H.E. Fried, “The Relevance of the Nuremberg Trials Today (Tentative Draft of a Possible Public Statement),” May 1966, in Lawyers Committee on American Policy Toward Vietnam Papers, Box 4, Butler Library, Columbia University, New York.

³² Seymour Melman, ed., *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 43.

principles effective is hardly astonishing.”³³ Despite the ineffectiveness of the Principles and other international laws at curtailing the use of force in international affairs by the State, they were taken up by the antiwar movement and became a powerful tool to be utilized from below.

The Principles were used by both plaintiffs and defendants against the United States government and the military in legal cases. The Principles were instrumental in helping to build a grassroots, national political movement against the war. Moreover, the Nuremberg Principles acted as guidelines for individual responsibility and individual guilt during the Vietnam War. After the horrifying revelations of the My Lai massacre came to light in 1969, legal scholar Richard Falk insisted “the Nuremberg Principles imply a broader human responsibility to oppose illegal war and illegal methods of warfare.” “In this respect,” he continued, “the Nuremberg Principles provide guidelines for citizens’ conscience and a shield that can and should be used in the domestic legal system to interpose obligations under international law between the government and society.”³⁴ Falk’s position, the same adopted by draft and military resisters against the Vietnam War, found little popular support as war raged in Southeast Asia. Falk’s position, and that of the resisters, can confidently be called the radical interpretation of the Nuremberg Principles. In fact, it was the Vietnam War and the cases of its resisters that sparked a much-needed debate about the efficacy of the Nuremberg idea in books, legal journals, and conferences in the United States and abroad.

Falk’s position, the most extreme among international legal scholars, was the source of frequent criticism by both liberal and conservative lawyers. Telford Taylor’s seminal *Nuremberg and Vietnam: An American Tragedy* criticized Falk, as well as those of draft and military resisters, in their insistence that participation in the war on Vietnam would mean they were complicit in a war of aggression. Taylor argues that, “Those convicted at both Nuremberg and Tokyo of ‘crimes against peace’ were all part of the inner circles of leadership, and the Nuremberg acquittals of generals and industrialists cut directly against

³³ Beverly Woodward, “Nuremberg Law and U.S. Courts,” *Dissent*, March-April 1969, 133-134.

³⁴ Richard Falk, “Song My: War Crimes and Individual Responsibility: A Legal Memorandum,” *Trans-Action* Vol. 7 No.3 (January 1970): 40.

Professor Falk's arguments."³⁵ Taylor was arguing that because the draftees and enlistees were not in positions of leadership in the civilian or military commanded, they could not be held accountable for participating in a crime against peace. Benjamin B. Ferencz, a prosecutor at Nuremberg and quoted by Taylor, argues:

Nowhere was it held in any of the Nürnberg trials that a soldier has the duty to determine at his peril the legality or illegality of every order he receives. He was merely forewarned that if it should be obvious to every reasonable person that the order was a violation of national or international law...then the one who gives or carries out such an order may be accused of having committed a crime and he will have to answer for his deeds.

Moreover, Ferencz continues: "Any individual ordered by a military superior to commit a clear violation of the traditional laws or customs of war or a Crimes against Humanity would have a legal right and, indeed, a legal duty, to refuse." For Ferencz, "Protest on political or moral grounds should not, however, be misconceived or cloaked as a legal obligation." In his article, Ferencz points out that the Selective Service Act was enacted by Congress and therefore the law of the land. Those who burned their draft cards or refused the draft were violating the law. He argued the president, the Commander-in-Chief, has the authority to conduct foreign policy and act in a manner "necessary for the national defense." Therefore, for Ferencz, the burden of proof of a war's illegality or legality rests with the individual draftee or soldier. He argues that the Vietnam War "does not duplicate the patterns of World War II" and that the United States is acting in Vietnam for the "collective defense" of South Vietnam. Furthermore, the United States had not violated the Geneva Declaration of 1954 and the U.S.'s military involvement was "sanctioned by both Congress and the Constitution."³⁶

Despite the criticisms by the Johnson administration, pro-war intellectuals, and the media, the war crimes movement based itself firmly in the same principles and treaties adopted by the Allies after World War II. This was a critical defense by the movement. The violence, brutality and criminality of the war were shocking to more than just a small

³⁵ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam Books, 1971), 119.

³⁶ Benjamin B. Ferencz, "War Crimes Law and the Vietnam War," *The American University Law Review* Vol. 77, No. 3 (June 1968), 410, 420-422. See also Benjamin Ferencz, "Moral Issues in War," *New York Times*, 14 January 1968, E17.

minority of Americans and world opinion. What the Cold War, and the Vietnam War in particular, demonstrated was the large gulf between the energy and momentum generated by these principles and treaties after 1945 and the inability to create binding enforcement mechanisms and a world court to criminalize violations of international law and the laws of war. In the absence of such enforcement and criminal liability, a grassroots, international movement took up the reins and internalized the “ethos of Nuremberg.” This was a new feature in the history of international human rights activism and was accomplished before, and despite of, the large network of Non-Governmental Organizations (NGOs) that began to dominate the human rights landscape in the 1980s. In the absence of a world court and the international political will of the Great Powers to hold the United States accountable for its actions in Southeast Asia, what came to be known as an “unofficial” war crimes movement was organized and represented a form of participatory internationalism, or the establishment of a war crimes regime from below. It is my contention that these “unofficial” efforts represent the development of a form of world citizenship shared by people from around the globe who were concerned about the ramifications of international law, human rights, and war crimes during the Cold War.

The Nuremberg Principles and the Courts

Between 1965 and 1966, the usual channels of redress were utilized by draft and military resisters as they challenged the legality of the war on Vietnam. In each case the courts refused to challenge the Johnson administration’s use of the armed forces in Vietnam. This in effect, along with the legislative branch, ensured the breakdown of the checks and balances on American democracy and led to further escalations of the war. Longstanding notions of American exceptionalism hold that the American form of government was created to be different from the Old World governance of European monarchies. What makes American democracy different is the division of powers enunciated in the constitution between the Executive, Legislative and Judicial branches of government. These three branches were created to offer checks and balances on American democracy. Chief among

these was the power to declare war by the Congress. Article I, Section 8 of the Constitution grants Congress the right to declare war and Article II, Sections 1 and 2 make the president the “commander-in-chief” of the armed forces and give the president the authority to utilize the armed forces in emergencies.³⁷

The war in Vietnam caused a constitutional crisis because Congress, it was argued by the antiwar movement and a growing number of senators and representatives, had not declared war on Vietnam. The United States appeared to be transforming into an “imperial presidency” that some had feared. The “imperial presidency,” a term that found increasing usage in this period, was a way of saying the checks and balances on the war powers of the United States had broken down, and the President of the United States – the commander-in-chief – had usurped Congress’s war-making powers. In the literature on the “imperial presidency,” much is written about the executive and the legislative branches and their roles in the Vietnam War. However, there is a striking dearth of commentary on the judicial branch and its inability to stop the war on Southeast Asia. As I will demonstrate in the chapters that follow, this was not for want of trying. In both military and civilian courts, the issue of the war on Vietnam being undeclared was raised and that the war itself was in violation of international law, the Nuremberg Principles, and the laws of war and in each of the court cases these arguments were struck down. In many cases, especially in the cases of David Mitchell, the Fort Hood Three, and Dr. Howard Levy, these war resisters would face lengthy jail time.

Before the Vietnam War, there were no cases brought before civil or military courts arguing that an individuals’ participation in a particular war would make them complicit in crimes against peace, war crimes, and crimes against humanity. Francis Boyle, writing in 2007 and after defending American citizens and military personnel in court for over twenty years, concludes that judges in the United States “have already arbitrarily rejected” the Nuremberg idea and the use of such arguments “provides the judge with a ready-made

³⁷ John J. Abt, *Who Has the Right to Make War?* (New York: International Publishers Co., Inc., 1970), 13-14.

pretext to shut down any defense based on principles of international law.”³⁸ Why was this the case? Why did U.S. courts, part of the same system which was vital to the formation of the Nuremberg Tribunal and the issuance of the Nuremberg Principles, eschew any responsibility for hearing cases against participation in the Vietnam War on the very same grounds of individual responsibility and individual guilt? There are legal, political, and cultural answers to this not-so-simple question. But first, let us examine why the Nuremberg Principles are considered nonjusticiable in U.S. military and civilian courts.

As the historian and aide to President John F. Kennedy, Arthur Schlesinger, Jr., noted in his seminal *The Imperial Presidency*, “The Indochina War raised the issue of the justiciability of presidential war as it had never before been raised in American history.” Schlesinger notes that in the “long and voluble history” of American judicial “decisions bearing even marginally on the location of the war-making power could be numbered on the fingers of two hands.”³⁹ Because of the history of the American courts’ deference to the Executive and Legislative branches in the waging of war, the early challenges to the Vietnam War’s legality were briskly dealt with under the “political questions” doctrine.⁴⁰ This was the case in *Luftig v. McNamara* (1967) and *Mora v. McNamara* (1967).

After examining all of the legal challenges by war resisters in the U.S. courts alleging the war was illegal, international legal scholar John Norton Moore wrote in 1972 that all of

³⁸ Francis A. Boyle, *Protesting Power: War, Resistance, and Law* (Lanham: Rowman & Littlefield Publishers, Inc., 2007), 24. See also William V. O'Brien, "Selective conscientious objection and international law," *The Georgetown Law Journal* Vol. 56 (1967): 1080-1131.

³⁹ Arthur Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin Company, 2004), 287. See also, Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam Books, 1971), 111; and, Louis Henkin, *Foreign Affairs and the Constitution* (Mineola: Foundation Press, 1972), 209-214. Henkin, a proponent of the use of the “political question” doctrine in Vietnam cases writes:

In practice, surely, few “boundary disputes” between Congress and the President in regard to foreign affairs have come to court: even the perennial issues as to the President’s power to send troops abroad, which might perhaps have been challenged by an individual about to be sent, did not reach the courts during the 175 years before the bitter days of Vietnam.

⁴⁰ The “political questions” doctrine was introduced by the Supreme Court in *Marbury v. Madison* (1803). The ruling held that the judicial branch of government did not have the power to intervene in matters that were political in nature and therefore under the purview of the legislative and executive branches of government. For instance, during the Vietnam War the courts held in general that the war’s legality was a political question that could only be acted upon by legislation enacted in Congress. Arthur Schlesinger, Jr., writes that “[f]or most of American history the nature and scope of this doctrine were exceedingly unclear.” The doctrine was clarified in *Baker v. Carr* (1962) by offering for the first time a set of criteria to determine if the judicial branch should abstain from ruling in an otherwise political matter. Arthur Schlesinger, Jr., *The Imperial Presidency*, 288.

them “have been treated as nonjusticiable ‘political questions’ by every domestic court which has considered them. And the Supreme Court, by refusing to grant *certiorari* to review them, has acquiesced in this judgment, albeit without reasons.” As Moore notes, the judiciary had at its disposal a range of criteria to determine the “justiciability” of a particular case and these are “embodied in the doctrines of standing, ripeness, adversariness, and political question.” While Moore, a proponent of the Vietnam War, goes in depth to explain how the courts could and should dismiss the range of legal cases by resisters in the U.S. courts, he nonetheless demonstrates that it was only the ‘political questions’ doctrine which was used by the courts to abstain from rendering judgment on the legality of the U.S. war effort in Vietnam.⁴¹

In 1974, Richard Falk thoroughly reviewed the use of the “political questions” doctrine in Vietnam draft and military resister cases, and concluded that U.S. courts “should reconsider the applicability of the political question doctrine to the war-peace area in light of post-World War II international legal developments.” He argued that instead of coming to terms with, or “even addressing themselves,” to the changes in international law – including the Nuremberg Principles and the U.N. Charter – “courts have been hiding beneath the political question cloak.” Instead, Falk believes that post-World War Two developments in international law have provided “a reasonably definite set of legal criteria” with which to challenge the Executive’s usurpation of the war-making powers.⁴²

The courts offered a platform to test new legal theories and to garner media attention; however, in case after case, the courts simply refused to decide on the issue and deferred to the “political questions doctrine.” Therefore, despite advances in international law (the U.N. Charter and the Nuremberg Principles) and the laws of war (the Geneva Conventions of 1949), civilian and military courts refused to take postwar realities into consideration and deferred power to the political branches of government. In this atmosphere, it was the resisters – draft card burners, draft noncooperators, and military refusers – who went to jail while the war in Vietnam continued to escalate and the architects of intervention in Southeast

⁴¹ John Norton Moore, *Law and the Indo-China War* (Princeton: Princeton University Press, 1972). See Chapter 13, pp. 570-598.

⁴² Richard Falk, “The Nuremberg Defense in the Pentagon Papers Case,” *Columbia Journal of Transnational Law* 13, 2 (1974), 214.

Asia emerged from the era unchallenged by legal bodies. Once it became clear by 1967 that the courts would rule in favor of the Johnson administration in military and civilian courts, the organizations created in 1965 and 1966 to help early resisters, and the activists that founded them, were poised to undertake even greater resistance in 1967 and 1968. This coalescing of trials and charismatic individuals would lead to a rapid expansion of the antiwar movement among civilians, veterans and G.I.s against the war in Vietnam.

The Case for Legitimacy

Legal scholar Robert Strassfeld highlighted, in the first and only comprehensive account of the court-martial of Dr. Howard Levy, the challenges of invoking the Nuremberg Principles against the American war in Vietnam. “Nuremberg carried with it connotations of Nazis and Nazi atrocities and in so doing set too high a threshold,” Strassfeld warned. “Certainly few Americans could accept an analogy likening U.S. behavior to the Nazis. Indeed, Americans would find it hard to believe that we could be capable of atrocities of any sort.”⁴³ As noted previously, liberal lawyers such as Benjamin Ferencz, who participated at the Nuremberg Trials, admonished antiwar activists for using the laws established after World War II to condemn American military policy in Vietnam as well as the draft. The comparisons between World War II and Vietnam were unfounded, so the argument went, because nothing the United States military was doing in Vietnam was comparable to the atrocities of the Nazi’s in Europe or the attempted extermination of the European Jewry. However, it were American officials in the Johnson administration who vigorously argued if they did not intervene in Vietnam it was tantamount to appeasing Hitler in 1938 at Munich.

The use of the Munich Analogy was a powerful tool the U.S. government used in selling the Vietnam War to Congress, the media, and the American people. They did this in large part because the Cold War was being waged in the rubble of the Second World War. There the United States and the Allies were victorious and tried the Axis’ leaders as war criminals. As a consequence, Richard Falk, and many others have argued, the American

⁴³ Robert N. Strassfeld, “The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy,” *Wisconsin Law Review* 839, (1994), 923.

experience in World War II and the Nuremberg and Tokyo trials imbued the United States U.S. officials with “a kind of crusader-like attitude toward their role in world affairs, and it made them hyper-self-indulgent about what they could do in the postwar period.” Therefore, for Falk, the result of the post-war trials “pave[d] the way for the victors to engage in criminal behavior in their postwar diplomacy. It gave them a kind of moral and ideological mandate to reconstruct the world in their image.”⁴⁴ And part of this mandate included the fact that the Allied powers immunized themselves from wrongdoing during World War II. Actions that were proven to have been engaged in by both the Allies and the Axis were not considered crimes, such as the bombardment of civilian populations, as well as the use of the atomic bomb over Hiroshima and Nagasaki.⁴⁵

To oppose such arguments and the ideology of American exceptionalism, the American and international peace movements countered with the same principles and treaties the Allies established after World War II and earlier. This was a difficult argument for pro-war intellectuals to accept. Radical intellectuals on the other hand – historians such as Staughton Lynd and Howard Zinn, independent journalists like I.F. Stone, and pacifists such as David Dellinger and A.J. Muste – were much more likely to openly criticize the administration and its claims for why the U.S. had to resort to outright war to end the threat of Communist aggression in Southeast Asia. This is especially true in 1965 and 1966 where the liberal intellectuals were only beginning to find their voice to criticize the war.

Whatever the official justifications, there were counter-arguments proffered that tried to subvert official claims by pointing out the gap between official rhetoric and reality in Vietnam. Howard Zinn, World War II bombardier and radical historian, argued that whereas the “terrible mistake[s] in judgment” that resulted from Allied bombing of civilians during World War II were both “superfluous to the war and could have been eliminated”; “the bombing and shelling of civilians constitutes the war” in Vietnam. Therefore, according to

⁴⁴ Richard Falk, “Nuremberg: Forty Years After,” *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 80 (April 9-12, 1986), 66.

⁴⁵ As Richard Falk points out, what he calls the “irony of August 8, 1945,” the United States dropped the atomic bomb over Nagasaki on the same day that it signed the London Charter (of the Nuremberg Trials) with the French, British and Soviets. Richard Falk, “Nuremberg: Forty Years After,” *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 80 (April 9-12, 1986), 65. See also: Noam Chomsky, *Failed States: The Abuse of Power and the Assault on Democracy* (New York: Owl Books, 2006), 64, 69.

Zinn and many in the American and international peace movement, “the war *itself* is an atrocity,” and the only way to stop the atrocities and the destruction of the civilian population – especially of innocent women and children – was “to stop the war itself.” Zinn, and a growing chorus of other distinct and vibrant voices decried the American war in Vietnam as illegal. More importantly, at the core of the argument was an indictment of modern, technological warfare.⁴⁶ Zinn noted that “many people are aghast at the mass killing of innocents, even angrily comparing the United States to Nazi Germany.” He referred to some in the West German peace movement who referred to U.S. troops in Vietnam as “*Bandenfampf-verbände* (Bandit Fighting Units),” the name given to the Nazi Waffen-SS anti-resistance soldiers.⁴⁷ It also became popular after 1967 for some in the United States to refer to the country as *Amerika* (the German spelling of America). But instances in the American peace movement of hatred for American soldiers, or even spitting, were rare.⁴⁸

The use of the Nuremberg Principles and other international laws for the vast majority in the American peace movement was not intended to draw a direct comparison between Nazi atrocities in World War II and U.S. atrocities in Vietnam. Rather, it was to argue that the horrifying cauldron of global war underscored the importance of enforcing these international principles and treaties. It was because the Vietnam War itself was a crime and immoral that it therefore needed to be resisted. This was not any less a criminal because they did not reach the level of Nazi violence. Howard Zinn argues the point was not to draw direct comparisons between the Nazis and the United States, but to highlight and organize

⁴⁶ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 60-66. Zinn argued: “Modern warfare has certain fundamental characteristics which make it the least defensible use of violence in achieving a social goal: It is massive, indiscriminate, not focused on the evil-doers; its human cost is gigantic; it violates the principle of free choice on two counts, because it is fought by conscripts, and against people who did not decide to be involved (civilians).” For Zinn’s argument against modern warfare, see *Vietnam: The Logic of Withdrawal*, Chapter Six.

⁴⁷ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 62. See also Wilfried Mausbach, “Auschwitz and Vietnam: West German Protest Against America’s War During the 1960s,” in Andreas W. Daum, Lloyd C. Gardner, Wilfried Mausbach, eds., *America, the Vietnam War and the World: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2003), 292. See also Max Paul Friedman, *Rethinking Anti-Americanism: the History of an Exceptional Concept in American Foreign Relations* (Cambridge: Cambridge University Press, 2012), Chapter Six, “Anti-Americanism in the Age of Protest” for an excellent discussion of the use of Nazi analogies by Western European peace movements to how the United States was conducting its war in Vietnam.

⁴⁸ Jerry Lembcke, *The Spitting Image: Myth, Memory, and the Legacy of Vietnam* (New York: New York University Press, 1998).

against the same detestable aspects of the Axis war machine: racism, nationalism, invasion and occupation, torture, summary executions, and the indiscriminate destruction of civilian populations. They looked to international principles and treaties set-up after World War Two to guide their analysis of warfare during anti-colonial wars of national liberation in a decolonizing world.

Other critics of the war in Vietnam were far from the usual suspects of the American peace movement. Bernard Fall, a French scholar-soldier, who taught at Howard University, wrote many influential articles and books on the French-Viet Minh war from 1946 to 1954 and the American involvement. Fall was no dove. In the early 1960s, he began to gather data on the National Liberation Front's kidnapping and assassination of village chiefs in South Vietnam and warned American officials of the increasing instances.⁴⁹ Fall counseled and advised everyone from the French government to I.F. Stone on the guerrilla war in Vietnam. In an article released in *Ramparts* magazine in December 1965 after Fall returned from reporting on the war, he wrote that the war had become an "impersonal, an American war." He wrote of the formerly "lush" vegetation visible flying over the countryside and jungles that had become a "dead, brown surface ... sprayed with weed killers"; the massive bombardment of the countryside "to deprive the guerrillas of his population"; the use of napalm and fragmentation bombs in "free bomb" zones; the body count and aerial target destruction count; the attacks on hospitals and medical personnel by *both* the National Liberation Front (NLF) and U.S./Army of the Republic of Viet Nam (ARVN) forces; and the abuse of prisoners of war. Fall was careful to distinguish between the crimes committed by the United States armed services and the ARVN, their allies in South Vietnam, and the National Liberation Front.

Fall took specific issue with violations Geneva Conventions of 1949. "In this war, there is no respect for the wounded," he wrote. Asking an U.S. Army officer about the abuse of POWs, he was told that the abuse was conducted by the Vietnamese and not the Americans. Moreover, with respect to the targeting of hospitals, he writes of American

⁴⁹ See Bernard Fall, *Last Reflections on a War* (Garden City: Doubleday, 1967). Herein contains a series of excellent articles and essays by Fall on everything from Vietnamese history to guerrilla war and counterinsurgency to U.S. combat operations.

bombings and the tactics of the Viet Cong, “in this war, there is no respect for hospitals either.” Recalling his years as a research analyst at the Nuremberg Trials between 1946 and 1948, Fall argues that – as at Nuremberg – the excuse that violations of the laws of war are committed by allied forces “is not an *excuse*.” By contrast, he argues that “the Viet Cong’s terror tactics, the selective assassination of village chiefs,” in military strategy, is considered “productive.” The reason is that former president of the government of South Vietnam Ngo Dinh Diem abolished the 400 to 500 year traditional of electing village chiefs to a system of imposed village chiefs who, for the most part, did not live amongst the villagers. Fall called this “probably his [Diem’s] most crucial mistake.” Donald Duncan, who served in the elite Special Forces in Vietnam in 1964-1965, reached the same conclusion about this NLF tactic in his famous *Ramparts* exposé announcing his opposition to the war in Vietnam in February 1966.⁵⁰

Fall lamented that the laws of war “are not obeyed” in Vietnam and that “‘war crimes’ are recorded almost daily and sometimes by cameramen.” Fall concludes: “There seems to be a predisposition on our side to no longer be able to see the Vietnamese as people against whom crimes can be committed. This is the ultimate impersonalization of the war.” Fall was later killed in South Vietnam, stepping on a landmine, while out on patrol with American forces in 1967.⁵¹

This was not simply a scathing indictment of the war and of the application of American military power in South Vietnam; it was an argument that war crimes were being committed by the United States. Fall and Duncan’s opinion were respected the world over. The fact that these two particular articles were printed in *Ramparts* magazine demonstrates that these articles would be highly read in the peace movement as well. In Fall’s piece, he specifically based his analysis in the laws developed after World War Two and argued that “the rules *do* apply to guerrilla wars as well.”

The criticism of the war in Vietnam based on international law and the laws of war is important to highlight because Vietnam is largely omitted from the post-1990 surge in

⁵⁰ Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966. For more on Duncan, see Chapters 3 and 6 of this thesis.

⁵¹ Bernard Fall, “This Isn’t Munich, It’s Spain,” *Ramparts*, December 1965, 23-29.

interest among scholars regarding human rights, international law and the laws of war.⁵² For instance, in the 2012 book *The Human Rights Revolution: An International History*, a chapter on the Geneva Conventions on 1949 by historian William Hitchcock argues that the Conventions were not a matter of serious controversy in the post-World War Two world until the global war on terror in the early-twenty-first century.⁵³ Prior to the global war on terror, Hitchcock tries to make the case that the Conventions had been “briefly controversial in the Korean War ... and also in the Vietnam War, when captured U.S. pilots were routinely tortured by the North Vietnamese forces.” The North Koreans and North Vietnamese went so far as to argue the U.S. pilots were war criminals and should be tried as such. Hitchcock rightly points out that this prospect was condemned around the world, and as I will show, by leading U.S. congressional doves, U.S. antiwar organizers when they personally met with Ho Chi Minh, and officials in the Johnson administration. However, without looking at what the world-wide anti-Vietnam War movement was doing, saying and writing, or the International Committee of the Red Cross, Hitchcock concludes:

The United States, indeed, reaped some degree of international propaganda value by making it plain that it adhered to the Geneva Conventions even when its enemies flaunted it. The failure of the Geneva Conventions to compel respect for its articles was lamentable and disappointing; but at no point in the Cold War era were the articles themselves subject to serious dispute.⁵⁴

⁵² A careful study of the leading works since the 1990s on international law, war crimes, human rights abuses and international war crimes tribunals rarely, if ever, mention the war in Vietnam as an example of a post-World War II conflict worthy of analysis under these categories of international justice. In 2010, Edward S. Herman, an early critic of war crimes and atrocities in Vietnam, wrote with David Peterson that “leading mainstream experts on ‘genocide’ and mass-atrocity crimes today still carefully exclude from consideration the U.S. attacks on Indochina ...” This is despite the fact that the war in Vietnam could be analyzed in light of all of the post-World War II international legal developments. Edward S. Herman and David Peterson, *The Politics of Genocide* (New York: Monthly Review Press, 2010), 17-20. When the war in Vietnam is discussed in these works, it is usually either in reference to the My Lai massacre or the rise to power of the Khmer Rouge in Cambodia in the latter half of the 1970s. See such distinctive works as Samantha Power’s *“A Problem from Hell”: America and the Age of Genocide*; Gary Bass, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals*; or Edel Hughes, William Schabas, Ramesh Chandra Thakur, *Atrocities and International Accountability: Beyond Transitional Justice*. While this is by far an incomplete list, these sources are representative of the types of scholarship on this important and still limited field of study.

⁵³ William I. Hitchcock, “Human Rights and the Laws of War: The Geneva Conventions of 1949,” in Iriye, Goedde, and Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 94-95.

⁵⁴ William I. Hitchcock, “Human Rights and the Laws of War: The Geneva Conventions of 1949,” in Iriye, Goedde, and Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 94-95.

This interesting assessment completely misses one of *the* central controversies during the entire “Americanized” war in Vietnam: alleged grave breaches of the Geneva Conventions as well as violations of the United Nations Charter, the Nuremberg Principles, and the Geneva Accords of 1954 by the United States. American intervention in Vietnam and the day-to-day war crimes committed there cast a long shadow over future American military interventions up to and including the 1991 Gulf War and 2003 war in Iraq. Historian Van Gosse argues that from 1967 until the end of the Cold War, outrage over intervention in Southeast Asia created a radical-liberal coalition of intellectuals, new and old leftists, and religious organizations that challenged subsequent U.S. interventions around the world (and particularly in Latin America). “Suddenly, opposition to U.S. foreign policy became pervasive instead of marginal,” Gosse explains, and this rigorous anti-interventionism confronted twenty years of Cold War consensus. He argues that this anti-interventionism and activism against torture and other human rights abuses which began during the Vietnam War *was* the Vietnam Syndrome and “not just an unarticulated public malaise and a gun-shy senior-officer corps, but the establishment of a well-grounded foreign policy opposition.”⁵⁵ However, while Gosse’s analysis explores the opposition to the coup d’état in Chile in September 1973, this thesis seeks to demonstrate how the early pioneers of the anti-Vietnam War movement contributed to, and laid the foundation for, this popular anti-interventionism and the radical-liberal coalition of intellectuals, new and old leftists and religious organizations.

A central argument here is that the exposure of war crimes in Vietnam and the insistence on the war’s illegality under the U.S. Constitution and the U.N. Charter helped to establish what has been euphemistically called the “Vietnam syndrome.” It was precisely because of the American intervention in the Vietnamese internal struggle for independence, the popular backlash that it produced at home and abroad, and the documentation of war crimes that would help constrain American military interventionism. This was the result of

⁵⁵ Van Gosse, “Unpacking the Vietnam Syndrome: The Coup in Chile and the Rise of Popular Anti-Interventionism,” in Van Gosse and Richard Moser, eds., *The World the Sixties Made: Politics and Culture in Recent America* (Philadelphia: Temple University Press, 2003), 100-102.

antiwar organizing and the publication of numerous books and articles documenting the criminality of the war.

While the antiwar movement was busy documenting violations of the laws of war, the International Committee of the Red Cross was also active condemning the violations of the Geneva Conventions by *both* sides in the conflict. The ICRC had been privately warning the State Department and Secretary Rusk about their concerns regarding the mistreatment of Prisoners of War (POW) in 1965. The ICRC's concerns were not entirely private as letters between Dean Rusk and the ICRC appeared in the January 1966 edition of the *American Journal of International Law*.⁵⁶ Just because the State Department and other U.S. government departments reassured the American public and the international community that it abided by the Geneva Conventions in Southeast Asia as a matter of policy did not guarantee the accuracy of such claims.

For instance, in an August 10 meeting on the “Viet-Nam information problem” with representatives from the White House, the Defense Department, the United States Information Agency, and the State Department, Press Secretary Bill Moyers stated that the president “gives this subject very high priority.” James L. Greenfield from the State Department observed that “the news reports of U.S. soldiers setting fire to Vietnamese villages and related incidents are causing very serious problems here and abroad.” Referring to the August 4 CBS *Evening News* report by Morley Safer with cameras recording U.S. marines torching the village of Cam Ne, burning 150 homes in total, Greenfield felt that such images “are considered more serious if Americans, rather than South Vietnamese, are responsible.” Arthur Sylvester from the Defense Department stated that the problem was – referring specifically to Morley Safer – “unfriendly correspondents in Viet-Nam, particularly foreigners, including some who work for U.S. news agencies and media.” While some in the meeting raised concerns about the burning of villages and the conduct of the war, the meeting was of lower-level officials who held no sway within the National Security Council or the president’s Tuesday lunch club with Bundy, McNamara, and Rusk. Nonetheless, despite concerns about the bombardment and razing of villages, Bill Moyers, who was in daily contact with the

⁵⁶ See *American Journal of International Law* Vol. 60, No. 1 (January 1966): 91-106.

President, concluded that he “was considering meeting with the heads of the major wire services, to discuss the nature of the war and ask for a balanced view of it. We would suggest that they assign better, more mature reporters, preferably U.S. nationals.”⁵⁷

At the meeting, Leonard Meeker, legal adviser to the State Department, informed the officials that the International Committee of the Red Cross “was about to enter the picture” and they were concerned about the treatment of prisoners of war in Vietnam. Therefore, Meeker advised that the Johnson administration should

Publicly demonstrate our concern that the rules of war be observed in Viet-Nam. This should be accomplished by publicizing our willingness to cooperate with the Red Cross, and the Viet Cong-North Viet-Nam unwillingness to do likewise. We should call on the other side to mark their hospitals, permit inspection of prison camps, etc. We should also publicize directives and guidelines given to our troops in the field.⁵⁸

Instead of implementing policy directives demanding the immediate end of prisoner abuse, the problem was presented as an information flow issue that needed to be better managed. Far from the Geneva Conventions being accepted as guidelines by Washington during the Vietnam War, as Hitchcock argued in *The Human Rights Revolution*, the U.S. government actively subverted them at the highest levels. The strategy of the State Department was to argue that the Viet Cong’s use of terrorism, torture and atrocity was far more common and barbaric than anything the United States was doing in Vietnam. In preparation for the Twentieth International Conference of the Red Cross in Vienna slated for October 1965, for instance, a “Secret” memo within the State Department between officials dated September 24 noted that U.S. military policy in Vietnam might be scrutinized. Specifically, the memo argued that because the Geneva Conventions applied to the conflict and various violations of

⁵⁷ For President Johnson on Morley Safer, see: Lyndon Johnson quoted in Tom Wells, *The War Within: America’s Battle Over Vietnam* (Lincoln: iUniverse, 2005), 205. See also: Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973* (Oxford: Oxford University Press, 1998), 286-287. For the White House meeting on the “Viet-Nam information problem, see: “Memorandum of Conversation,” 10 August 1965, Foreign Relations of the United States, 1964–1968, Volume III, Vietnam, June–December 1965, Document 117 <http://history.state.gov/historicaldocuments/frus1964-68v03/d117>.

⁵⁸ “Memorandum of Conversation,” 10 August 1965, Foreign Relations of the United States, 1964–1968, Volume III, Vietnam, June–December 1965, Document 117 <http://history.state.gov/historicaldocuments/frus1964-68v03/d117>

the Third and Fourth Conventions were occurring, the subject was sure to come up and they needed to be prepared. The memo stated:

If pressed on our actions in South Viet-Nam, we can point out that our military actions are always conducted with the greatest restraint possible under the circumstances, that the war was originally caused by Hanoi's aggression, and that the Viet Cong have a conscious policy of terrorism and victimization of civilians. If appropriate, we can use material we have available on VC terrorism.⁵⁹

This material was collected by Daniel Ellsberg and associates at the Pentagon working under the Secretary of Defense Robert McNamara. While the ICRC could air its concerns publicly, it could not share its findings with the American or international community as a matter of policy. Such concerns, however, were dealt with far more explicitly in an explosive article written by former Special Forces Master Sergeant Donald Duncan and through the testimony of other Vietnam Veterans after 1967. Exposing violations of the Geneva Conventions were continuously invoked by the antiwar movement and grave breaches of them were not only highlighted almost daily by war correspondents from the national press, but in movement books such as the published proceedings of the International War Crimes Tribunal in *Against the Crime of Silence* (1968) and the Clergy and Laymen Concerned About Vietnam (CALCAV) sponsored study *In the Name of America* (1968).

This unprecedented combination of antiwar activism with the dissemination of information of war crimes in Vietnam engendered a response from Johnson administration officials, Capitol Hill, and pro-war intellectuals. A key argument to challenge and discredit the use of international law and the laws of war by antiwar opponents was that the activists were anti-American, disloyal, and anti-democratic, and therefore ultimately prolonged the war because they were giving aid and comfort to the enemy. For conservative intellectuals such as William F. Buckley, Jr., dissenters were anti-American because they opposed the policies of a democratically elected leader. Like him or not, the argument goes, President Johnson was elected by the American people and the president has the right to conduct foreign affairs as he saw fit. Moreover, in the early years of the war, the majority of

⁵⁹ "Vietnamese Issues which May Arise at Red Cross Meeting," Secret, 24 September 1965, RG 59 General Records of the Department of State, Bureau of Far Eastern Affairs, Vietnam Working Group: Subject Files, 1963-1966, Box 8, National Research and Archives Administration (NARA) II, College Park, Maryland.

Americans supported the president's policies. Therefore, questions of morality, legality and criminality were anything but primary considerations.

This is the essence of the myth of American exceptionalism that propelled the United States throughout the Cold War. Buckley was certainly not alone. Liberals and conservatives alike adhered to this view. Notions about the benevolence of American power abounded during the Cold War. They were reinforced by an ardent anti-communist worldview that saw threats around every corner and in every country. Interviewing Robert Scheer of *Ramparts* magazine in 1967 to get to the bottom of whether the magazine was anti-American, Buckley set-out the fundamental ideology of the pro-war intellectuals: "if it's in disagreement over methods of achieving the same ends that are generally desired, that's one thing. If it's actually seeking sort of a revolutionary change in the whole American system, I think that's something else." For Buckley, that "something else" was anti-Americanism.⁶⁰ Buckley regarded anything less than total adherence to the demand of a non-communist government in Saigon to be anti-American. McGeorge Bundy, representing the liberal wing of pro-war apologetics, made much the same argument in *Foreign Affairs* when he argued "there are wild men in the wings, but on the main stage ... the argument on Viet Nam turns on tactics, not fundamentals."⁶¹

Therefore, the question of whether the war in Vietnam was illegal under domestic and international law, let alone questions of war crimes, took these "wild men in the wings" off of "the main stage" in the debate over Vietnam. After the courts refused to hear the Nuremberg arguments, the only way the resisters could affect the course of the war was to engage in the reclamation of the law through the use of extra-legal means such as mass civil resistance and obstruction of the war effort. This was not popular, even within the peace movement. When the War Resisters League advocated for desertion within the armed forces and draft resistance among draft-aged men, this position "frightened moderates" David

⁶⁰ Program 059, "Is Ramparts Magazine Un-American," *Firing Line*, 26 June 1967. The full transcript is available online at the Hoover Institution, Stanford University, Firing Line Archives, <http://hoohila.stanford.edu/firingline/programView2.php?programID=79>.

⁶¹ McGeorge Bundy, *Foreign Affairs*, January 1967, 191.

McReynolds recalled.⁶² The Cold War anti-communist consensus and the institutional and societal respect for the military after World War Two brought a clash of ideologies during the Vietnam War and this proved a formidable obstacle to antiwar organizing. The fight against communism at home and abroad became infused with the formation of the national security state. “Under the Cold War ideology that dominated the American political culture of the 1950s,” historian Max Paul Friedman argues, “‘Americanism’ represented good and its opponent evil; hence to oppose American policy, to engage in ‘anti-Americanism,’ was to stand on the dark side.”⁶³ And this was the side that millions of Americans found themselves in the early years of the anti-Vietnam War movement. The early years for activists between 1965 and 1967 were lonely times.

Many labels were applied to antiwar organizers and activists as a way to delegitimize the movement. Activists were not only anti-American, they were communist dupes or directed by Hanoi and Moscow and therefore prolonged the war. J. Edgar Hoover told a Washington, D.C., audience that anti-Vietnam War protesters were “half-way citizens who are neither morally, mentally or emotionally mature.”⁶⁴ After the first International Days of Protest against the war on October 15-16, 1965, Senator Frank Lausche announced that the demonstrators were “harmful to the security of our country.” Trying to instill fear into the America population and turn public opinion against the still small antiwar movement, Lausche argued the “demonstrators are the product of communist leadership. Countless innocent, uniformed youth of the country are participating in them not knowing that they are following the flag of the Reds and bowing to the voices of the Communists.”⁶⁵ By April

⁶² David McReynolds, “Pacifists and the Vietnam Antiwar Movement,” in Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992), 63.

⁶³ Max Paul Friedman calls this the “myth of anti-Americanism” which aroused “the conviction that criticism of the United States encounters at home is produced by disloyal citizens, and opposition it meets abroad springs principally from malevolence, anti-democratic sentiment, or psychological pathologies among foreigners.” Therefore, a “main function” of critics who applied the concept of anti-American to antiwar activists “has been the constriction of political discourse about U.S. society and especially about U.S. foreign policy” (pp.3-4). Max Paul Friedman, *Rethinking Anti-Americanism: the History of an Exceptional Concept in American Foreign Relations*(Cambridge: Cambridge University Press, 2012), 90.

⁶⁴ Hoover quoted in James Kirkpatrick Davis, *Assault on the Left: The FBI and the Sixties Antiwar Movement* (Westport: Praeger, 1997), 32.

⁶⁵ Quoted in *The Congressional Record*, 18 October 1965 (Washington: United States Government Printing Office, 1965), 26292-26293.

1967, Secretary of State Dean Rusk informed the press that “antiwar demonstrators were supported by a communist apparatus and were prolonging the war.”⁶⁶

The case for legitimacy hardly deterred those at the cutting edge of the movement. By the end of 1965 it was clear to any thoughtful, fair-minded observer that the war in Vietnam was going to be a long, drawn out conflict. What was considered a radical or militant analysis of the war in 1965 and 1966 had gravitated to the mainstream by the end of the decade. Part of the goal of this thesis is to demonstrate the legitimacy of the resistance, and especially the more radical manifestations of the antiwar movement. By and large, the establishment media, liberal and conservative critics in the academy and intelligentsia, and government officials all criticized the movement and its key constituencies – draft resistance, GI and veteran movements – as well as the use of the Nuremberg Principles and international law. No movement tactic or strategy was perfect and none was going to win immediate successes. Living with the residual effects of McCarthyism and almost two decades of Cold War consensus was a formidable obstacle to organizing any effectual movement against the war.

Understanding the Nuremberg Principles and the Antiwar Movement

The genesis of my thesis has been my own critical engagement with the brilliant antiwar literature for the past decade as an undergraduate and graduate student. Studies have evolved through three major phases since the early 1970s and consist of numerous accounts from participants to dense and lengthy surveys of the movement, biographies of movement leaders, organizational histories and monographs on a specific form of organizing such as draft resistance, the GI movement and veteran organizing.⁶⁷ Despite the breadth and scope of

⁶⁶ Quoted in *The New York Times*, 9 April 1967, 22.

⁶⁷ See, for instance: Thomas Powers, *The War At Home; Vietnam and the American People, 1964-1968* (New York: Grossman Publishers, 1973); John F. Bannan and Rosemary Bannan, *Law, Morality, and Vietnam: the Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974); Nancy Zaroulis and Gerald Sullivan, *Who Spoke Up? American Protest Against the War in Vietnam, 1963-1975* (New York: Doubleday and Company, 1984); Steven E. Barkan, *Protesters on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements* (New Brunswick: Rutgers University Press, 1985); Melvin Small, *Johnson, Nixon and the Doves* (New Brunswick: Rutgers University Press, 1988); John Dumbrell, ed., *Vietnam and the Antiwar*

the literature, much of the ink spilled has been to defend the movement against attacks by critics and refute stereotypes that have endured since the Sixties. The historians writing about the movement have had to take a stand, demonstrating that the movement is indeed worthy of academic study and that it had an impact on U.S. foreign policy in Southeast Asia. The movement and its scholarship have ensured that any major work on the Vietnam War has had to include a discussion about the impact of the antiwar movement on the Johnson and Nixon administrations.

Rather than defined schools of thought, the literature has been cumulative and evolved in phases with each study enriching our understanding of different aspects of the movement. The key debates concern the efficacy of radical versus moderate forms of antiwar organizing and much attention has been devoted to the major events and demonstrations of the antiwar movement, its key leaders and personalities, and the intercene debates between new leftists, old leftists, radical pacifists and peace liberals over tactics and strategies. In trying to make a case for the importance of the movement, its effects on the United States government, or a different strain of antiwar activity, scholars have by and large taken the

Movement: An International Perspective (Aldershot: Avebury, 1989); Charles DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990); Mitchell Hall, *Because of Their Faith: CALCAV and the Religious Opposition to the Vietnam War* (New York: Columbia University Press, 1990); Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992); Tom Wells, *The War Within: America's Battle over Vietnam* (Berkeley: University of California Press, 1994); Kenneth J. Heineman, *Campus Wars: The Peace Movement at American State Universities in the Vietnam Era* (New York: New York University Press, 1993); James Clinton, *The Loyal Opposition: American's in North Vietnam, 1965-1972* (Colorado: University Press of Colorado, 1995); Richard Moser, *The New Winter Soldiers: GI and Veteran Dissent during the Vietnam Era* (New Brunswick: Rutgers University Press, 1996); James Kirkpatrick Davis, *Assault on the Left: The FBI and the Sixties Antiwar Movement* (Westport: Praeger Publishers, 1997); Mary Hershberger, *Traveling to Vietnam: American Peace Activists and the War* (Syracuse: Syracuse University Press, 1998); Rhodri Jefferys-Jones, *Peace Now! American Society and the Ending of the Vietnam War* (New Haven: Yale University Press, 1999); Andrew Hunt, *The Turning: a History of the Vietnam Veterans Against the War* (New York: New York University Press, 1999); Walter L. Hixson, ed. *The United States and the Vietnam War: the Vietnam Antiwar Movement* (New York: Garland Publishing, Inc., 2000); Gerald Nicosia, *Home to war: a history of the Vietnam veterans' movement* (New York : Crown Publishers, 2001); Melvin Small, *Anti-Warriors: The Vietnam War and the Battle for America's Hearts and Minds* (New York: SR Books, 2002); Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003); Andrew E. Hunt, *David Dellinger: The Life and Times of a Nonviolent Revolutionary* (New York: New York University Press, 2006); Carl Mirra, *The Admirable Radical: Staughton Lynd and Cold War Dissent, 1945-1970* (Kent: Kent State University Press, 2010); and David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think about the Environment* (Athens: The University of Georgia Press, 2011).

intellectual arguments of the movement for granted. Instead of seeking to supplant the important works that have come before, I seek to fill a void in the literature by examining the antiwar movement in relation to its use of international law and the Nuremberg Principles and the formation of the war crimes movement from below.

By focusing on the Nuremberg Principles and the developments in international law after the Second World War, I will add a crucial discussion about the different types of war resisters which developed in this atmosphere. The scholarship on the movement has not yet come to grips with the status and role of the non-pacifist military and draft resisters. For instance, there has been no sustained discussion or analysis of the fact that a significant number of draft and military resisters were not associated with the traditional peace churches or pacifists who qualified for conscientious objector status as defined by the Selective Service Act. Those who are non-pacifist, noncooperators with the draft, for instance, are by and large treated in the literature as political objectors and judged by the same standards as those of the radical pacifists who would qualify for conscientious objector status. However, figures such as David Mitchell – while employing a political strategy attempting to put the war on trial – employed a legal strategy that was fundamentally different from traditional conscientious objectors or those engaged in civil disobedience. The legal scholar Francis Boyle labels this “civil resistance” as opposed to civil disobedience. Boyle, writing about resistance during the U.S.-led Iraq War, argues that those engaged in “civil resistance” are “individuals attempting to prevent the ongoing commission of international crimes under well-recognized principles of international law and U.S. domestic law ... for the express purpose of upholding the rule of law, the U.S. Constitution, international law, and human rights.” This is different, Boyle contends, from those in the South during the civil rights movement who “deliberately violated domestic laws for the express purpose of challenging and changing those laws.”⁶⁸

By and large, international law and questions of the war’s illegality are threads which weave through much of the literature as a way to explain motivations of activists or to explain the nature of the Vietnam War. Thomas Powers’ *The War at Home: Vietnam and the*

⁶⁸ Francis A. Boyle, *Protesting Power: War, Resistance, and Law* (Lanham: Rowman & Littlefield Publishers, Inc., 2008), 24-25.

American People, 1964-1968 explores the major events, leaders, and tactics of the antiwar movement during the Johnson administration. Widely considered the first major work on the antiwar movement, Powers' oscillates between discussing the policies of the Johnson administration in Vietnam and the politics of the antiwar movement, civil rights movement, and the counterculture. While highlighting the main tensions between New Left, Old Left, radical pacifist and liberal antiwar organizing methods and the debates over tactics, strategies, and irreconcilable issues such as whether to allow communists into coalition building efforts, little attention is paid to the larger question of the Vietnam War's legality and the challenges in the courts by draft and military resisters. Instead, Powers' study presents the tumultuous events between 1964 and 1968 as leading to a crisis in the United States and one which led President Lyndon Johnson not to seek re-election in March 1968.

John and Rosemary Bannan broke new ground by exploring the legal challenges of draft and military resisters in the civilian and military courts in the United States. In *Law, Morality and Vietnam*, the Bannans presented a chapter on each of the leading court challenges of resisters during the war such as David Mitchell, David Miller, the Fort Hood Three, and the Boston Five. They offered an in depth analysis of the intricacies of the judicial process, the legal arguments advanced by the resisters and the U.S. government, and included lengthy passages from their invaluable interviews with the activists about the Vietnam War, the courts, individual responsibility and civil disobedience. However, the Bannans viewed this from the lens of a pacifist and considered the actions of those they studied to be acts of civil disobedience stemming from an individual's conscientious opposition to the war. Unable to reconcile the distinction between the views of the pacifist and the non-pacifist, they were never fully able to come to grips with the distinction between acts of moral witness against nuclear testing and those of the draft resisters like David Mitchell who sought to build collective action against the war in Vietnam. Despite Mitchell and Dennis Mora, of the Fort Hood Three, refuting the use of the label civil disobedience to describe their actions in their interviews with the Bannans, the authors did not strive any further to clarify or re-label the phenomenon. While they distinguished between the pacifist and non-pacifist resisters and noted that the new generation of peace militants "took the peace movement from moral

witness to the legal confrontation,” they viewed the challenges of the David Mitchells and the Fort Hood Threes as “less pure, less patient, and much more committed to proximate results than the civil disobedience of the radical pacifist.”⁶⁹ By focusing on the actions of the war resisters as a form of civil disobedience and individual conscience, they did not explore the legal challenges as a political act which sought not only to put the war on trial, but to build a social movement against the war. It is here where I build on the work of the Bannans and explore the dissemination of information about the legal cases, the Nuremberg Principles, international law, and war crimes that was so much a part of the young resisters’ strategies to build collective resistance. Instead of radical pacifists, I consider Mitchell and the Fort Hood Three to be selective war objectors engaged in civil resistance rather than civil disobedience.

The investigative journalists’ Nancy Zaroulis and Gerald Sullivan compiled the first account of the antiwar movement spanning the entire war effort. Written in 1984, *Who Spoke Up? American Protest Against the War in Vietnam, 1963-1975*, offered us a narrative history of the movement which sought to challenge the stereotypes of the movement as a youth-led movement prone to violence and naivety. Instead, they paint a picture of a movement which is multifaceted and multigenerational and offer a blow by blow account of its major achievements. Zaroulis and Sullivan’s dense history distinguishes, like the Bannans, between acts of moral witness by radical pacifists as forms of civil disobedience that challenged “*valid* laws” and the acts of the “new breed of civil disobedient” who sought to challenge laws they considered “*not valid*.”⁷⁰ Briefly explaining the cases of David Mitchell, the Fort Hood Three, Howard Levy and others as examples of this new generation of activist who inspired others to act; the authors offer little by way of analysis of the use of the Nuremberg Principles, international and domestic law in these cases. Moreover, while the legal challenges are presented as political acts which spawned more activists against the war, each are presented as part of the same continuum of war resistance whereby we do not understand

⁶⁹ John F. Bannan and Rosemary Bannan, *Law, Morality, and Vietnam: the Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 156-157.

⁷⁰ Nancy Zaroulis and Gerald Sullivan, *Who Spoke Up? American Protest Against the War in Vietnam, 1963-1975* (New York: Doubleday and Company, 1984), 224-236.

the differences between the individuals or their actions. Moreover, they are presented so briefly that we do not see why and how they influenced others to act.

The second phase of the literature opened up with a series academic explorations of the movement against the Vietnam War. Charles DeBenedetti, with Charles Chatfield, expanded the discussion of the movement by broadening the scope to include the actions of peace liberals and radical pacifists during the 1950s and early 1960s. In *An American Ordeal: The Antiwar Movement of the Vietnam Era*, DeBenedetti and Chatfield treated figures such as David Mitchell as having “epitomized” the “political side” of the draft resistance movement. Whereas the traditional pacifists challenged the draft on civil libertarian grounds, activists such as Mitchell invoked the Nuremberg Principles in their resistance. For DeBenedetti and Chatfield, the radical left utilizing the Nuremberg Principles led the movement astray. “Living by what they called ‘a post-Nuremberg ethic,’” the authors write, “antiwar radicals increasingly saw themselves less as a domestic opposition than as an internal resistance.” This meant that the radical fringe of the movement began to compare the American war in Vietnam to the crimes of Nazi Germany and argued that an American fascism was taking hold.⁷¹ DeBenedetti details the drift among leading pacifists from the antiwar coalitions with the new and old left. He specifically chronicles the debates about the nature of American society and of the war in Vietnam among these diverse groups. Dramatic acts of confrontation with the U.S. government over the war, DeBenedetti demonstrates, particularly by the incipient draft resistance movement, increasingly alienated the pacifists such as David McReynolds, Norman Thomas, Dorothy Day, and Robert Pickus.

Tom Wells took a more sympathetic approach to the radical left during the Vietnam War in *The War Within: America’s Battle Over Vietnam*. Wells’ expansive survey of the movement from the Tonkin Gulf Resolution to the end of the war explored the tensions between the movement and coalition building and, most importantly, the effects the movement had on the Johnson and Nixon’s administrations. Wells argued the movement constrained the various administrations actions in Vietnam. While not directly engaging with the significance of the Nuremberg Principles or the use of international law, not mentioning

⁷¹ Charles DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990), 96, 127.

David Mitchell for instance, Wells viewed the actions of the Fort Hood Three and Howard Levy as a form of inspiration to the antiwar movement. The numerous interviews and lengthy quotations from movement protagonists help us understand the motives of draft resisters such as David Harris on the West Coast and it is here where we get a sense of ideas of individual responsibility during wartime and how international law influenced different historical actors.

The third phase of scholarship on the antiwar movement provided us with an enhanced understanding of different strands of antiwar activism. Richard Moser's *The New Winter Soldiers: GI and Veteran Dissent during the Vietnam Era* and Andrew Hunt's *The Turning: A History of the Vietnam Veterans Against the War* delved into the world of active-duty GI and Vietnam veteran organizing against the war. While both Moser and Hunt discuss the significance of the Fort Hood Three and Howard Levy, they do so as a way to explain the background and early organizing efforts of antiwar GIs before moving on to explain the growth of the movements after 1967.

In 2003, Michael Foley's compelling account of the draft resistance movement drew attention to a much ignored strand of antiwar organizing during the Vietnam War. Focusing on the movement in Boston, Foley explored local organizing efforts by groups such as the Boston Draft Resistance Group (BRDG) and the tumultuous events in 1967 and 1968 in order to tell a much larger story about the significance of the draft and opposition to it during the Sixties. While stereotypes of draft dodging hippies are still commonplace in the United States, Foley successfully argues that the movement and its protagonists were "at the cutting edge of the movement" and were comparable to the freedom riders or those sitting-in at lunch counters and public buildings during the civil rights movement in the early 1960s. Foley is particularly strong when explaining how the opposition to the draft in Boston went from a small group of committed pacifists in early 1966 to a mass movement by 1967-1968 under the auspices of the BDRG, the New England Resistance and radical organizers with the Students for a Democratic Society. He skillfully traces the Johnson administration's reaction to the growth of the movement against the draft and the indictment and trial of the Boston Five – William Sloane Coffin, Benjamin Spock, Mitchell Goodman, Michael Ferber

and Marcus Raskin – for violating the Selective Service Act. While Foley describes the draft resistance as a political movement and a political issue by 1966-1967, he does not fully explore the role of the Nuremberg Principles, international law and the U.S. constitution in the cases of the draft resisters. While the legal aspect is apparent throughout his analysis, and he quotes many individual resisters who invoked international and domestic law, Foley is more concerned with making the case that the draft resistance was a powerful force which impacted American society and the Johnson administration during the Vietnam War.

In this study, I wish to enhance the discussion about the anti-Vietnam War movement by asking how international and domestic law, particularly the post-World War II developments such as the Nuremberg Principles, informed the antiwar activism of draft and military resisters and their adult supporters. While I explore familiar personalities and events, unlike the growing body of work on the antiwar movement, I focus on a radical idea which cut across movements and international boundaries. What Telford Taylor called the “ethos of Nuremberg” was a powerful force during the Vietnam era. The history presented is admittedly limited and far from a complete picture of just how powerful and pervasive this idea was in the movement. Instead, I examine specific cases which help explain the broader currents of the American peace movement during the Johnson administration, the period when the war in Southeast Asia was “Americanized.” This idea provided information and the impetus that would produce indignation spurring activists and regular people to act by marching, signing petitions, and engaging in civil disobedience, and the like. I cut the thesis off at the beginning of the Nixon presidency. President Nixon’s war, the revelations of the My Lai massacre, and the opposition it engendered will be the focus of my future research.

The following thesis is divided into three sections and six chapters. The first section explores the Johnson administration’s arguments for war in Vietnam in early-1965 and the reaction by the nascent antiwar movement. Chapter one, “Challenging Aggression: The Radical Critique of the Americanization of the War in Vietnam,” outlines the Johnson administration’s public arguments for war in Southeast Asia after the passage of the Tonkin Gulf Resolution in August 1964 and the critical reaction among radical intellectuals, critical journalists, and international legal specialists concerned with what they considered to be the

United States' illegal use of force in Vietnam. I contrast the official government justifications found in the State Department's February White Paper, "Aggression from the North: The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam," with the response of rebel journalist I.F. Stone in his *Weekly* where he effectively demolished the official justifications for the sustained bombing campaign over North Vietnam. After the release of the White Paper, the State Department released a series of legal memoranda that set out Washington's domestic and international legal justifications for Americanizing the war in Vietnam. In response, an ad hoc group of international legal experts and law professors formed the Lawyers Committee on American Policy Towards Vietnam and published a widely distributed rebuttle to the State Department which countered every facet of the official arguments. The chapter concludes with an examination of the skillful employment of the Munich Analogy by Johnson administration officials, particularly President Johnson and Secretary Dean Rusk, and the response by radical historians Staughton Lynd and Howard Zinn and the soldier-scholar Bernard Fall.

Section two comprises of three cases studies of non-pacifist draft and military resisters who challenge the American war in Southeast Asia inside and outside the courtroom. Chapter two, "*End the Draft: David Mitchell, the Early Draft Resistance Movement, and the War in Vietnam, 1964-1967,*" explores Mitchell's battle with the Selective Service System in the U.S. justice system. Mitchell was the first draft resister to use the Nuremberg idea as the basis for his refusal to cooperate with the draft. However, unlike the radical pacifists of the World War II era and early Cold War, Mitchell was a non-pacifist noncooperator with the draft who opposed the war in Vietnam in particular. He did not oppose "war in any form" and instead argued that the war in Vietnam violated domestic and international law and therefore under the Nuremberg Principles of 1950 he had the legal and moral responsibility to refuse to cooperate with conscription. While little has been written on this early trailblazer, the example of David Mitchell's draft noncooperation offers us an opportunity to explore how the anti-draft movement went from the margins to the center stage of the antiwar struggle between 1964 and 1967.

Chapter three, “Three American Heroes: The Fort Hood Three, Movement Defense Committees, and Military Resistance, 1966-1967,” investigates the first publicized case after World War II where a group of soldiers refused orders to deploy to Vietnam on the basis of the Nuremberg Principles, the United Nations Charter and the U.S. Constitution. James Johnson, Dennis Mora, and David Samas – the Fort Hood Three – argued the war in Vietnam was illegal and because war crimes and crimes against humanity were being committed, they refused to deploy to Vietnam. Like David Mitchell, the Fort Hood Three were not pacifists and they based their refusal on the fact that the war in Vietnam was “illegal, immoral, and unjust.” Their case was a lightning rod around which a core group of radical pacifists and committed antiwar activists gathered and built bridges with the nascent G.I. and veterans movements against the war. Attracting the support of the radical wing of the peace movement, which helped establish the Fort Hood Three Defense Committee, the committed group of grassroots activists supported the soldiers with their legal challenges and more importantly disseminated information about their case in the United States and around the world. While there were other isolated acts of resistance by individual soldiers in the military, the Fort Hood Three and their Defense Committee seized a crucial moment during the escalation of the war in Vietnam and spread literature about the trio, their court battle, and information about the Nuremberg Principles, international law, and the U.S. constitution to help others in their refusal to serve in Vietnam.

Chapter four, “The Little Nuremberg: Dr. Howard Levy, the Nuremberg Principles and Medical Ethics in the American Military, 1965-1967,” examines the case of Dr. Levy and his use of the Nuremberg Principles and medical ethics in the U.S. military justice system as a justification for refusing to teach Special Forces aidmen dermatology to be used in Vietnam. Considered by some critics and legal analysts the least likely candidate to successfully employ international law and medical ethics in the courts, Levy’s case was actually the only instance during the Vietnam War where such questions were openly debated and evidence was presented to prove that military personnel, and especially military physicians, have an individual responsibility to follow their conscience and refuse orders they believe to be illegal. This is the last of the court cases I examine during the American

escalation in Vietnam challenging the war's legality and raising fundamental questions about individual responsibility during wartime. Despite the failure of Levy's legal arguments, and he would spend time in jail, his court-martial and the attention he received in the national mainstream media and in the world of the civilian and G.I. underground presses set off a national debate about international law, the Nuremberg Principles, and medical ethics. Levy's case, as well as those of the Fort Hood Three and David Mitchell, is integral to understand how the "ethos of Nuremberg" spread throughout the United States during the Vietnam War.

The final section explores the challenges of gathering and disseminating information about the war in Vietnam vis-à-vis international and domestic law and war crimes, crimes against humanity, and crimes against peace. Chapter five, "Too Loud to Rise Above the Silence: The Johnson Administration versus the International War Crimes Tribunal," moves away from exploring legal cases in the United States and looks at how the Johnson administration and the national media in the United States responded to Bertrand Russell's International War Crimes Tribunal (IWCT). Organized under the auspices of the Bertrand Russell Peace Foundation (BRPF) in the United Kingdom, the IWCT sought to put the American war in Vietnam on trial by investigating whether the United States and its allies were guilty of waging a war of aggression, committing war crimes, crimes against humanity, and genocide in Vietnam. This controversial undertaking was heavily criticized as a mock tribunal and a "kangaroo court" as the IWCT sought to disseminate information about the use of napalm, chemical weapons, cluster bombs, and the destruction of hospitals, schools, and pagodas and other civilian infrastructure in North and South Vietnam, Laos and Cambodia, as well as other violations of the laws of war. With no pretense to impartiality, the Russell Tribunal took as its example the Nuremberg Trials and its legacy during the Cold War to render judgment on a war while it was still be waged in the hopes of providing people in the United States, and the world over, with enough evidence to challenge the American war in Southeast Asia. The IWCT also gained inspiration from, and also supported, the draft and military resister cases in the United States. In this chapter, I explore the politics of organizing unofficial war crimes tribunals from below and how the "ethos of Nuremberg"

and notions of individual responsibility and individual guilt shaped the organization of the Tribunal. Moreover, I illuminate the debates about the Tribunal by highlighting how the Johnson administration, the national media and pro-war intellectuals in the United States attempted to discredit the Tribunal as a demonstration of an almost farcical form of anti-Americanism. More than just attempting to discredit the Tribunal, I explore how the Johnson administration tried to disrupt and subvert the Tribunal from convening in numerous Western European countries such as France, Britain, and Switzerland as well as in Scandinavian countries such as Sweden and Denmark.

The final chapter, “Movement Books: The Radical Challenge to the Vietnam War,” explores the substantial cottage industry of antiwar publications during the war and the importance of disseminating information about war crimes, international law and the Nuremberg Principles in print. Specifically, I look at the major movement publications that sought to educate Americans about war crimes in Vietnam as well as how-to-guides for the anti-draft and GI movements. These movement publications – such as Howard Zinn’s *Vietnam: The Logic of Withdrawal*, Alice Lynd’s edited collection *We Won’t Go: Personal Accounts of War Objectors*, and the growing number of books provided evidence on the illegality of the war such as the Clergy and Laymen Concerned About Vietnam sponsored war crimes study *In the Name of America*, and the International War Crimes Tribunal’s published proceedings in *Against the Crime of Silence*– played a crucial role in disseminating information to the antiwar movement. The publication of numerous books by the antiwar movement was unprecedented in American history. The breadth and scope of the works demonstrated that war crimes were being committed in Vietnam on almost a daily basis and that the war was illegal under international and domestic law. The researching, writing and publication of these books was also a form of antiwar organizing; it was movement praxis and it was a vital source of information to counter the Johnson administration’s official pronouncements about the war.

I will argue that this war crimes movement from below was organized within a vacuum during the Cold War that had seen the optimistic years after World War II and the development international organizations evaporate due to great power rivalries in the

colonized and decolonizing world. Where my study differs drastically, for example, from the growing body of work on international law *is the centrality of the Vietnam War* in the development of this movement from below. If the Vietnam War is mentioned in these works, it is in passing or in casual reference to the Cambodian genocide. Moreover, the Cold War is depicted in this literature as a betrayal, or, in the words of Justice Richard Goldstone in 1999, as a period of “irrational, almost pervasive neglect, by the international community of one of the most serious and growing problems facing our world – the increasing frequency of the commission of crimes such as genocide, crimes against humanity and war crimes like grave breaches of the Geneva Conventions.”⁷²

⁷² Richard Goldstone, “Foreword,” in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 7.

Chapter 1

Challenging Aggression: The Radical Critique of the Americanization of the War in Vietnam

The United States began the sustained bombing of North Vietnam in February and March 1965 while it introduced ground troops and escalated the air war in South Vietnam in an atmosphere where the Johnson administration attempted to prove it escalated the war because of North Vietnamese aggression. This “Americanization” of the war in South Vietnam and the bombing of North Vietnam were defended within the narrow confines of a pervasive post-World War II anti-communist consensus that began under the Truman administration (when U.S. aid began to flow to the French in their war against the Viet Minh revolutionaries). This consensus – what has been called the Cold War consensus – gripped both liberals and conservatives, Democrats and Republicans in the 1950s and 1960s. At its core, the consensus offered an exceptionalist discourse on American democracy and foreign affairs that was utilized to sell the escalation of the war in Vietnam to the American people and Congress. The exceptionalist narrative is as old as the Republic; however, it took on a new identity after the defeat of the Axis powers in World War II and the Nuremberg and Tokyo war crimes trials. After the war, and the condemnation and conviction of top Axis war criminals, the U.S. was imbued with the sense that they were the “good guys” and the benevolence of liberal democracy, capitalism, and the righteousness of the U.S. military in its interventions abroad created a formidable ideology in the burgeoning Cold War. The ideology meant that the United States needed a proactive foreign policy that included economic and military aid, the creation of a national security state at home and alliances with friendly governments, the use of covert operations facilitated by the newly created Central Intelligence Agency, and the use of stultifying propaganda to reinforce the ideology at home and abroad.¹

¹ Randall B. Woods, “World War II, Congress, and the Roots of Postwar American Foreign Policy,” in Randall Bennett Woods, ed., *Vietnam and the American political tradition the politics of dissent* (Cambridge:

Johnson administration officials employed the Cold War consensus in a way that divided the conflict in Vietnam between the forces of democracy and communism, East and West, freedom and dictatorship, and the United States versus the Soviet Union and Communist China. It divided the complex Vietnamese struggle for self-determination into what historian Robert K. Brigham called the “North-South paradigm” whereby American intervention was justified because the communist North Vietnamese attacked the free and democratic South Vietnam in a war of aggression.² Central to this argument was the use of the Munich Analogy by top officials in the U.S. government to sell the war by linking the aggression of Nazi Germany in the late-1930s with the aggression of the Democratic Republic of Vietnam. While U.S. officials, particularly Secretary of State Dean Rusk, argued the two countries were not the same, they believed the lesson of Munich for the world was the inability of the West to meet aggression in 1938 led to general war in 1939. Here, too, the Korean War analogy was also applied, as we will see, although the Korean War example was a derivative of the lesson of Munich and in this case the United States met the aggression and saved South Korea.

America’s national media largely accepted the argument and the broader Cold War consensus, usually only disagreeing over tactics and not the end goal of American policy in Southeast Asia. Much of the press corps took it at face value that South Vietnam was a free and democratic country and that the United States had a responsibility to save it from a communist takeover. Subsequently, the North Vietnamese and the southern resistance movement, the National Liberation Front (collectively referred to as the Viet Cong) were demonized by the administration and in media coverage. Conventional wisdom of the day held that all military tactics applied by Americans in the course war were in response to the cruelty and barbarity unleashed by the communists in Vietnam. For instance, after the Pleiku air base raids in South Vietnam on February 7, 1965, when communist forces attacked the

Cambridge University Press, 2003), 42,56-57; George C. Hallin, *The “Uncensored War”*, 29, 48-58; Max Paul Friedman, *Rethinking Anti-Americanism: the History of an Exceptional Concept in American Foreign Relations*(Cambridge: Cambridge University Press, 2012), Chapter Three: “The Specter Haunting Europe: Anti-Americanism and the Cold War.”

² Robert K. Brigham, “Why the South Won the American War in Vietnam,” in Marc Jason Gilbert, ed., *Why the North Won the Vietnam War* (New York: Palgrave, 2002), 97.

American base, Daniel Ellsberg, working in the Pentagon, was ordered to gather details and provide weekly reports on the use of Viet Cong “terrorism” to provide the American media. Author and economist Edward S. Herman, in *Atrocities in Vietnam*, argues “atrocities serve to explain why our support of an admittedly minority faction [in South Vietnam] is compatible with ‘free choice’ and ‘self-determination’” and that “the pressures to be patriotic – to ‘support the boys’ – are enormous in every country, and enemy atrocities always play an important role in mobilizing opinion.”³ Herman calls this “atrocities management” and states that it can be carried out by the government because the “national communications media will transmit to the public largely without comment the enormous amount of government propaganda which is poured forth every day.”⁴ This, of course, is not to deny that communist atrocities and terrorism occurred in Vietnam. Rather, it is to demonstrate how the war was sold to the American public and the ways in which language and analogy were used to convince soldiers and the public what is an acceptable response. Dean Rusk argued on June 23, 1965, that the conflict in Vietnam was a “cruel” and “brutal war - marked by terror and sneak attack.” He invoked an American benevolence and paternalism in his defense of the war in Vietnam: “We must remember that this ancient people is young in its independence, restless in its hopes, divided in its religions, and varied in its regions. The turmoil of Vietnam needs the stead-fastness of America.”⁵

Despite the strong hold that the Cold War consensus had over the public and the American foreign policy establishment (including journalists, intellectuals, politicians and civil servants), independent journalists, or critical sources on the ground in Vietnam, or those who were part of the nascent antiwar movement helped to establish a counter-narrative that slowly challenged the dominant narrative on the war in particular, and the ideology that drove the Cold War in general. These voices – independent journalists like I.F. Stone, radical

³ Edward S. Herman, *Atrocities in Vietnam: Myths and Realities* (Philadelphia: Pilgrim Press, 1970), 16- 17.

⁴ Herman continues to say that in the national communications media, “mention of *our* atrocities will always be episodic, and our atrocities will never be treated as integral parts of policy. They are always ‘isolated incidents’; it is only atrocities of the enemy that are a product of deliberate policy.” Edward S. Herman, *Atrocities in Vietnam: Myths and Realities* (Philadelphia: Pilgrim Press, 1970), 18.

⁵ “Four Steps to Peace: Address by Secretary Rusk Before the American Foreign Service Association, 23 June 1965,” in Richard Stebbins, ed., *Documents on American Foreign Relations: 1965* (New York: Harper & Row, Publishers, 1966), 168,174.

intellectuals like Staughton Lynd and Howard Zinn, French soldier-scholar Bernard Fall, and the ad hoc Lawyers Committee on American Policy Towards Vietnam – argued the conflict was more complex than Washington was asserting in public. The critics believed the conflict was a product of a desire for self-determination by the Vietnamese people from foreign domination in whatever guise (Chinese, French, or American). Central to this counter-narrative was the argument that the war in Vietnam was not the result of aggression by the North Vietnamese over the South Vietnamese, and if it was a case of aggression, it was the United States who were the aggressors. Utilizing the available history of Vietnamese wars for liberation before and after World War II and international law such as the United Nations Charter and the Nuremberg Principles, and the laws of war such as the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949, these critics formulated a response to the United States’ war that challenged the very basis of the American war effort and created a discourse that endured throughout the conflict. This counter-narrative did not emerge in a vacuum; it grew out of a direct response to the Johnson administration’s own arguments for war as well as the use of international law to the conflict in Vietnam.

Widening the War: NSAM 288 and The Gulf of Tonkin Incident

Lyndon Johnson inherited a deteriorating situation in South Vietnam after the assassinations of Ngo Dinh Diem and John F. Kennedy in November 1963. In February and March 1964, he approved a strategy of “graduated military pressure” against North Vietnam that would guide U.S. policy in Vietnam for the remainder of 1964-1965. Unwilling to escalate in South Vietnam by sending in ground troops during an election year, Johnson wanted instead to focus on the domestic legislative agenda he called “The Great Society.” In February, he approved the Military Assistance Command, Vietnam’s (MACV) OPlan 34-A which called for escalated and directed covert operations north of the 17th parallel and crossed-border operations in Laos directed against the Ho Chi Minh Trail. The covert program increased surveillance of the North via air and sea (expanding naval intelligence operations known as DE SOTO begun in 1962) as well as increased commando raids

focusing on sabotaging DRV infrastructure. In South Vietnam, MACV set up the Studies and Observation Group (SOG) which brought together the Army's Special Forces, the CIA, and elite ARVN soldiers to infiltrate Laos. This was, as John Prados explained, a flip-flop from the Johnson administration's initial vision for the war in late-1963. At the National Security Council meeting of March 17 President Johnson approved National Security Action Memorandum 288, which implemented the recommendations within Secretary McNamara's March 16 memo.⁶ LBJ's covert war against North Vietnam, begun under the Eisenhower administration, escalated under the Kennedy administration, led directly to a small but explosive confrontation in the Gulf of Tonkin in late-July and early-August.⁷

On July 30, South Vietnamese commandos and U.S. "advisers" launched commando raids on two islands in the Gulf of Tonkin while the destroyer U.S.S. *Maddox* was in the Gulf conducting DE SOTO missions in support of the raids. On August 2, three North Vietnamese patrol (PT) boats charged the destroyer. In a hotly contested confrontation, both the *Maddox* fired and the North Vietnamese launched torpedoes which missed their mark. After the reports reached the White House, Lyndon Johnson ordered the U.S.S. *Turner Joy* to the area. In an event on August 4 which was even more opaque than the events two days earlier, the second destroyer reported that North Vietnamese PT boats had fired torpedoes at it. In a declassified National Security Agency (NSA) article in its *Cryptologic Quarterly*, historian Robert J. Hanyok utilizes previously unused NSA Signals Intelligence (SIGINT) from August 4 and concludes that "two startling findings emerged": first, "*no attack* happened that night. Through a compound of analytic errors and an unwillingness to consider contrary evidence, American SIGINT elements in the region and at NSA HQs reported Hanoi's plans

⁶ For Secretary Robert McNamara's March 16, 1964 memorandum to President Johnson, see *The Pentagon papers: The Defense Department history of United States Decisionmaking on Vietnam. The Senator Gravel edition* (Boston: Beacon Press, 1971), pp. 496-499.

⁷ For the Eisenhower administration's military support for ARVN and CIA operations under Col. Edward Lansdale, see Mark Atwood Lawrence, *The Vietnam War: A Concise International History* (Oxford: Oxford University Press, 2008), 56-57, 59-61. In the summer, the Central Intelligence Agency and Saigon continued clandestine raids above the DMZ in an effort to subvert North Vietnam. Known as Project Tiger, CIA trained South Vietnamese forces would parachute into North Vietnam and conduct commando raids on important installations. The effort was a disaster, with two hundred specially trained agents killed in action between 1961 and 1963. In November and December 1961, the Kennedy administration widened the war after the bleak Taylor-Rostow report. The White Paper was a demonstration of this deepening commitment. John Prados, *The Blood Road: The Ho Chi Minh Trail and the Vietnam War* (New York: John Wiley & Sons, Inc., 1999), 77-81.

to attack the two ships of the Desoto patrol.” Instead, the North Vietnamese navy’s only actions consisted of salvaging “two of the boats damaged on 2 August,” Hanyok observed. In the aftermath of the alleged attack and in the following days and months, the NSA historian argues that “SIGNIT information was presented in such a manner as to preclude responsible decisionmakers in the Johnson administration from having the complete and objective narrative of events of 4 August 1964.”⁸

Before the alleged attack could be verified, and while much confusion existed in the Gulf and in Washington, the president ordered “reprisal” bombings against North Vietnam. He called congressional leaders to the White House and informed them what had occurred and the actions he as commander-in-chief had taken. White House officials quickly rewrote a congressional resolution that had already been drafted in June for such an eventuality and submitted it to Congress on August 5. After two days of debate, the Tonkin Gulf Resolution was approved 88-2 in the Senate and 416-0 in the House. Only two senators, Wayne Morse of Oregon and Ernest Gruening of Alaska, both Democrats, voted against the bill. In what would give the president a blank cheque to conduct the war in Vietnam as he saw fit, the Resolution stated: “the Congress approves and supports the determination of the President, as Commander and Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”⁹

After the Tonkin Gulf Resolution in August 1964 and the Viet Cong’s attack on the army barracks at Pleiku and the retaliation by the United States, the Johnson administration issued a variety of statements and memoranda defending their attacks on North Vietnam and escalation in South Vietnam. The first was the State Department’s “White Paper” entitled “Aggression from the North: The Record of North Vietnam’s Campaign to Conquer South Viet-Nam” released on February 27, 1965. After the White Paper’s release, the State

⁸ Robert J. Hanyok, "Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2-4 August 1964," *Cryptological Quarterly*, 2001, p. 3. The entire declassified article and more information on the alleged Gulf of Tonkin incident is available online: “Tonkin Gulf Intelligence "Skewed" According to Official History and Intercepts,” National Security Archive Electronic Briefing Book, No. 132, December 2005, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/press20051201.htm>.

⁹Quoted in John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993), 16, 15-26; Marilyn Young, *The Vietnam Wars: 1945-1990* (New York: HarperPerennial, 1991), 114-123; John Prados, *The Blood Road: The Ho Chi Minh Trail and the Vietnam War* (New York: John Wiley & Sons, Inc., 1999), 77-84.

Department issued a brief report, “Legal Basis For United States Actions Against North Viet-Nam” on March 8. Administration officials went on the offensive, publicly defending the Johnson administration’s attack on North Vietnam. These included President Johnson’s speech at John Hopkins University of April 7 titled “Peace Without Conquest” outlining why the United States was in Vietnam and announcing the government’s willingness to open “unconditional negotiations.” Johnson’s next key speech was his July 28 troop surge announcement where he more fully elucidated his administration’s rationale for fighting in Vietnam. This speech was followed by a Department of Defense documentary *Why Viet-Nam* which was shown to every soldier en route to Vietnam and was distributed widely airing on ABC’s “The Big Picture” program. The administration’s arguments were compiled neatly into a small pamphlet “Why Viet-Nam” released on August 23, the day before a major Republican Party “White Paper” on the Vietnam crisis.

The White Paper: Aggression from the North?

The White Paper – titled “Aggression From The North: The Record of North Viet-Nam’s Campaign to Conquer South Viet-Nam” – was released on February 27, 1965, and appeared in the Sunday editions of major American newspapers. The White Paper, in the words of a Pentagon Papers historian, “was considered essential to justifying any program of U.S. military operations against North Vietnam.”¹⁰ The State Department started assembling the report on February 12 (with evidence from the Central Intelligence Agency) following the “reprisal” attacks against North Vietnam in response to the National Liberation Front’s attack on U.S. bases in Pleiku on February 7 and Qhi Khon on February 10. This was the first attack by U.S. planes on North Vietnam since the Gulf of Tonkin incident in August and the first time that overt attacks by the U.S. Air Force and Navy on South Vietnam were announced. It happened despite the fact that a similar attack occurred at the U.S. air base at Bien Hoa on November 1, 1964, killing 4 Americans, 2 South Vietnamese and wounding 72 Americans

¹⁰ Pentagon Papers, Part IV, C.3, “Evolution of the War: Rolling Thunder Program Begins: January - June 1965,” National Archives and Research Administration, 59. Available online: <http://www.archives.gov/research/pentagon-papers/>.

and 5 Vietnamese. The damage was much greater, destroying or damaging all the B-57 planes. In this case, Johnson ordered no reprisal bombing, as it coincided with the presidential election campaign.¹¹ At Pleiku, the Johnson administration had found its pretext to launch a bombing campaign against North Vietnam and tried to conceal it within the White Paper by putting the North Vietnamese on the defensive by arguing they were responsible for the attacks. The White Paper argued that it was “beyond question that North Vietnam is carrying out a carefully conceived plan of aggression against the South.” Despite the patchwork of evidence cobbled together, the report placed the responsibility for the conflict on North Vietnam and threatened in its closing paragraph that “the choice now between peace and continued and increasingly destructive conflict is one for the authorities in Hanoi to make.” The paper sought to demonstrate that the conflict was not a “civil war” between two zones divided by a temporary demarcation line, but that Hanoi was waging a war of aggression by leading and directing the local guerrillas (Viet Cong) with infiltrators, weapons, and other supplies against an independent government.¹²

Top U.S. officials in the National Security Council believed that a public campaign needed to be waged to present its position to the American people, by way of the American press. The administration continued to claim that it sought “no wider war” in Vietnam and air strikes against the DRV had only begun in “reprisal” against the attacks on the U.S. Navy on the Gulf of Tonkin. Daniel Ellsberg, working for John McNaughton at the Pentagon, recounts in his memoir that after the Viet Cong attacks on an American air base at Pleiku and the advisory compound in Qui Khon, McNaughton “told me urgently to gather ‘atrocities’ details regarding the VC attack on Qui Khon and a list of other terrorist actions in recent weeks.”

¹¹ In the early morning hours of February 7, National Liberation Fighters attacked the U.S. air base at Pleiku. The attacks killed 8 Americans and left 109 wounded. 11 aircraft and helicopters were destroyed. At the time McGeorge Bundy, National Security Adviser, was in South Vietnam. He would later tell David Halberstam that “Pleiku’s are like streetcars” because an attack of this nature would come around again. Such a statement proved to be accurate, as NLF fighters attacked the U.S. barracks at Qui Khon on February 10 killing 23 Americans. John Prados, *The Blood Road: The Ho Chi Minh Trail and the Vietnam War* (New York: John Wiley & Sons, Inc., 1999), 91-98. See also: “Evolution of the War. ROLLING THUNDER Program Begins: January - June 1965, Part IV. C. 3.,” in “Report of the Office of the Secretary of Defense Vietnam Task Force [The Pentagon Papers],” 1-2, 23-31.

¹² “Aggression From The North: The Record of North Viet-Nam’s Campaign to Conquer South Viet-Nam,” Department of State Publication 7839, Released February 1965 (Washington: U.S. Government Printing Office, 1965), 29.

Pentagon officials, working under Secretary McNamara, searched for data to “convince LBJ that the time had come to go beyond a tit-for-tat retaliation ... and launch systematic bombing” over North Vietnam. Ellsberg hurriedly worked through the night to produce a report on Viet Cong “atrocities” for 8:00 a.m. so McNamara could present the material to President Johnson on February 11. Utilizing a direct, open line to Military Assistance Command, Vietnam (MACV) and with “a whole staff at MACV” working to find information, Ellsberg finished the report by 6:30 a.m. The atrocities included details from January to February and as Ellsberg recalled, there were “so many minings of buses, schools and district offices blown up, hamlet, village, and district officials assassinated; American deaths in the last three days at Pleiku and Qui Nhon; a detailed, graphic account of the condition of the bodies of the two American advisers.” The report for McNamara “was exactly what he needed” and that “it had had a significant influence on the president.”¹³ President Johnson and the National Security Council moved into action.

The shift in strategy was subtle, designed to fly under the national media’s radar. The U.S. government announced the bombings in response to the attack on Qui Khon as a “response to further direct provocations by the Hanoi regime,” rather than being presented as a “reprisal” attack. In order to legitimize the air strikes, administration officials cited Ellsberg’s Viet Cong atrocity report.¹⁴ The government’s press release, as Ellsberg notes, left out the words “reprisal” and “retaliation” and the policy subtly shifted to one of countering aggression by North Vietnam in the South. The “data I had collected were on unspectacular VC actions of the sort that occurred daily, the press release paved the way for a systematic campaign without actually announcing it,” Ellsberg writes.¹⁵ The White Paper was released to fill the void of an official government announcement of a policy shift. During the preparation of the White Paper, President Johnson agreed to launch Operation ROLLING THUNDER on February 13 and the first missions were officially flown on March 2 due to delays caused by bad weather.

¹³ Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Viking, 2002), 68-69.

¹⁴ “White House Statement,” *New York Times*, 12 February 1965, 13 .

¹⁵ Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Viking, 2002), 71.

The report, 64 glossy pages replete with maps, pictures and appendices, sought to provide what the State Department presented as the government's "massive evidence" that North Vietnam was waging a war of aggression on South Vietnam. Its major findings tried to demonstrate that the war in Vietnam was "a totally new brand of aggression" – a sharp contrast to uprisings in Greece, Malaya and the Philippines in the post-World War II era – whereby "a Communist government has set out deliberately to conquer a sovereign people in a neighboring state. And to achieve its end, it has used every resource of its own government to carry out its carefully planned program of concealed aggression." The State Department's key findings demonstrated that Hanoi had infiltrated South Vietnam at an increasing rate and that it had been supplying the majority of weapons used by the National Liberation Front. The report noted that between 1959 and 1965, Washington could confirm 19,550 men had infiltrated into the South, with estimates of an additional 17,000 men that could not be confirmed at the time. Of the forces validated, 4,400 had come in 1964. Moreover, in terms of weapons, the White Paper reported that an increase in the number of guns and munitions, made in communist countries (China, USSR, Czechoslovakia), were coming by sea. While the "flagrant aggression" had been "going on for years," this escalating situation by Hanoi "has now become acute," according to the White Paper.¹⁶

The text of the State Department's White Paper appeared verbatim in the *New York Times* and the *Washington Post*, without the detailed appendices. Matter-of-fact stories were printed in both papers, citing the statistics without any critical analysis. The evidence marshaled by the State Department was "incontrovertible" according to the editors of the *Washington Post*. Less enthusiastic about the prospects for a major war in Southeast Asia, the editors of the *New York Times* opined that the "Johnson administration seems to be conditioning the American people for a drastic expansion of our involvement in Vietnam." Citing nothing new in the White Paper to justify escalatory strikes against North Vietnam, the paper admonished the Johnson administration for pursuing a policy that would embolden China in the region, "the nation whose imperialist ambitions the world has most to worry

¹⁶ "Aggression From The North: The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam," Department of State Publication 7839, Released February 1965 (Washington: U.S. Government Printing Office, 1965), 3-20.

about.” Instead, the *Times* editors advised that the U.S. government should “make it plain that the United States is ready to talk as well as fight, and thus leave China isolated as the obstructor of any attempt to achieve a sound and enforceable peace.”¹⁷ The *Times* never questioned the justifications for U.S. policy in South Vietnam; however, throughout the early months of 1965, the newspaper had demanded more transparency from the White House about Vietnam and U.S. policy there.

The administration became alarmed because the national press accurately reported the White Paper represented a shift in U.S. policy on Vietnam from one of reprisal air strikes against North Vietnam to an escalation of the war. Despite its best intention, the White Paper fooled no one. For instance, Arthur Knock reported in the *New York Times* that “the State Department is disturbed over the widespread acceptance of its ‘White Paper’ on North Vietnamese aggression in South Vietnam as a notice of a change in United States ‘policy.’”¹⁸ The article was printed on the day that Operation ROLLING THUNDER officially started, and after the decision to send the marines to Da Nang Air Base had already been made. The war in Vietnam widened extensively after February and it took independent and more perceptive critics to condemn the policy reversal as what appeared to be the beginning of a long war.

I.F. Stone, the muckraking independent journalist who published *I.F. Stone’s Weekly*, crunched the State Department’s numbers, and requested more from the Pentagon. He found that nothing added up correctly: “The striking thing about the State Department’s new White Paper is how little support it can prove.” In what Stone’s biographer called “the single most important issue of the *Weekly* ever published,” Stone focused on the evidence presented in

¹⁷ “War or Peace,” *Washington Post*, 1 March 1965, A16, and, “Storm Signals Over Asia,” *New York Times*, 28 February 1965, E8. The editors of the *New York Times* took a more critical approach to the White Paper because, up until this point, the Johnson administration had remained relatively silent on its policies in Vietnam. As they noted, since Pleiku, “American policy has plunged dangerously beyond the one enunciated then by the President and Secretary McNamara of limiting ourselves to retaliatory action and shunning a wider war.” Until the president elucidated his administration’s goals and policies in Vietnam between April and July 1965, the editors of the *Times* were skeptical of American policy because of a lack of communication with the American people. After the key policy statements, the *New York Times* was quick to rally around the flag and support the “Americanization” of the war in Vietnam. See, for instance, Daniel C. Hallin, *The Uncensored War*, 61, 81, 86, 90-91, 98-101.

¹⁸ Arthur Knock, “In the Nation: The Elements That Mark a Change of Policy,” *New York Times*, 2 March 1965, 34.

the appendix on weapons and infiltrators and slammed the report for key evidence it had omitted. Appendix D of the White Paper provided evidence on the weapons, munitions and supplies that had been captured from the Viet Cong between June 1962 and January 1964, a total of 179. Stone contacted the Pentagon to obtain figures that were not included in the White Paper, specifically the number of weapons that had been captured versus the number lost to the Viet Cong. The figures were illuminating: Between 1962 and 1964, U.S. and Vietnamese forces captured 15,100 and lost 27,400 weapons, a difference of 12,300. Crunching the numbers, of the 15,100 captured weapons, only 179 were of communist origin; “not a very impressive total,” Stone concluded. He writes: “According to the Pentagon figures, we captured on the average 7500 weapons each 18-months in the past three years. If only 179 Communist-made weapons turned up in 18 months, that is less than 2 ½% of the total.”¹⁹

Critically assessing the numbers provided on the infiltration of men into South Vietnam from the North between 1959 and 1964, Stone found more dubious evidence to prove the Government’s claim that Hanoi was waging an “elaborate program” of aggression. First he notes that the State Department can only confirm 19,550 infiltrators in this period, although it estimated an additional 17,000 it could not prove. Comparing those numbers to the amount of U.S. forces in Vietnam – 23,500 – Stone notes that the U.S. has a twenty-five percent larger force than that of the North Vietnamese in the south. Digging into the appendix, which was not printed by the national media, Stone concludes that of the 4,400 reported by the Department of State to have entered the South in 1964, only six native born North Vietnamese could be accounted for within those statistics.²⁰

In one sense, the White Paper turned out to be surprisingly accurate concerning the infiltration north of the 17th parallel into South Vietnam. Historian John Prados demonstrates that the number of Vietnamese moving south in early 1960s averaged 4,000 to 5,000 per year. Quoting official Vietnamese histories, Prados estimates that 40,000 infiltrated the south

¹⁹ “A Reply to the White Paper,” *I.F. Stone’s Weekly*, 8 March 1965, Available Online: <http://www.ifstone.org/weekly/IFStonesWeekly-1965mar08.pdf>.

²⁰ “A Reply to the White Paper,” *I.F. Stone’s Weekly*, 8 March 1965, Available Online: <http://www.ifstone.org/weekly/IFStonesWeekly-1965mar08.pdf>.

between 1959 and 1964. However, during this period, the DRV was careful to send the vast majority of those soldiers born in the south to take part in the resistance. This is a crucial distinction, even if one takes the North-South paradigm as the fundamental element to the conflict in Vietnam. Infiltration, or “aggression from the North,” was *the* major *raison d’être* for the United States’ continued involvement since 1954 after the Geneva Agreements. However, between 1959 and 1964 the vast majority of Vietnamese marching south were those born in the south, fighting in a Vietnamese revolution for self-determination. Indeed, as Prados’ excellent history of the “Ho Chi Minh Trail” demonstrates, the first North Vietnamese battalion, the 808th Battalion, was sent south in August 1964. The 95th Regiment left in November and the 101st Regiment left in mid-December. Therefore, while North Vietnamese troops were in the South at the time of the White Paper, this was not until half-way through 1964 and ten years after the Eisenhower administration’s subversion of the Geneva Agreements and the sending of military and economic support for the regime of Ngo Dinh Diem.²¹ As was pointed out earlier, it was under President Eisenhower, and escalated under Kennedy and Johnson, that CIA trained commandos began infiltrating North Vietnam in a campaign of subversion.

Interrogating the facts with a critical eye, it was clear the situation in Vietnam painted by the White Paper was more complex than a case of aggression by the North Vietnamese. Critics like I.F. Stone argued despite what the State Department claimed, the “White Paper withholds all evidence which points to a civil war” in Vietnam. Countering all of the government’s assertions – pointing to the omission that elections were to be held in 1956 under the Geneva Accords and that the Government of Vietnam quickly erected a “dictatorship” in the South – Stone argues that the war is “a rebellion in the South, which may owe some men and material to the North but is largely dependent on popular indigenous support for its manpower, as it is on captured U.S. weapons for its supply.” He called the war

²¹ John Prados, “The Road South: The Ho Chi Minh Trail,” in Andrew Weist, ed., *Rolling Thunder in a Gentle Land: The Vietnam War Revisited* (Oxford: Osprey Publishing 2006), 82; and, John Prados, *The Blood Road: The Ho Chi Minh Trail and the Vietnam War* (New York: John Wiley & Sons, Inc., 1999), 18, 21-22, 77, 85-86, 109-113.

“a story of lost opportunities” and laid the blame for the current escalations squarely on the United States.²²

Hungry for information on the U.S.’s policy on Vietnam, the White Paper garnered widespread media attention in the nation’s papers. Despite the receptive audience, the press offered little to no critical engagement with the material, except a *New York Times* editorial that warned the advantage was given to China in the geo-political chess game between the U.S., the Soviet Union and China over Southeast Asia. The critical editorial appeared, however, after a series of articles presenting the administration’s data as fact. Despite this lackadaisical coverage, the White Paper was singlehandedly torn-apart by an establishment outsider in his small independent weekly. Daniel Ellsberg, who helped edit a portion of the official report, later said that I.F. Stone’s “criticism was right on” regarding the weapons estimates. The State Department’s William Bundy recalled that the report was “a disaster.”²³ Stone’s demolishing of the major Johnson administration justification also gave the nascent antiwar movement some ammunition of its own as his *Weekly* was widely disseminated in movement circles. Stone himself would be invited to be a speaker at the upcoming Students for a Democratic Society (SDS) organized March on Washington on April 17, 1965.

Before the first national antiwar demonstration against the Vietnam War, rumblings of dissent quaked college campuses. On March 24, the first, all-night, teach-in occurred at the University of Michigan where 3,000 people attended to hear all manner of discussions about the war. Throughout the spring and summer, more than a hundred teach-ins took place on college campuses. On April 17, the first national antiwar demonstration spilled onto the mall in Washington, D.C. with an estimated crowd of 20,000.²⁴ The gathering antiwar forces owed much to the questions being raised by radical intellectuals and independent journalists. Other sources of dissent, this time from the international community, would crystallize and nearly foil the Johnson administration’s carefully laid public relations campaign.

²² “A Reply to the White Paper,” *I.F. Stone’s Weekly*, 8 March 1965, Available Online: <http://www.ifstone.org/weekly/IFStonesWeekly-1965mar08.pdf>.

²³ Daniel Ellsberg quoted in interview with Myra MacPherson in “*All Government’s Lie*”: *The Life and Times of Rebel Journalist I.F. Stone* (New York: Scribner, 2006), 397. William Bundy quoted in interview with Tom Wells in *The War Within: America’s Battle Over Vietnam* (Lincoln: iUniverse, Inc., 2005), 21.

²⁴ Tom Wells, *The War Within: America’s Battle Over Vietnam* (Lincoln: iUniverse, Inc., 2005), 23-26.

United Nations Secretary General U Thant was perhaps the most active of any figure in this period between 1964 and 1965 in trying to seek a diplomatic settlement to the deepening conflict in South Vietnam. Between the Tonkin Gulf Resolution in August 1964 and the White Paper, numerous foreign governments had attempted to act as third-party negotiators to end the percolating conflict. U Thant had privately created three major opportunities for low- and high-level negotiations between Washington and Hanoi before the war escalated further in the fall of 1965. U Thant's various initiatives on August 6, mid-January 1965 and February 7 were blunted by a skeptical United States. When the August 1964 attempt became public in the *Chicago Sun Times*, U Thant responded at a press conference on February 24:

I am sure that the great American people, if only they knew the true facts and the background to the developments in South Vietnam, will agree with me that further bloodshed is unnecessary. The political and diplomatic method of discussions and negotiations alone can create conditions which will enable the United States to withdraw gracefully from that part of the world. As you know, in terms of war and hostilities, the first casualty is truth.²⁵

The public nature of U Thant's criticism enraged the president and secretary of state. They already distrusted the U.N. secretary general, and this statement, just before the release of the White Paper, could potentially undermine everything the State Department had been drafting since mid-February. The Johnson administration's inadequate response to this public statement created a major public relations problem that would only grow worse as the war dragged on. However, as previously noted, the Johnson administration dealt with such criticisms by laying the blame for an impasse in negotiations squarely on Hanoi and succeeded in putting the communists on the defensive in the American media.

²⁵ Quoted in George C. Herring, *LBJ and Vietnam: A Different Kind of War* (Austin: University of Texas Press, 1994), 91-93. The first initiative began on 6 August after the Gulf of Tonkin incident and included a meeting with President Johnson, Secretary Rusk and US Ambassador to the UN Adlai Stevenson. From this meeting U Thant claimed to have secured in late-September, through a Russian intermediary, a commitment from Ho Chi Minh to participate in negotiations. This initiative, U Thant was advised, had to be postponed due to the presidential election. The second and third attempts by U Thant in early 1965 were to set-up conferences in Burma.

Despite this, international pressure mounted. On April 1, seventeen countries representing the Non-Aligned Movement presented a petition to the United Nations calling for a peaceful solution through negotiations without any preconditions. The Non-Aligned countries argued “we are deeply concerned at the aggravation of the situation in Vietnam and are convinced that it is the consequences of foreign intervention in various forms, including military intervention, which impedes the implementation of the Geneva Agreement on Vietnam.”²⁶ This balanced appraisal gave the Johnson administration the ability to respond to its international and domestic critics.

On April 7, Lyndon Johnson delivered his famous speech at John Hopkins University in Baltimore, Maryland, where he set out for the American people the reasons for escalation in Vietnam. Specifically, Johnson established that Washington backed peace and Hanoi acted as the aggressor. “The first reality is that North Vietnam has attacked the independent nation of South Vietnam. Its object is total conquest,” Johnson declared. “Of course, some of the people of South Vietnam are participating in the attack on their own government. But trained men and supplies, orders and arms, flow in a constant stream from North to South. This support is the heartbeat of the war,” he continued.²⁷ On the U.S. government’s approach to peace, Johnson argued that the United States was poised “for unconditional discussions.”²⁸ Historian David Kaiser has argued Johnson’s speech offered “unconditional discussions,” as opposed to negotiations. As Kaiser contends, Johnson managed to express his willingness to *talk* without indicating any willingness to *negotiate*.

The *New York Times* lauded the president’s speech as “bold,” believing that every American could “take pride” in the policy put forth at John Hopkins University. Johnson, it argued, had “wisely broken his long silence” on U.S. goals in Vietnam and that “he has restored the olive branch that balances the arrows in the Eagle’s claws.” Noting that the

²⁶ “Petition of the Seventeen Non-Aligned Countries, Presented to the United States 1 April 1965,” in Richard Stebbins, ed., *Documents on American Foreign Relations: 1965* (New York: Harper & Row, Publishers, 1966), 136-137

²⁷ Quoted in “Address at John Hopkins University: ‘Peace without Conquest, 7 April 1965,’” in *Public Papers of the Presidents of the United States: Lyndon Johnson, 1965 Book One* (Washington: United States Government Printing Office, 1966), 394.

²⁸ “Patterns for Peace in Southeast Asia: Address by the President at John Hopkins University, Baltimore, 7 April 1965,” in Richard Stebbins, ed., *Documents on American Foreign Relations: 1965* (New York: Harper & Row, Publishers, 1966), 144.

speech offered an answer to the Non-aligned countries and other international critics, the editors of the *Times* thought Johnson's speech "open[ed] the door to peace" with Hanoi, Moscow, and Beijing. The editorial concluded: "Neither they nor anyone else can dispute the fact that a serious offer has been made. It is now clearly up to them [the DRV] to make a reasonable response."²⁹

Reacting to the president's speech, Staughton Lynd, radical historian at Yale, wrote in the *New York Times*: "The President cannot expect North Vietnam to agree to negotiations while being bombed. Bombing is itself a formidable 'condition.' To hold out olive leaves while dropping bombs is to suggest not unconditional negotiation but unconditional surrender." Instead, Lynd believed a just peace meant the recognition of the National Liberation Front and a willingness to negotiate with them and an end to the bombing of the North. Days before the John Hopkins speech, Lynd spoke at an emergency meeting at Carnegie Hall in New York. "This country," he argued, "is presently waging an undeclared war so evil and so dangerous that the imagination can hardly comprehend it." He further condemned what he perceived as the lying perpetrated within the Johnson Administration about their intentions in Vietnam:

A democracy depends on the inalienable right not to be lied to... First we were told that the Americans in Vietnam were mere advisers. Then it was denied that we were using napalm. Then it was said that chemicals which, according to Jerome Wiesner, were potentially more dangerous than radioactive fallout, were merely weedkillers. Now it is said that gas which kills only some of the people some of the time is a non-lethal benevolent incapacitator. Considerable ambiguity, to say the least, surrounds the incidents of Tonkin Bay and the Pleiku barracks. And the State Department has never spoken honestly about the postponement of the 1956 election provided for by the Geneva Accords.³⁰

²⁹ "The President Opens the Door," *New York Times*, 8 April 1965, 38. The following day on April 8 North Vietnamese Premier Pham Van Dong issued North Vietnam's Four Point plan for peace in Vietnam. This document was perhaps the most controversial negotiating proposal as they would be discussed, debated and argued over at the highest levels of the Johnson administration for the remainder of its tenure in office. The major contention would always be point three: the recognition of the program of the National Liberation Front. Robert McNamara, James Blight and Robert Brigham argue that point three was "the principal stumbling block" to the U.S. accepting Hanoi's position." Robert McNamara, James Blight and Robert Brigham, *Argument without End: In Search of Answers to the Vietnam Tragedy* (New York: Public Affairs, 1999), 224.

³⁰ Staughton Lynd, "Civil War, Not Invasion," *New York Times*, 14 April 1965. For Lynd's April 1, 1965, speech, see: "Remarks at Emergency Meeting on Vietnam, 1 April 1965," Staughton Lynd Papers, Special Collections, Kent State University, Box 6, Folder 42.

Dizzying events of the spring and summer of 1965 energized the fledgling antiwar movement. Lynd's concerns were amplified as the conflict escalated and new voices of dissent sought to challenge the rationale of American policy. While the *New York Times* had complained in the early part of 1965 that there were no major policy announcements about why the U.S. was escalating in Vietnam, the John Hopkins speech had pacified them. In the meantime, antiwar organizing escalated on campuses and in communities across the nation. The White Paper fooled no one in the American peace movement, yet a key question remained: Was the whole endeavor legal? And how might its legality – or lack thereof – be determined?

The Lawyers Committee on American Policy Towards Vietnam

The only legal defense pertaining to the escalating conflict in the State Department's White Paper was that North Vietnam's aggression violated the United Nations Charter and the Geneva Accords. With regard to the Geneva Accords, the White Paper tried to go into great detail on the infiltration of men and war material as breaches of the 1954 Accords and the DRV's use of Laos as infiltration points as breaches of the 1962 Accords. The White Paper cited a June 1962 International Control Commission report that North Vietnam "beyond reasonable doubt" had sent soldiers and weapons into South Vietnam in violation of the Accords. As I.F. Stone pointed out, the use of the I.C.C.'s report "fails to tell the full story" because "the same report also condemned South Vietnam and the U.S., declaring that they had entered into a military alliance in violation of the Geneva agreements." Moreover, as Stone noted, the U.S. had 5000 "military advisers" in South Vietnam at the time in 1962. This also violated the Geneva Accords as the U.S. was only allowed to have 684 advisers as it had in 1954. Furthermore, the same 1962 report criticized both the U.S. and the Government of Vietnam for blocking the Commission's efforts to inspect the import of

weapons into South Vietnam.³¹ How North Vietnam violated the United Nations Charter, the White Paper did not say.

Perhaps the earliest public questioning of the legality of America's air war over North Vietnam happened at a State Department press conference on March 4. Responding to a reporter that raised the issue, Department spokesman Robert J. McCloskey noted that while "military hostilities have been taking place," this did not amount to the "existence of a state of war." Nonetheless, due to "armed aggression from the North against the Republic of Viet-Nam" the United States was "engaged in collective self-defense" under article 51 of the United Nations Charter, McCloskey explained. Moreover, the actions taken were well within the "constitutional powers of the President" and the Tonkin Gulf Resolution of 1964.³² Four days later, the State Department released its "Legal Basis for United States Actions Against North Viet-Nam." This came almost four weeks after President Johnson made the decision to conduct a sustained bombing campaign over North Vietnam and six days after Rolling Thunder began. This demonstrated, at the very least, international law mattered little to the Johnson administration at this point.

The paltry "Legal Basis" focused solely on the United States' arguments that North Vietnam had violated the United Nations Charter and the Geneva Accords, relying on a statement of facts taken from the White Paper, "that North Viet-Nam is carrying out a carefully conceived plan of aggression against the South." On the first point, the State Department argued that Article 51 of the United Nations Charter meant "the victim of armed aggression is obviously permitted to defend itself and to organize a collective self-defense effort." The memorandum quotes Chapter VII, Article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council

³¹ "A Reply to the White Paper," *I.F. Stone's Weekly*, 8 March 1965, Available Online: <http://www.ifstone.org/weekly/IFStonesWeekly-1965mar08.pdf>.

³² "Viet-Nam Action Called 'Collective Defense Against Armed Aggression,'" *State Department Bulletin*, 22 March 1965, 403.

and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.³³

The “Legal Basis” tried to demonstrate that more than just “a single armed attack” had occurred and that the North Vietnamese were engaged in “a continuing program of armed aggression.” Furthermore, the State Department argued that Chapter I, Article II (4) of the U.N. Charter was applicable: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”³⁴ The memorandum gave credence to 17th parallel as an internationally recognized boundary whose “territorial integrity and political independence” have been violated “by North Viet-Nam and not by anyone else.”³⁵

On the second point, that North Vietnam had violated the Geneva Accords, the State Department observed “that the North Vietnamese have repeatedly violated the 1954 Geneva Accords in a most serious and flagrant manner.” Moreover, the “continued presence in neighboring Laos of North Vietnamese forces and their use of Laotian territory for infiltration into South Viet-Nam” violated the 1962 Geneva Accords. Therefore, under international law, the Republic of Viet-Nam and the United States are entitled “to withhold compliance with an equivalent, corresponding or related provision until the other party is prepared to observe its obligations.”³⁶

The “Legal Basis,” less popular with the press than the White Paper, still garnered its own set of critics. Carl Marcy, Chief of the Staff Committee for the Senate Foreign Relations Committee, wrote to Senator Wayne Morse that the memorandum was “about the sloppiest piece of legal work I have ever seen.” Marcy informed Morse that it looked “like it was put

³³ Chapter VII, Article 51, *Charter of the United Nations*, 24 October 1945.

³⁴ Chapter I, Article II (4), *Charter of the United Nations*, 24 October 1945.

³⁵ “Legal Basis for United States Actions Against North Vietnam,” 08 March 1965, Folder 08, Box 48, Douglas Pike Collection: Unit 03 - Legal and Legislative, The Vietnam Center and Archive, Texas Tech University, Available online: <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=2184808024>.

³⁶ “Legal Basis for United States Actions Against North Vietnam,” 08 March 1965, Folder 08, Box 48, Douglas Pike Collection: Unit 03 - Legal and Legislative, The Vietnam Center and Archive, Texas Tech University, Available Online: <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=2184808024>.

together by a high school student.”³⁷ The “Legal Basis” would also provide the opportunity for a challenge from an ad hoc group of international law specialists, some who had worked for the United States at the Nuremberg Trials.

Formed following the release of the State Department’s “Legal Basis,” the Lawyers Committee on American Policy Towards Vietnam (or Lawyers Committee for short) brought together respected experts on international law in the American academic community such as Richard Falk, John H.E. Fried, Stanley Hoffman, Hans J. Morgenthau, Quincy Wright, and others. Members of the Lawyers Committee not only published articles in law reviews, they made their work available to a wider audience including senators, representatives, United Nations officials, international lawyers, and the nascent antiwar movement. The Lawyers Committee demonstrates how an anti-interventionist ethic, tied to the international laws developed after 1945, spread between 1965 and 1967. Despite the formidable legal challenge the ad hoc committee marshaled against the Johnson administration’s war in Vietnam, very little has been written about international lawyers’ opposition to the Vietnam War.

The Committee drafted a Memorandum of Law, “American Policy Vis-à-Vis Vietnam,” in response to the State Department’s legal rationale. This was the first meticulously argued legal memoranda opposing the Johnson administration’s legal justifications and provided opponents a solid basis to critique the war from an international and domestic law standpoint. Both controversial and widely disseminated, the response influenced many in the antiwar movement and Senators Wayne Morse (D-Oregon) and Ernest Gruening (D-Alaska) inserted the Memorandum into the *Congressional Record* on September 23.

The basic argument of the Lawyers Committee, in response to the State Department’s legal justifications, was that the war in Vietnam violated the provisions of the United Nations Charter, the Geneva Accords of 1954, and the United States Constitution. First, the Memorandum noted that U.N. Charter had been signed by the President and ratified by the

³⁷ Carl Marcy to Wayne Morse, 17 March 1965, quoted in Information Memorandum From the Legal Adviser (Meeker) to Secretary of State Rusk, 20 January 1967, Foreign Relations of the United States, 1964-1968, Volume XXVII, Document 86, ft.2. Available online: <http://history.state.gov/historicaldocuments/frus1964-68v27/d86>.

Senate on July 28, 1945. Under the Supremacy Clause of the U.S. Constitution, the Charter had attained the status of ‘supreme law of the land.’ The Charter, the Lawyers Committee argued, “constitutes the cornerstone of a world system of nations which recognize that peaceful relations, devoid of any use of force or threats of force, are the fundamental legal relations between nations.” With regard to the use of force in international affairs, the following provisions of the Charter were highlighted, including Article 51 previously quoted:

Chapter I, Article II (4): “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Chapter VII, Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

Chapter XVI, Article 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

The Lawyers Committee quoted from the same international laws that the State Department did in its “Legal Basis.” However, the lawyers pointed out that the U.N. Charter permitted the use of force in only two circumstances: 1) in self-defense against armed attack until the U.N. Security Council intervened to stop the conflict; or, 2) if the U.N. Security Council sanctions the use of force. With regard to the Article 51 provisions of self-defense, the Lawyers Committee demonstrated that it clearly restricts action “only ‘if an armed attack occurs.’” They argued: “This restriction in article 51 very definitely narrows the freedom of action which states had under traditional law.” They noted also, that under U.S. law the use of self-defense was “limited” by highlighting the judgment in the *Caroline* case, included in the Nuremberg Judgment of 1945, that “any resort to armed force in self-defense must be confined to cases in which ‘the necessity of that self-defense is instant, overwhelming and leaving no choice of means and no moment of deliberation.’” They conclude that the United

States government was well aware of this provision in the U.N. Charter before it was ratified by the Senate.³⁸

In an internal memorandum between the State Department's legal adviser and Secretary Dean Rusk, Leonard Meeker stated that the Department had adopted the February 7 Pleiku attacks as its "first determination" that "aggression by means of armed attack" had occurred against the South and this laid the basis for "the decision to launch air strikes against the North" in connection with Article 51 of the Charter. The U.S. in fact launched retaliatory air raids against the North in connection with the attack on the air base in Pleiku undertaken by insurgents in the South. Since there was no evidence the North Vietnamese forces undertook the attack, the fact that Operation Rolling Thunder commenced a full twenty-three days later demonstrates that the sustained bombing campaign hardly met the requirements of Article 51.³⁹

A second major argument advanced by the Johnson administration for its escalation in the summer of 1965 pointed to its obligations under the Southeast Asia Treaty Organization (SEATO) treaty. The Lawyers Committee refuted the legality of this claim. Citing Chapter XVI, Article 103 of the U.N. Charter – the United Nation's "supremacy clause" – they pointed out that this had direct bearing on the Johnson administration's constant referral to the SEATO's collective self-defense provisions. "This supremacy clause was drafted to meet the predictable reassertion of dominance by the great powers within their respective geographic zones or hemispheres," they explained. Moreover, the supremacy clause "makes clear that the obligations of the United Nations Charter prevail vis-à-vis the

³⁸ "American Policy Vis-A-Vis Vietnam," *Viet-Report*, January 1966, 22-25. The Memorandum was reprinted as "Memorandum of Law Lawyers' Committee on American Policy Towards Vietnam," *Congressional Record*, 89th Congress, First Session, 23 September 1965, and issued by the Government Printing Office as document number 790-112-0094. The Memorandum was published and distributed as an extended booklet by the Lawyers Committee. It is available online: American Policy Vis-a-Vis Vietnam, 20 December 1965, Folder 17, Box 03, Douglas Pike Collection: Unit 04 - Political Settlement, The Vietnam Center and Archive, Texas Tech University. Accessed 15 Nov. 2013. <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=2300317039>.

³⁹ Information Memorandum From the Legal Adviser (Meeker) to Secretary of State Rusk, 20 January 1967, Foreign Relations of the United States, 1964-1968, Volume XXVII, Document 86. Available online: <http://history.state.gov/historicaldocuments/frus1964-68v27/d86>.

obligations of the SEATO treaty. Indeed, article VI of the SEATO expressly recognizes the supremacy of the United Nations Charter.”⁴⁰

Regarding the questions of law surrounding the war in Vietnam vis-à-vis the United States Constitution, the Lawyers Committee quoted President Johnson’s speech of July 28 that “this is really war,” and noted that the U.S. forces would surge from 75,000 to 125,000 immediately and the President’s promise that “additional forces will be needed later, and they will be sent as requested.” The Memorandum cited the separation of powers doctrine within the Constitution – Articles I, II, and III – and note “contrary to widely held assumptions, the power to make and conduct foreign policy is not vested exclusively in the President, but is divided between him and Congress.” Moreover, “the Constitution imposes a tight rein upon the President” to wage war. “Under Article I, Section 8, Clause II, that power is confided exclusively to the Congress.” Echoing mounting concerns of a move toward an imperial presidency, the committee concluded: “Ours is not a government of executive supremacy.” Pointing to the Tonkin Gulf Resolution, they insisted this “is not a declaration of war. At most it is an ultimatum – if that.” They believed that even if the United States Congress had declared war on Vietnam, this did not absolve the U.S. from the provisions of the U.N. Charter or the violations of the laws of war under the Geneva Conventions of 1949 and other treaties.⁴¹

In an unprecedented move by a group of respected international legal experts, utilizing post-WWII legal mechanisms, the Lawyers Committee argued the U.S. war in Vietnam was illegal under international and domestic law. In other words, they argued the war was a crime against peace, or a war of aggression. By highlighting the relevant sections of the U.N. Charter outlining legitimate uses of force in international relations, they point out that this is the international treaty that forms the basis for international order and was applicable to the U.S. war effort in Southeast Asia. The group distributed the *Congressional Record* reprint as widely as possible to over 173,000 lawyers and 3,750 law professors in the United States as a way for them to sign on to it and bring in new members to the ad hoc committee. Out of this mass mailing, the Committee’s membership ranks swelled to 4,100 by

⁴⁰ “American Policy Vis-A-Vis Vietnam,” *Viet-Report*, January 1966, 22-25.

⁴¹ “American Policy Vis-A-Vis Vietnam,” *Viet-Report*, January 1966, 22-25.

January 1966. Given the residue of McCarthyism, and the war's initial popularity, this was an exceptional success for such a cautious and careful profession. Unlike radical intellectuals or antiwar activists, the ad hoc group of experts in international law carried greater legitimacy in the national media. For instance, Hans Morgenthau, member of the Lawyers Committee, debated National Security Adviser McGeorge Bundy on television at Harvard University in June 1965 and a representative was interviewed for the NBC *News* special "Viet Nam: December 1965." The information and arguments the lawyers produced lent much credibility to antiwar cause. The Memorandum would be reprinted in the antiwar magazine *Viet-Report* in its January 1966 edition. The Lawyers Committee also submitted it to President Johnson on January 25 where it was re-entered a second time into the *Congressional Record* on February 9 by Senator Gruening (this time with the letter to the President attached). The letter to the president, citing the findings in the Memorandum of Law, demanded Washington halt the bombing over North Vietnam and negotiates directly with the National Liberation Front in South Vietnam. On February 18, the Senate Foreign Relations Committee inserted it into their record of hearings being conducted into the war in Vietnam. The Memorandum was gaining traction.⁴²

Like all matters of vital importance, especially those issues concerning war, disagreements arose over interpretations of the facts and the law. However, in at least three major instances, the detractors were organized at the initiative of the White House to specifically respond to the Lawyers Committee's memorandum. After Senators Gruening and Morse entered the memorandum into the *Congressional Record* in September, the White House's legal counsel, Harry McPherson, wrote to E. Ernest Goldstein, professor of law at the University of Texas, to write a letter to President Johnson defending the legality of his war effort in Vietnam. Prepared by Prof. Goldstein, signed by thirty law professors, the letter was sent on November 23 and inserted into the *Congressional Record* in January by Representative J.J. Pickle (D-Texas). The letter argued rather simply, "the position of the

⁴² A summary of the Lawyers Committee's activities appears in William L. Standard and Joseph H. Crown to Edward K. Kuhn, 15 March 1966, Lawyers Committee on American Policy Towards Vietnam Papers, Box 5, Butler Library, Columbia University. For the Lawyers Committee's letter to President Johnson, see: Douglas Robinson, "Legality of Vietnam War Questioned," *New York Times*, 5 February 1966, 6.

United States in Vietnam is legal, and is not in violation of the Charter of the United Nations.”⁴³ A battle of the legal opinions was now raging in tandem with the escalation of the war in Vietnam.

When the Lawyers Committee submitted the 26-page Memorandum of Law to President Johnson on January 25, he asked for a comment from the Justice Department of the legal analysis. On February 19, Attorney General Nicholas Katzenbach responded to the president that the memorandum was “based on a blatant misreading of the facts, the relevant history and the law.” Moreover, the Lawyers Committee’s arguments were “so completely indefensible that I did not want to dignify it by a long, scholarly rebuttal.” However, the Attorney General did encourage the president to seek out a response from international law specialists. The White House was already pursuing this avenue. On February 5, Harry McPherson wrote a letter to Professor Neill H. Alford, University of Virginia School of Law, to gather a group of legal experts to write a letter to President Johnson supporting the legality of the war. McPherson wrote that the letter was needed expeditiously as the Senate Foreign Relations Committee’s hearings on the war were on the horizon. “It would be desirable, though not essential,” he wrote, “to reject the position expressed in the Lawyers’ Committee letter.” Prof. Alford agreed and sought out Yale Law School Professor Myres S. McDougal and two other professors. They sent their letter nine days later, February 14, to President Johnson. The letter, as suggested, opposed the Lawyers Committee’s legal analysis. It argued “the legal position of the United States in South Vietnam is clearly defensible. It would, in fact, seem the legal position most compatible with protecting the genuine self-determination of the peoples of South Vietnam.”⁴⁴ Prof. McDougal was again sought out by the White House to prepare a longer legal brief defending its position. The 259-page report, aptly titled, “The Lawfulness of United States Assistance to the Republic of Vietnam,” was prepared by Prof. McDougal, Prof. John Norton Moore, University of Virginia School of Law, and James

⁴³ The letter quoted in Austin C. Wehrwein, “Bar Group Finds U.S. War Policy Legal under U.N.,” *New York Times*, 22February 1966, 1. For the Johnson administration’s initiation of the letter, see William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, July 1965-January 1968* (Princeton: Princeton University Press), 246ft96.

⁴⁴All of the above quotes are from William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, July 1965-January 1968* (Princeton: Princeton University Press), 246ft96.

L. Underwood, University of South Carolina College of Law. The American Bar Association distributed their report in June 1966 and it was inserted into the *Congressional Record* by Senator Russell Long.⁴⁵

Senator Long and the White House also collaborated with the American Bar Association (ABA) in another venture to try and discredit the Lawyers Committee's legal arguments on Vietnam. On February 21, with the help of Morris Liebman, a Chicago attorney and valued Wise Man of the Johnson administration, the ABA's House of Delegates meeting in Chicago passed unanimous vote, without debate, that the United States' war in Vietnam was legal under international law. The *New York Times* reported that with this move, "unusual in its rapidity," the ABA acted on the encouragement of Senator Russell Long (D-Louisiana) who requested them to respond to the criticisms of Senator Wayne Morse in the Senate's televised hearings on Vietnam (who was relying on the legal analysis provided in the Memorandum of Law by the Lawyers Committee). Austin Wehrwein of the *Times* noted the resolution "amounted to support of the Administration's Vietnam policy" and letter of thirty-one law professors in January to President Johnson supporting the war was entered as supporting documentation. The resolution read, in part: "Now therefore it be resolved by the American Bar Association that the position of the United States in Vietnam is legal under international law, and is in accordance with the Charter of the United Nations and the Southeast Asia Treaty."⁴⁶

The American Bar Association, which represented 120,000 lawyers in the United States, received criticism for its actions. "In Peking, whenever the Chinese Government disapproves of American action in some part of the world," writes Professor Jerome Cohen from Harvard University, "it is standard practice for an important Communist party leader to

⁴⁵ William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, July 1965-January 1968* (Princeton: Princeton University Press), 246ft96.

⁴⁶ The full text of the American Bar Association's resolution is available in Austin C. Wehrwein, "Bar Group Finds U.S. War Policy Legal under U.N.," *New York Times*, 22February 1966, 1. For the White House's involvement, see William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, July 1965-January 1968* (Princeton: Princeton University Press), 246-247ft96. Gibbons writes: "A note to McGeorge Bundy from Chester Cooper on the day that the resolution was passed, to which Cooper attached a copy of the wire service story of the ABA action, stated: 'Mac - You should know that Morris [Morris Liebman] (one of my tame clients) was instrumental in pushing this through.' Liebman, a Chicago attorney, one of the Wise Men, strongly supported the war and was very active in helping the White House organize public support activities."

ask a meeting of the national lawyers' association to take a stand." Decrying the same practices of Senator Long and the ABA, Professor Cohen concludes: "Although I agree with the resolution's conclusion, I nevertheless deplore the unseemly lack of consideration preceding its adoption. It is essential that this nation's principal body of lawyers avoid both the appearance and the reality of serving as the obedient tool of Government."⁴⁷ A statement such as this, from a lawyer who endorsed the resolution, speaks volumes of the underhanded way in which the Johnson administration actually worked to subvert the Lawyers Committee's principled and legalistic stand against the war.

The Lawyers Committee responded by writing to the President of the American Bar Association, Edward K. Kuhn, demanding that they print the Memorandum of Law in its American Bar Association Journal and account for its actions. The letter, forwarded to every United States senator and representative, argued that the Association's resolution, adopted without debate, "does a disservice to the Bar for it treats the gravest issue of the day in a manner not befitting a bar association." Moreover, the resolution offered a "distorted excerpting of a few phrases, out of context, from Article 51 and 52 of the United Nations Charter, and totally fails to meet the points advanced in the 26-page documented Memorandum of Law." They concluded their letter stating they expected a debate about the legality of Vietnam, and indeed they welcomed it as the American people deserved it; however, the Lawyers Committee expected "the country's largest bar association [to] have documented their case in a lawyerlike, analytical and objective manner – to illuminate rather than obfuscate issues affecting the lives of Americans and Vietnamese."⁴⁸

⁴⁷ Jerome A. Cohen, "Bar Group's Stand on Vietnam Action," *The New York Times*, 13 March 1966, 199. The letter was written on 28 February 1966.

⁴⁸ William L. Standard and Joseph H. Crown to Edward K. Kuhn, 15 March 1966, Lawyers Committee on American Policy Towards Vietnam Papers, Box 5, Butler Library, Columbia University. The Lawyers Committee's letter to the Senators and House Representatives appears in the same box, dated 23 March 1966. The American Bar Association did allow William Standard, Chairman of the Lawyers Committee, to respond to an article by Eberhard P. Deutsch, Chairman of the American Bar Association's Committee on Peace and Law Through the United Nations and writer of the Resolution adopted by the Association in its February meeting. In his article, Deutsch concludes the Lawyers Committee's Memorandum of Law "is grounded on an emotional attitude opposed to United States policy, rather than on law" (p.442). See: Eberhard P. Deutsch, "The Legality of the United States Position in Vietnam," *American Bar Association Journal*, May 1966, Vol.52, pp. 436-442, and, William L. Standard, "United States Intervention in Vietnam Is Not Legal," *American Bar Association Journal*, July 1966, Vol. 52, pp. 627-634.

As the nation's lawyers and elected representatives debated the legality of the war, spurred in no small measure by the Lawyers Committee's efforts, State Department officials felt compelled to respond as well. The Department's legal adviser, Leonard Meeker, prepared a lengthier response outlining the government's "very strong" case that was to be representative of the Johnson administration's legal rationale.⁴⁹ The State Department's second legal memorandum argued that: (I) the United States and the Government of Vietnam are entitled to act in collective self defense against armed attack, (II) the United States has made historical commitments under Presidents Eisenhower and Kennedy to defend South Vietnam, (III) that the actions taken by the United States and South Vietnam are justified under the Geneva Accords of 1954, and (IV) President Johnson has the full authority of the United States Constitutions under Article II to commit U.S. forces to Vietnam.⁵⁰ The Lawyers Committee would spend the remainder of 1966 preparing a rebuttal to the State Department's definitive legal analysis and its members would continue writing and speaking out against the war.

In October, the Lawyers Committee produced a 118-page (with 51 pages of footnotes) Memorandum of Law – titled "The Military Involvement of the United States in Vietnam: A Legal Analysis" – and sought out publishers to release the Analysis in book form. The introduction declared:

The actions of the United States are without historical precedent. Never before has any government intervened on a comparable scale in a foreign civil war. Never before has any nation, under the claim of collective self-defense, engaged in military actions of such destructiveness. Never before have military actions so imperiled the very nation initiating them – and all the nations of the world. For the United States Government cannot give any confident assurance that this course will not lead to wider conflagrations, and even provoke eventually a nuclear catastrophe.

⁴⁹ See, for instance, McGeorge Bundy to Lyndon Johnson, "Legal Brief on United States Actions in Viet Nam," in Memo To President Lyndon B. Johnson: Legal Brief On United States Actions In Vietnam (Missing Attachment), 08 March 1966, Folder 08, Box 04, Larry Berman Collection (Presidential Archives Research), The Vietnam Center and Archive, Texas Tech University. Accessed 15 Nov. 2013. <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=0240408016>.

⁵⁰ See: "The Legality of United States Participation in the Defense of Viet-Nam," 8 March 1966, in *The Department of State Bulletin*, 28 March 1966, 474-489. See also: John W. Finney, "U.S. Brief Backs Role in Vietnam," *New York Times*, 10 March 1966, 7.

Citing the unprecedented domestic and international dissent against U.S. intervention in Vietnam, the Legal Analysis states that “the more a policy deviates from the normal and the more it entails hazardous repercussions and human suffering, the sounder must be its legal foundation.” The Lawyers Committee’s October 1966 report called into question the State Department’s March Memorandum and labeled it an inadequate expression of the United States’ legal justifications for its war in Vietnam.⁵¹

At the end of 1966, the Lawyers Committee took their new Legal Analysis to the United Nations. On December 8, the Committee petitioned the Sixth (legal) Committee of the General Assembly of the United Nations to “request the International Court of Justice to render an advisory opinion as to whether any party to the Vietnamese conflict had violated the Charter of the United Nations.” Moreover, the Committee called on the General Assembly to adopt “a resolution calling for (1) the immediate and unconditional termination of bombing of North Vietnam; and (2) unconditional recognition of the National Liberation Front as possessing belligerent status and hence negotiating status equal to that of the Saigon regime.” The letter concluded: “We strongly believe that the solution to the Vietnam conflict which threatens to take us to the brink of World War III depends upon the return to the principles of international law embodied in the Charter of the United Nations.”⁵²

Following the Lawyers Committee’s appeal to the United Nations, Leonard Meeker, the State Department’s legal adviser, responded to the criticisms of the Committee in a lecture at the University of Pittsburgh Law School on December 13. Reiterating much of what was already in print by the State Department, Meeker argued that South Vietnam was subject to “aggression” and “armed attack” by the North Vietnamese. “Legitimate defense,” Meeker contended, “includes military action against the aggressor wherever such action is needed to halt the attack.” Meeker insisted that the war in Vietnam was not a civil war and

⁵¹ Report - Consultative Council of the Lawyers' Committee on American Policy Towards Vietnam - The Military Involvement Of The United States In Vietnam: A Legal Analysis, 01 October 1966, Folder 06, Box 01, Hugh Manes Collection, The Vietnam Center and Archive, Texas Tech University. Accessed 26 Nov. 2013. <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=22700106002>.

⁵² Quoted in “Press Release,” no date, Box 4, and, William L. Standard and Joseph H. Crown to Members of the Sixth Committee of the General Assembly of the United Nations, 8 December 1966, Box 5, Lawyers Committee on American Policy Towards Vietnam Papers, Butler Library, Columbia University. See also: “Lawyers Group Urges Ruling by World Court on Vietnam,” *New York Times*, 9 December 1966, 34.

that “it seems beyond dispute” that the military personnel, supplies and weapons have come from the North. Taking for granted that the media was largely in agreement with the government’s official story, relying on strict adherence to a pervasive Cold War ideology, and underplaying the growing evidence that was being presented to the contrary, Meeker concluded that “the planning and direction” as well as “the orders have come from Hanoi” in the conflict between North and South Vietnam.⁵³

Responding to the Department’s legal adviser, the Lawyers Committee officially submitted its 169-page “Legal Analysis” to Secretary Dean Rusk. In a press conference announcing the submission, Professor Richard Falk quoted from Senator Mike Mansfield (Democrat-Montana) after he conducted an investigation into the infiltration of North Vietnamese soldiers into South Vietnam. Mansfield noted: “When the sharp increase in the American military effort began in early 1965, it was estimated that only about 400 North Vietnamese soldiers were among the enemy forces in the South which totaled 140,000.” Even if the American war in Vietnam was in collective self-defense, Falk argued, Article 25 of the Hague Convention of 1907 prohibits “the attack or bombardment by whatever means, of towns, villages, dwellings or buildings which are undefended.” Falk utilized the series of dispatches from *New York Times* assistant managing editor Harrison Salisbury who, despite official U.S. Government claims, documented the bombing of civilian areas and the deaths of civilians.⁵⁴

A vital boost to the antiwar movement came on December 25, 1966, when the *New York Times* ran the first of fourteen dispatches by Harrison Salisbury from North Vietnam. In his first dispatch, Salisbury contradicted President Johnson’s insistence that the United States’ air war in Vietnam was only striking military targets and sparked an explosive debate about the morality America’s bombing campaign over North Vietnam.⁵⁵ “It is the reality of

⁵³ Leonard Meeker quoted in Hedrick Smith, “U.S. Aide Says Law Justifies Vietnam Bombing,” *New York Times*, 14 December 1966, 3. For the full text of Meeker’s talk, see: Leonard Meeker, “Viet-Nam and the International Law of Self-Defense,” *Department of State Bulletin*, 9 January 1967, pp. 54-63.

⁵⁴ “Press Release,” 5 January 1967, Box 5, Lawyers Committee on American Policy Towards Vietnam Papers, Butler Library, Columbia University.

⁵⁵ Mark Attwood Lawrence, “Mission Intolerable: Harrison Salisbury’s Trip to Hanoi and the Limits of Dissent against the Vietnam War,” *Pacific Historical Review*, Vol. 75, No. 3 (August 2006): 429-460; Tom Wells, *The War Within: America’s Battle over Vietnam* (Berkeley: University of California Press, 1994),178; Charles

such casualties and such apparent by-products of the United States bombing policy that lend an atmosphere of grimness and foreboding to Hanoi's Christmas cease-fire," Salisbury wrote. "It is fair to say that, based on the evidence; Hanoi residents do not find much creditability in United States bombing communiqués."⁵⁶ In April 1965, President Johnson announced that the United States' air campaign against North Vietnam was targeting "radar stations, bridges and ammunition dumps, not at population centers. They have been directed at concrete and steel and not human life."⁵⁷ Despite foreign correspondents and U.S. peace activists' firsthand accounts in the North, this was the accepted wisdom in the national press.⁵⁸ Because of the Salisbury dispatches, the Johnson administration was forced to change its rhetoric around the bombing campaign to keep up with its public relations campaign. On December 31, President Johnson held a press conference where he stated that it was his administration's policy "to bomb only military targets. We realized that when you do that, inevitably and almost invariably there are casualties, there are loses of life."⁵⁹ Because

DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990),168; Mary Hershberger, *Traveling to Vietnam: American Peace Activists and the War* (Syracuse: Syracuse University Press, 1998), 80-81.

⁵⁶ Harrison Salisbury, *The New York Times*, 25 December 1966, A1. Over the next three weeks, Salisbury wrote fourteen dispatches from Hanoi during his stay there between December 23, 1966, and January 7, 1966, with eight other stories summarizing his experience from Hong Kong. He took numerous pictures detailing bombing damage – reproduced in *Behind the Lines- Hanoi* published in July 1967 – and had high-level meetings with Premier Pham Van Dong. Reflecting in *Behind Enemy Lines-Hanoi*, the book that grew out of his dispatches, Salisbury noted the situation militarily and politically, for both sides, was at an "epochal crossroads." He criticized the politicians in Washington for concerning themselves with the next election or what would discomfort a possible election opponent. Salisbury argued it was difficult to engage in "imaginative statesmanship" in an atmosphere as charged as in Vietnam. Harrison Salisbury, *Behind Enemy Lines-Hanoi: December 23, 1966 – January 7, 1967* (London: Secker & Warburg, 1967), 238

⁵⁷ "Appraisal of Current Trends: Statement by the President at LBJ Ranch, Johnson City, Texas, 17 April 1965," in Richard Stebbins, ed., *Documents on American Foreign Relations: 1965* (New York: Harper & Row, Publishers, 1966), 149

⁵⁸ On 11 February 1966 Herbert Aptheker, who had just returned from a three week visit to North Vietnam with Staughton Lynd and Tom Hayden, addressed a conference in Windsor, Ontario, about his experiences in Hanoi. He stated:

I saw some of the damage inflicted by the U.S. bombers, too. President Johnson said that his planes bomb only military targets and that they are of concrete and steel and that 'concrete and steel do not bleed.' But I looked upon schools and factories and nurseries and pagodas that had been bombed and strafed and of course in those 'structures' were men and women and children and I know that some among them were killed and many of them were wounded. And of course they also bleed.

Herbert Aptheker, "What I learned in Vietnam," University of Windsor, Canada, 11 February 1966, Department of Special Collections: Stanford University Libraries, Herbert Aptheker Papers, Box 92, Folder 6.

⁵⁹ "Text of President's Year-End News Conference," *Washington Post*, 1 January 1967, A8.

Salisbury's reports represented a watershed moment for American peace activists as President Johnson now admitted that bombs fell on civilians; however, he framed it as an inevitable part of the war.⁶⁰ According to Dave Dellinger, Salisbury's dispatches "stunned the public" and "created a new dynamics in the antiwar movement's battle to turn the public against the government's terrorist policies."⁶¹

The Lawyers Committee's letter to Secretary Rusk is worth quoting due to its departure from normal lawyerlike decorum representative of the Committee's work. The letter to Rusk, which summarizes the Committee's 169-page "Legal Analysis," is divided into three sections, asking: Who is the aggressor? Do U.S. actions violate the U.N Charter? And, is the U.S. committed to South Vietnam? The letter argues that the Department of State is operating from the "premise" that North Vietnam is "guilty of aggression against the South." Quoting from the Mansfield report, the Committee pointed out that before 1965 the infiltration by the North "was confined primarily to political cadres and military leadership" of South Vietnamese. Moreover, as of 1962 "United States military advisers" had reached 10,000 and that significant infiltration from the North came only *after* the U.S. began bombing the North. With regard to the U.N. Charter, the Committee argued "our intervention in early 1965 with massive support is unilateral action which the U.N. Charter was conceived to thwart" and that the United States illegally intervened in a civil war. Even if the Government of Vietnam requested the presence of U.S. forces in South Vietnam, this "demonstrates that the present Saigon regime, just as its predecessors since 1954, is a client government of the United States; that the present government has no constitutional basis and is incapable of achieving stability on its own." Furthermore, the Lawyers Committee "deplores" the fact that the Department of State felt compelled to quote "out of meaningful context" the statements of Presidents Eisenhower and Kennedy that the U.S. made a commitment to South Vietnam. Even if these statements were "assurances," according to international law, they "certainly do not add up to commitments by the United States to take

⁶⁰ Mary Hershberger, *Traveling to Vietnam: American Peace Activists and the War* (Syracuse: Syracuse University Press, 1998), 80.

⁶¹ Dave Dellinger, *From Yale to Jail: The Life Story of a Moral Dissenter* (New York: Pantheon Books, 1993), 235.

military action in Vietnam.” With regard to the now frequent use of the Southeast Asia Treaty Organization (SEATO) as a legal justification for U.S. intervention, the Lawyers Committee labels this “untenable.” The Lawyers Committee points out that SEATO was not invoked in February 1965 when bombing commenced, in the March 8, 1965, “Legal Basis” memorandum, or in President Johnson’s July 28, 1965 speech announcing the troop surge. According to the SEATO Treaty (Articles I and VI) and the U.N. Charter (Article 103), the treaty is “expressly subordinate” to the provisions of the U.N. Charter. The letter concluded by announcing it was requesting Senator Fulbright of the Senate Foreign Relations Committee to conduct hearings on the legality of the war in Vietnam and called for a meeting with Secretary Rusk to see how the war may be ended according to the provisions of the U.N. Charter.⁶²

At some point in early January, Rusk asked the Department of State’s legal office why the March 1965 “Legal Basis for United States Actions Against North Vietnam” did not include the SEATO justification. It is unclear whether Rusk’s request came after he read the Lawyers Committee’s strongly worded letter. Nonetheless, on January 20, Leonard Meeker responded that, “in March 1965 it was the judgment of the Department that reliance on the Southeast Asia Treaty would not strengthen our case. On the contrary, such reliance would have been vulnerable to the criticism that our SEATO partners did not agree with us.” Indeed, other members of SEATO such as the United Kingdom and France were not in agreement with Washington’s policies in Vietnam. Meeker noted that it was not until May 1965 when President Johnson asked Congress to approve an appropriations bill to fund the Vietnam War that SEATO was used to justify the war.⁶³

The Lawyers Committee continued its public campaign to bring international law to the forefront of the conversation on Vietnam. The Committee purchased a full-page advertisement in the *New York Times* on January 15 declaring: “U.S. Intervention in Vietnam is *illegal*.” In a condensed version of its latest Memorandum of Law, the Committee cited in

⁶² William L. Standard and Joseph H. Crown to Dean Rusk, 5 January 1967, Box 5, Lawyers Committee on American Policy Towards Vietnam Papers, Butler Library, Columbia University.

⁶³ Information Memorandum From the Legal Adviser (Meeker) to Secretary of State Rusk, 20 January 1967, Foreign Relations of the United States, 1964-1968, Volume XXVII, Document 86. Available online: <http://history.state.gov/historicaldocuments/frus1964-68v27/d86>.

the preamble its letter to Secretary Rusk, President Johnson's State of the Union address – which reiterated the basic tenets of the administration's position (SEATO, aggression by North Vietnam, and the Korean War analogy) - the March 1966 Department of State Memorandum of Law, and Leonard Meeker's remarks at the University of Pittsburgh in December. The Lawyers Committee stated that the Johnson administration's legal arguments are “based on misleading presentations of fact and unwarranted interpretations of law. Observance of the law would have spared the American people as well as the Vietnamese a cruel war.” In a five-point plan, the Lawyers Committee demanded: (1) unconditional stoppage of the bombing of North Vietnam, (2) the replacement of U.S. military forces with the International Control Commission, (3) the de-escalation of military operations in South Vietnam, (4) the recognition of the National Liberation Front, and (5) a commitment to negotiate on the basis of the 1954 Geneva Accords.⁶⁴

In a letter to the editor of the *Times*, two law professors at the University of Virginia dismissed the Lawyers Committee and their full-page advertisement. John Norton Moore and Neil Herbert Alford, Jr., two supporters of the U.S. intervention in Vietnam and cooperative with the Johnson administration's attempts to discredit the Lawyers Committee's legal arguments, pointed to the January 1966 letter from 31 law professors to President Johnson, the February 1966 unanimous resolution by the American Bar Association, and the “The Lawfulness of United States Assistance to the Republic of Vietnam” memorandum of law to argue that “there are a large number of scholars and lawyers who agree” United States intervention in Vietnam “is entirely lawful.” On the other hand, “The ‘Lawyers Committee’ represents no official bar organization and merely reflects the sentiment of some lawyers and legal scholars. Their advertisement in *The Times* is essentially an adversary argument presenting one side of the legal issues.” In an interesting critique, the two law professors argue that the Lawyers Committee's arguments are “highly legalistic” and distract “attention from more important clarification of long-run community policies underlying the legal norms involved” in the debate over Vietnam. How the Lawyers Committee's “highly legalistic” arguments distract from “clarification of long-run community policies” the letter does not

⁶⁴ “U.S. intervention in Vietnam is *illegal*,” *New York Times*, 15 January 1967, E9.

say. Instead, clarifying nothing, the two professors argue verbatim the Johnson administration's line that "the Vietnam conflict cannot be fairly characterized as a 'civil war' for purposes of assessing the lawfulness of assistance to the Government of South Vietnam, that South Vietnam has requested assistance to meet a situation amounting to an armed attack, that the present assistance to South Vietnam is in accordance with the right of collective defense recognized under customary international law and the United Nations Charter, and that the Executive-Congressional action taken in rendering assistance is in accordance with United States constitutional processes."⁶⁵ When one consults "The Lawfulness of United States Assistance to the Republic of Vietnam," we read that John Norton Moore, and the other authors, believe that beyond "mere legalistic" arguments, "the genuine shared expectations of the international community," embodied in the United States' commitment to the South Vietnamese Government "is to secure genuine freedom of choice to the peoples of the world about their own form of government."⁶⁶ The freedom of choice at the barrel of a gun was exactly what the Lawyers Committee and antiwar critics were arguing against. For them, the right of self-determination for the Vietnamese meant the Vietnamese choosing their destiny without U.S. intervention, as the Geneva Accords of 1954 clearly established.

A May 1967 memorandum to the Senate Internal Security Subcommittee (SISS), after the publication of the full-page *New York Times* ad, concluded that: "It appears unlikely that it could be demonstrated that the material in the statements by the Lawyers Committee 'follows the general Communist line' regarding the Vietnamese war." The memo observes that many of the criticisms have been launched by Arthur M. Schlesinger, Jr., George Kennan, Edwin Reischauer, General Gavin, Senator Robert Kennedy and James Reston of the *New York Times*. Moreover, the Lawyers Committee's critical stance toward the Soviet Union's suppression of the Hungarian revolt of 1956 and North Korea's invasion of South Korea in 1950 "certainly could not be tied to the Communist line." The only respite for SISS

⁶⁵ John Norton Moore and Neil Herbert Alford, Jr., "Lawyers Group Disputed on Vietnam," *New York Times*, 22 January 1967, 173. The letter was originally written on 16 January 1967.

⁶⁶Lawfulness of U.S. Assistance to South Vietnam, p.2, June 1966, Folder 15, Box 48, Douglas Pike Collection: Unit 03 - Legal and Legislative, The Vietnam Center and Archive, Texas Tech University. Accessed 27 Nov. 2013. <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=2184815031>.

could be found in the fact that “analyses by other prominent lawyers in this country take the same [State Department] documents and interpret them in an entirely different way to prove the legal basis of United States policy toward Vietnam.”⁶⁷

The Lawyers Committee on American Policy Towards Vietnam was viewed as a legitimate threat to be combated by the Johnson administration. They were taken seriously enough that the U.S. government covertly solicited pro-war international legal experts to publicly refute the Committee’s arguments by describing their work as political or “emotional” or condemned the group as unrepresentative of the legal community as a whole. Consisting of some of the most prominent international legal scholars in the country, their work could not simply be brushed off as the product of “emotionalism” or politics. Other than the civil rights movement, the war in Vietnam was perhaps one of the most important questions vexing the United States. Moreover, the Committee members were not easily written off as Communist dupes or anti-American Americans. These were leading liberal international legal scholars and lawyers who believed in American democracy and its legal traditions. In the case of John H.E. Fried, he worked for the U.S. delegation at the Nuremberg Trials in 1945 and 1946 and edited the official transcripts of the proceedings.

Why Viet-Nam: The Munich Analogy at War

The Munich Analogy was a powerful tool used by the Johnson administration in 1964 and 1965 to sell its war to the American public. It was dominant precisely because it drew a comparison between the war in Vietnam and World War II. It was utilized both in public and in private discussions concerning escalation of the war. Utilized increasingly in 1964 and 1965, the administration employed the analogy to garner support among both liberals and conservatives by recalling British Prime Minister Neville Chamberlain’s appeasement of Hitler at Munich in 1938. For instance, Secretary of State Dean Rusk, the foremost proponent of the Munich Analogy, argued at a press conference on December 23, 1964, that “we feel

⁶⁷ Lawyers Committee on American Policy towards Vietnam, May 1967, Folder 01, Box 49, Douglas Pike Collection: Unit 03 - Legal and Legislative, The Vietnam Center and Archive, Texas Tech University. Accessed 15 Nov. 2013, <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=2184901007>.

that we have learned in the last many decades that a persistent course of aggression left to go unchecked can only lead to a general war and therefore that the independence of particular countries is a matter of importance to the general peace.”⁶⁸ In another example, in a meeting at Camp David on March 10, 1965, with President Johnson, Dean Rusk, Robert McNamara, and McGeorge Bundy, Rusk stated that the United States had two options: negotiate or escalate the war. By this time, Operation Rolling Thunder was under way and Johnson had dispatched the Marines to South Vietnam. Johnson responded to Rusk, according to Bundy’s notes of the meeting: “... if you can show me any reasonable out I’ll grab it...To give in = another Munich. *if not* here – then Thailand.”⁶⁹ The fears of the administration that a failure to confront what they saw as Communistic desires for domination of Southeast Asia would lead to an all-out general war were palpable.

In a compelling analysis of how the top U.S. officials used historical analogies in Vietnam War decision-making, Yuen Foong Khong argues that the Munich Analogy was utilized by the Johnson administration in public speeches as a way to explain and justify the war. Yuen demonstrates that the analogy was seldom used before 1965 and had not been a favorite argument used in the Kennedy administration. The chief adherents of the analogy – Vice President Lyndon Johnson and Secretary of State Dean Rusk – did not hold much sway in the Kennedy administration. However, once Johnson took power, the Munich Analogy factored in much more prominently in rationales for the war. More than just for public consumption, Yuen also argues that Rusk and Johnson believed wholeheartedly in the lessons of Munich. Yuen argues that Munich’s role in 1938 – and images of appeasing an aggressor – “led to a ‘no more Munichs’ syndrome in the postwar period.” Yuen goes on to argue that the Munich Analogy was the “intellectual basis of the domino theory” as we can see with Johnson’s fear in March 1965 that failure to stop communist aggression in Vietnam

⁶⁸ “Secretary Rusk’s News Conference of December 23,” 23 December 1964, in *The Pentagon Papers: The Defense Department History of United States Decisionmaking on Vietnam, Volume III* (Boston: Beacon Press, 1971), 724.

⁶⁹ Lyndon Johnson, 10 March 1965, quoted in Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bein Phu, and the Vietnam Decisions of 1965* (Princeton: Princeton University Press, 1992), 178.

would consume Thailand.⁷⁰ While Yuen, and others such as Arthur Schlesinger, Jr., were critical of the Johnson administration's use of the Munich Analogy, Cold War liberal historian Michael Lind argues that the analogy is "exactly" what "one would expect well-informed policymakers to use." "The lesson of Munich," Lind observed, "is based on a danger that a countries enemies will act assertively because they have *underestimated* the nation's actual military power and will. Chinese encouragement of North Vietnam's escalation of its war on South Vietnam was based on a classic Munich-type underestimation of American power and will."⁷¹ Perhaps this was the case. However, the Munich Analogy affirms the North-South paradigm as representative of the North invading a permanent, internationally recognized territorial boundary. At the time, there was no country to invade and those who were doing the supposed invasion were Vietnamese seeking to unify their country in a war for self-determination.

So pervasive was the analogy that it garnered widespread public acceptance among the United States' Western allies. In June 1965, Canadian External Affairs Minister Paul Martin argued that the war in Vietnam was an example of "indirect aggression" and that if North Vietnam is allowed to succeed in taking over South Vietnam "there will be incalculable consequences for world peace." Martin added that "if the rest of the world is prepared to sit back and see this happen, saying feebly that, after all, it is only a domestic rebellion so why not accept the inevitable, we would in my judgment, be guilty of an error of the same nature as the mistakes at Munich ..."⁷²

President Johnson utilized the Munich Analogy in his two most important speeches on Vietnam in 1965. In his April 7 John Hopkins University speech, Johnson argued that North Vietnam had openly "attacked the independent nation of South Vietnam" and that North Vietnam sought "total conquest." He warned that another reality of the war in Vietnam was the "deepening shadow of Communist China" and that the North Vietnamese are "urged

⁷⁰ Quoted in Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bein Phu, and the Vietnam Decisions of 1965* (Princeton: Princeton University Press, 1992), 4, 176-184.

⁷¹ Michael Lind, *Vietnam: The Necessary War* (New York: Simon & Schuster, 1999), 41-49. See also Arthur Schlesinger, Jr., *War and the American Presidency* (New York: W.W. Norton & Company, 2005), 131-133.

⁷² Paul Martin quoted in Yves Engler, *The Black Book of Canadian Foreign Policy* (Black Point: Fernwood Publishing and Vancouver: RED Publishing, 2009), 126.

on by Peking.” Nonetheless, Johnson asks: “Why are these realities our concern?” Since 1954, Johnson insisted, “every American President” has “made a national pledge” to the South Vietnamese and that he “intend[s] to keep that promise.” Moreover, if the United States left the South Vietnamese to be overrun by the North Vietnamese and China would “shake the confidence” of all the countries of the world – “from Berlin to Thailand” – in their belief “that they can count on us if they are attacked.” Moreover, he stated:

We are also there because there are great stakes in the balance. Let no one think for a moment that retreat from Viet-Nam would bring an end to conflict. The battle would be renewed in one country and then another. The central lesson of our time is that the appetite of aggression is never satisfied. To withdraw from one battlefield means only to prepare for the next. We must say in Southeast Asia--as we did in Europe--in the words of the Bible: "Hitherto shalt thou come, but no further."

Johnson concluded that the goal of U.S. policy was “the independence of South Viet-Nam, and its freedom from attack” and insisted on America’s benevolence, claiming “we want nothing for ourselves.” Johnson proclaimed that war was the only way to demonstrate that the United States’ only objective was “that the people of South Viet-Nam be allowed to guide their own country in their own way.”⁷³

In President Johnson’s second major speech on Vietnam where he announced a troop surge from 75,000 to 125,000 troops on July 28, 1965, at the White House, he used his most specific language yet. “Three times in my lifetime, in two World Wars and in Korea, Americans have gone to far lands to fight for freedom,” he said. “We have learned at a terrible and a brutal cost that retreat does not bring safety and weakness does not bring peace.” Moreover, “we learned from Hitler at Munich that success only feeds the appetite of aggression. The battle would be renewed in one country and then another country, bringing with it perhaps even larger and crueler conflict, as we have learned from the lessons of history.”⁷⁴ A week earlier, on the eve of the major decision to send hundreds of thousands

⁷³ President Lyndon B. Johnson's Address at Johns Hopkins University: "Peace Without Conquest," April 7, 1965, in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, Volume I, entry 172, 394-399 (Washington, D. C.: Government Printing Office, 1966). Available Online: <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650407.asp>

⁷⁴ Lyndon B. Johnson: "The President's News Conference," July 28, 1965. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=27116>.

more troops to Vietnam at the National Security Council, on July 21, 1965, Ambassador Henry Cabot Lodge, Jr., argued, “I feel there is a greater threat to start World War III if we don’t go in. Can’t we see the similarity to our own indolence at Munich?”⁷⁵

After Johnson’s July 28 speech announcing the troop surge and a major escalation of the war, the Pentagon produced a thirty minute film called *Why Viet-Nam*. Like the pamphlet released in late-August of the same name, there was no question mark in the title; rather, the film’s title was an “assertion” leaving no doubt about America’s commitment to South Vietnam.⁷⁶ The film was highly influential as it was shown to every soldier sent to Vietnam and was also widely distributed by the Pentagon, appearing on ABC’s “The Big Picture” program. The film was sent to over five hundred high schools and universities and was shown at Legion’s across the United States.⁷⁷ It was also a masterful use of the Munich Analogy.

Opening with President Johnson’s July 28 press conference, the film cuts to four scenes from Vietnam coupled with piercing music and the question *Why Viet-Nam* repeated four times. Moving from the introduction of the president’s press conference, the film takes us to “Munich, 1938.” With video showing German Chancellor Adolf Hitler and Italian leader Benito Mussolini arriving for the peace conference with British Prime Minister Neville Chamberlain, the film’s narrator tells us: “The meeting will long be remembered, for

⁷⁵ Henry Cabot Lodge, Jr., 21 July 1965, quoted in Yuen Foong Khong, *Analogies at War: Korea, Munich, Dien Bein Phu, and the Vietnam Decisions of 1965* (Princeton: Princeton University Press, 1992), 3.

⁷⁶ After the July 28 announcement of the troop surge, the president wanted to release a booklet that explained the diplomatic, military, and international development aspects of the war. Working under the national security adviser, James C. Thomson was charged with assembling statements from the president, the secretary of state and secretary of defense that would be a definitive answer as to why the United States had staked so much in Southeast Asia. The booklet was produced with lightning speed over the third weekend in August after LBJ got wind that the Republic National Committee was releasing its own “White Paper” on Vietnam. Intending to scoop the Republicans initiative and beat them at their own game, the booklet was released two days before the Republican’s report. The administration’s work – titled “Why Vietnam” – was according to Thomson an “assertion” rather than a “question.” There was to be no doubt about the United States’ commitment to South Vietnam. The booklet included a section on “The Roots of Commitment” with selections of letters from Presidents Eisenhower and Kennedy, a statement from President Johnson and testimonies by Secretaries Rusk and McNamara in front of the Senate Armed Services Committee. See: “Why Vietnam,” (Washington: United States Government Printing Office, 23 August 1965), and, James C. Thomson, Jr., 22 July 1971, Lyndon Baines Johnson Library Oral History Interview.

⁷⁷ George C. Herring, *LBJ and Vietnam: A Different Kind of War* (Austin: University of Texas Press, 1994), 132, and, Randolph Lewis, *Emile de Antonio: Radical Filmmaker in Cold War America* (Madison: The University of Wisconsin Press, 2000), 78.

it opens the door to the dreams of dictatorship.” After playing scenes from Chamberlain’s speech, the narrator continues: “Peace in our time; a shortcut to disaster.” We then move to Korea in 1950 where “aggression was again unleashed ... But free men had begun to learn the lesson and something *was* done.” The lesson, as the film portrayed it by quoting President Johnson’s press conference: “Aggression unchallenged, is aggression unleashed.” So it was in the first three minutes of the thirty minutes film that the United States’ objectives in Vietnam were the same as its objectives in World War Two and in Korea. Moving on to discuss the key events between 1954 and 1965, the film argues that from 1954

the basic story of United States help to Vietnam is simple: the Communists have steadily increased their pressure on South Vietnam. South Vietnam has asked for greater support to resist that pressure and has received it. So increasing Communist aggression has called forth increases in the scope of United States counter-action. But United States policy has remained the same: we are committed to helping a free people defend their sovereignty.

Why Viet-Nam depicted Ho Chi Minh in North Vietnam planning a “reign of terror” in South Vietnam and even subverted the elections promised for 1956 in the Geneva Agreements. Despite this subversion, the South Vietnamese with the benevolent aid of the United States had brought “peace” and “fresh beginning[s]” by “building new homes; new hopes.” This was no doubt an allusion to the same path that Americans’ pursued after World War II after soldiers settled back home. The film contrasts the aid and security the United States provided South Vietnam to the nefarious coalition between the Soviet Union, China and the North Vietnamese which were directing rebellion in the South with “terror and subversion” through “open guerrilla war,” “assassinations,” and the “war of liberation.” Despite the North’s attempts at conquering the South, the Southern economy was booming: production in rice, coal, phosphate, zinc, manganese, and rubber and latex processing; all integral to “industrial development.”⁷⁸

The film is not only important because it was widely shown to the American people in high schools, universities, and on television, but because it became mandatory viewing for U.S. soldiers deploying to Vietnam. The film produces the narrative crystallizing the North-

⁷⁸ *Why Viet-Nam*, Department of Defense, 1965. The film is available on C-Span as part of ABC’s *The Big Picture* television series. Available online: <http://www.c-span.org/video/?302213-1/WhyVi>.

South paradigm as integral to the struggle in Vietnam. Dividing the country into a tyrannical communist North Vietnam and free and independent South Vietnam, it functioned as a plea for American intervention in Southeast Asia to stop Communist aggression and plans for domination of the region. Drawing a line straight from Munich in 1938 to Korea to the battlefields of South Vietnam, the film presents the Vietnamese as incapable of determining their own political and economic future without the help of the United States. Randolph Lewis, biographer of the radical filmmaker Emile de Antonio, has argued this film, as well as other pro-war films, produced an orientalist dichotomy between the Vietnamese “other” and the Americans. “This sort of orientalism – a way of seeing that was implicitly violent, out of context, and reductive – was at the heart of these official representations of Vietnam,” Lewis writes.⁷⁹ At the time in 1965, there were other arguments being made that what was happening in Vietnam was much more complex than the official narrative and that it was the result of American interventionism in South Vietnam.

At the heart of *Why Viet-Nam*'s explanatory appeal was the Munich Analogy, which had been utilized in President Johnson's two major speeches on the war in Vietnam in 1965. Staughton Lynd responded specifically to this analogy and argued after the president's John Hopkins speech in the *New York Times* this rationale demonstrated “the basic fallacy in American policy toward Vietnam.” Lynd wrote that Johnson “continues to assume that the conflict there is essentially a military invasion, like those of Nazi Germany, when in fact it is essentially a civil war.” This was an unpopular view at the time in 1965 and remained so throughout Johnson's presidency. Pro-war intellectuals and the national media had bought into the anti-communist consensus after World War II and such appeals to fight in Vietnam to stop aggression because the United States had done so in the 1940s and 1950s carried substantial weight. “Proceeding on this mistaken assumption,” Lynd continued, “the President has offered to negotiate unconditionally with all interested parties except our actual antagonists [the Viet Cong].”⁸⁰ For Lynd and other radicals who critically analyzed the roots

⁷⁹ Randolph Lewis, *Emile de Antonio: Radical Filmmaker in Cold War America* (Madison: The University of Wisconsin Press, 2000), 78.

⁸⁰ Staughton Lynd, “Civil War, Not Invasion,” *New York Times*, 14 April 1965.

of American military and economic power, the escalation of the war in Vietnam on such pretenses could only spell disaster. In his memoir, Lynd called 1965 “the year of wrath.”

Lynd’s views were shared by unlikely personalities. Bernard Fall, the hawkish French soldier-scholar, who was an important adviser to the United States military in the early-1960s, had grown increasingly wary of the application of U.S. counter-insurgency in Vietnam. Fall complained in the December 1965 edition of *Ramparts* magazine that “I have just returned from the war there [in Vietnam] and found it depersonalized and, to a large extent, dehumanized.” He refuted the Johnson administration’s official justification for the war – that it is being “tested” in Vietnam and that the U.S. has “to stand up and stop communism” – embodied in the “analogy of Munich.” He wrote that

the situation in Vietnam isn’t Munich; it’s Spain...One side believes it can win with a combination of guerrilla warfare and political ideology. The other side believes it can win with the massive use of military power. America may be able to prove, as the Germans and Italians did in Spain, that superior firepower will carry the day in such a situation.

However, Fall questioned if the effort was worth the “human sacrifice.”⁸¹

Howard Zinn, World War II bombardier, demolished the utilization of the Munich Analogy by the Johnson administration in an article in *The Nation* magazine on January 17, 1966. He argued that the inability to criticize the Munich Analogy “is to leave untouched the major premise which supports the present policy of near genocide in Vietnam.” Zinn drew attention to the substantive differences between the situation that existed in Europe in 1938 and that of Vietnam in 1965. First, Zinn pointed out that in Czechoslovakia in 1938, the “main force operating against the Czech *status quo* was an outside force, Hitler’s Germany,” whereas “the major force operating against the *status quo* in South Vietnam has been an inside force, formed in 1960 into the NLF” and its main ally “is not an outside nation but another part of the same nation, North Vietnam.” Zinn turned the analogy on its head: “The largest outside force in Vietnam consists of American troops.” Second, he wrote that the Czech government, which Britain and France gave away to the Germans, “was a strong, effective, prosperous, democratic government...The South Vietnamese government which

⁸¹ Bernard Fall, “This Isn’t Munich, It’s Spain,” *Ramparts*, December 1965, 23-29.

we support is a hollow shell of a government, unstable, unpopular, corrupt, a dictatorship of bullies and torturers, disdainful of free elections and representative government.” Third, Zinn demonstrated that whereas in 1938 standing against Germany meant confronting “the central threat of that time,” the U.S. intervention in Vietnam “does not at all engage what the United States considers the central foes – the Soviet Union and Communist China.” Fourth and fifth, while Munich was an example “of a long line of surrenders and refusals to act” against Japan, Italy, and Germany in the 1930s; the crisis in Vietnam is demonstrative of a series of examples where the West had “on occasion held back,” but more likely acted: Korea, the Philippines, Malaya, South Vietnam, Guatemala, Cuba, and the Dominican Republic. Each case, however, did not serve as a deterrent. Zinn concluded that

One touches the Munich analogy and it falls apart. This suggests something more fundamental that American policy makers and their supporters simply do not understand either the nature of communism or the nature of the various uprisings that have taken place in the postwar world. They are not able to believe that hunger, homelessness, oppression are significant spurs to revolution, without outside instigation, just as Dixie governors could not believe that Negroes marching in the streets were not led by outside agitators.⁸²

Zinn’s article, which would form the basis of his influential *Vietnam: The Logic of Withdrawal*, offered a powerful argument against the United States government’s claims. Foremost was Zinn’s challenge of the Munich Analogy and that the United States intervened in Vietnam because of aggression from North Vietnam.

Conclusion

Surveying the main counter-arguments set out by independent journalists such as I.F. Stone, liberal international legal scholars in the Lawyers Committee on American Policy Towards Vietnam, radical intellectuals such as Staughton Lynd and Howard Zinn, and French soldier-scholar Bernard Fall, it is possible to trace the emergence of the view of the conflict in Vietnam as a battle between Vietnamese for the fate of their country in the continuation of an anti-colonial struggle begun after World War II. Using the Johnson administration’s

⁸² Howard Zinn, “Vietnam: Setting the Moral Equation,” *The Nation*, 17 January 1966, 65-67.

arguments against itself, these critics employed international legal mechanisms adopted after World War II and the contemporary history of Vietnam to argue the American war in Vietnam was illegal; a war of aggression. Indeed, as we have seen, this view found little popular support in the war's early months, and authorities undertook efforts to vehemently attack those who adopted such positions. The arguments employed by these critics, based on a sweeping and nuanced legal and moral analysis of the war, would lay the foundation for the growth of a mass protest anti-Vietnam War movement.

Chapter 2

“End the Draft”:

David Mitchell, the Early Draft Resistance Movement,
and the War in Vietnam, 1964-1967

The anti-draft movement during the early years of the Americanization of the Vietnam War was disorganized and much of what existed fell on the shoulders of the traditional pacifist organizations such as the War Resisters League (WRL), the Fellowship of Reconciliation (FOR), the American Friends Service Committee (AFSC) and the Committee for Non-Violent Action (CNVA). The anti-draft movement did not become a mass movement against the Vietnam War until 1967 and 1968. As the war escalated, so too did the draft calls and the number of draftees killed in action. But the number of draft calls and the daily reality for soldiers in Vietnam was not the sole reason a mass movement emerged in the United States. A confluence of events and of protagonists propelled the movement from the margins in 1965 and 1966 into the center of the struggle to end the war by 1967.

The period between 1964 and early-1967 was, in the words of one historian, “a lonely time to oppose the war.”¹ The early peace movement – and especially the draft resistance – consisted of disparate acts by individuals or small groups of people taking big risks against the war. To oppose the draft or the war did not require, for example, an individual to read the Nuremberg Principles or know about the intricacies of domestic and international law. The horrors of the war, brought home on television and in newspapers, were enough to inform anyone of what Bernard Fall called the “impersonalized” war in Vietnam. By 1967, these disparate acts crystallized. During this period, draft calls rose from 150,808 in 1964 to 103,328 in 1965 to 343,481 in 1966 and 298,559 in 1967. Corresponding with escalation of the war in 1965, prosecutions of draft related noncooperation went from 316 to 369 to 642 to 1,314 respectively. In the atmosphere of the Cold War where any dissent was linked to

¹ Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 31.

communism and anti-Americanism, the Justice Department was able to obtain quick convictions and sentences for the earlier refusers: 227 in 1964, 262 in 1965, and 450 in 1966.² The U.S. government began to take the nascent draft resistance movements more seriously by the end of 1966, corresponding with growing activity against the draft by the U.S. peace movement.

A central figure in this struggle was David Mitchell and he played a pivotal role in both theorizing and practicing the ideas put forward in the Nuremberg Principles of 1950. In January 1965, Mitchell became one of the first draft resisters to be prosecuted for his draft induction refusal. Mitchell's case rested on his noncooperation with the war in Vietnam by specifically invoking the Nuremberg precedent and that the United States was committing war crimes, crimes against humanity and crimes against peace in Vietnam. Mitchell's praxis is uncommon for the early draft resisters and it is in this uniqueness that we can better explore how the anti-draft movement went from the margins to the center of the antiwar struggle.

Mitchell was not a pacifist or a conscientious objector. He was a noncooperator with the draft system. More precisely, he was a selective war objector. As such, Mitchell criticized both the Selective Service System as a function of American imperialism in the Cold War and traditional pacifist objection to the draft as individualistic. In 1963, he would co-found End The Draft, a Brooklyn, N.Y., based anti-draft collective. In May 1964, Mitchell argued in the pages of the collective's newsletter, *downdraft*, that "many draft refusers fail to get down to the political issues in their cases; many refuse to contest their own 'legal guilt' in court. Yet an effective way of challenging our government's policies and morality is by maintaining a *not guilty* plea in the courts." Mitchell went on to state his fundamental position against the draft and the war in Vietnam:

The position of individual guilt and individual responsibility, and therefore one's obligation to dissociate himself from war crimes, is established – not only philosophically by Thoreau, etc. – but historically and legally by Nuremberg International law which is part of the law of every country. Under international

² See Table 8.1 "Draft Efficiency, 1953-1967" in George Q. Flynn, *The Draft, 1940-1973* (Lawrence: University Press of Kansas, 1993), 212. See also: Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 46.

Law the United States is guilty of Crimes Against Peace and is also in violation of the Kellogg-Briand Pact, other international agreements, and Article 2 Section 4 of the United Nations Charter which prohibits a policy of force and threats of force. Only if we served as accomplices in these activities would we be guilty morally or legally.

The opposition of Mitchell and End The Draft to the draft and the Vietnam War was based on a radical – or structural critique – of American society as a whole. End The Draft viewed the Selective Service System as an “integral part of our country’s domination or threatened domination of small nations” and viewed U.S. foreign policy as both “arrogant and criminal.” The collective criticized the draft for “channeling” American youth into military roles through the use of occupational and student deferments and its inherent class biases whereby the Selective Service acted as a mechanism of social uplift to cure “economic ills by turning unemployed youth into grist for the war preparations mill.”³ Moreover, Mitchell connected the struggle against militarism to civil rights campaigns in the South. For instance, Mitchell argued that “the FBI that harasses and arrests people on the draft issue is the same that wears blinders when it comes to beatings, bombings, and murders in the civil rights struggle.”⁴ In connecting these issues, Mitchell and the collective furnished a visionary and pioneering critique of the draft that was three years ahead of the development of the mass anti-draft movement of 1967-1968.

End The Draft’s and Mitchell’s position was, and remained, almost singularly alone in the wilderness on the draft issue between 1963 and 1967. By January 1966, with it looking as if Mitchell would lose in court, End The Draft editorialized in its newsletter that Mitchell’s position “is the farthest out – and therefore gets little of the support that goes to mild, non-basic, non-toxic amorphous positions.” “Before the anti-draft activity hit the headlines, no organization would even return our contact overtures,” they continued, and when Mitchell’s case began making the national news, “organizations allow[ed] themselves

³ “how to beat the draft...”, quoted in Alice Lynd, *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 96.

⁴ David Mitchell, “Challenge the Draft,” *downdraft*, Vol. I, No. III, May 1964.

to contact us just long enough to find out that we were too far out, too uncompromising and too unimpressive ‘prestige[-]wise. ...’⁵

Mitchell’s position was supported early on by intellectuals and older pacifists who had been through the experiences of World Wars I and II and who also offered a radical analysis of the war in Vietnam. For instance, Mitchell was partnered with Staughton Lynd on a panel discussion at Yale University in front of a capacity audience at Dwight Hall on the draft and its legality in October 1965. Lynd spoke in support of Mitchell’s position, arguing, “Marines are killing prisoners in Vietnam. The Nuremberg Trials established that if a government requires one to commit crimes against humanity, one must disobey.”⁶ Both Mitchell and Lynd would play a large role in speaking about the importance of the Nuremberg Principles to war resisters during the war. The invaluable role of adult supporters such as Lynd, A.J. Muste, and Bertrand Russell helped spread and ultimately legitimate the arguments of Mitchell and End The Draft.

The following chapter will examine the draft noncooperation of David Mitchell as a way to further explore the early challenges to the draft between 1964 and 1967 before a mass movement developed against the draft and against the war. Mitchell’s resistance has not been fully examined in the literature on the anti-Vietnam war movement. While his noncooperation is the subject of brief references in the larger historical literature, the case of David Mitchell has not been explored for its movement building campaign.⁷ Mitchell was one of the few early draft resisters actively seeking to build a much larger draft resistance movement and for this he would be convicted and sentenced to jail for violating the Selective

⁵ “Why David Mitchell Will Go to Jail Soon,” *downdraft*, Vol. III, No. I, January 1966.

⁶ Quoted in “Panelists Split in Heated Debate Over Issue of Cold War Draft,” *The Yale Daily News*, 5 October 1966.

⁷ See, for instance, Charles DeBenedetti and Charles Chatfield’s somewhat misinformed analysis concerning Mitchell in *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990), 96. While rightly characterizing Mitchell and End The Draft as representing the “political side” of the early anti-draft movement, the authors erroneously state that Mitchell adapted his defense to incorporate the Nuremberg precedent during his trial. The Nuremberg Precedent was invoked by End The Draft in its founding declaration and was part of Mitchell’s argument for draft resistance before he faced draft related charges. Other important works on the American antiwar movement, such as Tom Well’ *The War Within: America’s Battle Over Vietnam* (New York: Henry Holt and Company, 1996) does not include any mention of David Mitchell. Other works, such as John F. and Rosemary S. Bannan’s *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974) feature a whole chapter on Mitchell and the legalistic aspects of his trial and draft non-cooperation.

Service Act. While in jail, his wife Ellen Schneider wrote to Alice Lynd that “one of the main objectives of his fight was to help build a movement and he often makes this point in letters.”⁸ As Stephen Barkan notes in *Protesters on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements*, the use of courts and trials in social movements can help to “mobilize important resources” such as motivating those directly involved, in expanding the base of particular organizations involved in litigation, and to get their message into the public sphere. Barkan writes that “the political trial, then, must be understood as both a legal event and as a small battle in the larger struggle between social movements and their opponents.”⁹ In May 1964, David Mitchell wrote that if he were “brought to trial, I plan to use my trial as a forum in which to try the United States Government before the world” in order “to stir up a storm.”¹⁰

David Mitchell

David Mitchell III was born in 1943 and became politically active as a freshman at Brown University in 1960-1961. He was personally concerned with what he called U.S. imperialism and interventionism around the world and joined the Student Peace Union (SPU) at Brown. After the United States sponsored Bay of Pigs invasion in April 1961, Mitchell dropped out of university and immediately traveled over 600 miles to attend the SPU’s national conference at Oberlin College in Oberlin, Ohio. Mitchell was troubled by the infighting within the SPU and its lack of support for unilateral disarmament by the United States. He would spend the remainder of the summer of 1961 working for the New England Committee for Nonviolent Action in Connecticut.¹¹

⁸ Ellen Schneider to Alice Lynd, 6 August 1967, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 12, Alice book *We Won’t Go* – correspondence, notes and rough drafts re: David Mitchell entry.

⁹ Steve E. Barkan, *Protesters on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements* (New Brunswick: Rutgers University Press, 1985), 5, 11.

¹⁰ David Mitchell, “Challenge the Draft,” *downdraft*, Vol. I, No. III, May 1964.

¹¹ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 17. According to Lynd and Ferber, “The New England affiliate [of the CNVA] was created in 1960 to facilitate a program of sustained nonviolent civil disobedience against the launching of Polaris submarines at New London. A remarkable array

David Mitchell was eager to take a principled stand against the growing nuclear arms race. On August 8, 1961, he and seven others with the Committee for Non-Violent Action (CNVA) were arrested in Groton, Connecticut, at the gateway to the Electric Boat Division of General Dynamics for interfering with the deployment of the Ethan Allen, a Polaris nuclear submarine.¹² On October 30, Mitchell was arrested again after a series of anti-nuclear protests in front of the Soviet Union's United Nations mission headquarters. The communist superpower's decision to test a hydrogen bomb triggered the protests.¹³ However, Mitchell's participation in these direct actions led him to believe that such symbolic confrontation of the machinery of nuclear war had little effect on the proliferation of these weapons of mass destruction. He searched for more meaningful and effective ways to confront the military-industrial-complex.¹⁴ He ended up moving from Connecticut to Brooklyn at the end of 1961.

Shortly after Mitchell's eighteenth birthday in 1961 he registered with his local draft board, number 17 in Connecticut, under the Universal Military Training and Service Act. In August, local board 17 sent him his Classification Questionnaire. As a result of his participation in the anti-nuclear protests and his growing political consciousness, Mitchell decided not to cooperate with his local draft board's Questionnaire and thus began his involvement in the anti-draft movement.¹⁵ In the two years between this initial contact with the Selective Service System, Mitchell endured harassment throughout 1962 and 1963 by the F.B.I. at his place of employment and at his house; the F.B.I. even visited Mitchell's family. It was during this two-year period, between 1962 and 1963 that Mitchell decided to move

of resisters, including David, Gene Keyes, and Tom Cornell, spent time with the New England CNVA during the early 1960s.”

¹² “8 Pacifists Jailed in Submarine Case,” *New York Times*, 17 August 1961, 8. For an excellent analysis of the early Committee for Non-Violent Action (CNVA) actions, see James Tracy, *Direct Action: Radical Pacifism from the Union Eight to the Chicago Seven* (Chicago: University of Chicago Press, 1996), 99-123.

¹³ “8 Arrested Here in Protest on Soviet Bomb Tests,” *New York Times*, 31 October 1961, 15.

¹⁴ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 17-18.

¹⁵ For a detailed description of the correspondence between Mitchell and his local draft board, see Conrad Lynn, “The Case of David Mitchell Versus the United States,” *Right and Left: A Journal of Libertarian Thought* Vol. I, No. 2 (Autumn 1965): 13-14.

“beyond simply a personal refusal – to a direct challenge of the government in order to attempt to stop the criminality which they were pursuing.”¹⁶

In November 1962, Mitchell’s search for more effective political organizing crystallized in the formation of the End The Draft Committee. The group took its name from Norman Thomas’ group End The Draft in ’63, which sought to put political pressure on Congress to dismantle the peacetime draft under the Selective Service law, the extension of which was under review at the time. Mitchell and the others involved in the creation of End The Draft sought a more systemic critique of the peacetime draft than Thomas’ group, which viewed the draft as unlawful under civil libertarian grounds.¹⁷ Moreover, unlike Thomas’ group and many other liberal or social democratic organizations of the period, End The Draft was a non-exclusionary group that allowed Marxists into its organization. The Committee’s inaugural statement of March 1963 proclaimed: “In the tradition of Thoreau and the principles of individual guilt and individual responsibility established in the Nuremberg trials and in the first session of the United Nations, we assert the right and obligation of the individual to protest and disassociate himself from these criminal preparations.”¹⁸ The collective connected the particularly American tradition of noncooperation with the government through civil disobedience advocated by Henry David Thoreau in the 1840s to the post-World War II Nuremberg Principles which called upon those engaged in war to

¹⁶ Quoted from Mitchell’s talk at the 4 December 1966 “We Won’t Go” conference in Chicago in Mitchell, “What is Criminal?” in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 94.

¹⁷For instance, End The Draft’s statement before the Senate Armed Services Committee on 12 March 1963 during its hearings on the bill to extend the peacetime draft, bill S846, read in part: “The committee which I represent goes beyond conscientious objection. It goes beyond the plight of the individual and his conscience caught in the draft; it is concerned with the basic war-like purpose of the draft itself. More than liberating an individual category from the draft, we are interested in liberating the nation as a whole from an “un-American” threat-technique which has been countenanced only since World War II.” End The Draft argued that the draft “forces our country’s people to accept war as a sane, normal function of world relations by making national policy of the military subjugation of our young men and by conditioning them, in the services, to the cold war.” Quoted from “Statement of the *End The Draft* Committee on the Bill to Extend the Draft (S 846) Before the Senate Armed Services Committee, March 12, 1963,” Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University. See also: Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 18.

¹⁸ Quoted in Conrad Lynn, “The Case of David Mitchell Versus the United States,” *Right and Left: A Journal of Libertarian Thought* Vol. I, No. 2 (Autumn 1965): 14.

refuse a superior's orders if they were illegal. This was perhaps the earliest manifestation of the Nuremberg precedent being used in opposition to the draft in the United States.

In January 1964, the End The Draft committee began publishing a small newsletter titled *downdraft*. This newsletter was an important forum for its member's views and announcements of upcoming events, and it went out nationwide and internationally to subscribers such as the Bertrand Russell Peace Foundation in the United Kingdom. In a lead editorial in *downdraft*'s first edition, Mitchell argued that "the draft issue continues to suffer from a lack of concerted opposition." He criticized peace groups who "shelved" the draft issue until it was up for congressional approval again in 1967 and believed the government made the draft "more palatable," quelling criticisms by creating exemptions "*within the system*" for fathers in March 1963 and married men in September 1963. Instead, Mitchell argued "the draft" is "an instrument in the cold war" and "opposition should not be organized quickly and sporadically, or for Congressional hearings only, but should be organized *by uniting present opposition and igniting general anti-draft sentiment.*"¹⁹

The early anti-draft movement consisted mainly of the efforts of traditional pacifist groups: the Committee for Non-Violent Action (CNVA), the Fellowship of Reconciliation (FOR), and the War Resisters League (WRL). By 1964, other small groups, acting mainly on a local level, such as the May 2nd Movement (M2M) and Youth Against War and Fascism, added their presence to the movement. In the early part of 1964, the draft was subject to a number of protest actions in New York City. For instance, on March 14, Youth Against War and Fascism organized a 150-person march in midtown Manhattan that snaked along 14th Street and Fifth Avenue to the U.S. Army and Air Force Exchange Center. Youth Against War and Fascism passed out 5000 leaflets which read in part: "Don't Let Vietnam Become Another Korea. ...In Korea, 157,000 Americans and a million Koreans were killed and wounded...In Vietnam the toll would be even greater...The Vietnamese will not fight for the Pentagon, the State Dept., the C.I.A., or the White House...U.S. youth will be asked to die in

¹⁹ David Mitchell, "Editorial," *downdraft*, Vol. I, No. I, January 1964.

Vietnam—while Generals and the Bankers grow fat...Only a mass protest can stop the war in Vietnam.”²⁰

Actions against the war in Vietnam continued in April and May. On April 25, *The National Guardian* printed an advertisement signed by 87 individuals declaring their objection to the war in Vietnam. The *New York Times* reported that several “liberal publications” refused to print the ad “patterned on one that French students once signed opposing the Algerian war.” Moreover, the *Times*, quoting a number of its signers, stated that they “represent a spectrum of left political opinion” from non-communists, to those who traveled to Cuba “in defiance of a State Department ban,” to those who “are now conducting drives for medical supplies for the Vietcong guerrillas in Vietnam.”²¹ The escalation of the war led to the establishment of new groups, such the May 2nd Committee. The Committee organized a demonstration on May 2 “to End U.S. Intervention in Vietnam” and the “withdrawal of U.S. troops.” The May 2nd Committee, later known as the May 2nd Movement, was formed by Russ Stetler of the Haverford Student Peace Union, Levi Laub of the Progressive Labor Party and Peter Camejo of the Young Socialist Alliance. The May 2nd Committee also began organizing an early “we won’t go” style petition in the summer and by

²⁰ Youth Against War and Fascism press release, “New Yorkers Stage Militant Demonstration Against U.S. Aggression in Vietnam,” 14 March 1964, quoted in *downdraft*, Vol. I, No. II, April 1964. The release went on to state: “A considerable number of people joined the demonstrators who carried placards and chanted slogans such as: “No More Koreas, Bring the Troops Home,” “Stop the War in Vietnam,” “Withdraw all U.S. Troops from Vietnam,” “No War in Vietnam, North or South.” The group claimed that it was its sixth protest in New York City against the war in Vietnam.

²¹ The advertisement read:

We the undersigned

ARE YOUNG AMERICANS OF DRAFT AGE. We understand our obligations to defend our country and to serve in the armed forces but we object to being asked to support the war in South Vietnam.

BELIEVING that the United States participation in that war is for the suppression of the Vietnamese struggle for national independence, we see no justification for our involvement. We agree with Senator Wayne Morse, who said on the floor of the Senate on March 4, 1964, regarding South Vietnam, that “We should never have gone in. We should never have stayed in. We should get out.

BELIEVING THAT WE SHOULD NOT BE ASKED TO FIGHT AGAINST THE PEOPLE OF VIETNAM, WE HEREWITH STATE OUR REFUSAL TO DO SO.

The National Guardian, 25 April 1964. See also: Lawrence O’Kane, “87 Youths Sign an Ad Declaring They Wouldn’t Fight in Vietnam,” *The New York Times*, 26 April 1964.

February 1965 attained 1000 signatures of mostly students.²² During Armed Forces Week – May 9 to 17 – a series of anti-Vietnam War protests took place in Manhattan, sponsored the War Resisters League, the Committee for Nonviolent Action, the Catholic Worker, and the Student Peace Union. During the week, leaflets were passed out at the “Power of Peace” armed forces exhibit in Union Square and on Saturday May 16, nine people burned their draft cards. Speakers included David McReynolds of the WRL, Roget Lockhard of the SPU, Julian Beck of the Living Theater and the General Strike for Peace, Bob Gore of CNVA, and Tom Cornell of the Catholic Worker. Draft cards were burned in front of one hundred “spectators,” according to the Associated Press, with David McReynolds announcing: “You have just witnessed an act of civil disobedience done without arrogance and with humility.”²³

Anti-draft activity was picking up steam in April and May, but End The Draft viewed much of the efforts as ineffective. Martin Boksenbaum criticized the first “We Won’t Go” statement in *downdraft*’s third installment. He wrote that the group was contacted to sign the advertisement, however, its members were unable to sign because of the premise of the petition which stated: “We understand our obligations to defend our country and to serve in the armed forces but we object to being asked to support the war in South Vietnam.” Boksenbaum argued that such a premise is contradictory and that “we do not understand any such obligation to serve in the armed forces, nor do we agree with what our country calls defense.” Moreover, Boksenbaum believed the sentence was added by its drafters to make the statement “respectable.” He went on to criticize the May 16 draft card burning as bordering “on the ritualistic by making a fetish of the individual’s abhorrence of violence.” Boksenbaum criticized this civil libertarian position of the draft card burners because “the basic point is the individual’s responsibility in opposing the criminality to which his country would have him acquiesce.” Instead, Boksenbaum argued that “the strongest tactic lies in

²² See Fred Halstead, *Out Now!: A Participant’s Account of the American Movement Against the Vietnam War* (New York: Monad Press, 1979), 167.

²³ “9 Demonstrators Burn Draft Cards in Protest,” *The Hartford Courant*, 17 May 1964. For other early organizing efforts against the war in Vietnam, Andrew Hunt, *David Dellinger: The Life and Times of a nonviolent revolutionary* (New York: New York University Press, 2006), 124-125, 132-136; Charles DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990), 81-102; and James Tracy, *Direct Action: Radical Pacifism from the Union Eight to the Chicago Seven* (Chicago: University of Chicago Press, 1996), 124-133.

uniting with others in opposition to the criminality and in support of individual protest.” End The Draft hoped that the “ferment” that was beginning to rise on “both the draft issue and the war in Vietnam” would not be channeled “into avenues amenable to the cold war and antithetical to peace.”²⁴

David Mitchell versus the Selective Service System

The confrontation that Mitchell had been agitating for with the Selective Service System came to fruition by the end of 1964 and the beginning of 1965. Throughout 1964, letters from his local draft board continued to reach him. He received his Order to Report for Armed Forces Physical Examination on January 31, 1964. While Mitchell did not cooperate with his local draft board, they did not seek to prosecute him. Despite this, he received visits from the Federal Bureau of Investigation. In May 1964, Mitchell wrote a piece titled “Challenge the Draft” in *downdraft* and sent it to local board 17 in which he not only challenged the legitimacy of American policy in Vietnam, but argued, “I refuse to cooperate with any Koreans, Cuban invasions or blockades, Vietnams, or with the nuclear arrogance with which we threatened to blow up the world.”²⁵ On August 18, local board 17 notified Mitchell that his “delinquency status was removed” and that his “classification reopened and considered anew.”²⁶ Starting the process all over again, on December 14, a new Order to Report for Induction arrived in Mitchell’s mailbox on January 11, 1965. His refusal to report resulted in the government’s decision to prosecute him in the courts, which coincided with its preparations to widen the war in Vietnam.

The F.B.I. also stepped up its harassment of Mitchell. On June 1, 1965, Mitchell surrendered to F.B.I. agents in his lawyers’ office and, the following day, End The Draft issued a press release stating: “During the past week, in an attempt to find and arrest David

²⁴ Martin Boksenbaum, “Criticism of Actions Protesting the Draft and U.S. Intervention in Vietnam,” *downdraft*, Vol. I, No. III, May 1964.

²⁵ Quoted in David Mitchell, “What is Criminal?” in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 98-99.

²⁶ Conrad Lynn, “The Case of David Mitchell Versus the United States,” *Right and Left: A Journal of Libertarian Thought* Vol. I, No. 2 (Autumn 1965): 16.

Mitchell, specially trained FBI men have been scurrying up ladders into his second story apartment...” The committee playfully added: “When Mitchell finally caught up with the FBI yesterday, he maneuvered them into the office of his counsel, Conrad J. Lynn...They were not allowed to appear with their ladders. On this occasion, Mitchell surrendered voluntarily and was taken to the Federal Building.”²⁷

Mitchell plead not guilty in United States District Court in New Haven two weeks later on June 14, and requested a jury trial. Together with Mitchell’s attorney, Conrad Lynn, a noted civil rights lawyer, they prepared a thrifty-seven page brief for a pre-trial motion to dismiss the case. The brief laid out Mitchell’s contentions that U.S. policy in places such as the Dominican Republic and Vietnam violated the Nuremberg Principles, as well as international and constitutional law. The brief argued that Mitchell’s open challenge to the U.S. government “voices an indictment against its leaders for their national arrogance and racial chauvinism.” “Mitchell expressed his belief that U.S. officials had failed to imbue “brown, black or yellow people” with “the full status of humanity.” Nonetheless, the ideology of U.S. foreign policy resulted in “Hiroshima, Nagasaki, Indian and Negro genocide, and the atrocities in Vietnam.”²⁸ In the defendant’s affidavit, Mitchell argued that his position had been clear and was stated over a four-year period where he “challenged, obstructed, and pursued the United States government in an attempt to bring *it* to justice. My draft board’s response has been a complete avoidance of the issues.” Moreover, Mitchell added: “Yet, now with the United States in the process of compounding its aggression and slaughter around the world by a massive use of bombs and troops to ‘pacify’ and occupy Vietnam, they have summoned the legal machinery to take me in tow – to get me out of the way.”²⁹

²⁷ “Voluntary Surrender of Draft Refuser Outmaneuvers FBI Posse,” 2 June 1965, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University. Mitchell reported that the F.B.I. had been harassing him since at least early-1964. See: David Mitchell, “Challenge the Draft,” *downdraft*, Vol. I, No. III, May 1964.

²⁸ Conrad Lynn, “The Case of David Mitchell Versus the United States,” *Right and Left: A Journal of Libertarian Thought* Vol. I, No. 2 (Autumn 1965): 31. See also: End The Draft press release “David Mitchell Begins Prosecution of Government,” 14 June 1965, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University.

²⁹ Affidavit quoted in David Mitchell, ““What is Criminal?”” in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 100-101.

The pre-trial motion was argued before Judge Timbers of the U.S. District Court on September 8, 1965, in Connecticut. Supporters of Mitchell rallied outside the courtroom and the American Civil Liberties Union sent a lawyer to the proceedings with a “friend of the court brief” in support of Mitchell. Judge Timbers, who originally set the oral arguments for later in the month, pushed the trial to the next day. Many observers speculated that the judge sped up the court proceedings before students returned to classes at Yale. Regardless of the reasons, the last-minute trial date hastened the pace of the defense and forced disagreements between Mitchell and his lawyer to the surface. Due to the disagreements between Mitchell and Lynn over how to conduct the case, Mitchell – “in the interests of maintaining my fundamental indictment against U.S. policy as criminal before morality and law” – dismissed his lawyer.³⁰

Part of Mitchell’s strategy was to use the trial to foment anti-draft sentiment at Yale and other college campuses across the United States. The *Yale Daily News* covered Mitchell’s trial closely. The campus paper noted that on the opening day of the trial, professors Staughton Lynd (history) and Robert Cook (sociology) “spoke in support of Mitchell’s” stand before 50-plus demonstrators outside the courthouse.³¹ Amid noisy heckling counter-demonstrators, Lynd was quoted as saying: “The Nuremberg trials established the individuals obligation to humanity and international law to refuse the draft ... United States soldiers in Vietnam are doing the same as Germans did in World War II.”³² Special agents of the F.B.I. monitored the pickets outside the courthouse. In Lynd’s F.B.I. file, the Special Agents recorded that members of the CNVA were present and the picket lasted from 9:15am to 1:45pm followed by a public meeting on the New Haven Green.³³

³⁰ David Mitchell, ““What is Criminal?”” in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968),101.

³¹ “Draft Objector Tried in New Haven Court,” *The Yale Daily News*, 14 September 1965, 1.

³² Lynd quoted in “Draft Protester Refuses Defense in District Court,” *The Yale Daily News*, 15 September 1965.

³³ The report noted that Staughton Lynd was the first speaker at the New Haven Green and that he supported Mitchell. According to the special agents:

LYND said the MITCHELL case was important because it brings up the constitutional point of the Government drafting individuals to fight in Viet Nam in a war not declared by Congress. LYND said that since Congress has not declared war in Viet Nam, the United States was attempting to draft MITCHELL which could result in MITCHELL committing crimes against humanity. He pointed out that United States action in Viet Nam resulted in the killing of innocent

In the courtroom, Judge Timbers gave Mitchell the weekend to find suitable counsel after he had dismissed Lynn. Unable to find a lawyer in such a short amount of time, Mitchell returned on Monday September 13 without counsel. The judge, refusing to grant Mitchell sufficient time to retain legal representation, ordered Anthony G. Apicella, a former Assistant U.S. Attorney, to defend Mitchell.³⁴ Expressing his disappointment with the decision, Mitchell told the court that he took “exception to this whole proceeding” for not allowing him to find suitable counsel. On September 16, after a three-day trial, the twelve-member jury after less than an hour of deliberations found Mitchell guilty of “willfully and knowingly failing to report for induction into the Armed Forces of the United States.” Judge Timbers sentenced Mitchell to the maximum five years and \$5000 fine. He argued that the sentence was “a sharp warning to anyone who thinks he can avoid military service.” Turning to Mitchell, Timbers declared, “Fortunately his views appear not to have cut any ice whatsoever in this country or in this community,” and that Mitchell’s actions “have galvanized upright and loyal citizens of this country to rally and support this country in time of need.”³⁵

The *Yale Daily News* reported that Mitchell, “still refusing to participate in his own trial, yesterday calmly received a sentence of from 18 months to five years in prison and a \$5000 fine for failure to report for induction.” Yale law professor Thomas I. Emerson paid Mitchell’s \$5000 bail and he was freed on a conditional release (his travel was restricted to Connecticut and southern and eastern portions of New York). The campus paper emphasized that Mitchell “is not a pacifist, but is opposing the draft because of the ‘criminal policies it is helping in Vietnam and Santo Domingo.’”³⁶ Once out on bail, Mitchell launched an appeal of his decision to the Second Circuit Court of Appeals in New York. The End the Draft Committee then retained Fyke Farmer, a Korean War tax resister, to represent Mitchell.

victims and prisoners which LYND claimed was similar to the atrocities of which the Germans were convicted at Nuremberg.

Quoted in 17 February 1966 Investigative Report, “Staughton Craig Lynd” from New Haven office of FBI.

³⁴ William E. Farrell, “Evader of Draft is Given Five Years: Vietnam Critic Also Fined \$5000-Release on Bail,” *The New York Times*, 16 September 1965, 27.

³⁵ Quoted in *The New York Times*, 16 September 1965, 27.

³⁶ “Despite Trial Protest Mitchell is Sentenced,” *The Yale Daily News*, 16 September 1965.

Defeat in the New Haven courtroom prompted Mitchell to clarify his views with a reporter from the *Yale Daily News*: “I’m not a pacifist. I probably would have fought in World War II. But the wars the U.S. is fighting now are not morally justifiable. We’re pursuing a concerted policy of maintaining our political and economic power around the world by force. And we’re condoning torture and genocide in Vietnam.” Mitchell argued that he was “against the draft because it’s supporting U.S. aggression in Vietnam and Santo Domingo and elsewhere.”³⁷

It is difficult to evaluate the immediate effects of the Mitchell trial on the Yale community. It took over a year before Yale students signed the first “We Won’t Go” anti-draft statement. However, on October 5, Mitchell and Lynd spoke together on a panel, “The Draft or Free Choice?”, at Yale’s Linsly-Chittenden Hall in front of a capacity audience. “We are committing genocide in Vietnam – we, not the Communists, are the aggressors against a whole people,” Mitchell said, adding that he was “protesting the draft in the context of U.S. war crimes abroad.” The audience applauded Lynd when he invoked the tradition of Thomas Paine, Henry David Thoreau, William Lloyd Garrison, Eugene Debs, and other prominent American dissenters when he stated: “My strongest allegiance is not to the U.S. but to the world as a whole,” in connection to subversive tenets of Nuremberg Principles.³⁸

Despite Judge Timbers’ belief that Mitchell had galvanized “upright and loyal citizens” to rally around the United States’ effort in Vietnam, no such groundswell occurred. Conservative pundit William F. Buckley, Jr., the Yale alumnus who worked as a former Central Intelligence Agency officer while a student there, wrote a column attempting to discredit Mitchell and his use of the Nuremberg Principles. Mitchell “whose words could well have been dictated to him by the editors of the Communist Worker,” Buckley writes, “nevertheless appears as the first man in American judicial history to plead the Nuremberg precedent as a reason for defying the draft.” Believing Judge Timbers’ decision “wasn’t a clear victory for the good guys [the Americans],” Buckley agreed with the judge that it was

³⁷ “Mitchell: Draft Aids US War Crimes,” *The Yale Daily News*, 5 October 1965.

³⁸ “Panelists Split in Heated Debate Over Issue of Cold War Draft,” *The Yale Daily News*, 5 October 1965. Lynd develops this concept more fully in his soon to be release book *Intellectual Origins of American Radicalism* in chapter 5 “My Country is the World.”

not Mitchell's individual choice to decide "whether American foreign policy was morally defensible." Buckley contended that Mitchell was bound as an American to whatever foreign policy decisions the president made because he was selected by "the majority of American voters." Buckley's dogmatic adherence to the myth of American exceptionalism, used in this instance to delegitimize Mitchell, completely missed the point of the draft resister's arguments based on the Nuremberg Principles. Because a particular foreign policy is undertaken by a democratically elected leader does not inherently make it legal under the U.S. Constitution or international law. According to Buckley, Mitchell's argument was not legitimate because of its "anti-American rhetoric." Furthermore, still reaching for the exceptionalist argument, Buckley writes: "I am glad I didn't have Judge Timbers' job. . . . I'd have had to cough and wheeze and clear my throat during that passage in my catechism at which I explained to Mr. Mitchell wherein the Nuremberg doctrine was obviously not at his disposal."³⁹ The crux of Buckley's argument was that because American officials were "the good guys" whatever they did, be they Republican or Democrat, was justifiable, however gruesome the consequences. Anything that veered from outward acceptance of U.S. foreign policy was "anti-American." This would become the standard line among those who sought to marginalize dissenters who used the Nuremberg Principles and condemned U.S. war crimes throughout the Vietnam War as the protests escalated.

By contrast, the *New York Times* reported after the first International Days of Protest against the Vietnam War, held October 15-16, that "organizations opposing the war are turning their attention to a nationwide movement against the military draft." "For some, the hero of this movement is 22-year-old David Mitchell," the *Times* noted, adding that peace organizations "hope to capitalize on a spirit that has already led thousands of youths to try to

³⁹Buckley wrote of Mitchell: "I am, of course, glad that Mr. Mitchell is in jail. But one's orderly soul quavers just a bit at the not uninteresting points of law he raises. Granted his anti-American rhetoric is especially crude. But apply a little make-up to it, and you are not so far removed from the kind of thing you hear these days from Senator Fulbright, let alone the teach-in types." William Buckley, "The Nuremberg Doctrine Is Raised And It Was Just a Matter of Time," *The Atlanta Journal*, 25 September 1965, 2. Sen. Fulbright was the Chairman of Senate Armed Services Committee and originally was an ardent backer of the Tonkin Gulf Resolution of August 1964. He became disillusioned with President Johnson's foreign policy after he sent Marines to the Dominican Republic in April 1965 as he also escalated the bombing in North Vietnam. He began televised Senate hearings on the Vietnam War in February 1966, questioning Secretary Dean Rusk and special adviser to the president Gen. Maxwell Taylor. The teach-ins began in the winter of 1965 in tandem with the Americanization of the war in South Vietnam.

avoid the draft by burning their draft cards, by neglecting to register, by feigning homosexuality, madness or ‘football knee,’ by deliberately flunking a mental test, or simply by staying on in school or hastening marriage plans.” The *Times* quoted a Pentagon statement that the Defense Department “was not worried” and that due to “the pressure of the increased draft calls voluntary enlistments were increasing for all services.” Despite the Pentagon’s nonchalant rebuke of the growing movement, attorney general Nicholas Katzenbach launched an investigation into what he called “beat the draft” movement. The *Times* article then went on to chronicle efforts by the main peace groups in New York who dealt with draft refusal – including the Students for a Democratic Society, the War Resisters League, the Central Committee for Conscientious Objectors, etc. The paper quoted Ralph DiGia of the War Resisters League: “A year ago we’d have one or two people a month come to our group for advice. Now we’re getting three or four a day, including some people from the reserves.”⁴⁰

At the October 15 rally in New York, David Miller, a Catholic Worker activist, became the first to challenge new legislation banning draft-card burning. Between two speeches, he walked up to the microphone and stated: “I believe the napalming of villages is an immoral act. I hope this will be a significant political act, so here goes” and Miller set his draft card aflame.⁴¹ The burning of one’s draft card became a form of protest that caught the ire of Congress on July 29, 1965, when another Catholic Worker, Chris Kearns, burned his draft card in protest against the draft and the war in Vietnam outside of the Whitehall Induction center in New York City. The act became a sensation after *Life* magazine printed a photograph of the event. Representative Mendel Rivers reacted by introducing a bill in the House that would outlaw willful destruction of a draft card. Senator Strom Thurmond

⁴⁰ “Vietnam Protesters Plan Drive to Avoid the Draft,” *The New York Times*, 18 October 1965, 9.

⁴¹ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 23. Miller’s story is covered in Lynd and Ferber, *The Resistance*, 21-26. See also David Miller’s interview with James Finn in James Finn, ed., *Protest: Pacifism and Politics* (New York: Random House, 1967), 186-192.

supported the measure in the Senate. On August 30, President Johnson signed the bill into law, banning draft card destruction, punishable by five years in prison and a \$10,000 fine.⁴²

After the International Days of Protest against the Vietnam War, the Johnson administration and its allies in Congress attempted to link the antiwar movement to communism and argue that the movement was prolonging the war. Sen. Thomas Dodd, Chairman of the Senate Internal Security Subcommittee (SISS), released a 235-page Senate Internal Security Subcommittee report arguing that the movement was “under communist control.” The report featured an entire section on the activities of Mitchell’s close ally, Staughton Lynd.⁴³ Moreover, after the successful first International Days of Protest, General Maxwell Taylor, the special adviser to the president and former Ambassador to South Vietnam, on a speaking tour explaining United States policy in Vietnam told reporters that the protests might give the communists the impression “there is a real division of strength in this country, and that may tempt them to prolong the war.” Moreover, he stated that the leaders of the Democratic Republic of Vietnam “are on a sharp hook; they’re looking for something to get them off, and they may think this is it.”⁴⁴ The International Days of Protest, with demonstrations in 100 U.S. cities and elsewhere around the world, drew sharp denunciations from members of Congress and the president. According to Joseph Califano, a special adviser to President Johnson, the president “became excised” every time the media ran stories of draft card burners or demonstrators disrupting local draft boards.⁴⁵ Johnson, recovering from surgery at the Bethesda Naval Hospital, and speaking through press secretary Bill Moyers, endorsed the Justice Department’s investigation into communist infiltration of the movement. “The President feels it is possible for our adversaries to misread events in this country and to take and put into these events greater and broader support for a particular position than is justified by the feeling of the American people at large,” Moyers

⁴² Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 22-22. See also: Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 29.

⁴³ Quoted in James Kirkpatrick, *Assault on the Left: The FBI and the Sixties Antiwar Movement* (Westport: Praeger, 1997), 32.

⁴⁴ Quoted in Douglas Robinson, “Policy in Vietnam Scorned in Rallies Throughout U.S.,” *The New York Times*, 16 October 1965, 1.

⁴⁵ Joseph Califano, Jr., *The Triumph and Tragedy of Lyndon Johnson: The White House Years* (New York: Simon and Schuster, 1991), 198.

told the press. Moreover, he stated that President Johnson believed that if the Vietnamese are given the impression that there was a sizable antiwar opinion in the United States this would cause America's foes to fight harder and would prolong the war.⁴⁶ The previous day, attorney general Nicholas deB Katzenbach told reporters in Chicago that there were indeed "some Communists involved" in the anti-draft movement and that he was initiating an investigation against the Students for a Democratic Society and the National Coordinating Committee to End the War in Vietnam. Most tellingly, a November 19 Gallup poll demonstrated that fifty-eight percent of Americans believed that the communists had been involved in the demonstrations against the Vietnam War.⁴⁷

Despite the Justice Department's focus on the thriving new left group Students for a Democratic Society, its members were nowhere to be found among the milieu of anti-draft organizers. As the main group responsible for organizing the first national antiwar demonstration in Washington on April 17, SDS quickly stepped back from antiwar work in general, and anti-draft organizing in particular. In June, at the national SDS convention in Kewadin, Michigan, the national organizers voted against a campaign opposing the draft and looked to deepen its community-focused programs under the Education Research and Action Project (ERAP). According to Lynd and Michael Ferber, a draft resister and graduate student at Harvard University, SDS undertook this course of action because they did not want to become involved in a "single-issue movement" and looked to "stop the seventh war from now" by organizing in their communities. Moreover, the organization feared the repression that was going to bear down on them anyways because the Federal Bureau of Investigation and Johnson administration officials ignorance of the nuances of the SDS's position. The most the group would do was adopt "a mild program" to encourage draftees to apply for conscientious objection.⁴⁸

⁴⁶ Robert B. Semple, Jr., "Johnson Decries Draft Protests: Presses Inquiry," *The New York Times*, 19 October 1965, 1.

⁴⁷ "19 November 1966, Communists and Demonstrations," in *The Gallup Poll: Public Opinion 1935-1971, Vol. III, 1959-1971* (New York: Random House, 1972), 1971.

⁴⁸ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 33-44. See also: Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 31-32.

In September, End The Draft wrote to members of SDS urging them to participate in an anti-draft campaign. End The Draft suggested that SDS take on “minimal number” campaigns whereby “a minimal number of 500 commitments must be reached before anyone goes ahead with the activity – from draft card burning to total noncooperation (Peter Irons, formerly of SPU [Student Peace Union], suggested that a few years back).”⁴⁹ SDS did not bite and End The Draft and the other isolated acts of draft resistance continued without much national coordination.

The dramatic acts of draft card burning and the calls for the Justice Department to investigate the nascent movement against the Selective Service System further concerned peace liberals and social democrats. In an influential article in peace movement circles in the *New York Review of Books*, Irving Howe, Michael Harrington, Bayard Rustin, Lewis A. Coser, and Penn Kimble co-wrote a piece outlining their arguments about effective tactics and strategies for the movement to be successful. They were critical of the use of civil disobedience, the stopping of troop trains in Oakland in August, and other forms of “extreme gestures of opposition.” They argued for a need for coalition building and “common action.” They specifically argued that the antiwar movement should not engage in a systematic analysis of the war and American society. With regard to opposition to the draft, the authors believed that most of the young student refusers were not traditional conscientious objectors and should request “that he be accorded a special status as a non-combatant under the provisions of the draft.”⁵⁰ However, in the very same paragraph, the authors recognize that this strategy probably would not prove successful and that the individual would probably face “severe jail sentences.” The authors concluded that no form of draft resistance should be advocated. “To allow the question of the draft to become the central focus of the Vietnam protest—something that both the right wing and sections of the press would relish, for all too

⁴⁹ Quoted in Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 17.

⁵⁰ The authors wrote: “Those young people who say they intend to claim a refusal to serve in a war of which they disapprove must recognize their responsibilities to authentic conscientious objectors, that is, pacifists who refuse on principle to employ violence under any circumstances. Not many of the students said to be contemplating a refusal to serve in Vietnam fall in this category, and there is consequently a possibility that, especially if public hysteria arises on this matter, the present status of conscientious objectors, achieved only after long and hard struggles, will be endangered.” Irving Howe, Michael Harrington, Bayard Rustin, Lewis A. Coser, and Penn Kimble, “The Vietnam Protest,” *The New York Review of Books*, 25 November 1965.

obvious reasons—is to forego in advance any possibility of affecting U.S. policy in the immediate future,” they wrote.⁵¹

Staughton Lynd responded to the article by Howe, Harrington, Rustin, Coser and Kimble. Lynd stated he welcomed “a variety of forms of protest,” including those advocated by Howe and the others. However, he differed with the authors of “The Vietnam Protest” because he believed “that extreme forms of protest during the summer and fall have been helpful in that, far from leading to the disappearance of more moderate dissent, they have stimulated it. Witness the forthcoming SANE-sponsored march on Washington, the newly-formed committee for Reappraisal of Far Eastern Policy, and indeed, your correspondents’ statement. Many persons who last Spring were silent are now taking a more forthright position.”⁵² Indeed, as Lynd points out, the appearance of more confrontational tactics by mainly younger people – students and non-students alike – did indeed push the peace liberals and social democrats into action.

This question of conscientious objection to particular wars or the idea of selective war objection would be debated within the peace movement until the war’s end. When asked his opinions about the matter in May 1966, A.J. Muste said it was “utterly illogical to make a distinction” between traditional conscientious objectors and this new generation of selective objectors. Muste argued, in contrast to the authors of “The Vietnam Protest,” that “the government, if it is going to make provision for conscientious objection at all, ought by all means to put on an equal basis those who are opposed to all war and the young people who today are opposed to this war in Vietnam.” Moreover, Muste insisted, “there can’t be any question that these people can be just as sincere in their opposition to this particular war as

⁵¹ Irving Howe, Michael Harrington, Bayard Rustin, Lewis A. Coser, and Penn Kimble, “The Vietnam Protest,” *The New York Review of Books*, 25 November 1965. The authors advocated that the movement instead should demand for common action: “a) We urge the U. S. immediately to cease bombing North Vietnam; b) We urge the U. S. to declare its readiness to negotiate with the NLF, the political arm of the Vietcong; c) We urge the U. S. to propose to Hanoi and the Vietcong an immediate cease-fire as a preliminary to negotiations; d) We urge that the U. S. recognize the right of the South Vietnamese freely to determine their own future, whatever it may be, without interference from foreign troops, and possibly under United Nations supervision; e) We urge Hanoi and the Vietcong to accept a proposal for a cease-fire and to declare themselves ready for immediate and unconditional negotiations.”

⁵² Staughton Lynd, “An Exchange on Vietnam,” *The New York Review of Books*, 23 December 1965.

people who are on religious grounds opposed to all wars.”⁵³ This was a minority view in 1966, first attracting attention in the radical pacifist community, and then spreading to more mainstream churches and associations in 1967 such as the National Council of Churches.⁵⁴

By the end of 1965, the number of American troops in South Vietnam increased to over 180,000 after President Johnson’s July troop surge. In November, General Westmoreland requested an additional fifty-three battalions to be sent to South Vietnam, totaling 440,000 troops by the end of 1966. Because Johnson and Secretary of Defense Robert McNamara refused to call up the reserves and the National Guard, draft calls increased by the end of 1965 to fill the ranks. According to historian John Prados, sixteen percent of battle deaths in Vietnam in 1965 consisted of draftees. This low figure reflected the higher percentage of professional soldiers being deployed to South Vietnam in the early stages of the war. Yet President Johnson and Secretary McNamara’s decision not to activate the reserves and National Guard for combat meant the military increasingly relied on draftees or volunteers and subsequent battle deaths of draftees increased to twenty-one percent in 1966 and more than thirty-three percent in 1967. Combined with increasing draft calls and the escalation of the war in Vietnam in 1966, this created a perfect storm at home just waiting to erupt. There was a feeling within radical circles of the peace movement that the movement had not properly dealt with the draft. The year 1966 would prove to be a critical year in anti-draft organizing against the Vietnam War.⁵⁵

Mitchell versus the Selective Service System Redux

Mitchell’s appeal was heard between January 10 and 13, 1966, in New York. Court support rallies were organized outside the courtroom in Foley Square with placards reading “A New Trial, A Fair Trial, for David Mitchell” and “Enlist Now to Fight the Draft.” Despite

⁵³ A.J. Muste quoted in interview with James Finn, in James Finn, ed., *Protest: Pacifism and Politics* (New York: Random House, 1967), 202.

⁵⁴ See Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 46.

⁵⁵ For the number of draftee battle deaths and troop requests in late-1965, see John Prados, *Vietnam: The History of an Unwinnable War, 1945-1975* (Lawrence: University of Kansas Press, 2009), 151-152.

Judge Irving R. Kaufman's admonishment of Mitchell's supporters, arguing "the court does not need that kind of pressure" and "it doesn't help their cause at all,"⁵⁶ the three Court of Appeals judges reversed Judge Timbers' conviction and issued a re-trial for Mitchell. The decision stated:

Of basic importance is the fact that appellant, for four previous years...had taken the position before the Draft Board and in the District Court that his refusal to comply with Selective Service requirements was not because he was a pacifist but because, if he submitted to the draft, the "Nuremberg Law" would render him "guilty of complicity in crimes defined by the Charter of the International Military Tribunal," specifically wars of aggression and acts of inhumanity. Apparently it was his plan of defense to attempt to prove in one way or another that the United States had been guilty of such wars of aggression and acts of inhumanity in Vietnam, Cuba, Panama, Santo Domingo and elsewhere...In essence, what the trial judge failed to take into consideration is that this is not "a very simple case."⁵⁷

Mitchell's retrial was slated for March 1966. In an example of the importance of international solidarity efforts with the American peace movement, Bertrand Russell took an interest in Mitchell's noncooperation and tried to aid and publicize the case as much as possible through the Bertrand Russell Peace Foundation. Such action dovetailed with Russell's belief that the best way to end American involvement in South Vietnam and the bombing of North Vietnam was antiwar activities within the United States. Russell corresponded with Mitchell and Ralph Schoenman, Russell's personal secretary, would help to coordinate an international campaign to support the case. One important tactic involved soliciting prominent intellectuals in Western Europe to sign a declaration condemning the war in Vietnam and supporting Mitchell's draft refusal. Moreover, as a later chapter will underscore, Russell's support of David Mitchell coalesced with his own ideas of holding an international war crimes tribunal. For Russell and the staffers of the Bertrand Russell Peace Foundation, the Mitchell trial presented the first opportunity to organize a war crimes

⁵⁶ "U.S. Court Picketed as it Weighs Draft Appeal," *The New York Times*, 11 January 1966, 3.

⁵⁷ Quoted in Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 102.

tribunal in the United States. Although this attempt ultimately failed, it later developed into the International War Crimes Tribunal of May and November 1967.⁵⁸

Mark Lane, attorney and a director for the BRPF, acted as Mitchell's counsel for the March 1966 appeal. Moreover, the Mitchell trial was an impetus for Russell sending his secretary, Ralph Schoenman, to North Vietnam on a fact-finding mission. Most likely acting on Russell's behalf, Schoenman wrote to North Vietnamese Premier Pham Van Dong on January 25, 1966, that, as a result of the Mitchell trial the Foundation wanted to bring Vietnamese as witnesses and hold "a war crimes trial in the United States. If the witnesses are disallowed, the case against Mitchell will fail and the entire effort to conscript large numbers of young Americans will be in jeopardy. I seriously ask for your help in facilitating this." Helping with Mitchell's campaign was "an opportunity to frustrate the U.S. Government's war plans."⁵⁹

At Mitchell's retrial in Hartford, Connecticut, in mid-March 1966, Lane tried to call both Ralph Schoenman and Staughton Lynd, who had just recently returned from his trip to North Vietnam, to testify on behalf of Mitchell. Lane, in coordination with Ho Chi Minh, also tried to bring a U.S. Navy Pilot who was captured over North Vietnam. Ho said he would release the pilot to testify. Furthermore, Lane and Mitchell attempted to fly others from North Vietnam to act as witnesses. As reported by *Time* on March 25, "Judge T. Emmet Clarie rejected the whole line of argument, refused to allow Lynd and Schoenman to testify" and that "it took the jury twelve minutes to find Mitchell guilty."⁶⁰ In the end, Mitchell was re-convicted and sentenced to five years in prison. Lane quickly appealed the decision.

The article in *Time* magazine focused on both Mitchell and David Miller, who was also being tried for burning his draft card the previous October, and called them "The Inglory Boys." Referring to Mitchell as a "Brown University Dropout," the article called his defense "grandiose." "Contending that the U.S. is committing genocide and other crimes against world law in Viet Nam, he cited the Nurnberg war-trial verdicts as an injunction on all

⁵⁸ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 109-110.

⁵⁹ Bertrand Russell to Pham Van Dong, 25 January 1966, in Nicholas Griffin, ed., *The Selected Letters of Bertrand Russell: The Public Years, 1914-1970* (London: Routledge, 2001), 585-586.

⁶⁰ "Protest: The Inglory Boys," *Time*, Friday, Mar. 25, 1966.

citizens to disobey illegal orders from their governments,” wrote *Time*. Miller appeared before the U.S. District Court in New York and Judge Harold Tyler Jr. dismissed Miller’s argument that burning his draft card was protected under the First Amendment as free speech. *Time* reported that the judge “announced dryly” he would not participate in creating “a myth of martyr-hood.” He gave Miller a three-year sentence under the new draft card burning law and offered to suspend the sentence if Miller agreed to “obtain a new draft card, carry it as required by law, and submit to induction if drafted.” Miller said he had “no intention” of obtaining a new draft card, “even if I have to go to jail.” He was sentenced to his three-year term.⁶¹

By March of 1966, the antiwar movement found itself in a rut. The escalations of January 31, after more than a month-long bombing pause over North Vietnam, demonstrated that the war was just beginning. Looking for strategies to expand the movement and its effectiveness, A.J. Muste, the eighty-two year old American pacifist, used the pulpit of a March 1966 editorial in *Liberation* to call for an escalation of protest in the face of the expanding war. Muste called on Americans to organize “demonstrations, parades, picketing, vigils, sit-ins, fasts, mass rallies, street-corner meetings, draft-card burnings, non-violent invasions of missile bases, arms factories, the White House and the Pentagon, “unauthorized” journey’s of Americans to Vietnam, anything and everything of this kind anyone can think of.”⁶² Muste would travel to South Vietnam with a delegation from the Committee for Non-Violent Action (CNVA) in April 1966.⁶³ Searching for strategies to keep momentum through the winter months, generally considered low times of organizing by activists, the National Coordinating Committee to End the War in Vietnam set in motion the Second International Days of Protest against the War in Vietnam in March.

The protests turned out over one hundred thousand in the streets of New York, San Francisco, Chicago, and eighty to one hundred cities in the United States and thirty countries around the world. The protests were organized locally by grassroots coalitions, demonstrative

⁶¹ “Protest: The Inglory Boys,” *Time*, Friday, Mar. 25, 1966.

⁶² A.J. Muste, “Escalate the Protests,” *Liberation*, March 1966, 6.

⁶³ See Mary Hershberger, *Traveling to Vietnam: American Peace Activists and the War* (Syracuse: Syracuse University Press, 1998), 55-65.

of the growth in the movement.⁶⁴ Staughton Lynd, for instance, addressed rallies in Chicago and Madison on the same day on March 26. He told the crowds gathered in each city that during his trip to Hanoi, the North Vietnam Peace Committee commented that they were “puzzled” more young people in the United States were not “refusing to serve in your army.” Lynd went on to criticize SDS for failing “not to emphasize an anti-draft program” and the May 2nd Movement for starting the “We Won’t Go” pledges in 1964 and then “suddenly [backing] away from it.” He called on those in attendance to start thinking about the upcoming national Selective Service Exams in May and June “when young men will be invited, after being fingerprinted, to do well on a test so that the person in the next chair will be killed.” He concluded: “The most obvious and tragic failure of the movement against the war in this last year has been its failure to develop a responsible program against the draft.”⁶⁵

Independent Anti-draft organizing 1966

In the vacuum created by a lack of concerted organizing against the draft, independent anti-draft organizing and demonstrations took place. For instance, on March 31, 1966, four Boston CNVA workers – David O’Brien, John Phillips, David Reed and David Benson – publicly burned their draft cards outside of South Boston District Court House in front of cameras and a throng of angry counter-demonstrators. As their cards blackened in flames, the angry crowd pounced on the CNVAers and violently attacked them. The event caused a stir in Boston and demonstrated that in early-1966 it was still unpopular and even dangerous to publicly protest the war in Vietnam.⁶⁶

By June 1966, David Mitchell’s legal expenses had already reached \$20,000. The End The Draft committee printed an appeal for fundraising in its June edition of *downdraft*. Mitchell’s defense campaign needed money to print appeals brief for both the court and the

⁶⁴ Charles DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990), 149-150.

⁶⁵ “How the American Left Can Change the System: Text of Address at 26 March Demonstration of Protest Against the War,” Staughton Lynd Papers, Special Collections, Kent State. Box 6, Folder 42.

⁶⁶ For an excellent account, see Michael S. Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: The University of North Carolina Press, 2003), 20-26.

public dissemination.⁶⁷ Moreover, international support for Mitchell's case had grown due in large part to the efforts of the Bertrand Russell Peace Foundation. In two separate attempts on June 9 and September 3, the BRPF won the support of such international luminaries as philosopher Günther Anders, physicist Max Born, French author and feminist Simone de Beauvoir, Brazilian scientist Josue de Castro, Yugoslavian political scientist Vladimir Dedijer, Sicilian Danilo Dolci, and French existentialist philosopher Jean-Paul Sartre. In a letter seeking the backing of these prominent figures, Russell encouraged the recipients to "support" Mitchell's "courageous opposition which could have a major effect on American youth." Framing Mitchell's case through the prism of international law:

There is a case of great importance taking place in the United States. A young American, David Mitchell, is on trial for his refusal to serve in the United States army in Vietnam. He is not a pacifist or a conscientious objector. His objection is based on the Nuremberg trials. The United States is using gas, chemicals, jelly gasoline, fragmentation bombs and is committing other crimes against humanity. Mitchell cites the violation by the United States of the Geneva Agreements of 1954, the Geneva Convention, the United Nations Charter, the Kellogg-Briand Treaty and the Nuremberg Agreements of London. It is his view that American action violates national law and that citizens are in danger of becoming war criminals through their acquiescence.⁶⁸

With international support gaining momentum, during the summer activists made sporadic attempts at organizing a movement against the draft. In July, eight young men from New Haven drafted and signed a statement of noncooperation with the draft and announced a mass draft card turn-in for November. Two of the signatories were members of SDS, disappointed in what they saw as their organization's obfuscation with the issue. Another participant was a CNVA member and three others had volunteered in Mississippi in the summer of 1964. A majority of the draftees of the New Haven statement of non-cooperation fanned out across the country over the month of July, reaching as far as the Mid West and West Coast, and produced a report on draft resistance in the United States. Staughton Lynd was tasked with organizing supporters who were too old to be drafted. In August 1966,

⁶⁷ "NUREMBERG ANTI-DRAFT CASE ON APPEAL – FUNDS URGENTLY NEEDED!!!" *downdraft*, vol. III, no. 3, June 1966.

⁶⁸ See 9 June 1966 letters from Russell to: Danilo Dolci, Günther Anders, Josue de Castro, Max Born and 3 September 1966 letters from Russell to: Jean-Paul Sartre and Simone de Beauvoir, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University.

members of the CNVA, including David Reed who had burned his draft card in South Boston in March, attended a Peacemakers Training Session at the Catholic Worker Farm in Tivoli, New York. Out of the session came several proposals, including organizing a large noncooperation conference in New York City in October. At the end of August 25-26 training session, the same New Haven group who had recently traveled across country were instrumental in organizing an anti-draft meeting with 40-50 participants at the American Friends Service Committee building in Des Moines, Iowa. The conference had been strategically slated to occur before Students for a Democratic Society National Council meeting in Clear Lake, Iowa.⁶⁹

Despite the lack of participation by SDS, the anti-draft movement was gaining momentum, due in large part to the independent organizing efforts of small groups of committed organizers. The Eastern Conference on Noncooperation with Conscription took place New York City between October 28 and 30. More than two hundred people attended the conference representing almost every pacifist group in the Eastern United States. A “Statement of Noncooperation with Military Conscription” was finalized and sent out across the country seeking signatories.⁷⁰

⁶⁹ For an excellent discussion of the summertime events, see Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 47-58.

⁷⁰ The “Statement of Noncooperation with Military Conscription” read:

WE, the undersigned men of draft age (18-35), believe that all war is immoral and ultimately self-defeating. We believe that military conscription is evil and unjust. Therefore, we will not cooperate in any way with the Selective Service System.

We will not register for the draft.

If we have registered, we will sever all relations with the Selective Service System.

We will carry no draft cards or other Selective Service certificates.

We will not accept any deferment, such as 2-S.

We will not accept any exemption, such as 1-O or 4-D.

We will refuse induction into the armed forces.

We urge and advocate that other young men join us in non-cooperating with the Selective Service System.

We are in full knowledge that these actions are violations of the Selective Service laws punishable by up to 5 years imprisonment and/or a fine of \$10,000.

“Statement of Noncooperation with Military Conscription,” in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 45, Conscientious Objection. See also: “Call to Eastern Conference On Noncooperation with Conscription, October 28, 29, 30,” no date; and “Notes of Conference on Non-Cooperation,” no date, in n A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 45, Conscientious Objection. Because the conference was the initiative of pacifist non-cooperators, the reach and scope of the conference was discernibly limited to a mostly pacifist audience. Lynd and Ferber noted that the conference “made room only

David Mitchell's appeal was fast approaching and he still faced an uphill battle. End The Draft was seeking support for the trial as the newly named Mobilization Committee (MOBE) was preparing for its November 5-8 Mobilization. On October 4, A.J. Muste issued a statement on behalf of the Fifth Avenue Vietnam Peace Parade Committee in support of Mitchell:

David Mitchell is one American who has placed this issue [of individual responsibility for war crimes] before the American government and the American people by refusing to report for induction for the war in Vietnam. Courts trying his case have so far ruled that international treaties such as the Treaty of London (Nuremberg Trial) signed by an American President and ratified by the United States Senate may not be used as evidence to demonstrate the invalidity of an order issued to the defendant. This ruling must not be permitted to stand.⁷¹

Mitchell's pioneering resistance to the draft was simultaneously helping to distribute information to other would-be draftees about the Nuremberg Principles and other international laws. All the hard, and at times, solitary work was beginning to pay off.

Days before he was scheduled to appear at Foley Square for his appeal, Mitchell participated in a November 5 antiwar march in New York numbering 10,000 to 15,000 participants, sponsored by the Fifth Avenue Peace Parade Committee, that went from Greenwich Village to Times Square. With the Congressional elections approaching, placards read: "You Voted in 1964 and Got Johnson – Why Bother?" Speakers included Allan Ginsberg, A.J. Muste, Edward Keating, publisher of *Ramparts*, and David Mitchell. At the microphone, Mitchell told the crowd that "America is attempting to secure a crumbling domination throughout Southeast Asia and generally throughout the world" and that "the 'loss' of Vietnam could lead to the breakdown of United States control in countries as close as Latin America."⁷²

Two days later, Mitchell and Lane were on the dock at the Court of Appeals in New York City. This marked Mitchell's fourth appearance in Federal Court, this time to appeal his March 16 conviction for violating the Selective Service Act. In a courtroom "jammed" full of

for those who opposed all wars and all forms of cooperation with the draft." Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 49-50.

⁷¹ Statement in Support of David Mitchell, 4 October 1966, in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.'s.

⁷² John P. Callahan, "10,000 War Critics Stage Rally Here," *The New York Times*, 6 November 1966, 42.

Mitchell's supporters, a panel of three judges heard Mark Lane's arguments that international and domestic laws should bear on the decision of whether Mitchell was guilty. The Chief Judge, J. Edward Lumbard, told Lane that if this happened, "it seems to me you would have anarchy..." Moreover, Judge Kaufman invoked the "political questions doctrine" when he told the defense lawyer that "the courts have historically stayed out of the field of foreign policy." The United States prosecutor, John O. Newman, countered Lane's arguments by pointing out Mitchell never used the appropriate "legal remedies" such as applying for conscientious objector status. Instead, Newman called Mitchell "a draft evader." Moreover, Newman tried to demonstrate that since Mitchell never appeared for his physical, he did not know whether he would even qualify for service in the Army. Therefore, according to Newman, Lane's charge that if inducted, his client would be forced to commit war crimes in Vietnam was "premature." The three-judge panel reserved their decision for a later date despite of the fact it sounded like they already made up their minds.⁷³

Outside the courtroom, the Fifth Avenue Vietnam Peace Parade Committee sponsored a demonstration in support of Mitchell as part of its organizing efforts for the November 5-8 Mobilization for Peace in Vietnam, Economic Justice and Human Rights. The flyer for the demonstration, titled, "Nuremberg vs. U.S.: Mass Demonstration at Mitchell Appeal Hearing," quoted Mitchell from an affidavit: "...America is long overdue for its Nuremberg. There is no one who can remain untouched in my case – not the judge, not the U.S. attorneys, not the public: for everyone is on trial who takes part in America's crimes."⁷⁴ Demonstrators "included gray-haired women, bearded and non-bearded youths and men in business suits" and chanted "End the draft – end the war – bring the troops home," noted the *Hartford Courant*.⁷⁵

While Mitchell was battling his case out in the courts, students at major universities not involved in his crusade began issuing "We Won't Go" statements. This proved to be an ingenious idea that buoyed the movement. Unlike sitting-in at a local draft board, or

⁷³ Robert Waters, "Judges Weigh Draft Conviction Appeal," *Hartford Courant*, 8 November 1966, 31.

⁷⁴ See End The Draft's press release and attached flyer: "Appeal Hearing in Mitchell Anti-Draft Case Scheduled for November 7," 28 October 1966, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University.

⁷⁵ Robert Waters, "Judges Weigh Draft Conviction Appeal," *Hartford Courant*, 8 November 1966, 31.

participating in demonstrations, the statements required students to simply sign their names and make their intentions known that they planned not to cooperate with the draft. This stepping stone tactic was designed to bring people into the movement and it worked. For instance, in early November, thirty-two University of Chicago students drafted and signed the first of many “We Won’t Go” statements and was published in the campus newspaper, the *Chicago Maroon*. The statement read: “The undersigned men of draft age are united in their determination to refuse military service in Vietnam, and urge others of like mind to join them.”⁷⁶ The Chicago students inspired many other We Won’t Go statements at colleges across the United States including Cornell, Yale, and other places.⁷⁷

Thirteen Yale students issued their “We Won’t Go” statement on November 22, the culmination of over a year of organizing on campus to initiate a more persistent anti-draft campaign after Mitchell’s trial in New Haven. The students released the statement on the same day that they held an information session at Yale’s Dwight Hall. “Convinced that our government’s present course of action is not in the best interests of either the United States or the people of Vietnam,” the statement read, “we are united in our intention to refuse induction if drafted into the armed services that are participating in the current war.”⁷⁸ Two of the thirteen signers had already returned their draft cards to their local draft boards. As the *Daily News* reported, “This can lead to immediate induction. Refusal of induction is punishable by a three to five year jail sentence.”⁷⁹ Yale senior David Hilfiker told the *Daily News*, “We’re not trying to cajole people at this meeting. We only want to tell them about our thoughts and concerns and to challenge them to make a decision about their own

⁷⁶ Quoted in Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 59.

⁷⁷ For other examples of “We Won’t Go” statements, see Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), pp. 203-205.

⁷⁸ “We Refuse Induction,” *The Yale Daily News*, 23 November 1966, 2. The statement read in full:

We the undersigned members of the Yale community are grieved that the war in Vietnam continues to grow. We are distrustful of our government’s avowed concern for peace. We earnestly seek for ourselves a constructive role in bringing peace to Vietnam.

Convinced that our government’s present course of action is not in the best interests of either the United States or the people of Vietnam, we are united in our intention to refuse induction if drafted into the armed services that are participating in the current war. We choose to express our position publicly at this time in the hope that others of like mind will join with us to create a politically effective protest. We encourage all decisions of conviction and challenge each man to assess his position regarding the war.

⁷⁹ Ad Hoc Group to Consider Draft Protest,” *The Yale Daily News*, 22 November 1966, 1.

responsibilities.” Emphasizing the decentralized nature of these actions, Hilfiker added, “we don’t have a policy or a leader, and we won’t mean to lead a movement. We do want to open the possibility of a movement by encouraging personal decisions.”⁸⁰

The increased antiwar activism on Yale’s campus was beginning to worry some of the school’s alumni. Staughton Lynd, a lightning rod of attention because of his outspoken antiwar position and civil disobedience, was the focus of a campaign by a group of alumni to see him ousted from this history department. Just before the emergence of the “We Won’t Go” statements, special agents of the F.B.I. reported on October 28:

On 10/28/66, [redacted] who is well known to the Bureau advised SA [redacted] that on the morning of 10/28/66, a group of Yale University alumni were meeting in New York City to formulate a plan to ease subject out of Yale University. The alumni were greatly concerned that Yale University might “become another Berkeley.” ... This group of alumni includes a number of Yale University trustees who seek to effect subject’s dismissal with no publicity.⁸¹

The F.B.I. was interested as well in the growing anti-draft activity at Yale University and had two informants attend and report on the meeting called for 9:30 p.m. at Dwight Hall on November 22. The informants wrote that fifty undergraduate, graduate, and Divinity School students as well as several faculty members attended. The report stated that, “a Yale Divinity School student whose name is unknown to the source, announced that the subject of the meeting was to discuss the possibility of developing support for a movement to oppose the draft and the war in Vietnam.” Other speakers included Hallan C. Shorrock, visiting lecturer and Navy line officer during World War II, Staughton Lynd, and Chaplain William Sloane Coffin, all openly in support of the thirteen Yale students. Lynd announced that he and his wife Alice would be holding “weekly seminars at his residence for the purpose of helping individuals make up their own minds concerning the Vietnam war and the draft.” Moreover, William Sloane Coffin announced that he would be approaching Yale faculty to obtain “endorsement of the moral right of the group to refuse to be drafted.” Concluding the report, the first informant “advised that although a number of those present at the meeting said they

⁸⁰ “Ad Hoc Group to Consider Draft Protest,” *The Yale Daily News*, 22 November 1966, 1.

⁸¹ SAC, New York to Director, F.B.I., 28 October 1966. For Lynd’s subsequent denial of tenure by the history department because of his antiwar activism, see Carl Mirra, *The Admirable Radical: Staughton Lynd and Cold War Dissent, 1945-1970* (Kent: The Kent State University Press, 2010), 117-149.

wanted to become part of a nationwide movement to oppose the Vietnam war and to resist the draft, no formal organization was established at this meeting and no indication was given that a formal organization or committee would result from this meeting.”⁸²

With the *Yale Daily News* and the *New Haven Journal-Courier* covering the meeting at Dwight Hall, the participants agreed in advance that no one could be identified by name in the press to protect their identities. The campus paper noted that the student presenters argued that draft refusal was the most “politically effective” tactic now available to the antiwar movement. One of the speakers “called for a switch from mass meetings, marches, teach-ins, and letter-writing to tactics that thwart the draft system” and called for greater cooperation with other campuses, such as the University of Chicago students who initiated the “We Won’t Go” statements. Both the *Daily News* and *Journal-Courier* focused on Staughton Lynd’s announcement that draft seminars would be held at his home just a few blocks from campus.⁸³

Meanwhile, the initial signers of the University of Chicago “We Won’t Go” statement followed-up by organizing the “We Won’t Go” conference at the University of Chicago on December 4. The conference was organized at the same time as a Ford Foundation-University of Chicago sponsored private conference on the draft. Tom Gushurst, one of the initial signers of the Chicago “We Won’t Go” statement, introduced the conference: “Across the midway today they’re [at the Ford Foundation-University sponsored conference] talking about the best way of supplying the war machine with cannon-fodder. We think they’re talking about the wrong issue...” Instead, the “We Won’t Go” conference was organized by the thirty-two signers of the University of Chicago statement because they were “tired of attending rallies in Madison Square Garden to end the war now, tired of marching down Fifth Avenue, tired of hearing the President say, ‘Forgive them, for they know not what they do.’” The conference would discuss conscientious objection, draft dodgers, draft resisters, draft card burning, fleeing the United States, those who had already refused induction, and those

⁸² SAC, New Haven to Director, F.B.I., 2 December 1966. The report, “Discussion Meeting at Yale University to Express Opposition to War in Vietnam and Selective Service System” was filed on 1 December 1966.

⁸³ Alan Bolcs, “Ad Hoc Groups Presents New Anti-War Protests,” *The Yale Daily News*, 23 November 1966, 1, and, Edward Freeman, “Lynd Plans Classes on Draft System,” *New Haven Journal-Courier*, 23 November 1966, 1.

jailed for noncooperation. It would also address the “problems and frustrations” of the movement, the tactics and history of anti-draft organizing, as well as the theory of noncooperation as a justifiable form of struggle.⁸⁴

Conference speakers included Lynd, Richard Flacks, a University of Chicago professor and co-founder of SDS, Civil Rights leader James Bevel of the Southern Christian Leadership Conference, Arlo Tatum of the *Central Committee for Conscientious Objectors*, John Otis Sumrall of the Congress of Racial Equality, Jeff Segal who would eventually become national SDS draft coordinator, and David Mitchell. At the event, Mitchell argued that the Nuremberg ‘defense’ went beyond a mere challenge of the draft on civil libertarian grounds of “accommodating the rights and demands of one’s conscience to refuse to cooperate” with the draft to demand “the application and enforcement of law to justify and demand a refusal to participate in what *is* wrong and, thereby, a condemnation of that wrong itself. The vindication of such a defense would not just free one from participating in the crimes of the United States Government, but would condemn the crimes and the criminals.”⁸⁵ Mitchell lamented that the anti-draft movement has “remained only individuals, for no coherent and organized program has been forthcoming” and that “in some quarters we have been martyred, called heroes, or whatever, but to my mind such a response only isolates our acts as impossible and therefore closets [them] into ‘irrelevance.’” Instead, Mitchell, at the conference, stated that:

My purpose is to contribute to building a movement to challenge and end policies of aggression and inhumanity. My purpose (if not to win a legal victory to end the war the Vietnam War in the courts, which is near impossible) is to raise, and focus on, the issues and help to elicit the response of organizing *power* that can effectively deal with them. If such power was forthcoming, then the legal victory would come forth as an aspect of the implementation of *change*.⁸⁶

⁸⁴ Tom Gushurst, “Introduction,” *We Won’t Go Conference*, 4 December 1966, in Alice Niles Lynd and Staughton Lynd Papers (DG 099), Box 1, *We Won’t Go*, Chicago, Dec. 4, 1966, Swarthmore College Peace Collection.

⁸⁵ Quoted in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 94-95.

⁸⁶ Quoted in Mitchell in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 105-106.

Staughton Lynd's conference remarks focused on the historical parallels of the draft resistance movement in France during the Algerian War and in the United States. He continued to push the idea for selective objection to the war in Vietnam. "Many if not most American young men who refuse to serve in Vietnam are not conscientiously opposed to all wars, but are conscientiously opposed to *this* war. They are not pacifists. But they are deeply convinced that America's war in Vietnam is – to use the language of the Fort Hood Three – illegal, immoral and unjust."⁸⁷

To historicize the draft resistance movement, Lynd quoted a 1773 pamphlet, "Manslaughter and Murder." Written by Granville Sharp, a clerk in the British defense department who resigned from his post in defiance of the British war in the American colonies, argued that "the Law will not excuse an unlawful Act by a Soldier, even though he commits it by the express Command of the highest military Authority in the Kingdom: and much less is the Soldier obliged to conform himself implicitly to the mere opinions and false Notions of Honour, which his Superiors may have unfortunately adopted." For Lynd, this demonstrated how old the "Nuremberg principle" was and proffered it was part of the same trajectory that led to the "We Won't Go" conference. He went on to quote from Henry David Thoreau, Charles Sumner, and Eugene Debs and historicize the expressly American tradition of conscientious objection to particular wars from the annexation of Mexican territory and the Fugitive Slave laws to the annexation of Santo Domingo in 1870-1871 to the use of U.S. troops in the Mexican revolution by Woodrow Wilson in 1914. Finally, he called on American intellectuals "to clarify where they stand in relation to the refusal of the young. They must make it known that they support and encourage refusal to be inducted for the war in Vietnam." Such support, from an intellectual at an elite university, who was too old to be subject to the draft, would prove a heartening expression for the youths who faced the draft. Lynd called on the intellectual to "publicize their conviction that young men who are deeply

⁸⁷ Staughton Lynd, "We Won't Go Conference, 4 December 1966, University of Chicago". A copy of Lynd's remarks are housed in the National Archives in Washington, D.C. RG 233, Records of the U.S. House of Representatives Un-American Activities Committee, Box 6, Folder 963/3/16/5 "Lynd, Staughton, 1966".

convinced that this war in Vietnam is an unjust war have, in the language of the Declaration of Independence, not only the right but the duty to say: We Won't Go.”⁸⁸

The University of Chicago We Won't Go conference was the most successful and influential conference on the draft to date, precisely because of the efforts of a small group of determined individuals throughout 1965-1966 to bring about a mass movement against the draft and the war in Vietnam. Staughton Lynd and Michael Ferber, central protagonists in this struggle, wrote five years later that the conference “brought together representatives of every significant strain of anti-draft activity – at a moment when that activity was on the verge of assuming mass proportions.” “Over five hundred attended from dozens of organizations,” noted Lynd and Ferber. “They brought back to their organizations not only ideas and contacts but a sense of purpose and solidarity within a rapidly growing almost movement.”⁸⁹

On December 6, the Federal Court of Appeals released its decision in the Mitchell case. The three judges upheld the lower courts' ruling and argued, “we need not consider whether the substantive issues raised by appellant can ever be appropriate for judicial determination.” On January 28, 1967, Mitchell filed a petition with the Supreme Court and before he could have another chance to argue his case he was forced to surrender and began serving his sentence on February 6. Before surrendering, Mitchell issued a statement. “My case is not my prosecution but rather the prosecution of America for its oppression and slaughter at home and abroad,” he proclaimed. “America's guilt cannot be scared away or locked up. It is there to be broadcast by every attempt to silence it. The Germans claimed they submitted unaware of Nazi crimes. With American crimes staring us in the face, are we to goose-step down the same path of domination and genocide to the final holocaust?”⁹⁰ Mitchell's action was “inspiration to all struggling against the criminality of America's war

⁸⁸ Staughton Lynd, “We Won't Go Conference, 4 December 1966, University of Chicago”. A copy of Lynd's remarks are housed in the National Archives in Washington, D.C. RG 233, Records of the U.S. House of Representatives Un-American Activities Committee, Box 6, Folder 963/3/16/5 “Lynd, Staughton, 1966”.

⁸⁹ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 59-60.

⁹⁰ David Mitchell's statement, “You Can't Lock Up America's Crimes!!!,” 6 February 1967, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University.

of aggression,” Bertrand Russell later cabled. “We salute you as a voice of conscience and I assure you of our unyielding efforts to reverse this injustice.”⁹¹

On March 20, the Supreme Court denied the petition for a writ of certiorari with no comment. However, Justice William O. Douglas wrote in dissent: “There is a considerable body of opinion that our actions in Vietnam constitute the waging of an aggressive ‘war’.” “These are extremely sensitive and delicate questions,” Douglas noted. “But they should, I think, be answered...I intimate no opinion on the merits. But I think the petition for certiorari should be granted. We have here a recurring question in present-day Selective Service cases.”⁹² For the early draft resisters, it was clear the courts would not offer them redress for their grievances against the Selective Service System or the war in Vietnam.

Conclusion

At the beginning of 1967 David Mitchell was sent off to jail and, despite the pessimism he voiced at the University of Chicago “We Won’t Go” conference, both the anti-draft and broader antiwar movement in late 1966 and early 1967 experienced unexpected successes. In December 1966, the SDS National Council, meeting in Berkeley after a year and a half of inaction on the draft, adopted a militant anti-draft resolution after two days of debate. The resolution called the draft “coercive and anti-democratic” and argued “that a sense of urgency must be developed that will move people to leave the campus and organize a movement of resistance to the draft and the war, with its base in poor, working class, and middle class communities.” SDS encouraged “all young men to resist the draft.”⁹³ SDS leaders had come around, sensing which way the wind was blowing. As the war escalated, and draft calls rose, the organization realized it needed to take a bold step against the draft

⁹¹ Bertrand Russell to End The Draft Committee, 23 February 1967, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University.

⁹² Quoted in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 104-105.

⁹³ Quoted in Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 60-61. See also, Michael Foley *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 57-58.

and against the war that they had originally took in organizing the first non-exclusionary antiwar demonstration in April 1965.

By the end of 1966, according to Staughton Lynd and Michael Ferber, the large-scale antiwar coalitions “had still not quite become a collective resistance.” Moving from individual acts of resistance such as the early draft card burners, to non-pacifist non-cooperators like David Mitchell, to the signing of We Won’t Go statements on college campuses, the development of anti-draft unions, and the eventual endorsement by SDS of draft resistance still had not pushed the anti-draft movement into a truly mass movement. In the words of Lynd and Ferber, “A means had yet to be found that would tie together in one political process the hundreds of signers of We Won’t Go statements and the bold tactics of the draft card burners.”⁹⁴

Struggles to organize a mass movement, the crux of End The Draft and David Mitchell’s efforts since 1963, were beginning to pay off. Participants in the December “We Won’t Go” conference returned to their communities and campuses. By March, there were over “two dozen ‘We Won’t Go’ groups on college campuses” and demonstrated that independent anti-draft organizing on campus was moving ahead despite the missteps of SDS chapters across the country.⁹⁵ The battle of draft-age youth and their adult supporters, more than two years in the making, would reach a fever’s pitch by the end of the year. Moreover, President Johnson sent to Congress his request to renew the draft after a series of draft reform reports were release in March 1967. Congress voted to renew the draft in June 1967.⁹⁶

The year 1966 ended bitterly for the Johnson administration. Coinciding with Harrison Salisbury’s dispatches from Hanoi about U.S. bombing killing civilians, on December 26 Army Dr. Howard Levy was charged with disobeying orders because he refused to teach Green Berets aidmen medical techniques because the Berets would use their skills to commit war crimes.⁹⁷ Also, a military court convicted and sentenced three marines

⁹⁴ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 64-65.

⁹⁵ Tom Wells, *The War Within: America’s Battle over Vietnam* (Berkeley: University of California Press, 1994), 124-129.

⁹⁶ Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 59-61.

⁹⁷ See Chapter Four.

to life imprisonment for killing civilians while on patrol.⁹⁸ To make matters worse for the administration, on December 29, one hundred student body presidents and campus newspaper editors wrote President Johnson that “unless this conflict [in Vietnam] can be eased, the United States will find some of her most loyal and courageous young people choosing to go to jail rather than to bear their country’s arms.” Citing Salisbury’s dispatches, the students called for a “frank discussion” on the war. The *New York Times* noted that the “tone of the letter is restrained and respectful” and that the signers make up “represent a far more moderate university group than the members of the student New Left, whose objections to the war are frequently and stridently demonstrated.” Believing they had to respond to the pleas of such respectable student leaders, White House officials’ set-up a meeting between Secretary of State Dean Rusk and the student representatives.⁹⁹ In spite of attempts quell one storm, more followed.

The war’s escalation in early 1967 and Harrison Salisbury’s dispatches spurred unusual suspects to action. On January 29, 1967, more than 400 Yale faculty members, including fifteen of Department Chairmen and five Deans, signed an open letter to President Johnson printed in the *New York Times*. Organizing efforts at Yale, helped along by the trial of David Mitchell in September 1965 and led by such stalwart peace activists as Staughton Lynd and William Sloane Coffin, was having an impact on the campus community. While speaking individually and not on behalf of the University, the ad read: “The signers of this letter ... write to urge most respectfully that you declare an unconditional halt to the bombing of North Vietnam.”¹⁰⁰

Always attentive to anti-Vietnam War advertisements in the national papers, especially the *New York Times*, White House officials asked the F.B.I. for dirt on any of the

⁹⁸ Charles DeBenedetti and Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990), 168

⁹⁹ “Text of Students’ Letter to the President,” *New York Times*, 30 December 1966, 4; Terence Smith, “Student Leaders Warn President of Doubts on War,” *New York Times*, 30 December 1966, 1; and, Tom Wells, *The War Within: America’s Battle over Vietnam* (Berkeley: University of California Press, 1994), 117-119.

¹⁰⁰ The advertisement ultimately emphasized positive developments: “We are very much strengthened in this view by the events of the last few days, particularly U Thant’s growing conviction that the cessation of bombing in the necessary key to the opening of peace talks, and Pham Van Dong’s interview with Harrison Salisbury in which a new flexibility seems to have been indicated.” “A Letter to the President,” *The New York Times*, 29 January 1967, 165. See also Melvin Small, *Johnson, Nixon and the Doves* (New Brunswick: Rutgers University Press, 1988), 98.

signers. On February 3, the F.B.I. responded to the “name check request” after it had tried to match the signers to its fingerprint database. A small group, including Staughton Lynd, had a brief summary of their political activities forwarded to Marvin Watson, the president’s special advisor.¹⁰¹ The fact the administration viewed such advertisements with suspicion and sought damaging information against its signers instead of embracing their conclusions demonstrates a lack of vision on the part of top officials. As historian Tom Wells observed, the peace movement was “heartened by the outpouring of letters” and statements at the end of 1966 and beginning of 1967. Wells summarized an interview with George Christian, the White House press secretary, where he stated “that administration officials judged antiwar statements signed by numerous professors telling indicators of the trend of public opinion as a whole. Dean Rusk admitted that officials considered these statements influential at home, as well as encouraging to the North Vietnamese.”¹⁰²

David Mitchell, entered prison for five years for his noncooperation with the draft. His wife Ellen Schneider wrote to Alice Lynd: “He has no regrets about taking the position he did – he just feels the present situation is a ‘waste of time.’ He doesn’t like jail and finds it a rather isolating experience.”¹⁰³ By January 1968, after the Justice Department had indicted the Boston Five (including Dr. Benjamin Spock and Rev. William Sloane Coffin) for conspiracy to aid and abet draft resisters, David Mitchell remained in prison. Ellen wrote to an upcoming anti-draft conference in Chicago slated for the weekend of the 27th-29th, asking that the program include a discussion about draft resisters already in jail. “People remember the guys in jail and send cards or mention them at a rally etc. but for all intents and purposes they are cut off from the movement and thus the government succeeds. It seems to me one of the ways to help keep people out of jail is to make jail a focus of attention. (Why jail Dr. Spock, or anyone if he can cause as much attention and support being in as being out!)”. Schneider wrote that “few people realize that a year ago paroles were almost automatic but

¹⁰¹ F.B.I. Liaison to Marvin Watson, 3 February 1966, Staughton Lynd F.B.I. File.

¹⁰² Tom Wells, *The War Within: America’s Battle over Vietnam* (Berkeley: University of California Press, 1994), 117.

¹⁰³ Ellen Schneider to Alice Lynd, 6 August 1967, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 12, Alice book *We Won’t Go* – correspondence, notes and rough drafts re: David Mitchell entry.

that this year almost no draft prisoners have been granted parole –unless they agree to induction ... So that when the judge says five years – that’s what it is.”¹⁰⁴ Schneider’s efforts paid off. Two years into Mitchell’s sentence, he ended up being paroled on February 5, 1969. This was a full four years after his initial legal ordeal with the Selective Service began.¹⁰⁵

¹⁰⁴ Ellen Schneider letter, 22 January 1968, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 12, Alice book *We Won’t Go* – correspondence, notes and rough drafts re: David Mitchell entry.

¹⁰⁵ End The Draft press release, “David Mitchell, Draft Resister, Paroled,” 1 February 1969, Bertrand Russell Archives II, Box 3, 340 Civil Rights, McMaster University.

Chapter 3

“Three American Heroes”: The Fort Hood Three,
Movement Defense Committees and Military Resistance, 1966-1967

Come all you brave Americans and listen unto me,
If you can spare five minutes in this 20th century,
I'll sing to you a story true as you will plainly see
It's about three U.S. soldiers they call the "Fort
Hood Three."

...

The army tried cajolery, and later on came threats
They were taken into custody, told jail was what
they'd get. At the moment that I'm singing, the
story's far from through; The next verses in the
ballad may be partly up to you.

Now if you don't believe me, you can read about it
more, About the Fort Hood Three who have refused
to fight this war; We can help them set our country
straight on the right track again, When a man can
hold his head with pride and say: "I'm an
American!"

Pete Seeger "The Ballad of the Fort Hood Three"

Nineteen sixty-five was the year that most Americans learned about the American war in Southeast Asia. In March, ground troops arrived to re-enforce air bases in the South after a sustained bombing campaign against North Vietnam was launched. The ground troops begin offensive operations against the revolutionary forces. On July 28, President Johnson announced plans to send more troops to Vietnam, over 170,000 by the end of the year. He played on the public's Cold War anxieties to defend his steady escalation of the war. Vietnamese communists, the president told the American people, were attempting to

overthrow an American ally in South Vietnam and U.S. forces were needed to preserve freedom in a far away land.

In early 1966, the war escalated to massive proportions. The Johnson administration intensified bombing over North Vietnam and the war in the South, where the vast majority of American bombs fell, saw an increase in ground troops. By the end of the year, 385,300 U.S. troops were based in South Vietnam. A centerpiece of this escalation was the decision to bomb petroleum, oil and lubrication (POL) facilities in North Vietnam. Most were in the Hanoi and Haiphong areas. This meant a geographic shift of the air war, as the U.S. Air Force had not previously targeted these areas. With key advisers pushing Johnson toward adding POL targets, the bombing program finally received the green light from LBJ in June and bombings began on June 30.¹

On the same day at the Community Church at 40 East 35th Street in New York City, a group of three soldiers from Fort Hood, Texas, held a press conference to inform the public, through the national media, of their refusal to participate in the widening war in Southeast Asia. "We have decided to take a stand against this war, which we consider immoral, illegal, and unjust," wrote Pfc. James Johnson, Pvt. Dennis Mora, and Pvt. David Samas in a joint statement, read by Pvt. Mora. "We intend to report as ordered to the Oakland Army terminal, but under no circumstances will we board ship for Vietnam. We are prepared to face court-martial if necessary." They called Vietnam a "war of extermination" and denounced "the criminal waste of American lives and resources."² Simultaneously, the soldiers launched an injunction against the Secretary of the Army and Secretary of Defense

¹ The POL targets were originally proposed in October 1965 and Admiral Sharp and General Westmoreland favored the bombing of the facilities. Walt Rostow, taking over from McGeorge Bundy as National Security Adviser, believed this would strengthen the U.S. negotiating position. Secretaries McNamara and Rusk both feared an escalation of the bombing to POL facilities would bring China into the war. John Prados, *Vietnam: The History of an Unwinnable War, 1945-1975* (Lawrence: University of Kansas Press, 2009), 159-162. According to Fred Halstead, "Hours before the June 30 Fort Hood Three press conference, the U.S. bombed oil storage depots in Hanoi and Haiphong, the first time those population centers had been attacked by U.S. forces. As a result, demonstrations previously called for July 4 in several cities were larger than expected, including one in Los Angeles sponsored by the Peace Action Council there." Fred Halstead, *Out Now! A Participant's Account of the American Movement Against the Vietnam War* (New York: Monad Press, 1979), 184.

² Quoted in Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 184. For Johnson, Mora and Samas' statements in the movement literature, see "Stand and Fight," *Liberation*, July 1966, 3-6.

in civilian courts to enjoin the military from sending the trio to Vietnam because the war was undeclared by Congress. Their bold act of resistance represented an unprecedented demonstration of opposition to an American war by its own soldiers.

By turning the spotlight on the three GIs, the event, sponsored by the Fifth Avenue Peace Parade Committee (at the time, a coalition of 93 local and national peace groups) turned into a coup for the fledgling anti-Vietnam War Movement. To symbolize their support for the trio, antiwar luminaries gathered around Johnson, Mora and Samas. Among those in attendance were A.J. Muste, Dave Dellinger, Staughton Lynd, Lincoln Lynch (associate national director of the Congress of Racial Equality), and Stokely Carmichael (chairman of the Student Nonviolent Coordinating Committee). Muste told the press he hoped the trio's example "will be followed by hundreds and thousands of G.I.'s."³ The peace movement, according to Dellinger, gained some "badly needed muscle" after Johnson, Mora and Samas announced their intention to refuse orders to embark to Vietnam. The creation of the Fort Hood Three Defense Committee in the lead-up to the trio's press conference mobilized prominent members of the peace movement to attend. The Defense Committee's formation represented the convergence of three important groups: the peace movement, the civil rights movement and the nascent G.I. movement. "In the past, the peace movement has been surprisingly slow to carry its message to soldiers, the men on whose unquestioning obedience the government relies to be able to thwart the democratic will in time of unpopular war," stated Dellinger.⁴

In conjunction with the press conference in New York, the trio launched a suit in the U.S. District Court for the District of Columbia that admonished Secretary of Defense Robert S. McNamara and Secretary of the Army Stanley Resor from deploying them to Vietnam. The injunction cited the United States' violations of the Kellogg-Briand Pact of 1928, the United Nations Charter of 1945, the Geneva Agreements of 1954, and the "Nuremberg Judgments."⁵ This multi-pronged approach sought to force the Army's hand in the civilian

³ Quoted in "3 Young GIs To Refuse To Fight in Vietnam," *Chicago Tribune* 1 July 1966, 1.

⁴ Dave Dellinger, "The Fort Hood Three," *Liberation*, August 1966, 3-5. Reprinted in Dave Dellinger, *Revolutionary Nonviolence: Essays* (Indianapolis: Bobbs-Merrill, 1971), 351-357.

⁵ "Press Release," 30 June 1966, in "The Fort Hood Three: The Case of the Three G.I.'s Who Said "No" to the War in Vietnam," in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace

courts by declaring the orders and the war as illegal. The lawsuit coincided with efforts by the trio's attorney, Stanley Faulkner, to pursue another injunction on behalf of Army cook Robert Luftig. Luftig had filed suit to seek an injunction against being sent to Vietnam because the war was illegal. The only difference in the two cases was that Luftig filed suit before the Fort Hood Three and he had not been given orders to deploy to Vietnam. Luftig anticipated those orders would come and saw his move as preemptive. The two cases would eventually merge in the civilian courts. Faulkner relied on the legal precedent in *Youngstown Sheet and Tube Co. v. Sawyer* (1952) to argue that in an undeclared war, both draftees and soldiers could not be sent to Vietnam. During the Korean War, President Henry Truman attempted to seize the nation's steel mills because the United Steelworkers of America were poised to go on strike. Truman, aware that steel was the driving force behind the massive American military, issued Executive Order 10340 a few hours before the impending April 10, 1952, strike, thus seizing the nation's steel mills for the war effort. The Supreme Court argued, however, that the President did not have the right to seize property for an undeclared war.⁶ Using this decision, Stanley Faulkner argued in a widely distributed legal brief in the cases of the Fort Hood Three and Robert Luftig that "it is unlawful 'to seize persons' to perform an illegal act."⁷

Collection, Box 16, Reference – Fort Hood Three. According to John and Rosemary Bannan, "The case of the Fort Hood Three unfolded in both the military and civilian court systems. While the civilian court is permanently established by federal, state, or local government to try all law violations within its jurisdiction, the military court is convened by the commanding officer of the accused serviceman on the occasion of a violation of military regulations. The very term *court* in its military application – court-martial – is applied to what the civilian system calls the jury: the group that renders the verdict. In addition, the military system has its own system of review and does not grant bail." John F. Rosemary and Rosemary S. Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 63-64.

⁶ Justice Black argued:

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 2 June 1952.

⁷ Stanley Faulkner, "Civil Court Preempted By Military Arrests," *downdraft*, September 1966, 18-21.

The Fort Hood Three were the first soldiers to publicly refuse orders and subsequently garnered a great deal of publicity, generating especially strong interest within the ranks of servicemen stationed across the United States. Like David Mitchell, Johnson, Mora and Samas were not pacifists. While they were drafted into the Army in December 1965, they were not “opposed to participation in war in any form.” The three soldiers were opposed to the Vietnam War in particular. They did not apply for conscientious objector status because their applications would have been rejected. They became what would be referred to as selective war objectors as opposed to “selective conscientious objectors.” This was a formality for the peace movement, but one that mattered in the context of military regulations. In a letter to supporters of the Fort Hood Three, their civilian Defense Committee wrote:

The Fort Hood Three case is one of the first that has sought to test out whether soldiers, who are not pacifists or conscientious objectors in the technical sense, can legally refuse to participate in a war which they believe to be “unjust, immoral and illegal.” The legal case of the three soldiers is based upon the precedents of the Kellogg-Briand Pact, the Geneva convention, the Nuremberg judgements, the U.N. Charter, and the U.S. Constitution.⁸

The Fort Hood Three Defense Committee raised money for the trio’s legal costs, organized demonstrations, printed ads in the *New York Times*, distributed literature, and its supporters gave talks that spotlighted moral and legal questions about Vietnam and provided practical examples of resistance to the war in both the armed forces and in the anti-draft movements with regard to the Nuremberg Principles. The national mainstream media and underground press alike covered the case.

The impact the trio had on raising consciousness amongst Americans just beginning to question the war was immeasurable. The refusal of Johnson, Mora and Samas to serve in Vietnam had a ripple effect that inspired different strains of antiwar activity both in the United States and around the world. Fearful of such an impact, the Army held high level conferences in the Pentagon to discuss the threat such a form of disobedience would have within the ranks service-wide. The Army decided to arrest the trio before they actually

⁸ “Dear Friends,” 3 November 1966, in A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – sponsorship.

refused their orders, not even halfway through their thirty-day furlough, prompting the Fort Hood Three Defense Committee to cry foul in the national media and the movement press, arguing the Army intervened to quash dissent while the case was going through the civilian courts. The Fort Hood Three were court-martialed and ended up spending three years in prison.

While the major works on the G.I., veteran and civilian antiwar movements mention the case of the Fort Hood Three, they do so briefly by way of introducing the origins of the more potent movement among G.I.s that developed after 1967.⁹ Such a cursory handling of the case fails to adequately explain how it helped to galvanize the G.I., veteran and civilian antiwar movements. While John and Rosemary Bannan write a whole chapter on the case of the Fort Hood Three in their exemplary *Law, Morality and Vietnam: The Peace Militants and the Courts*, they focus exclusively on the legalistic aspects of case in the civilian and military courts. The Bannans do not explore how the trio helped galvanize antiwar activity through the help of the Defense Committee and the spreading of the ethos of Nuremberg. The significance of the Fort Hood Three's refusal of orders to serve in Vietnam, their subsequent court-martials, and the dissemination of their stories by their Defense Committee helped to build the case against the war by publicizing the connection between the trio, the Nuremberg Principles, and international law. "The basic issue which my case raises is the individual's right to refuse to obey orders which he considers morally or legally wrong," James Johnson wrote from prison.¹⁰ The case of the Fort Hood Three was a crystallizing moment for different strands of antiwar activity: stirrings on bases against the war, the nascent anti-draft movement, the exposé by former Green Beret Donald Duncan in *Ramparts* magazine, and the escalation of the war in Vietnam in the summer of 1966.

⁹ See, for instance: Richard Moser's *The New Winter Soldiers: GI and Veteran Dissent during the Vietnam Era* (New Brunswick: Rutgers University Press, 1996), 69-70; Andrew Hunt's *The Turning: A History of the Vietnam Veterans Against the War* (New York: New York University Press, 1999), 8; Tom Wells, *The War Within: America's Battle Over Vietnam* (Berkeley: University of California Press, 1994), 99-100; and Charles DeBenedetti with Charles Chatfield, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse: Syracuse University Press, 1990), 155, 169.

¹⁰ James Johnson quoted in Alice Lynd, *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 200.

While the Fort Hood Three were arrested surreptitiously, court-martialed and served lengthy jail sentences, it could be concluded the efforts of the Defense Committee did not amount to much in and of itself. However, the impact of case and the dissemination of information about the trio in the United States, on military bases, and around the world inspired countless draftees, soldiers, and civilians alike. The Fort Hood Three and the day-to-day work of their Defense Committee seized a crucial moment the peace movement had been searching for: to find a cause to bring together different strands of antiwar activity. The Defense Committee did so by developing a support structure for the trio and by disseminating information about the case and international law by creating pamphlets, flyers, leaflets, organizing speaking tours across the country, organizing rallies and demonstrations in front of draft centers and military bases, raising money for legal costs, writing letters and soliciting letters from faith groups, labor organizations, and other prominent figures in American social life. For instance, the ad hoc Lawyers Committee on American Policy Towards Vietnam submitted an *Amicus Curiae* legal brief in the Military Court of Appeals to support the soldiers' main contention that the war in Vietnam was illegal.¹¹ Moreover, the soldiers' family members, particularly David Samas' wife Marlene and Dennis Mora's sister Grace Mora Newman, played an integral role in the Defense Committee by traveling around the country and spreading the word about the soldiers case. The support of family members helped to personalize the case of each resister and made their refusal less abstract by demonstrating the impact on the family. While the role of women in the antiwar movement has been heavily documented elsewhere, Grace Mora Newman and Marlene Samas speaking at events across the United States and raising money for the Defense Committee demonstrated the significance of women within the peace movement.

The case of the Fort Hood Three as both a symbol of antiwar resistance and an example to be followed helped to sustain a fractured coalition of antiwar personalities and groups in the summer of 1966. I will focus on the arguments Johnson, Mora, and Samas utilized in their publicized campaign and in their court-martial defense, the role of race and class in the early years of the war within the United States military, and the convergence of

¹¹ See the Lawyers Committee on American Policy Towards Vietnam's newsletter *Report*, November 1967, p. 6.

the peace, civil rights, and G.I. movements, as represented by the formation of the Fort Hood Three Defense Committee and the publicization of the Nuremberg Principles as central to the antiwar struggle. The Fort Hood Three and the work of their Defense Committee helped to build the war crimes movement from below by bringing these different strands of antiwar activism together. Through the publication of numerous movement materials, the ethos of Nuremberg was able to gather a national and international prestige that would help others in the military formulate the ideological basis of their opposition to the Vietnam War.

The Early G.I. Movement

Once the Americanization of the war in Vietnam was underway, the nascent G.I. movement began with isolated acts by individual soldiers who were quickly contained by the military brass. On January 31, 1965, before the Viet Cong assaults on Pleiku and subsequent Americanization of the war in Vietnam, Lieutenant Richard R. Steinke refused a direct order from Saigon to relocate to a secret Green Beret outpost in the jungles of South Vietnam to participate in counterinsurgency operations. Steinke, an honors graduate from West Point and member of the elite Special Forces, voiced his disapproval of American actions in Vietnam and argued the Vietnam War “isn’t worth a single American life.”¹² In the midst of a growing protest movement in the United States and discussions within the Johnson administration to increase troop and draft calls, Steinke appeared on June 23 before a Court Martial and was convicted after the two day hearing for having disobeyed orders. The Army, in order to reduce publicity of the affair, simply dismissed Steinke from the Special Forces.¹³ Other soldiers would not be so lucky.

In an unprecedented case that would later bring First Amendment free speech rights to the forefront of the G.I. movement, Lt. Henry Howe, Jr. was charged with conduct unbecoming of an officer and using contemptuous language towards President Johnson for

¹² Conrad Lynn, “The Case of David Mitchell Versus the United States,” *Right and Left: A Journal of Libertarian Thought* Vol. I, No. 2 (Autumn 1965): 30-31.

¹³ “Steinke Visits Home, Won’t Talk of Trial,” *The Milwaukee Journal*, 8 September 1965, 3., and, *National Guardian*, 3 July 1965.

his participation in an antiwar demonstration in El Paso, Texas, on November 6, 1965. While in civilian clothes and off-duty, Howe held a sign that read: “End Johnson’s fascist aggression in Vietnam” and “Let’s have more than a choice between petty, ignorant fascist in 1968.”¹⁴ According to the Freedom Now For Lt. Howe Committee, formed to disseminate information about his case, he was court-martialed and sentenced to two year in prison, loss of pay, and dismissal from the military. Lt. Howe was paroled on March 24 after three months in prison pending his appeal launched by the American Civil Liberties Union.¹⁵ The A.C.L.U. agreed to pay for Howe’s legal costs. Howe’s parents, Herbert and Jane, had founded the Freedom Now For Lt. Howe Committee to disseminate information about their son’s case to the peace movement. A fact sheet and pamphlet entitled “Do GIs Have Rights? The Case of Lt. Howe” received far and wide distribution and was published in newsletters such as End The Draft’s *downdraft* in September 1966. In a letter to the Fifth Avenue Peace Parade Committee in New York, Howe’s parents wrote that the “right of a soldier to speak out against policies he believes to be wrong” is at stake. “Publicity is his only hope for early release,” they argued, adding that such “publicity should help other political prisoners” and “help the antiwar movement.”¹⁶

In May 1966, Lt. Howe, while on parole, spoke at several antiwar rallies and public forums. These were monitored closely by the military and on July 7, Alfred B. Fitt, General Counsel for the Department of the Army, sent a letter to Melvin Wulf, Legal Director of the ACLU, stating: “Howe is still an officer in the Army ... I want to make it very clear that Howe is not to make public attacks on the character of the President or otherwise play a public role which might tend to cause disaffection in the armed forces.” Fitt went on to argue that while Howe had been raising first amendment concerns in his court-martial, “the government will continue to uphold and apply the opposing theory.”¹⁷ Howe’s case rallied

¹⁴ Quoted in Fred Halstead, *Out Now! A Participant’s Account of the American Movement Against the Vietnam War* (New York: Monad Press, 1979), 174.

¹⁵ “Dear Friends,” 22 April 1966, in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.’s.

¹⁶ Herbert and Jane Howe to Fifth Avenue Peace Parade Committee, 23 March 1966, AJ Muste Papers, SCPC, Box 45, Reel 89-25, Conscientious Objection.

¹⁷ Fitt specifically informed Melvin Wulf that “Howe should refrain from pamphleteering or participation in meetings, rallies, conferences and the like where it might reasonably be expected that his personal views

civil libertarians and represented yet another significant example of GI resistance that would resonate among servicemen via a growing underground press.

Private Robert Luftig's lawsuit, the first by an active-duty soldier seeking intervention by civilian courts to prevent him from being sent to Vietnam, was filed on March 17, 1966, in United States District Court, against Secretary of Defense Robert McNamara and Secretary of the Army Stanley Resor. Luftig was drafted on September 13, 1965, and stationed at Fort Benning, Georgia. Represented by Stanley Faulkner, the injunction claimed the war in Vietnam was an undeclared war and in violation of the United States' treaty obligations under the United Nations Charter, the South East Asia Treaty Organization Collective Defense Treaty, the Geneva Agreements of 1954, the Nuremberg Principles, and the Kellogg-Briand Pact of 1928 (which was the first international treaty outlawing the launching of aggressive war).¹⁸ On April 5, U.S. District Court judge Alexander Holtzoff dismissed Pvt. Luftig's injunction, claiming that the court could not consider the justiciability of the claim because it was of a political nature. "The courts may not substitute themselves in the position of Commander in Chief of the armed forces and in turn with the disposition of soldiers," Judge Holtzoff argued.¹⁹ This was the first decision by a Federal Court ruling on the constitutionality of the war in Vietnam. It also marked the first time, and certainly not the last, where the court held that the war making powers of the President was a matter to be decided between the Legislative and Executive branches of government. Luftig's case would become intertwined with the Fort Hood Three case

concerning the President, our presence in Vietnam, the obligations of soldiers and related topics come to public attention." Alfred B. Fitt to Melvin Wulf, 7 July 1966, in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.'s. For more information, see: "Army Threatens to Silence Lt. Howe with 10-Year Sentence," Freedom Now For Lt. Howe Newsletter #2, 25 July 1966, in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.'s. On 5 August 1966, A.J. Muste wrote to Melvin Wulf declaring: "I have become very strongly convinced by our recent experience with G.I.'s that this issue of 'civil liberties' for them is a crucial one. It seems to me, furthermore, that in the atmosphere which exists in this country today, we really have a chance of getting somewhere with it." A.J. Muste to Melvin Wulf, 5 August 1966, in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.'s.

¹⁸ See the injunction "Luftig v. McNamara and Resor," in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.'s. See also "G.I. Says U.S. Hasn't Right to Transfer Him to Vietnam," *The New York Times*, 19 March 1966, 23.

¹⁹ "G.I. Loses Lawsuit on Avoiding War," *The New York Times*, 6 April 1966, 7. For more on Pvt. Robert Luftig and his motivations for filing the injunction, see Alice Lynd's interview with him on 26 December 1966 in "Robert Luftig: Suing the Army," in Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 168-180.

throughout 1966 and early-1967. However, Luftig served his time in the Army as a cook and was discharged before the case could be settled in the courts.

In relation to the mounting individual acts of conscience of soldiers in the military, veterans from America's previous wars also began to voice their opposition to the Vietnam War. In sporadic actions across the United States in 1965 and 1966, veterans from World Wars I and II, and Korea began forming groups, showing up at protests, and organizing their own actions. On November 24, 1965, the Ad Hoc Committee of Veterans for Peace in Vietnam bought a full-page advertisement in the *New York Times* that endorsed the November 27 march planned for Washington, D.C. "Our first-hand experience with the hideousness of war has given us a particular passion for peace, a special responsibility and need to speak out," the ad stated. It demanded a bombing halt by Washington over North Vietnam, negotiations with the National Liberation Front, and recognition of the provisions of the 1954 Geneva Agreements.²⁰

Veterans of other wars attempted to organize their peers. In January 1966, roughly fifty veterans from World War I, World War II, and the Korean War assembled at the Gettysburg Civil War battlefield in Pennsylvania to conduct "A Veterans March to End the War in Vietnam." In addition, Veterans and Reservists Against the War, formed during the summer of 1966, held a march from Valley Forge to Washington, D.C. The largest veterans group to organize at this time, Veterans for Peace, was founded in Chicago on January 28, 1966. Not until the spring of 1967 would Vietnam veterans begin organizing more systematically against the war.²¹

In the early years of dissent, Master Sergeant Donald Duncan rose to prominence as the nation's most influential antiwar G.I., acting as an inspiration to many G.I.'s and Vietnam veterans. Duncan spent ten years in the United States Army, six of them in the Green Berets, the Army's the Special Forces. He served eighteen months on active combat duty in Vietnam, was highly decorated, receiving the South Vietnamese Silver Star, the Combat Infantry Badge, the Bronze Star, and the United States Army Air Medal, and would turn

²⁰ *New York Times*, 24 November 1965, 13.

²¹ See Andrew Hunt, *The Turning: A History of Vietnam Veterans Against the War* (New York: New York University Press, 1999), 6-10.

down promotion to Captain in March 1965. He participated in many missions in War Zone D, Vung Tao and the An Khe Valley. He left Vietnam on September 5, 1965, and received an honorable discharge that same month. In February 1966, he released “The Whole Thing Was a Lie!”, an explosive exposé in *Ramparts*, a muckraking magazine out of San Francisco, California. The highly publicized *Ramparts* edition – featuring Duncan on the cover in full uniform and signature green beret with the caption “I Quit!”– included his treatise against counter-insurgency. Duncan famously wrote the oft-quoted passage: ““*The whole thing was a lie. We weren’t preserving freedom in South Vietnam. There was no freedom to preserve. To voice opposition to the government meant jail or death. ... It’s not democracy we brought to Vietnam – it’s anti-communism.*” He called anti-communism “a lousy substitute for democracy.”²² The article cemented Duncan as a prominent critic of the war and helped him become a central figure in the antiwar movement on the west coast. “It was a personal protest,” he recounted in the 2005 documentary *Sir! No Sir!*. “It was just getting out of the service. There was no movement to join,” recalling the trials and tribulations of early antiwar organizing.²³

The Story of the Fort Hood Three

“We represent in our backgrounds a cross section of the Army and of America,” announced the Fort Hood Three at their June 30, 1966, press conference in New York City. “James Johnson is a Negro, David Samas is of Lithuanian and Italian parents, Dennis Mora is Puerto Rican. We speak as American soldiers.” The statement placed race and class at the forefront of their explanation to the American public why they were refusing orders. “We know that Negroes and Puerto Ricans are being drafted and end up in the worst of the

²² He wrote: “It had taken a long time and a mountain of evidence but I had finally found some truths. The world is not just good guys and bad guys. Anti-communism is a lousy substitute for democracy. I know now that there are many types of communism but there are none that appeal to me. In the long run, I don’t think Vietnam will be better off under Ho’s brand of communism. But it’s not for me or my government to decide. That decision is for the Vietnamese. I also know that we have allowed the creation of a military monster that will lie to our elected officials; and that both of them will lie to the American people.” Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966, 23.

²³ Quoted in *Sir! No Sir!*, 2005, Documentary, Directed by David Zeiger.

fighting all out of proportion to their numbers in the population,” the statement read, “and we have first hand knowledge that these are the ones who have been deprived of decent education and jobs at home.”²⁴

Samas, age 20 at the time, was born in California and attended Modesto Junior College. His father worked at a trucking company and eventually opened his own furniture business. After high school, David hitch-hiked across country and landed in Chicago where he met his future wife, Marlene. Dennis Mora, 25, grew up in East Harlem (or Spanish Harlem) and went to high school in the Bronx. He originally went to Brown University, transferring to the City College of New York where he joined the W.E.B. DuBois Clubs of America and also became a welfare case investigator. James Johnson, 20, grew up in Harlem where his father, a union man, worked in direct mailing. A graduate from St. Cecilia's Parochial School and Rice High School, Johnson attended Bronx Community College before leaving to become a bank teller at the Bronx Savings Bank. The Army drafted the three in December 1965.²⁵

The three soldiers were caught up in the elaborate system of “channeling manpower” into prescribed occupations which would aid the United States’ “national interest” during the Cold War. While a majority of middle-class and wealthy students and professionals such as scientists, engineers, educators and skilled workers would be channeled into schools or occupations which would aid the expanding military-industrial-complex through a complex set of deferments; poor and working-class youth would be channeled into the U.S. armed forces to fight in the expanding conflict in Vietnam. The classist nature of the draft was implicitly recognized in a July 1965 memorandum by Selective Service System director General Lewis Hershey. Obtained and published in *Ramparts* magazine and *New Left Notes* in late-1967, the “channeling” memo laid out the way in which the Selective Service acted to procure manpower for military and non-military roles which served the “defense effort.”²⁶

²⁴ Quoted in Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 184. For Johnson, Mora and Samas' statements in the movement literature, see “Stand and Fight,” *Liberation*, July 1966, 3-6.

²⁵ For first-hand accounts by Samas, Johnson and Mora, see Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 181-202.

²⁶ The “Channeling Memo” quoted in *Ramparts*, December 1967.

By drafting or inducing American youth to enlist out of fear of being drafted, the armed forces would always have enough manpower to fill the ranks of an active-duty force capable to projecting American power all over the world. The vast majority of those who served in Vietnam as a result were from poor and working-class backgrounds. Historian Christian Appy estimates that of those who served in Southeast Asia, twenty-five percent were from poor backgrounds, fifty-five percent were working-class, twenty percent from the middle-class and a statistically negligible number from wealthy backgrounds.²⁷ This meant that while middle class students could obtain deferments to go to college, poor and working class Americans were serving and being killed in the jungles of Vietnam.

As the three soldiers were going through basic training in early 1966, the Defense Department released statistics on casualties in Vietnam. The numbers were shocking. At the end of 1965, African Americans represented 14.8 percent of the Army in Vietnam, but between 1961 and 1965 the death rate was 18.3 per cent. The Marine Corps had 8.9 percent of its forces in Vietnam made up of African Americans who had a death rate of 11.3 percent between 1961 and 1965. What these numbers demonstrated to the African American community in the United States was that blacks were serving on the frontlines in Vietnam and dying in disproportionately high numbers. The Pentagon attributed this to the “Valor” of the African Americans serving in Vietnam and demonstrated the progress that was being achieved in the desegregated forces.²⁸ Between 1965 and 1967, African Americans represented twenty percent of combat deaths in South Vietnam, a figure higher than the percentage of African Americans in U.S. society as a whole (11 percent) and the percent of draft-aged men (around 12 percent). Due to pressure within the military and outside from the civil rights and antiwar movements, military brass would lean less heavily on African Americans on the front lines after 1967 and the total percent of blacks killed in action would represent 12.5 percent of all combat deaths by the end of the war. Statistics on Puerto Ricans

²⁷ Christian Appy, *Working Class War: American Combat Soldiers and Vietnam* (Chapel Hill: The University of North Carolina Press, 1993), 27-29.

²⁸ Jack Raymond, “Negro Death Rate in Vietnam Exceeds Whites,” *New York Times*, 10 March 1966, 4.

are less clear: approximately 48,000 served in Vietnam and 345 died in combat during the length of the war.²⁹

The Fort Hood Three brought race to the forefront of their resistance to the war in Vietnam. “Many brave, loyal black American soldiers who fight and die for their country are hated, despised and cruelly treated in many sections of this country,” James Johnson said in his statement at the June 30 press conference in New York. “The Negro in Vietnam is being called upon to defend freedom which in many parts of this country does not exist for him.” The soldiers moved beyond simply identifying with struggles for racial equality at home to identifying their struggle with the Vietnamese. “Just as the Negroes are fighting for absolute freedom and self-determination in the United States,” Johnson continued, “so it is with the Vietnamese in their struggle against the Americans.”³⁰

The three soldiers received support from the militant wing of the civil rights movement. In a statement of support, the Student Non-Violent Coordinating Committee (SNCC), the first of the civil rights groups to oppose the war, argued:

The fact that two of the arrested soldiers were non-white, serves to underscore the growing awareness among non-whites in this country that they must begin to resist the efforts of the national government to use them as cannon fodder for racist oppression around the world. If the United States Government must engage in a cold-war power struggle, we must refuse to be used as tools.³¹

Stokely Carmichael of SNCC described the African American GI in Vietnam as a “hired killer” on NBC’s *Meet the Press*. He decried the military telling “a black youth in the ghetto” and “black youths in the rural South that their only chance for a decent living is to join the Army.” To Carmichael, this was creating an Army of mercenaries.³² The previous summer, in July 1965, a group of African Americans in McComb, Mississippi, distributed the first call for draft resistance by civil rights activists after a friend of theirs, John D. Shaw, had been

²⁹ Christian Appy, *Working Class War: American Combat Soldiers and Vietnam* (Chapel Hill: University of North Carolina Press), 19, 21-22.

³⁰ Martin Arnold, “3 Soldiers Hold News Conference to Announce They Won’t Go to Vietnam,” *New York Times*, 1 July 1966, 13.

³¹ “SNCC Statement,” in “The Fort Hood Three: The Case of the Three G.I.’s Who Said “No” to the War in Vietnam,” 22, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

³² Stokely Carmichael quoted in Herman Graham III, *The Brothers’ Vietnam War: Black Power, Manhood, and the Military Experience* (Gainesville: University of Florida Press, 2003), 27.

killed in Vietnam. “No Mississippi Negroes should be fighting in Viet Nam for the White Man’s freedom,” the leaflet read, “until all the Negro People are free in Mississippi.” The contradiction was clear for civil rights workers in the South who could not get federal government protection while they risked their lives trying to register African Americans in local communities to vote. “We don’t know anything about Communism, Socialism, and all that, but we do know that Negroes have caught hell here under this *American Democracy*.”³³

After being drafted in December 1965, Dennis Mora, James Johnson and David Samas became soldiers amid the growing controversy over the disproportionate death rates for black soldiers in Vietnam. They received their training at Fort Gordon, Georgia, and were among a small group of soldiers there who discussed the war and their opposition to it. They felt “America had no right being in Vietnam,” Samas later wrote from prison. “We all decided to refuse orders (we were all quite certain of getting them) for Vietnam, no matter what the circumstances.”³⁴ A notable influence on the trio, Pfc. Carl Edelman, served as an Army cook at Fort Gordon. He came from a working-class background in New York and arrived at his own conclusions that he opposed the war. Explaining the contradictory views of the soldiers at Fort Gordon, he wrote a letter to the Southern Coordinating Committee to End the War in Vietnam titled, “To the U.S. Peace Movement: The soldier is not the enemy,” after a group of soldiers watched the Huntley-Brinkley show. The news flashed pictures of an antiwar demonstration in New York City and the “immediate reaction was an outburst of nasty epithets: ‘Send those bastards to Vietnam,’ ‘All of those beatniks should be sent to the front line,’ etc.” Afterward, scenes of American soldiers killed and wounded flashed across the screen. “Out of the mouths of the same soldiers who only a few moments before were

³³ “Leaflet, McComb Mississippi,” quoted in Staughton Lynd and Alice Lynd, eds., *Nonviolence in America: A Documentary History*, Revised Edition (Maryknoll: Orbis Books, 1995), 271. There were other protests from within the civil rights community about the casualty figures, however, there was disagreement about what the numbers represented. Whitney Young, chairman of the National Urban League, believed that African American sacrifice in Vietnam would bring greater acceptance of blacks at home. See: Herman Graham III, *The Brothers’ Vietnam War: Black Power, Manhood, and the Military Experience* (Gainesville: University of Florida Press, 2003), 22. For Young’s comments on African American soldiers in Vietnam, see: Whitney Young, “When the Negroes in Vietnam Come Home,” *Harper’s*, June 1967, 63-69; Eric Pace, “‘Black Progress’ Is Called Aim of Negro Soldiers in Vietnam,” *New York Times*, 24 July 1966, 49; and, M.S. Handler, “Negro G.I. Hailed by Urban League,” *New York Times*, 4 August 1966, 16.

³⁴ Quoted in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 187.

condemning anti-war demonstrators, came ‘Why in the hell are those boys dying’, ‘They should get rid of McNamara’, ‘If Johnson wants to fight, he should go over there’. These are some of the contradictions. . . .³⁵

Pfc. Edelman left an impression on the trio before their transfer from Fort Gordon to the Fort Hood’s 142nd Signal Battalion. On June 7, 1966, Pfc. Johnson, Pvt. Mora, and Pvt. Samas were given orders to deploy to Vietnam from the U.S. Army Overseas Replacement Center in Oakland, California, with a departure date of July 13. Leaving Fort Hood on their customary month-long leave for GI’s prior to shipment overseas, they decided to refuse these orders. They contacted Edelman in search of guidance. He advised the trio to immediately contact the civilian antiwar movement and suggested they should think about a public campaign in coordination with the peace movement. Mora, already a member of the W.E.B. Du Bois Clubs of America, the youth wing of the Communist Party, contacted them immediately. The Du Bois Club suggested they contact Veterans for Peace in Vietnam and they suggested they contact the 5th Avenue Peace Parade Committee in New York City. The trio arranged a meeting in New York and met with Dave Dellinger and Fred Halstead of the Parade Committee.³⁶ The veteran activists conferred with the young soldiers and advised them that their decision to refuse orders would most likely result in prison sentences. According to Halstead, in front of a stunned Dellinger, he told the soldiers that he would do the opposite and go to Vietnam “and spread the antiwar message as best I could over there.” But, as Halstead writes in his memoir, “It was clear they knew the consequences and had their minds made up, so we consulted with Muste and worked out a procedure to make it impossible for the army to keep the case quiet.” Moreover, after advising the soldiers that the Parade Committee would support them, the Committee began initiating plans to build the capacity to interact with soldiers and develop links with dissenting GIs.³⁷

³⁵ Quoted in Fred Halstead, *Out Now! A Participant’s Account of the American Movement Against the War* (New York: Monad Press, 1979), 175. Halstead’s account of his work with the Fort Hood Three is perhaps the best of the movement memoirs. See pages 174-186.

³⁶ Fred Halstead, *Out Now!*, 176. See also David Dellinger, *From Yale to Jail: The Life Story of a Moral Dissenter* (New York: Pantheon Books, 1993), 253-254.

³⁷ Quoted in Fred Halstead, *Out Now!*, 176. According to Halstead, “The three Fort Hood GIs in consultation with Edelman had figured out their own strategy in basic outline, and even contacted a lawyer, before coming to the Parade Committee. Their plan was to hold a press conference to announce their stand, to allow time for the

With the full weight of a growing coalition of antiwar groups behind them, the three had good reasons to be encouraged. Movement activists promptly organized a press conference, and the Fort Hood Three Defense Committee was established, chaired by the tireless Staughton Lynd, with A.J. Muste as treasurer (he would later co-chair with Lynd), and Dave Dellinger as secretary. The Defense Committee aimed to raise money for the legal defense of the trio, publicize the case of the Fort Hood Three and gain the support from the American public and within the rank-and-file of American servicemen, and, defend the rights of the G.I.'s to "freedom of thought, conscience and expression."³⁸ The labeling of the three G.I.'s as the "Fort Hood Three" was itself important. In this way, the Defense Committee was able to group together the actions of the soldiers so as not to make it seem as if these were isolated acts by three G.I.'s. The military would do everything in its power to try to isolate and contain the damage that this act of refusal could do to morale in the armed forces. While it would eventually arrest and isolate the trio and try them separately, the labeling of the three soldiers as the Fort Hood Three had an important psychological effect on them and the movement, demonstrating that they were not alone and that it was possible to refuse orders.

The Fort Hood Three Defense Committee immediately sent out word to the peace movement about the intention of Johnson, Mora, and Samas to refuse orders to embark to Vietnam. With such high-profile activists such as Muste, Dellinger and Lynd, they were able to convince the Student Nonviolent Coordinating Committee and the Congress of Racial Equality to give their support and publicize their case. Before the press conference, Robert Scheer, a staff writer with *Ramparts* and a peace candidate for the Democratic Party in the upcoming mid-term elections, telegraphed the trio stating: "Your decision of refusal to participate in this immoral war, is to be applauded. I admire your courage and hope that your

civilian movement to mobilize behind them, then to report to the Oakland base as scheduled, but to refuse to embark for Vietnam". Moreover, "We invited them to present their case before the June 18 conference of antiwar activists which had been previously scheduled by the Parade Committee to make plans for the August 6-9 demonstration. They did so, and got the support they asked for". *Ibid.*

³⁸ "Fort Hood Three Defense Committee Statement of Aims," back cover, "The Fort Hood Three: The Case of the Three G.I.'s Who Said "No" to the War in Vietnam," in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

example and persistence will help stop this unjust war.”³⁹ Unable to attend the press conference, Donald Duncan wired words of support to be read at the event. Warning the soldiers of the multiplicity of “pressures” that “will be brought to bear on you,” Duncan proclaimed: “Yours will be a lonely position. Your actions, if properly motivated, take a strength greater than that required to go to Vietnam. To persevere will be an act of personal bravery far beyond the capabilities of most of us, certainly far beyond anything I have ever done.”⁴⁰ Such statements heartened the soldiers and the process of building links into new networks was unfolding.⁴¹

The press conference signified an important moment for the peace movement. Up until this point, soldiers who denounced the war in Vietnam or refused orders did so out of the public spotlight, without the systematic support of the civilian antiwar movement. As many in the peace movement lamented, the civilian movement was slow to support dissenting GIs. The activists who did end up backing them hailed from the pacifist movement or the old left, such as the Fred Halstead and the Socialist Workers Party. This time it was different. Unlike earlier cases of GI resistance, the Fort Hood Three’s message beamed loud and clear across the United States and eventually around the world.

After delivering a joint statement, Dennis Mora offered his own personal statement. He spoke against the “rationale for exterminating a whole people” such as the “theories of dominoes, Chinese ‘aggression’ or arguments of ‘appeasement.’” He called Vietnam a “war of genocide” and denounced “the technology of a military chamber of horrors from bomblets

³⁹ Quoted in “Robert Scheer Supports Case,” “The Fort Hood Three: The Case of the Three G.I.’s Who Said “No” to the War in Vietnam,” 13, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

⁴⁰ Quoted in “Letter from Donald Duncan,” “The Fort Hood Three: The Case of the Three G.I.’s Who Said “No” to the War in Vietnam,” 12, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

⁴¹As a non-exclusionary body, it allowed participation by Communists and communist sympathizers. This would become an issue as the committee reached out to peace liberals such as Dr. Benjamin Spock, who at this time was still leery of having his name appear on any campaign with individuals suspected of being Communists. On 28 November 1966, Benjamin Spock wrote to A.J. Muste that: “I want to support the Fort Hood Three in every possible way but I do not want my name to be listed on an advertisement with known Communists; it confuses a majority of the American people as to what the cause is, and it might lose me a lot of my influence.” Dr. Benjamin Spock to A.J. Muste, 28 November 1966, in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence.

to napalm, gas and defoliants.” He called into question the “colossal waste of resources” going in to the war effort that were “urgently needed here at home.” To Mora, the War on Poverty was “all guns and no butter” and he urged that the money being spent to “incinerate Vietnamese children” be reinvested in the ghettos and for “social and educational needs.” Referring to the escalation of the bombing in North Vietnam of POL facilities, he condemned the Johnson administration for bringing the United States “another step closer to an all out land war in Asia with the attacks on Hanoi and Haiphong.”⁴² Such prescient criticisms amounted to more than just rhetorical flourishes. They represented the views of a small, but growing, portion of soldiers in the military. Moreover, Mora’s statement clearly took a stand against what he considered to be war crimes committed in Vietnam and invoked his personal responsibility to dissociate himself from these acts. Such pronouncements demonstrated the power of the ethos of Nuremberg.

There was a battery of microphones in front of the trio and the press conference garnered extensive coverage by the national papers. The *New York Times* reported on the “neatly dressed” soldiers who “denounced the war as ‘immoral, illegal and unjust’” and commented upon the “atmosphere of the revival meeting” as “several persons in the audience chimed in agreement” as the soldier’s read their statements. Calling Dennis Mora’s the apparent “leader of the three,” the article played up Mora’s membership in the W.E.B. Du Bois Clubs of America, “which the Justice Department labeled in March as a Communist front organization” as a way to delegitimize the group. Moreover, the reporter wrote that the trio “likened the United States involvement in some ways to the Nazi aggression in Europe” after Mora’s personal statement and questions from the audience.⁴³

Following the press conference, the Defense Committee published a pamphlet and booklet with a picture of Johnson, Mora, and Samas in their military uniforms on both the covers. The booklet contained statements from the trio and a variety of supporting statements from Dave Dellinger, Donald Duncan, SNCC, CORE, and reprints of a sympathetic article in

⁴² Dennis Mora’s statement reprinted in “The Fort Hood Three: The Case of the Three G.I.’s Who Said “No” to the War in Vietnam,” 22, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

⁴³ Martin Arnold, “3 Soldiers Hold News Conference to Announce They Won’t Go to Vietnam,” *New York Times*, 1 July 1966, 13.

the *New York Post*. They also sent out mimeographed copies of the trio's statements and handed these out at bus stations and near military bases.⁴⁴ The materials of the Defense committee were widely circulated, reaching a peak in the fall of 1966.

Until the Army's eventual reaction to the Fort Hood Three's unprecedented and provocative actions, the three men experienced a period of emotional highs and lows. After the press conference, the F.B.I. began harassing them and, in the case of David Samas, the Modesto, California, police had visited his parents and lied to them about their son "being used as a tool of the Communists." The police officers, who claimed to have been sent by "higher authorities," told the Samases that their son was in "serious trouble" and that "higher authorities" needed to know where David was "to help and protect" him. Frightened for their son's safety, Samas's parents told the police where he was staying in New York City.⁴⁵

Three days after the trio's press conference, Frank A. Bartino, the Pentagon's assistant general counsel, told the *New York Times* that "members of the armed forces who refused to fight in Vietnam might be prosecuted under existing laws and regulations and, in extreme cases, might be sentenced to death." GI's looking to refuse orders, Bartino warned, "cannot expect lenient or other special treatment for refusing to obey orders on the ground of 'conscience.'"⁴⁶ The statement seemed to contradict what the Modesto Police had told David Samas' parents in order for the F.B.I. to find him. Moreover, Bartino's decision to invoke the death penalty brought undue anguish to soldiers already being pursued by federal agents.

Such harassment enraged the soldier's civilian supporters. On July 7, David Dellinger sent a letter, co-signed by A.J. Muste and prominent New York antiwar organizer Norma Becker, to Attorney General Nicholas Katzenbach, Secretary of Defense Robert S. McNamara, and the media. The letter protested the Modesto city police's harassment of Samas' family and other forms of intimidation and harassment the trio faced in New York City. "The peace movement will continue to aid in every possible lawful way anyone,

⁴⁴ Fred Halstead, *Out Now!*, 178.

⁴⁵ Quoted in Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 187-188.

⁴⁶ Quoted in Benjamin Welles, "Soldiers Who Refuse to Fight Held Subject to Courts-Martial," *New York Times*, 3 July 1966, 4.

civilian, soldier, sailor or Marine, who opposes this illegal and immoral war,” the letter announced.⁴⁷

The same day the letter went out, the Army made a decisive move against the three. The soldiers’ leave was terminated and they received orders to report immediately to Fort Dix, New Jersey. En route to a meeting at the Community Church in New York, they were arrested separately and driven via military police cars 30 miles away to Fort Dix, where they were told that they were being held under “investigative detention” on charges they violated Article 134 of the U.M.C.J. Article 134, “forbids uttering disloyal statements with intent to cause disaffection and disloyalty among the civilian population and members of the military forces.”⁴⁸ The official account of the surreptitious arrest was immediately contested.⁴⁹ Stanley Faulkner, attorney for the soldiers, who had visited the men at Fort Dix, “angrily” challenged the official version of the arrest. “They were arrested by plainclothesmen, and Mora and Johnson were taken to Fort Dix in handcuffs,” he said.⁵⁰ The arrest was all the more baffling because the soldiers had only indicated their intention to refuse orders *after* they reported back to the Army following the end of their month-long furlough. The trio was arrested *before* they actually refused orders.⁵¹

The church auditorium where the soldiers were slated to speak was packed with an estimated 500 to 800 people, all eagerly awaiting the trio’s arrival. When the three did not

⁴⁷ Quoted in Andrew Hunt, *Dave Dellinger: The Life and Times of a Nonviolent Revolutionary* (New York: New York University Press, 2006), 153. According to Hunt, “As head of the Fort Hood Three Defense Committee, David [Dellinger] regularly visited the men in the stockade, bringing them books, magazines, letters, and gifts from well-wishers in the antiwar movement. He also launched a speaking tour on their behalf, lecturing about their case in several cities, primarily in the East”. Quoted, p. 152. For the full text of the letter, see Fred Halstead, *Out Now!*, 179-180.

⁴⁸ Quoted in John F. Rosemary and Rosemary S. Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 64.

⁴⁹ Both Marlene Samas, wife of David Samas, and Darwin Johnson, brother of James Johnson, refuted the claim by Fort Dix’s chief information officer, Major Allen Galfund, that the trio was arrested at their homes by uniformed military policemen. Marlene insisted she and her husband had been walking to the meeting at the church when five plainclothes officers surrounded them and “hustled him into an M.P. car and took him away immediately.” Darwin told reporters that he was with his brother and Dennis Mora in the Bronx when three plainclothes officers and another in an M.P. car appeared. Marlene Samas and Darwin Johnson added that the three soldiers had been followed around for days by plainclothes officers. Quoted in Peter Millones, “Army Arrest 3 Who Refused to Serve in Vietnam,” *New York Times*, 8 July 1966, 1.

⁵⁰ Stanley Faulkner quoted in Richard Reeves, “Anti-Vietnam GI’s May Miss Sailing,” *New York Times*, 9 July 1966, 4.

⁵¹ Alice Lynd, *We Won’t Go*, 181.

show up to the meeting, the audience was told they had been arrested, touching “off an angry response.”⁵² The organizers of the Fort Hood Three Defense Committee improvised. Grace Mora Newman spoke on behalf of her brother Dennis Mora and Darwin Johnson, brother of James Johnson, and Marlene Samas, wife of Dennis Samas, read from the prepared statements that they were able to get to them before being arrested.⁵³ Organizers then rallied the attendees for an impromptu march down Fifth Avenue to Times Square that drew “scores of policemen” and one counter-protestor, who jumped into the march and ripped apart a placard. The march ended at Times Square and coalesced around the Army recruiting booth that was a favorite site of the peace movement for protests.⁵⁴

Two days after the arrests, the Fifth Avenue Peace Committee, SNCC, and CORE sponsored a demonstration at Fort Dix. About 250 people traveled to the New Jersey base via two buses and multiple cars to protest the arrest and confinement of the Fort Hood Three. Fort Dix officials were either worried that the demonstrators would spread antiwar messages to soldiers on the base or, conversely, that the soldiers would have a visceral reaction and attack them causing possible negative publicity. Therefore all military personnel were ordered back to their stations from Wrightstown, N.J., the nearest town to the base. Some of the soldiers snuck into local bars and restaurants to sneak a peek at the demonstrators. In the first large demonstration at an Army base during the war, Military Police formed a line in front of Fort Dix to prevent anyone from getting in. “Muste and members of the families argued with the officers in charge,” Fred Halstead remembered, trying to secure access to the base while picketers “ran around putting leaflets anywhere GIs might get them.”⁵⁵ The picket was called off after Muste and the family members were informed that they would not be allowed to visit the men until the demonstration ended. Joseph Mora, brother of Dennis Mora, told the *New York Times* that “he’s fine and in great spirits. We told him about the demonstration and he was really happy about the support.”⁵⁶

⁵² Peter Millones, “Army Arrest 3 Who Refused to Serve in Vietnam,” *New York Times*, 8 July 1966, 1.

⁵³ Quoted in Fred Halstead, *Out Now!*, 181. Halstead quotes the two statements in their entirety on pages 181-183.

⁵⁴ Peter Millones, “Army Arrest 3 Who Refused to Serve in Vietnam,” *New York Times*, 8 July 1966, 1.

⁵⁵ Quoted in Fred Halstead, *Out Now!*, 183. For Halstead’s account of the demonstration, see pages 183 to 184.

⁵⁶ Quoted in “250 Picket Ft. Dix Over Defiant GI’s,” *New York Times*, 10 July 1966, 8.

Support continued to come in for the Fort Hood Three. On the eve of the Fort Dix demonstration, the two black power civil rights organizations issued public statements protesting the arrest of the soldiers. Floyd B. McKissick, the National Director of CORE, “deplored the arbitrary arrest” of the soldiers that “were made explicitly to prevent these young men from exercising their First Amendment right to freedom of speech.” CORE recently adopted a resolution at its National Convention in Baltimore opposing the war in Vietnam and “pledged to aid and support those who would not serve in Vietnam.”⁵⁷ The Student Nonviolent Coordinating Committee issued a strongly worded statement highlighting the racist and classist nature of the Selective Service System and deplored the “illegal and immoral aggression on the peoples of Vietnam.” The statement called on “Freedom-loving people everywhere [to] join hands and protest the arrest of these three soldiers.”⁵⁸

The growing awareness of the soldiers’ plight forced the military’s hand; the brass had to tread carefully. The investigation of Samas, Johnson and Mora by Army officials at Fort Dix led to a report by the Major General J.M. Hightower that concluded there was “sufficient evidence” to charge the trio with violations of Article 134 of the Uniform Code of Military Justice (U.C.M.J.), for “uttering disloyal statements with intent to cause disaffection and disloyalty among the civilian population and members of the military forces.” The “Plan for Suppression of Anti-Vietnam Activities by US Army Personnel” released to the U.S. Army Chief of Staff on July 12 advised, however, that it was wiser to wait until the trio actually refused orders to charge them with a violation of the U.C.M.J.⁵⁹

Under Hightower’s plan, the three privates were to be separately ordered to board ship bound for Vietnam on the morning of July 14. They were to depart to Anchorage, Alaska, to Kadena, Okinawa, and then on to Tan Son Nhat, Saigon. The orders recommended

⁵⁷ “CORE Statement,” in “The Fort Hood Three: The Case of the Three G.I.’s Who Said “No” to the War in Vietnam,” 21, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

⁵⁸ “SNCC Statement,” in “The Fort Hood Three: The Case of the Three G.I.’s Who Said “No” to the War in Vietnam,” 22, in the Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

⁵⁹ Maj. General J.M. Hightower to U.S. Army Chief of State, “Plan for Suppression of Anti-Vietnam Activities by US Army Personnel”, 12 July 1966, in *Sir! No Sir!* Library, Fifth Floor - Investigations, Transcripts and Reports, Fort Hood Three Court Martial Transcripts. Available Online : http://www.sirnosir.com/archives_and_resources/library/investigations/ft_hood_3_transcripts/suppression_1.html

security for the trio and warned of demonstrations at Fort Dix and that “necessary steps will be taken by CG Fort Dix to preclude interference by any demonstrators.” “There should be no open restraint [sic] of individuals,” the orders stated. “Should all, or any one, refuse direct order to board aircraft, appropriate action will be taken. Force will not be used to place individuals aboard aircraft.”⁶⁰ As recommended, the soldiers were driven in unmarked cars to McGuire Air Force Base on orders from the Chief of Staff at the Pentagon the morning of July 14. The Army issued a statement, echoing that the soldiers could have been charged under Article 134 of the U.C.M.J. and were ordered instead “to comply with previously issued orders” to deploy to Vietnam. However, “Johnson, Mora and Samas refused to comply with their orders and have been placed in confinement at Fort Dix, charged with violation of Article 90, willful disobedience of a superior officer.”⁶¹

Coinciding with the drama playing out at Fort Dix and McGuire Air Force Base, Judge Edward M. Curran in the District Court for the District of Columbia rejected the trios’ civil suit and call for injunction against McNamara and Resor. On July 11, Faulkner appeared ready to present arguments for the plaintiffs that the war in Vietnam violated the U.S. Constitution and international law making it illegal to send his clients to Vietnam. Faulkner talked for roughly fifteen minutes before Judge Curran cut him off.⁶² The judge, according to Alice Lynd, “did not allow Faulkner to finish his presentation, denied the suit, and dismissed the hearing, saying that the war and foreign policy were the province of the President and not of that court.”⁶³ Just as in the case of David Mitchell in Federal Court, Judge Curran’s argued:

The propriety of transferring a member of the Armed Forces from one part of the world to another is not only political but a military question over which

⁶⁰ Maj. General J.M. Hightower to U.S. Army Chief of State, “Plan for Suppression of Anti-Vietnam Activities by US Army Personnel”, 12 July 1966, in *Sir! No Sir!* Library, Fifth Floor - Investigations, Transcripts and Reports, Fort Hood Three Court Martial Transcripts. Available Online: http://www.simosir.com/archives_and_resources/library/investigations/ft_hood_3_transcripts/suppression_1.html

⁶¹ Quoted in Richard Reeves, “3 G.I.’s Refuse to Board Plane for Vietnam and are Arrested,” *New York Times*, 15 July 1966, 3. See also Stanley Faulkner to Senator Ernest Gruening, 21 September 1966, in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence.

⁶² “3 G.I.’s Lose Suit to Avoid Vietnam,” *New York Times*, 12 July 1966, 6.

⁶³ Alice Lynd, *We Won’t Go*, 181.

the courts have no jurisdiction. ... In addition, it is not the function of the judiciary to entertain such litigation which challenges the validity, the wisdom, or the propriety of the Commander-in-Chief of our Armed Forces abroad.⁶⁴

According to the *New York Times*, “Court observers said it was rare for a judge here to dismiss a case on his own motion at such an early stage in the proceedings.”⁶⁵ Despite the major constitutional issues being presented by attorneys, the Federal Courts were simply dismissing the Vietnam War cases by referring to the “political questions doctrine.” As with the case of Mitchell, the attempts by the Fort Hood Three to receive a fair hearing by the judicial branch were proving improbable. For any outside observer, particularly young men of draft age, it was becoming clear that redress in the courts was not likely.

Not only were Mora, Johnson and Samas facing setbacks in the courts, they were being made examples of in military prison. The next few months would be a period of flux for the three men, and the work of their Defense Committee would be integral for getting information out to the public about their alleged mistreatment. For instance, A.J. Muste wrote to the Adjutant General in Washington, D.C. and Major General John Hightower at Fort Dix on July 28 informing them that “a relative of James Johnson recently brought him a copy of *Who’s Who in Baseball* and a copy of a daily newspaper. They were informed that he was not permitted to receive these or any similar materials.” The Defense Committee was concerned that the soldiers only had access to the Bible and on Sunday’s an abridged *Reader’s Digest* novel. Muste called into question such punitive actions. “Sound practice in modern penology rejects depriving even convicted persons of reading matter as a stupid, barbaric and inhuman practice,” he wrote. It took the Chief of the Correction Division in the Department of the Army over a month to answer Muste’s complaints and the allegations the men were being mistreated. Lt. Col. John J. Flanagan wrote that the soldiers were placed in “administrative segregation for their own protection” and that they were “treated in the same manner as other prisoners in a similar status.” Refuting James Johnson’s own conversation with family members, Flanagan stated that the soldiers were allowed to watch movies and go to the

⁶⁴ Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 65.

⁶⁵ “3 G.I.’s Lose Suit to Avoid Vietnam,” *New York Times*, 12 July 1966, 6.

library. “Material available in the stockade library,” Flanagan wrote, “is not limited to the Bible and Reader’s Digest but includes a wide variety of current news media and fictional and non-fictional material.”⁶⁶

Pentagon stonewalling led the Fort Hood Three Defense Committee to shift its energies to spread the word about the treatment of the soldiers, publicizing their case as far and wide as possible and connecting it to arguments that the war was illegal and the soldiers’ refused orders based on the Nuremberg Principles. The Committee sent out the pamphlets, mimeographed sheets of the trio’s statements, and updates to peace groups across the United States and around the world.⁶⁷ For instance, Howard Zinn, while addressing the World Conference Against Atomic and Hydrogen Bombs in Hiroshima, spoke in support of Johnson, Mora and Samas.⁶⁸ Moreover, Dave Dellinger, after returning from a three month trip to Japan, South Vietnam, Cambodia, Thailand, and North Vietnam reported to the Defense Committee that “the three soldiers are known everywhere in Asia.”⁶⁹ In August, the Defense Committee began distributing a legal brief focusing on the Federal Court case written by Stanley Faulkner specifically to raise awareness about the legal issues at stake in the cases of the Fort Hood Three and Pvt. Robert Luftig. The dissemination of the legal arguments via mass mailings and re-prints in movement newsletters – such as *End The Draft’s downdraft* – played an important role not only in disseminating the legal theory behind selective war objector cases, featuring prominently the argument the war was illegal,

⁶⁶ See: A.J. Muste to The Adjutant General, Pentagon, 28 July 1966; A.J. Muste to Major General John Hightower, Fort Dix, New Jersey, 28 July; and, Col. Marvin G. Krieger to A.J. Muste, 1 August 1966, in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence. And Lt. Col. John J. Flanagan to A.J. Muste, 1 September 1966, in A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Box 45, Fort Hood Three Defense Committee, 1966.

⁶⁷For instance, in July the Committee spent \$214.20 on literature and \$230.05 on postage. In August, in preparation for the Hiroshima Day protests, the Committee spent an additional \$895.50 on literature, \$195.05 on postage, \$181.44 on miscellaneous printing, and \$102.27 on speaking engagement travel. See: “Summary of Expenses, November 18, 1966,” in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – finances.

⁶⁸ See “Speech by Howard Zinn, International Session, 21st Atomic Bombing Anniversary, World Conference Against A- & H-Bombs, Hiroshima, August 5-7, 1966,” in Howard Zinn Papers, TAM 542, Box 37, Folder 10, Tamiment Library/Robert F. Wagner Labor Archives, New York University.

⁶⁹ Quoted in Jo Ann Robinson, *Abraham Went Out: A Biography of A.J. Muste* (Philadelphia: Temple University Press, 1981), 310fn52.

but it also clarified the broader ideology developing within the movement on the legality of the war in Vietnam and helped to build the war crimes movement from below.⁷⁰

The case of the Fort Hood Three came at a time when a lack of unity beset the Fifth Avenue Peace Parade Committee in New York, and the antiwar movement experienced, according to Fred Halstead, a “general ebb.” The tenuous antiwar coalition was fraying as pacifist organizations like the WRL and CNVA tried to work with new left and old left groups.⁷¹ The Fort Hood Three’s decision to contact the Parade Committee coincided with efforts to organize demonstrations between August 6 and 9. “A by-product of the Fort Hood Three case,” Halstead writes, “was a spirit of unity in New York behind the Parade Committee in preparations for the August 6-9 protests, as well as increased standing of the Parade Committee in the movement nationally.”⁷² The protests commemorating the twenty-first anniversary of the atomic bombings of Hiroshima and Nagasaki were held in Cleveland, Atlanta, San Diego, Washington, D.C., New York, San Francisco and other cities. In New York on August 6, the crowds were 20,000 and in San Francisco they were 10,000. Family members of the Fort Hood Three spoke in New York and San Francisco. “In general, defense of the Fort Hood Three was a feature of the August actions and in many places leafletting of GIs was stressed. In Madison, Wisconsin, the university was used to feed some 2,000 reserve troops passing through on summer training and the antiwar movement there leafletted them heavily, finding an unexpectedly friendly response,” Fred Halstead observed. The use of napalm by the United States in Vietnam was also a feature of the August demonstrations.⁷³

⁷⁰ Stanley Faulkner, “Civil Court Preempted By Military Arrests,” *downdraft*, September 1966, 18-21.

⁷¹ For instance, see David McReynolds, “Pacifists and the Vietnam Antiwar Movement,” in Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992), 53-55, 60-61.

⁷² Fred Halstead, *Out Now!*, 166, 184.

⁷³ According to Halstead, “Demonstrations against napalm had previously taken place at factories producing it in Redwood City and in Torrance, California, where a DOW Chemical plant was located. In April 1966 two Brooklyn women, Denzil Longton and Terry Radinsky, had organized a demonstration at a stockholders meeting of the Witco Chemical Company, one of the producers of napalm. They then formed the Citizens Campaign Against Napalm and launched a nationwide consumers’ boycott against Saran Wrap, one of the products of Dow, a chief producer of napalm.

Longton was a member of the Parade Committee and convinced it to make the Dow Chemical offices in Rockefeller Plaza a target of the August 6 New York demonstration”. Fred Halstead, *Out Now!*, 185. See also H. Bruce Franklin, *Vietnam and Other American Fantasies* (Amherst: University of Massachusetts Press,

The veteran peace activists understood the importance of connecting and reaching out to the soldiers who would be sent to Vietnam. Dave Dellinger wrote in *Liberation* in August that the antiwar movement had “to build its own independent constituency” that was from the grassroots and “not beholden to the established power structure.” One of the most important ways of building the movement, Dellinger argued was “to reach out directly to the soldiers and to other young people who are subject to the draft” who were not considered “‘legitimate’ conscientious objectors.”⁷⁴ Such a statement written by a conscientious objector from World War II, who would spend the war in prison for his beliefs, carried a certain moral and political currency in the movement. It was still early enough in the war, before the cases of the Fort Hood Three and David Mitchell spread, that “legitimate” conscientious objectors were considered by progressives to be those who adhered to the military’s definition: those who were “opposed to participation in war in any form” because of “religious training and belief.”⁷⁵ Instead, Dellinger and the members of the Fort Hood Three Defense Committee were advocating on behalf of the Nuremberg idea, that you did not have to be a pacifist to refuse illegal orders.

The Nuremberg Principles were featured prominently in a leaflet created by James Johnson’s father’s union local. Intended for national distribution, the District 65 Retail, Wholesale, and Department Store Workers Union of the AFL-CIO stated: “Jimmy’s son, James, is in the United States Army, and he needs your help. He’s one of the three GIs who has refused to go to Vietnam because he believes that it’s wrong. He has been arrested and faces court-martial.” Tailored to workers, the leaflet highlighted the fact that Jimmy Johnson has been a “65er” for fifteen years and a steward in a direct mail shop. Referring to “serious questions” relating to the case and to America’s involvement in Vietnam, the leaflet explained, “Neither Jimmy Johnson nor his son is a pacifist. ... [James] doesn’t object to military service. He was willing to accept any other assignment, and he still is.” Furthermore,

2000), chapter four “Burning Illusions: The Napalm Campaign,” 71-88; and, Robert M. Neer, *Napalm: An American Biography* (Cambridge: The Belknap Press of Harvard University Press, 2013), 109-125.

⁷⁴ Dave Dellinger, “The Fort Hood Three,” *Liberation*, August 1966, 3-5. Reprinted in Dave Dellinger, *Revolutionary Nonviolence: Essays* (Indianapolis: Bobbs-Merrill, 1971), 351-357.

⁷⁵ See, for instance, Irving Howe, Michael Harrington, Bayard Rustin, Lewis A. Coser, and Penn Kimble, “The Vietnam Protest,” *The New York Review of Books*, 25 November 1965.

the leaflet explained the Nuremberg Principles and explained the process that James went through to come to his decision to refuse orders:

Slowly, he became convinced that the war in Vietnam is an indecent war, an illegal war and an immoral war. He became convinced that killing Vietnamese in order to prop up a puppet government does not help the freedom of Vietnamese; that it does not help the freedom of Americans; and that it does not “stop Communism.” He became convinced that his fellow soldiers were being sent to die immorally – and that as a moral human being, it was his duty to object, whatever the consequences.⁷⁶

While it is difficult to determine this specific leaflet’s impact, it does point to the strategy of the Fort Hood Three Defense Committee to reach out to organized labor. By personalizing the story, Johnson’s co-workers would identify with him and the plight of his son despite their positive or negative views of the war. The strategy was to branch out as far as possible in peace movement circles, in the faith communities, and now organized labor. The Committee and the soldiers needed all the help they could get.

The Fort Hood Three not only inspired the peace movement, they acted as an inspiration to other active-duty G.I.’s. On August 17, Greg W. Conway, a soldier at Fort Wayne, Indiana, who had gone AWOL twice, wrote to A.J. Muste: “I have re-examined my conscience and I found I can no longer support the war in Vietnam directly or indirectly. I . . . sympathize with the Ft. Hood Three and have written the Ft. Hood Three Defense Committee.” Conway went on to explain the significance of the *National Guardian*, the *Worker*, *Liberation*, and *Viet Report* as making him “aware of the truth and awakened my inactivated conscience.”⁷⁷

Shortly after the Fort Hood Three’s defiance of the military brass, Ronald Lockman, a working class African American G.I., refused to be shipped to Vietnam, using the slogan: “I follow the Fort Hood Three. Who will follow me?”⁷⁸ Lockman, in the footsteps of the three soldiers, organized a press conference in San Francisco on September 13 and announced that

⁷⁶ “Jimmy’s Son Needs Your Help,” undated, in Swarthmore College Peace Collection, CDGA Collective Box – Fort Hood Three Defense Committee.

⁷⁷ Greg W. Conway to A.J. Muste, 17 August 1966, in A.J. Muste Papers DG 50, Swarthmore College Peace Collection, Box 44, Dissenting G.I.’s.

⁷⁸ Ronald Lockman quoted in Bob Ostertag, *People’s Movements, People’s Press: The Journalism of Social Justice Movements* (Boston: Beacon Press, 2006), 124.

his “fight is back home in the Philadelphia ghettos where I was born and raised.” Moreover, Lockman asserted: “I will not go 10,000miles away to be a tool of the oppressors of the Vietnamese people.” *Time* magazine reported on November 24, 1967, that it took the court-martial “eleven minutes to find Lockman guilty, 20 minutes to agree on a sentence of 30 months hard labor, loss of pay and dishonorable discharge.”⁷⁹

Despite raising awareness about the case of the Fort Hood Three and the other acts of disobedience they were inspiring in the military, the trio still faced an uphill battle. On July 22, their Article 32 pretrial hearing found there was enough evidence to proceed to a general court-martial. Such public acts of resistance and refusing orders would be difficult to garner sympathy in the courts of an establishment that rests on obedience to orders and good discipline.

General Court-Martial

The general court-martial of the Fort Hood Three took place between September 6 and 9, 1966, at Fort Dix. Dennis Mora was court-martialed first followed by James Johnson and David Samas. The three soldiers, despite announcing their intentions to refuse orders together as a group, were tried separately by the Army. This reinforced the sense of isolation amongst the three soldiers in the military machinery. The court-martial consisted of a ten-member panel of officers that would act as the jury. The law officer – or judge – was Col. Robert F. Maguire. The Army was represented by JAG officers Lt. Col. Richard L. Rice and Capt. Donald H. Partington. The trio was represented by their civilian lawyer, Stanley Faulkner, and their Army assigned lawyers Major Edward A. Lassiter and Lt. Jason M. Cotton. The cards were substantially stacked against the soldiers. While the Uniform Code of Military Justice of 1950 introduced some protections for soldiers in the military, the major issue of access to justice had been, and continues to be, contested. The court-martial is

⁷⁹ “Happy Tears,” *Time*, 24 November 1967, 28.

convened by the soldiers' commanding officer and the panel of officers – the jury – was composed of soldiers of higher rank than the three privates.⁸⁰

A week before the court-martial opened, Stanley Faulkner filed a petition for habeas corpus in the United States District Court for the District of New Jersey on August 30. Faulkner alleged that Johnson, Mora and Samas “were being illegally detained” because the war itself was “illegal and they could not be forced to engage in an illegal act” and asked for a stay of the court-martial. The Court rejected the petition and so too did the United States Court of Appeals for the Third Circuit. Faulkner then sent an appeal to the Supreme Court asking for a stay of the court-martial proceedings until the legality of the war could be determined by the courts.⁸¹

The strategy of the prosecution at the court-martial was simple. Col. Rice told the court that the only issue was whether Samas, Mora and Johnson obeyed Captain Damaso DeVera's order to board the ship to Vietnam. Faulkner, on the other hand, tried to argue that Capt. DeVera's order was “unlawful” and pursued two lines of argument to demonstrate the illegality of the order. First, Faulkner argued “the Department of the Army proceeded to invoke the order to go to Vietnam, knowing that it would not be obeyed, only for the purpose of imposing the greatest penalty that could have been imposed. . . .” Second, Faulkner told the court that “we will attempt to prove to you that the conduct of the war in Vietnam is illegal.” However, before Faulkner could finish, Col. Maguire interrupted him and the court was recessed in order to have an out-of-court meeting with the attorneys.⁸²

The previous day, at the pretrial hearing, Faulkner submitted several pretrial motions seeking to disqualify the law officer, a dismissal of charges, a change of venue, and a

⁸⁰ According to John and Rosemary Bannan, “While the civilian court is permanently established by federal, state, or local government to try all violations within its jurisdiction, the military court is convened by the commanding officer of the accused servicemen on the occasion of a violation of military regulations. The very term *court* in its military application – court-martial – is applied to what the civilian system calls the jury: the group that renders the verdict. In addition, the military system has its own system of review and does not grant bail.” Bannan and Bannan, *Law, Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 63.

⁸¹ Stanley Faulkner to Senator Ernest Gruening, 21 September 1966, in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence.

⁸² Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 66-67.

postponement or continuance.⁸³ Faulkner's strategy was to demonstrate that the law officer, Col. Maguire, had already predetermined his opinion on the legality of the Vietnam war and that he was biased and should excuse himself from the proceedings. However, the prosecution maintained that orders regarding the movement of soldiers from one point to another were not a violation of international law. Col. Maguire agreed, and stated that "it boils down to this, whether on July 14, 1966 the President of the United States had authority to order members of the Armed Forces to go to Vietnam" and that "for the purpose of this trial that as a matter of law the President of the United States has the power and had the power on 14 July, 1966. ..."⁸⁴ Col. Maguire refused to hear the argument that U.S. troops were illegally being sent to Vietnam because war had not been declared by Congress. In the out-of-court meeting on September 7, Col. Maguire stated: "I now forbid you in any manner, shape or form to present to the court that our troops are illegally in Vietnam. I have made my ruling as a matter of law for the purpose of the legality of the order involved in this case that they are legally there."⁸⁵ Therefore, the issue at stake was whether or not the soldiers refused orders to deploy to Vietnam.

After Maguire had imposed such stringent boundaries on the case, Faulkner tried to demonstrate that the order given to the trio to board the plane had been done so as to entrap them. The Manual for Courts-Martial stated: "Disobedience of an order ... *which is given for the sole purpose of increasing the penalty for an offense which it is expected that the accused may commit, is not punishable under this article.*"⁸⁶ The defense argued that the Army knew the trio would refuse the order because they had publicly said they would, as reported in the media on July 1. In a brief submitted to the Commanding General U.S. First Army, the defense team argued: "The plan was to entrap accused into a position where he would be given the order which it certainly could have been expected he 'may' disobey. In these

⁸³ Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 67.

⁸⁴ Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 69.

⁸⁵ Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 69.

⁸⁶ Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 70.

circumstances accused cannot be guilty of violating Article 90, U.C.M.J.”⁸⁷ Faulkner pointed to various public statements made by the Pentagon’s legal counsel in July and Fort Dix’s chief information officer Major Galfund after the arrest of the trio. Moreover, it was discovered through documents disclosed at the trial that plans were initiated at the Pentagon on July 6 on what to do with the three soldiers. The protests of “illegal confinement” from Faulkner and the Defense Committee on July 7 presented the problem of how to charge the soldiers with orders they had not yet disobeyed. Follow-up meetings were held on July 12 and 13 at Fort Dix where the “Plan for Suppression of Anti-Vietnam Activities by U.S. Army Personnel” written by Maj. Gen. Hightower was discussed and implemented.⁸⁸ It was a long shot, but Faulkner was attempting to get his clients acquitted on any legal technicality he could.

While the legal wrangling was taking place in the courtroom, the Fort Hood Three Defense Committee was seeking as much publicity as it could muster. During the lunch break at the September 7 court-martial of Dennis Mora, members of the Defense Committee gathered outside to read two statements at a press conference. First, Bertrand Russell had sent a cable read out loud announcing the trio “had the respect and ardent support of people throughout the world.” The second, issued by David Frost, the Democratic candidate for Senator in New Jersey, insisted the trio “should be decorated for their courage.”⁸⁹

While it was forbidden for the defense to present arguments about the legality of the Vietnam War, the soldiers testified nonetheless about why they refused orders. Dennis Mora stated

To feel that the war is illegal and immoral and not to protest against it or not to express an opinion amounts to compliance with something which is a crime against humanity. As in the second world war when crimes were committed by carrying out a direct order of an officer or any authority, which goes against their conscience or moral beliefs, is something which he is accountable for. The man who pushed the button, the man who pushed the bodies into the crematorium in

⁸⁷ Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 70.

⁸⁸ Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 70-71.

⁸⁹ Quoted in Ronald Sullivan, “Army Opens Trial for Vietnam Foe,” *New York Times*, 7 September 1966, 4.

Germany just because he did it on orders is just as culpable as the person who gave him the order.⁹⁰

Therefore, because of the Nuremberg precedent Mora refused participation in the war in Vietnam because he would be complicit in an illegal war.

David Samas in his one-day trial compared the Vietnamese revolution to the American revolution, and argued the United States was acting as the British had done in the late-eighteenth century. He was asked to recall the civil litigation he launched against Secretary McNamara and Secretary of the Army Resor. He argued they sought an injunction to stop them from being sent to Vietnam under domestic and international law because the war was “illegal, immoral and unjust.” He said because of “the Nuremberg Judgment ... every man, before he can obey an order, the order must pass the judgment of his own conscience. That was the ruling factor in my case. The way I was brought up was to judge things by my conscience, and that is what I did.”⁹¹

During his one-day trial, James Johnson testified:

I felt that if I participated in this war I would be participating in an illegal war and committing an illegal act. ...I felt it was not in the best interest of my country or Vietnam to violate my conscience and convictions, because if I did so I would lose my humanity and all respect if I would comply with orders to go to Vietnam. I was especially interested in the Nuremberg agreements which said each man, each soldier, was responsible for his individual acts; and a soldier had not only a right but a duty not to commit, not to follow any unlawful command given him. In other words, he should disobey anything he thought was immoral or illegal.⁹²

The moral and legal arguments by the soldiers were not persuasive to the ten stony-faced officers making up the jury. The first of the Fort Hood Three to be court-martialed, Dennis Mora, was given a three-year sentence. Over the next two days, Samas and Johnson received the maximum of five years at hard labor. Punishment included dishonorable discharges,

⁹⁰ “Record of Dennis Mora’s Court Martial,” *Sir! No Sir!* Library, Fifth Floor - Investigations, Transcripts and Reports, Fort Hood Three Court Martial Transcripts, Available Online: http://sirnosir.com/archives_and_resources/library/investigations/ft_hood_3_transcripts/dennis_mora_6.html.

⁹¹ Record of David Samas’ Court Martial,” *Sir! No Sir!* Library, Fifth Floor - Investigations, Transcripts and Reports, Fort Hood Three Court Martial Transcripts, Available Online: http://sirnosir.com/archives_and_resources/library/investigations/ft_hood_3_transcripts/david_samas_2.html.

⁹² James Johnson quoted in Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 195.

forfeiture of pay, and each were sent to Fort Meade in Maryland to await their appeal, filed immediately after the decisions came down.⁹³

Upon hearing of these sentences, roughly one hundred antiwar activists meeting in Cleveland responded immediately. They sent a telegram of support:

We are outraged at the harsh punishment served against you ... Your courageous stand against the war has not only been a source of inspiration to us but to thousands of American people including servicemen like yourselves. ... We take this occasion to promise a redoubling of our efforts to publicize the facts about your case and to organize protests aimed at winning your freedom.⁹⁴

They were busy organizing four days of protest between November 5 and 8 to keep momentum against the war going.

After Court-Martial

The next two months proved to be uncertain times for Mora, Johnson and Samas. After they were convicted, they were transferred to the Fort Meade Stockade in Maryland. The alleged harsh treatment of the three soldiers became a matter heavily publicized by Defense Committee and the cause of denials by the Army. Grace Mora Newman, sister of Dennis Mora, told the *Washington Post* that the trio was being held in solitary confinement, awakened daily at 5 a.m. and forced to stand in their cells until 6 p.m. "If they sit or lean against the wall, they are made to do push-ups," the statement noted. "They eat their meals on the floor of their cells and can receive mail only from four members of the family. Relatives are allowed to visit them for only an hour a week." The *Washington Post* reported

⁹³ Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 74. See also *New York Times*, 8 September 1966, 1; *Chicago Tribune* 8 September 1966, 1; *Chicago Tribune* 10 September 1966, 1; and *New York Times*, 10 September 1966, 4.

⁹⁴ "Message to Fort Hood Three," 11 September 1966, in A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – sponsorship. Moreover, in attempt to reassure the trio, Muste wrote a letter before the court-martial was scheduled to begin that "I want you to know that great numbers of people are personally involved in the case and are doing everything they [can] to see to it that the utmost use is made of it, both in order to secure your freedom if possible, and in order to reach vast numbers of G.I.'s with the truth about the war." A.J. Muste to James Johnson, 29 August 1966, in , in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence.

that the Army spokesman at Ft. Meade “denied that the men were being mistreated or treated differently from the other 200 prisoners in the stockade.”⁹⁵

The denials by the military did not deter family members of the soldiers and the Defense Committee from pushing the issue. On October 11, Richard Fernandez from Clergy and Laymen Concerned About Vietnam (CALCAV) wrote to Senators Robert F. Kennedy, Jacob Javits, Wayne Morse, Joseph Clark, and J. William Fulbright, quoting from a statement by Grace More Newman after a recent trip to Fort Meade to visit her brother echoing the same concerns: isolation, being forced to eat in their cells, lack of library privileges, and being forced to stand all day. Fernandez indicated to A.J. Muste almost two weeks later that Senators Javits, Clark and Fulbright had responded “indicating they were looking into the matter.”⁹⁶

⁹⁵ Fred Brack, “Pickets to Protest ‘Mistreatment’ of Meade Antiwar GIs,” *Washington Post*, 28 September 1966, A3. See also: “3 Antiwar Draftees Complain About Army Prison,” *New York Times*, 17 October 1966, 8, and, the mimeographed sheet produced by the Fort Hood Three Defense Committee “GI Heroes Subjected to Torment,” September 1966, in A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Box 45, Fort Hood Three Defense Committee, 1966.

The Army continued to deny the charges being made by the soldiers to their family and the Defense Committee. On September 27, after two months of correspondence, Representative James H. Scheuer (D-NY) wrote to A.J. Muste that the Army denied all allegations made by the Fort Hood Three Defense Committee about poor treatment. Scheuer claimed that the men were indeed in private cells because the Army feared “they might be physically assaulted” and this is the same reason they eat their meals in their cells. Moreover, it was the policy at Fort Meade that prisoners not be “permitted library privileges during the week or permitted to receive mail from anybody other than members of their immediate family.” The Army also denied the charge the men were forced to stand at attention all day. “I would appreciate if there was a double check on information of this nature,” Scheuer reprimanded. “My ability to be useful in this affair can be compromised by complaining about things that have not occurred.” Rep. James H. Scheuer to A.J. Muste, 27 September 1966. The correspondence began with Muste’s letter to Scheuer on 11 August 1966 and continued throughout the summer. Although Scheuer believed that no “nation can give to individual soldiers the right to decide which war is right and which wrong,” he offered his help to the trio because Pvt. Mora was a constituent and a brother of his secretary at his office in New York. See: A.J. Muste to Rep. James H. Scheuer, 11 August 1966; Rep. James H. Scheuer to A.J. Muste, 30 August 1966; A.J. Muste to Rep. James H. Scheuer, 1 September 1966, in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence.

⁹⁶ For example, see Richard Fernandez to Robert F. Kennedy, 11 October 1966. See also Richard Fernandez to A.J. Muste, 24 October 1966, in A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – correspondence. The passage from Grace Mora Newman that was quoted read:

They have been denied library privileges during the week, are no longer permitted to receive mail except from members of their immediate families, are force to eat their meals from the floor in their cells, are kept in solitary confinement, and are allowed no speaking privileges. Even worse, however, is that they are required to stand up all day in their cells. If they lean against the wall, sit down, or disobey this order in any way, they are forced to go through a push-up routine.

It appears that protests and the numerous letters to Senators and Congressmen were reaching the military brass. On October 25, the Fort Hood Three Defense Committee informed their supporters that the treatment of the Fort Hood Three has “improved as a result of the nation-wide protests.” The letter stated that, “In a report received from Grace Mora Newman...on October 17, she indicated that the men are no longer in solitary confinement, and that the restrictions on speaking to other men have been removed.” Samas and Johnson were put in a cell with four other prisoners and Mora was placed in a cell with three other men. The letter also indicated that on October 16, Father Phillip Berrigan, Rev. Herbert Edwards, and a Rev. Gorman, all from Baltimore, visited the three soldiers and “sharply protested the still cruel treatment of the men.” The letter to supporters further noted that Johnson, Mora and Samas “still must stand from 5 A.M. until 6 P.M. or undergo a push-up routine. They still have no library privileges.”⁹⁷

A.J. Muste worked tirelessly in the New York office of the Defense Committee, contacting local peace groups and congressmen about the alleged mistreatment of the soldiers. The mounting legal fees and bills for printing, telephone calls, mailings and postage, travel to and from the prison, were adding up. In October, the Committee was forced to take out loans and members were absorbing some of the costs on their own.⁹⁸ The Committee’s main task was spreading word about the soldiers and why they refused orders.

Stanley Faulkner traveled across the western United States presenting similar argument made in his legal brief which was still circulating around thanks to the speaking tour between October 13 and 16. Speaking at a variety of universities, Faulkner addressed the University of Arizona, the University of California Los Angeles, and the University of California Berkeley with Ann Samas and Marlene Samas and afterward a “very successful news conference in San Francisco netted considerable newspaper and television coverage.”

⁹⁷ “Dear Friends,” 25 October 1966, in Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference Fort Hood Three.

⁹⁸ The trio’s legal fees, between July and November, had reached \$3,111.79. Moreover, between September and November, the Committee spent \$2,322.05 on literature, \$615.15 on the telephone bill and telegrams, \$1,081.87 on postage, \$1,433.19 on travel to and from prison, and \$1,360.33 on advertising. Between July and November, the Committee raised \$17,477.34 and spent \$17,271.15 on expenses. See: “Summary of Expenses, November 18, 1966,” in the A.J. Muste Papers (DG 050), Swarthmore College Peace Collection, Supplement #3, Box 3, Fort Hood Defense Committee, 1966 – finances.

Faulkner and the Samases were back in Los Angeles speaking at the Unitarian Church and participated in a 35-minute interview. Furthermore, on October 21 the Philadelphia Fort Hood Three Committee, a local affiliate, sponsored an evening with Grace Mora Newman and Stanley Faulkner at the Ethical Society for around 150 people and rose over \$300. The letter announced that members of the families of the Fort Hood Three would be speaking at events organized for the November 5-8 Days of Protest in Chicago, Cleveland, Boston, New York and elsewhere. Moreover, to date the Defense Committee had sold 11,000 copies of the “Fort Hood Three” booklet and over 6000 buttons.⁹⁹ This on the ground work was exactly how the Defense Committee spread word about the illegality of the war in Vietnam and the importance of international law and the Nuremberg Principles to the soldiers’ resistance.

Despite the successful speaking events, by the end of October, the Defense Committee was strained beyond its capacity to operate. From July until October, much of the work of the Committee was handled on an ad hoc basis with A.J. Muste and family members of the three soldiers taking the lead in day-to-day operations. As fresh faces entered the Committee, new proposals were tabled. For instance, some of the younger volunteers believed that the Committee should also be doing anti-draft organizing, which coincided with the crystallizing of opposition to the Selective Service System. The family members, A.J. Muste and Staughton Lynd were particularly concerned about the negative impact this would have on the effectiveness of the Committee.¹⁰⁰ An investigative report from Staughton Lynd’s F.B.I. file, dated August 8 1967, included a section on the Fort Hood Three Defense Committee. An informant reporting from a March 16 meeting of the Socialist Workers Party in New York City – the Trotskyist organization that belonged to the Defense Committee and whose leader, Fred Halstead, sat on the Executive Committee – stated, “It was brought out that several members of the committee including LYND expressed opposition to the attempts to turn the defense committee into an anti-draft organization.” Moreover, at a meeting of the Defense Committee on March 15, the F.B.I. report alleges that “LYND threatened to resign

⁹⁹ “Dear Friends,” 25 October 1966, in Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference Fort Hood Three.

¹⁰⁰ “Minutes – Fort Hood Three Defense Committee temporary steering committee and staff meeting October 25, 1966,” in Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference Fort Hood Three.

because the defense committee was on the road toward becoming an anti-draft movement.”¹⁰¹

On November 7, Lt. General William F. Train, the convener of the September court-martials and commander of the First U.S. Army, reviewed the sentences of the Fort Hood Three and re-affirmed them in the first appeal available to the trio after the initial court-martial proceedings. The soldiers were transferred to the Army Disciplinary Barracks at Fort Leavenworth, Kansas.¹⁰² The Fort Hood Three Defense Committee wrote to its backers: “Support and publicity for the three men continues to grow.” From protests in Arizona by the Tucson Committee to End the War in Vietnam, receiving media coverage in *The New York Post*, to international support from the London Committee of 100, the War Resisters International group in Dortmund, Germany, and the Paris American Committee to Stop War came pouring in. There was a protest with 150 people on November 4 outside the New York State Selective Service Center in New York City. Moreover, since the last “Dear Friends” letter of October 25, the Defense Committee sold 1000 more pamphlets and had distributed 30,000 new brochures updated after the court-martial.¹⁰³

On January 7, 1967, another event supporting the Fort Hood Three occurred outside of Ft. Leavenworth. The combination march and demonstration, sponsored by the Kansas City Area Committee to End the War in Vietnam and the Fort Hood Three Defense Committee, began in Lansing, Kansas, where the demonstrators marched five miles to Ft. Leavenworth. There they encountered counter-demonstrators throwing snowballs and shouting jeers. Outside the gates to Leavenworth, the demonstrators tried to sing “We Shall Overcome” but were drowned out by sounds emanating from a truck mounted with speakers parked nearby. A fight broke out between a counter-demonstrator and an antiwar activist.¹⁰⁴

¹⁰¹ F.B.I. Investigative Report on Staughton Lynd, 8 August 1967.

¹⁰² “Conviction of 3 Soldiers Approved by First Army,” *New York Times*, 8 November 1967, 32. See also, Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 76.

¹⁰³ “Dear Friends,” 10 November 1966, in Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference Fort Hood Three.

¹⁰⁴ “Students’ Protest at Army Prison Ends in Fisticuffs,” *New York Times*, 8 January 1967, 20. According to Carl Davidson, writing to A.J. Muste after the demonstration: “The Leavenworth demonstration, despite some hostility of an active nature on the part of townspeople went quite well and gained a good deal of publicity for the case out there. I spoke on radio and we got good TV coverage.” Carl Davidson to A.J. Muste, 19 January

Nearly a month after the Ft. Leavenworth protest, on February 6, 1967, the Federal Court of Appeals affirmed Judge Curran's July ruling in the U.S. District Court for the District of Columbia. This time, however, Faulkner and the government's attorneys had agreed to combine the Luftig and Fort Hood Three reviews together because they were differentiated only on a "point of fact – Luftig had not actually received orders to Vietnam while Mora, Johnson, and Samas had ..."¹⁰⁵ The judges in their opinion refused the justiciability of the case and argued: "It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use of military power; these matters are plainly the exclusive province of Congress and the Executive."¹⁰⁶ In less than one year in the case of the Fort Hood Three, the courts sided with the Executive Branch and the war in Vietnam. Their decision left serious questions unanswered as Faulkner appealed to the Supreme Court. Pvt. Robert Luftig would complete his tour of duty and was discharged in September before the Supreme Court decided on the case.¹⁰⁷

Part of the Fort Hood Three Defense Committee's plan to garner more publicity for the trio and build the base of the campaign involved taking out a full-page advertisement in the *New York Times*. Organizers wished to see the advertisement printed on Christmas Day and to obtain as many signatures as possible from national and international figures. The idea, hatched in mid-November, was sent around to prominent members of various movements in order to build the executive committee of the Defense Committee, to alleviate A.J. Muste's crippling workload. As Muste wrote to Ivanhoe Donaldson of SNCC on December 8, "We are at a critical moment in the campaign to end the war in Vietnam." Due to a lack of fundraising, the advertisement was never run on Christmas as it would have cost

1967, A.J. Muste Papers, SCPC DG 50, Addendum 3 – Fort Hood Defense Committee (1966) – Correspondence.

¹⁰⁵ Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 76.

¹⁰⁶ Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 77. As Faulkner pointed out there was case law that demonstrated the question of the justiciability of the case was not out of the purview of the Courts, such as in the case of *Nixon v. Herndon* and *Baker v. Carr and Youngstown Sheet and Tube Co. v. Sawyer*.

¹⁰⁷ Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 168.

the Committee \$6000. By January 19, the Committee only had \$1400 toward the ad and Grace Mora Newman, who was inundated with requests to speak, had offered any speaking fees she received toward the cost of the advertisement.¹⁰⁸

The full-page advertisement finally appeared in the March 26 issue of the *New York Times*. A dense ad, containing a great deal of information, it was headlined, “Three American Heroes,” and presented the main arguments why the Mora, Johnson and Samas refused deployment to Vietnam. While some lawyers argued that rank-and-file foot soldiers could not be charged and convicted for participating in a war of aggression, the advertisement quoted the Army Field Manual of July 18, 1956, Section 498 which read: “Any person, whether a member of the Armed Forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.” The Field Manual then cites the crimes elucidated in the Nuremberg Principles: a) Crimes against peace. b) Crimes against humanity. c) War Crimes. This is important to highlight because, whatever the Courts may have determined about the liability of a soldier participating in a Crime Against Peace or aggressive war, the Field Manual does not rule the possibility they could be held liable.¹⁰⁹

The Defense Committee not only demanded the release of the three soldiers, but outlined the main arguments of their defense as well as their moral stand against the war. Summarizing the punishments the soldiers received, the advertisement briefly included the international and domestic laws the case relied on: “The suit filed in their behalf in the

¹⁰⁸ For a series of correspondence related to the *New York Times* advertisement and the building of the executive committee of the Fort Hood Three Defense Committee, see: A.J. Muste letter to supporters, 15 November 1966, A.J. Muste Papers, SCPC DG 50, Addendum 3 – Fort Hood Defense Committee (1966) *New York Times* Ad and Petition; “Dear Friend,” 5 December 1966, A.J. Muste Papers, SCPC DG 50, Addendum 3 – Fort Hood Defense Committee (1966) *New York Times* Ad and Petition; A.J. Muste to Ivanhoe Donaldson, 8 December 1966, A.J. Muste Papers, SCPC DG 50, Addendum 3 – Fort Hood Defense Committee (1966) – Sponsorship; “Dear Friends,” 5 January 1967, A.J. Muste Papers, SCPC DG 50, Addendum 3 – Fort Hood Defense Committee (1966) – Sponsorship; Carl to A.J. Muste, 19 January 1967, A.J. Muste Papers, SCPC DG 50, Addendum 3 – Fort Hood Defense Committee (1966) – Correspondence.

¹⁰⁹ The Field Manual states: “Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting ‘war crimes.’” Section II, Paragraph 498, “Crimes Under International Law,” quoted in Seymour Melman, ed., *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 53.

federal courts charges that the war in Vietnam violates the Kellogg-Briand Pact, the Geneva Accords of 1954, the UN Charter, the UN acceptance of the Nuremberg Judgments, and the U.S. Constitution.¹¹⁰

The tactic of buying advertising space for publicizing movement demands and messages was not new, but the Fort Hood Three advertisement was particularly powerful. By inverting certain myths that pandered to the idea of American exceptionalism, the advertisement called the soldiers “Three American Heroes” and flipped the United States government’s perennial advocacy for the rule of law in international affairs on its head by calling for the Johnson administration to respect international law in its war on Vietnam. The Nuremberg precedent is featured prominently, arguing that the United States was the main advocate for the Nuremberg Trials and reminded the Johnson administration that U.S. soldiers “still carry the obligation to act in accordance with their judgment and conscience as civilized human beings” when confronted with illegal orders. Moreover, the advertisement reaffirmed the belief, slowly gaining traction in the peace movement and the in the rank-and-file of the military, that armed forces personnel “must not be deprived of their rights as citizens to freedom of thought, of conscience, of expression in all matters, including those relating to the war in Vietnam.” The detailed and intricate ad called the war in Vietnam “undeclared” and argued that significant questions of international and domestic law had been ignored by the Federal Courts. The Defense Committee called for President Johnson “to exercise clemency and elementary justice” in the case of Mora, Johnson and Samas.¹¹¹ A number of influential writers, professors, musicians, and activists signed the statement.

Despite the best efforts of the military to break the soldiers and make examples of them, there were other soldiers who refused to participate in the war effort. In an unprecedented move, on March 27, Air Force Captain Dale E. Noyd filed suit in federal court because the Air Force had rejected his resignation as well as his request for noncombatant status under the provisions of conscientious objector status. Capt. Noyd moved to the federal courts in order to obtain classification as a conscientious objector. In this case, Noyd would be considered a selective conscientious objector as he was not a pacifist, but he nonetheless

¹¹⁰ “Three Americans Heroes,” *New York Times*, 26 March 1967, 149.

¹¹¹ “Three Americans Heroes,” *New York Times*, 26 March 1967, 149.

applied for CO status because he objected to the war in Vietnam in particular. In the press conference, organized by the American Civil Liberties Union, Noyd stated that he did not oppose all wars; only the war in Vietnam which he classified as “unnecessary and unjust.” This was, according to the *New York Times*, the first time an officer had applied for conscientious objector status. Capt. Noyd was a career officer and thirty-three-years-old at the time. The *Times* also pointed to the case of Pvt. James M. Taylor who was sentenced to three years in January 1966 for disobeying orders on the grounds that Taylor felt the Army had an “immoral mission” in Vietnam. Moreover, Specialist 4th Class J. Harry Muir pleaded guilty to going absent without leave (AWOL) at Ft. Benning, Georgia, in resistance to the war in Vietnam.¹¹² The small isolated acts of resistance in the military were bubbling up to the surface. This resistance coincided with increased escalations of the war by the Johnson administration and the heavy reliance on draftees to fill the ranks of a war which was at first manned by enlistees.

The Fort Hood Three Defense Committee sought to exploit this growing resistance to the draft and in the military. In late June, they sent a press release to media outlets across the country announcing that on June 23, the Army Board of Review will hear their appeal. The release noted that Johnson, Mora and Samas had “become a symbol in the controversy over U.S. policies in Vietnam” and that since the trio were the first to publicly refuse orders to Vietnam “other servicemen have openly opposed the U.S. position and have challenged the government’s orders for Vietnam-connected service and the army’s limitations on free speech rights of individual soldiers who oppose the war.” Moreover, citing specific example, the release went on to state:

The Fort Hood Three appeal follows closely the recent courtmartials of Captain Howard Levy for refusing to teach first aid to Green Beret medics in Fort Jackson, S.C., and Private Andrew Stapp in Fort Sill, Oklahoma for refusing to open his footlocker and surrender anti-war literature. Both were sentenced to hard labor, Levy for 3 years and Stapp for 45 days. Their cases are being appealed.¹¹³

¹¹² “An Air Officer Sues to Block War Duty,” *New York Times*, 28 March 1967, 1.

¹¹³ “News Release: Army Review Board to Hear Fort Hood 3 Appeal,” Undated, in Alice Niles Lynd and Staughton Lynd Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference Fort Hood Three.

In late July, the Army Board of Review upheld the court-martial of the three soldiers; however, the Board of Review reduced the prison terms of David Samas and James Johnson from five to three years to make them equal with Dennis Mora's three year term.¹¹⁴

Mora, Samas and Johnson had one more chance in the military's appeals system. Faulkner appealed to the U.S. Court for Military Appeals, the highest military court. On September 26, the Court for Military Appeals refused to review the Fort Hood Three's case. In a unanimous decision, the three civilian judges ruled that "under domestic law, the presence of American troops in Vietnam is unassailable." The opinion cited the 1827 Supreme Court in *Martin v. Mott* decision "that rejected the idea that the orders of the President as Commander-in-Chief may be ... questioned, either by the individual concerned or the judiciary."¹¹⁵ The war-making abilities of the President were "unassailable." Faulkner appealed to the Supreme Court.

Meanwhile, "Stop the Draft Week" began on October 16 in cities across the country – New York, Boston, and Oakland were the major sites of activity – and thousands were mobilized in a massive draft-card turn-in on October 19 at the Justice Department in Washington, D.C. As part of the week of actions, on October 16, members of the Fort Hood Three Defense Committee submitted a petition of 30,000 signatures protesting the court-martial of the Fort Hood Three. Richard Moose, an aide in the White House, accepted the petition.¹¹⁶ The tumultuous week ended with the march on the Pentagon where thousands of demonstrators descended on the Pentagon, creating scenes of confrontation between antiwar activists and military personnel. Some demonstrators got into the Pentagon, running through the halls before they were tackled and arrested. There were tense moments between demonstrators and the military police, while others called on the soldiers to "Join us!"¹¹⁷ The iconic march on the Pentagon proved a turning point for the antiwar movement.

¹¹⁴ "2 G.I.'s In Protest Get Sentences Cut," *New York Times*, 7 July 1967, 9. See also: Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 78-80.

¹¹⁵ Quoted in Carl Bernstein, "GI's Vietnam Plea Rejected by Court," *Washington Post* 27 September 1967, A10.

¹¹⁶ "War Protesters Rally in U.S.," *Washington Post*, 17 October 1967, A8.

¹¹⁷ See Staughton Lynd, *Accompanying: Pathways to Social Change* (Oakland: PM Press, 2012), 71.

Almost 16 months after their initial arrest in New York City, the Supreme Court refused to review the Fort Hood Three's appeal. On November 6, Justice William O. Douglas offered a dissenting opinion, just as he did in the case of David Mitchell. However, in rare move, Justice Potter Stewart, considered a traditionalist by liberals, joined Douglas and offered a series of questions that he found needed answers:

There exist in this case questions of great magnitude. Some are akin to those referred to by Mr. Justice Douglas in *Mitchell v. United States*, 386 U.S. 972, 87 S.Ct. 1162, 18 L.Ed.2d 132. But there are others:

I. Is the present United States military activity in Vietnam a 'war' within the meaning of Article I, Section 8, Clause 11 of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the joint Congressional ('Tonkin Bay') Resolution of August 10, 1964? (a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

These are large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates. I intimate not even tentative views upon any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument.¹¹⁸

¹¹⁸ *Mora v. McNamara*, 389 U.S. 934, 88 S. Ct. 282, 19 L. Ed. 2d 287 (Supreme Court 1967). Both Faulkner and Washington attorney Samols asked for a rehearing "one which would take into account, among other things, recent congressional interpretations of the Gulf of Tonkin Resolutions. Along with the restatement of a number of previous arguments (bearing on the relevance of treaties and of the laws of land warfare, for example), he cited a list of authorities, which began with von Clausewitz, according to whose definitions the

So important was this dissent that the *New York Times* opined: “the dissenting opinions of Justices Potter Stewart and William O. Douglas are significant. Their effort is to raise new constitutional questions that require steady examination and, under another set of circumstances, future justiciable findings.”¹¹⁹ Justice Stewart’s dissent was prescient; these issues did not go away. Nineteen sixty-eight proved to be a turning point in the war and a year that would shake the United States, and the world, to its core.

The Fort Hood Three were released from prison in January 1969 and started a national speaking tour.¹²⁰ Two members spoke at the counter-inaugural rally in Washington, D.C. on January 20.¹²¹ In mid-July, James Johnson flew with Rennie Davis, Linda Evans, and Grace Paley to North Vietnam to accept the release of U.S. Prisoners of War.¹²² Johnson, who represented the National Black Anti-war Anti-draft Union, was quoted by the FBI as stating on Hanoi Radio:

We consider it fitting that I, a black man and an ex-GI who spent 28 months in U.S. prisons for refusing to fight against the Vietnamese people, should read this statement. Thousands of American GI’s now feel that their fight is not with the people of Vietnam. Their fight is with those who make the war in this country.
...¹²³

Conclusion

The Fort Hood Three are representative of how the ethos of Nuremberg developed and grew during the Vietnam War. David Samas, James Johnson, and Dennis Mora openly and defiantly challenged the Johnson administration’s war in Vietnam by invoking the Nuremberg Principles, international and domestic law. The trio were not conscientious objectors or pacifists and, like David Mitchell, offered the burgeoning antiwar movement a

Vietnam action was indeed war.” The submission was refused without comment. Quoted in Bannan and Bannan, *Law, Morality and Vietnam: The Peace Militants and the Courts* (Bloomington: Indiana University Press, 1974), 82-83.

¹¹⁹ *New York Times*, 14 November 1967.

¹²⁰ “Fort Hood Three on Speaking Tour,” *Black Panther Paper*, 4 January 1969.

¹²¹ “Area Marcher Tells of Counter Inaugural,” *The Hartford Courant*, 24 January 1969, 10.

¹²² John Kifner, “Court Backs Plan To Free P.O.W.’s,” *New York Times*, 16 July 1969, 7.

¹²³ James Johnson quoted in “Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas,” *Hearings Before the Committee on Internal Security, House of Representatives, 92nd Congress, Second Session, September 19 and 25, 1972* (Washington: U.S. Government Printing Office, 1972), pp. 7689-7690.

practical way of refusing to participate in the war in Vietnam. While losing in the civilian and military courts, the trio helped galvanize various strands of antiwar activity which, up until 1966-1967, consisted mainly of isolated acts by individuals or local peace movement groups. The Defense Committee set up to support the three soldiers made their campaign a national and international story and in the process were able to disseminate information about their individual cases and about the justifications one could make for refusing military orders to deploy to Vietnam or draft orders from the Selective Service System. In these efforts, the Fort Hood Three were successful as they helped raise an antiwar consciousness in the United States in the civilian, GI and veteran antiwar movements. This was no small feat in 1966 when the movement was still marginal.

“I regret nothing,” David Samas wrote to Alice Lynd for her book *We Won't Go: Personal Accounts of War Objectors*. The influential book, addressed in more depth in a later chapter, was published in 1968 for the movement to read and disseminate. In his letter, Samas gave advice to the peace movement: “The GI should be reached somehow. He doesn't want to fight. He has no reason to risk his life. Yet he doesn't realize that the peace movement is dedicated to his safety. Give the GI something to believe in and he will fight for that belief.”¹²⁴ This was significant advice at the time, as the GI and veteran movements were beginning to awake and there was skepticism on both sides of the civilian-military divide. The Fort Hood Three Defense Committee, while facing many obstacles, demonstrated it was possible to bridge that divide and the movements could work together to help end the war in Vietnam.

As the Fort Hood Three Defense Committee noted, the first case of public refusal of orders inspired many other active-duty GIs to resist. At the same time the Fort Hood Three were planning to refuse orders in early-1966, a rebel doctor at Fort Jackson in South Carolina was also acting on his opposition to the war in Vietnam.

¹²⁴ David Samas to Alice Lynd, quoted in Alice Lynd, eds., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 202.

Chapter 4

‘The Little Nuremberg’:
Dr. Howard Levy, the Nuremberg Principles and Medical Ethics
in the American Military, 1965-1967

In June 1966, Dr. Howard Levy, a dermatologist stationed at Fort Jackson, South Carolina, refused to teach Special Forces soldiers who, as part of their training, were learning medical skills to use in Vietnam. The pupils were neither doctors nor medics. These so-called aidmen were part of a 12-man “A-teams” that were sent to Southeast Asia to perform counterinsurgency or guerrilla warfare missions. Each A-team had two medical aidmen in their detachments that were also trained in another specialty such as demolition. The aidmen were charged with providing on-the-ground medical treatment to the Special Forces during combat patrols as well as the additional task of winning the “hearts and minds” of the Vietnamese in the countryside by furnishing medical treatment to the local population as a function of counterinsurgency. In effect, Levy refused to train Green Berets aidmen. Because they were neither doctors nor medics, questions relating to the Nuremberg Principles and the Hippocratic Oath were central to Levy’s refusal.

The case of Dr. Howard Levy came into public light on December 28, 1966, when Levy was charged with disobeying orders to teach Green Beret military “aidmen.”¹ Authorities also charged him with “promoting disloyalty and disaffection among the troops” and faced up to 11 years in prison. On grounds of medical ethics, Levy indicated that he would no longer teach these Special Forces’ aidmen because they were committing crimes against humanity and war crimes. Levy told the *New York Times* in an interview: “You practice medicine with no strings attached. ... You don’t offer it as a bribe. There should be no ulterior motives. But here, it was clearly being used to promote political objectives. It was

¹ Roy Reed, “Army Doctor Refuses to Train Guerrillas,” *New York Times*, 29 December 1966, 1. Reed reported that Levy was charged under Article 90 and 134 under the Uniform Code of Military Justice. Reed also focused on Levy’s civil rights work with the Voter Education Project of the Southern Regional Council and that Levy “confirmed that he had told Negro Special Forces soldiers, ‘If I were a Negro, I would not fight in Vietnam.’”

just a prostitution of medicine. The medical art of healing was becoming the handmaiden of political objectives.”²

Unlike the court-martials of the Fort Hood Three, Levy was given an opportunity to provide a defense based on the Nuremberg Principles and the issue of individual responsibility for the commission of war crimes. This was the first time since the Nuremberg and Tokyo war crimes tribunals that the issue of individual responsibility, medical ethics and culpability for war crimes had been brought to the U.S. military legal system as a defense and was entertained by the law officer presiding over the court-martial. Despite the best effort of Levy’s defense team, his case was limited by the law officer to prove that Green Beret medical aidmen were specifically guilty of committing war crimes in Vietnam. In 1969, “the Levy case may have been the weakest possible situation to introduce a ‘Nuremberg defense,’” wrote Anthony A. D’Amato, assistant professor of law at Northwestern University. “On the other hand, the case does stand for the important precedent that a war-crimes defense is available, in relevant circumstances, to in-service resisters.”³

Levy faced an impossible challenge by employing the Nuremberg Principles in his case. By limiting the defense to prove only the Special Forces in Vietnam were committing war crimes, the law officer (or judge) at the court-martial narrowed the spectrum of evidence about the criminality of the war as a whole. Indeed, most of the material that Charles Morgan, Levy’s counsel, was able to obtain was immaterial because it did not deal specifically with the Special Forces. This is an excellent example of how the courts – civilian and military – during the Vietnam War limited, or just plain omitted, the application of the law to the war. The court had already decided that the war in Vietnam was legal and therefore the question of whether the war was constitutionally declared by Congress or was a

² Reed, *New York Times*, 29 December 1966, 1. Levy was quoted in the pages of *Science*, arguing:

Medically, I think they [the aidmen] do more harm than good. They go into a village, set up a station, hand out drugs indiscriminately. Penicillin will cure a lot of things but there are conditions it doesn’t affect, and it has dangerous implications in the long run, both for individuals and for its effect on the development of drug-resistant strains. Physicians should be concerned with this changing medical ecology. The Special Forces have access to the whole pharmacopeia. They use drugs, such as Chloromycetin, that I hesitate to use myself.

Quoted in Elinor Langer, “The Court-Martial of Captain Levy: Medical Ethics v. Military Law,” *Science* Vol. 156, No. 3780, Jun. 9, 1967:1349.

³ Anthony A. D’Amato (with Harvey L. Gould and Larry D. Woods), “War Crimes and Vietnam: The ‘Nuremberg Defense’ and the Military Service Resister,” *California Law Review* 57 (1969): 1055-1056.

war sanctioned by the Security Council or in self-defense under the U.N. Charter was not allowed in the case. This happened despite the fact that the war's legality was contested and controversial thanks in part to the work of groups like the Lawyers Committee on American Policy Towards Vietnam. However, as Jean-Paul Sartre pointed out in a cable to Dr. Levy during the court-martial, "GREEN BERET CRIMES AGAINST HUMANITY ONLY PART OF CRIME OF AGGRESSION."⁴ Sartre argued that the commission of war crimes by the Green Berets was only a symptom of a much larger crime of waging the war in first place. In other words, Sartre, as well as members of the Lawyers Committee, insisted the war in Vietnam was a war of aggression or crime against peace, what the framers of the Nuremberg Trials called the "supreme international crime." The judgment at Nuremberg stated:

War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.⁵

This meant that the war crimes and crimes against humanity committed in Vietnam were a derivative of the larger crime of invading South Vietnam.

In a recent history of the Levy court-martial, Andrew Myers concluded that Levy was "either too arrogant or too ignorant to avoid the trap set for him, and he paid a steep penalty." As this chapter will demonstrate, given Levy's actions and his personal statements about the war in Vietnam, he had a clear understanding about the orders he was refusing, and he did it with his eyes wide open. He told Alice Lynd in a letter that he was not looking to become a "martyr."⁶ Myers, on the other hand, argued that Levy's court-martial received "international attention" because the doctor "invoked the Nuremberg defense" which for Myers meant that "a soldier had an obligation to disobey orders that promoted genocide."⁷ This is an interesting interpretation of Levy's use of the Nuremberg Principles, one that had no

⁴ Jean-Paul Sartre quoted in Charles Morgan, *One Man, One Voice*, 138.

⁵ Michael Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (London: Pluto Press, 2004), 5-6.

⁶ Howard Levy to Alice Lynd, 5 November 1967, in Alice Niles Lynd and Staughton Lynd Papers DG 099, Box 11, Swarthmore College Peace Collection, Swarthmore, Pennsylvania.

⁷ Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 195.

resemblance to what the Principles clearly state or Levy's own use of them. This chapter seeks to clarify Levy's case and its importance in the history of military resistance.

Like the case of the Fort Hood Three, Levy's extraordinary affair played itself out in both civil and military courts and focused on three important issues: the freedom of speech of active-duty soldiers, the right to refuse illegal orders, and the right of doctors to practice their craft ethically in the military. The significance of the case was amplified by the fact that Levy's court-martial was potentially a precedent setting case in the history of military justice. Levy's trial and the issues forced into the open were emblematic of the period and represented to many in and outside of the military the draconian nature of the institution. For instance, four out of the five charges against Levy were due to what he said or was believed to have said to other soldiers about the war in Vietnam and about President Johnson. While Levy was not the first soldier during the war to be tried for his speech, his case was the most publicized at the time and served as a touchstone in the continued debate about reforming the Uniform Code of Military Justice (U.C.M.J.).⁸ For the legal showdown, Capt. Levy retained Charles Morgan, Jr., the flamboyant and influential director of American Civil Liberties Union's southern regional office in Atlanta.⁹ In the four-week trial, Levy and his legal team introduced evidence that tried to demonstrate that he refused to train Special Forces aidmen because they had committed crimes against humanity and war crimes and that the use of medicine for political purposes was contrary to medical ethics. In each instance, Col. Earl V. Brown, the presiding law officer, struck down the Nuremberg "defense" and the case of medical ethics.¹⁰

⁸ Ira Glasser, "Justice and Captain Levy," *Columbia Forum*, Spring 1969, 46-50.

⁹ Morgan was a revered lawyer from the South who, according to one historian, "left a lasting impact on the South and on constitutional law, desegregating the juries in three states, outlawing segregation in prisons, and reforming the ancient election system in Georgia. His clients included Julian Bond, Muhammed Ali, and Dr. Howard Levy." Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 268-272.

¹⁰ International lawyer and legal scholar Francis A. Boyle calls into question the frequent use of the phrase "Nuremberg defense" used by activists and lawyers in court cases, labeling it a "perverse misnomer." Demonstrating that the "original Nuremberg defense" was used by "the Nazi defendants before the Nuremberg Tribunal" who claimed they were following superior orders. Instead, Boyle argues that the use of the Nuremberg Principles is "civil resistance" whereby the individual is "attempting to prevent the ongoing commission of international crimes under well-recognized principles of international law and U.S. domestic law." Francis A. Boyle, *Protesting Power: War, Resistance, and Law* (Lanham: Rowman & Littlefield Publishers, Inc., 2007), 24-25.

Despite the failure of Levy's case in the courts, the court-martial was significant for a number of reasons. The trial brought out into the open serious questions that would rock the military by the end of the war in Vietnam, questions about individual responsibility during war and conflict that lay dormant since the end of World War II. While the previous attempts by David Mitchell and the Fort Hood Three in the courts had relied on many of the same legal arguments, Levy's attempt was by far the most publicized. The radical ideas of free speech in the military, refusing illegal orders, and physicians being able to practice their craft in accordance with medical ethics were advanced and debated outside of the antiwar movement. The media painted Levy as an eccentric, disobedient doctor – “the flannel-mouthed Army doctor from Brooklyn” as Nicholas von Hoffman of the *Washington Post* referred to him, or the “obscure physician from Brooklyn” who was “clearly a military misfit” according to *Time* – who challenged the very authority the armed forces relied on as the foundation of its institutional integrity. While issues such as freedom of speech gained some traction in the papers, there was never any question that such freedoms should supersede the necessary authority the military needed to keep its soldiers in line.

For *Time* magazine, what seemed like “a pedestrian case” ended up taking on “unexpected significance both as a precedent in military law and as a chapter in the worldwide debate over the Vietnam War.” However, despite the seriousness of the issues related to refusing orders based on the Nuremberg Principles and medical ethics, the media considered them “frivolous” and “farcical.” The court-martial received a great deal of mainstream media coverage and the trial left many in the military and the editorial staffs of major newspapers wishing that Levy's commanding officers would have dealt quietly with the Brooklyner instead of bringing these issues out into the open.¹¹

Their worst fears came to fruition. Levy's disobedient spirit and anti-authoritarianism crystallized by the Army's spectacular court-martial. Levy's act of defiance galvanized different strands of burgeoning antiwar activism. In the civilian, GI and veteran movements, Levy became a folk hero. Pictures of the wiry doctor in handcuffs appeared on posters and

¹¹ “The Levy Court-Martial,” *Wall Street Journal*, 6 June 1967, 18; “The Trial of Captain Levy,” *Washington Post*, 6 June 1967, A16; Nicholas von Hoffman, “Dr. Levy's Trial Draws Laments, Second Guessers,” *Washington Post*, 2 June 1967, A3; and “Nürnberg and Viet Nam,” *Time*, 26 May 1967, 20.

materials that focused on the major issues of the trial. Even as Levy received a large amount of coverage in the national papers, he was also the subject of countless articles in the burgeoning GI and civilian underground presses. The growing number of GI's refusing orders based on reasons of conscience, and most of the time directly related to the Nuremberg Principles, gathered a momentum of its own. Regardless of whether they understood the specifics of Levy's defense, he would be the inspiration for countless war resisters both in and out of the military. As Levy recounted in an interview in the early-2000s:

I think the most startling thing to me occurred however as the court-martial began. What would happen was we would walk from the parking lot to the building where the court-martial was being held and it was the remarkable thing when hundreds and hundreds of G.I.'s would hang out of windows, out of the barracks and would give me the V-sign or give me the clenched fist. This was mind boggling to me. This was a revelation. And at that point it really became crystal clear to me that something had changed here. And that something very, very important was happening.¹²

Upon his release from prison on August 6, 1969, three years after being convicted, he told the *Washington Post* that the U.S. Army had tried "to silence opposition" to the war by convicting him. However, "they did not change my mind and they helped to make up other minds to oppose the war. And their actions actually made it possible for some who had been silent to speak out."¹³ The following chapter will examine Dr. Howard Levy's refusal to train Green Beret aidmen, his subsequent high profile court-martial, and its aftermath.

The Doctor Who Resisted

Like most other military dissenters in the war's early months, Dr. Levy was not a pacifist, but he was opposed to the Vietnam War. Levy told the *New York Times* that he "would have fought in World War II" and before the widespread opposition to the Vietnam War, this

¹² Quoted in *Sir! No Sir!*, 2005, Documentary, Directed by David Zeiger.

¹³ Jack Nelson, "War Foe Levy Unchanged by Imprisonment," *Washington Post*, 21 August 1969, F4.

would have seemed an odd combination to the generations who had come of age during the Second World War. Levy was a selective war objector.¹⁴

During Levy's residency he was also in the Army Medical Corps as a commissioned reserve officer. Under the Berry Plan, Levy entered the Medical Corps and was given a deferment until he finished medical school.¹⁵ Levy's father, Seymour Levy, had fought during World War II and Levy followed in his footsteps by joining the military as well. The Medical Corps during the Vietnam War was an area where the Selective Service System sparked controversy. Civilian physicians were drafted for two years of "involuntary servitude" and constituted the only branch of the military where you could be drafted despite having children and where the age limit was extended to thirty-five. For physicians, being drafted entailed serving on a base in the United States or abroad, or going directly to Vietnam to serve in field hospitals. While not all military physicians would be tasked with training Green Beret aidmen, the blurring of the lines in Vietnam between medical duties and participating in the war effort in offensive capabilities challenged many of these doctors. Army psychiatrist Peter Bourne wrote in *Ramparts* that even "helicopter ambulance medics are expected to be able to operate .30-caliber machine guns while on evacuation flights" despite the fact this is clearly against the Geneva Conventions.¹⁶

Howard Levy, born in 1937 in Brooklyn, New York, went to New Utrecht High School and New York University. He took his medical training at the Downstate Medical Center in 1962 and was an intern at Maimonides Hospital. He returned to NYU where he had a residency that included working at University Hospital, Manhattan Veterans Hospital, and Bellevue between 1964 and 1965. Levy's personal experience working in these various hospitals and the poverty and inherent racism and classism in the medical system began to alter his ideas about the medical establishment. He began writing letters to the editor,

¹⁴ Reed, *New York Times*, 29 December 1966, 1.

¹⁵ The Armed Forces Reserve Medical Officer Commissioning and Residency Program, also known as the Berry Plan, named after assistant secretary of defense Dr. Frank B. Berry, was implemented in 1955 amid a shortfall in physicians and dentists enlisting into the armed forces. According to George Q. Flynn, "The Berry plan provided additional incentives for young physicians and dentists to take commissions by allowing those that volunteered to receive monetary assistance and remain deferred through internships." In the mid-to-late 1950s, the U.S. armed forces needed 10,000 physicians on active duty. See George Q. Flynn, *The Draft, 1940-1973* (Lawrence: University Press of Kansas, 1993), 158-160.

¹⁶ Peter Bourne, "The Hippocratic Oath: The Army Physician and Vietnam," *Ramparts*, July 1967, 57-58.

participating in demonstrations with welfare workers and attended the Militant Labor Forum where he was able to hear Malcolm X speak.

During his deferment he turned against American foreign policy in Vietnam. He had a deferment from 1962 to 1965 and entered the active service in July 1965. Rejecting pacifism at the time, he did not apply for conscientious objector status and was sent to Fort Jackson, South Carolina.¹⁷ Due to the high volume recruits coming in through what Levy called “the doctor’s draft” at that particular time, he did not receive the mandatory six-week course for physicians at Fort Sam in Houston, Texas.¹⁸

When Levy arrived at Fort Jackson, he was not a determined antiwar activist looking for trouble. Instead, based on his experiences as a medical student in low-income areas of New York, Levy took an interest in the local civil rights movement. In July, he read about an attempted lynching of a voter rights organizer in Newberry County and drove an hour to check out the situation. Levy met with William Treanor, a World War II veteran, and lead organizer of the Summer Community Organization and Political Education (SCOPE). Levy was the only soldier stationed at Fort Jackson who participated in local civil rights activities and the local police took notice of his New York license plate and Fort Jackson registration sticker. Fort Jackson brass did not look upon such actions favorably. As one historian noted, “Close ties between Fort Jackson and Columbia’s white elite helped prevent soldiers from protesting not only against racial discrimination but also the war in Vietnam.”¹⁹ The Monday morning after Levy’s first drive to Newberry County a note was filed in his personnel file: “determine whether [*sic*] loyal investigation should be made 19 July, 1965.”²⁰ The lead investigator into Levy’s loyalty investigation, Special Agent James West of the Army Counter-Intelligence Corps, was a World War II veteran and a resident of Newberry County.

¹⁷ Elinor Langer writes “[Levy] would have preferred to become a conscientious objector, but he is not a pacifist and the law provides no relief for opponents of individual wars. He convinced himself that standing armies are necessary and that, since they are necessary, they need doctors.” *Science* Vol. 156, No. 3780, Jun. 9, 1967: 1346.

¹⁸ Elinor Langer, “The Court-Martial of Captain Levy: Medical Ethics v. Military Law,” *Science* Vol. 156, No. 3780, Jun. 9, 1967: 1346.

¹⁹ Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 191-192.

²⁰ Levy’s personnel file quoted in Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 191-192.

West took a special interest in Levy's file and the medical corps captain became the subject of close scrutiny from there on out.

It was Levy's civil rights activities in Newberry County that piqued the interest of military counter-intelligence agents. During the summer and fall of 1965, on most weekday evenings and weekends, Levy would leave Fort Jackson and drive to Newberry County to work with SCOPE and voter rights organizing activities. He organized a fundraising rhythm and blues concert and helped with writing and editing the movement newspaper *Contrast*.²¹ In August, an Army official scrutinizing Levy's personnel file more closely found a discrepancy: the doctor failed to mention his participation in the Militant Labor Forum in New York on his required Armed Services Security Questionnaire despite the fact he told the Army six months earlier of his participation. This raised another red flag, which Levy simply dismissed as an act of "forgetfulness" in an official statement for the military brass.²²

Between the summer of 1965 and the beginning of 1966, Levy was losing favor at Fort Jackson. He had refused membership at the officers' club, which was informally considered mandatory, and associated with African American officers while he was off duty. His longer than normal hair and generally disheveled look did not conform to strict military discipline. His participation in local civil rights activities did not please military and local civilian authorities, but he did so while off-duty and in civilian clothes. If Levy was in the infantry, his treatment would have been much different. Since Levy was a physician, and the Army needed doctors, there was little they could do other than engage in low-level harassment, such as pulling him over on base for a traffic violation. As a result, Levy was called in to explain the traffic infraction to a lieutenant colonel. The report is revealing: "When told to come to attention and salute, subject smirked, came to attention on one leg and half-heartedly put his hand near his head with his fingers in a crumpled position, then threw his hand in the direction of the wall. His left hand remained in his pocket."²³

²¹ Andrew Kopkind, "The Doctor's Plot," *New York Review of Books*, 29 June 1967.

²² Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 192.

²³The lieutenant colonel added: "throughout the conversation CPT LEVY was insubordinate by facial expression, body movement, and vocal inflection. Subject needed a hair cut and his branch insignia and U.S. insignia were in reverse manner. CPT LEVY was wearing only one rank insignia on his blouse." Quoted in

Levy's relationship with the Army changed when he was ordered to begin training Special Forces soldiers in dermatology in January 1966. He initially began training the Green Berets for the first three to four months into the New Year. Levy told Andrew Kopkind, assistant editor of *The New Republic*, that he trained the soldiers "with some reservations" at first and that he had found these soldiers very interesting. "I talked to them about the war and about themselves ... but after a while I realized that it wasn't doing any good," Levy said. "For a time, I pulled the kind of crap that some of the other doctors did – they just let the aidmen hang around and never really trained them. Then, last June, I just kicked them out."²⁴ Levy was still under investigation by Special Agent West and these interactions with the aidmen permanently flagged Levy's file as of May.

From June to October, medical corps' authorities at Fort Jackson did not take action against Levy for his insubordination. During this period, Levy had two commanders at the hospital where his clinic was located. The first commander took no disciplinary action when it was clear the doctor had refused to train the Green Berets. A replacement commander, Col. Henry Franklin Fancy, who took over in the fall of 1966, and also did not attempt any disciplinary action until Special Agent West began paying him personal visits. On three separate occasions – October 2, 7 and 10 – West visited Col. Fancy and informed him of Levy's political activities. As a result of these meetings, Col. Fancy issued verbal orders on October 11 and written orders on October 14 to Levy to train the aidmen. There was a class scheduled for November 25 and Levy was expected to train the Green Berets in dermatology. On both occasions, Levy refused the orders from his commanding officer. Under military regulations, Levy could not actually be charged with disobedience until the date the orders were not followed. Therefore, Fort Jackson authorities waited it out until after November 25 to take more divisive action against the doctor. After Levy finally refused the orders, Fancy initiated legal action against him.²⁵

Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 192.

²⁴ Howard Levy quoted in Andrew Kopkind, "The Doctor's Plot," *New York Review of Books*, 29 June 1967.

²⁵ Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 194. See also, in Robert N.

Col. Fancy, perhaps inclined not to make a martyr out of Howard Levy, filed paperwork on December 14 recommending that Levy be given a reprimand under Article 15 of the Uniform Code of Military Justice for Nonjudicial Punishment. This was a minor infraction and would have acted as a warning. Instead, Levy so offended good order and discipline that Major General Gines Perez of Fort Jackson, in all likelihood wishing to make an example of Dr. Levy, pushed for a general court-martial. Special Agent West was sent to Col. Fancy's office with Levy's G-2 intelligence file in hand and by December 28, Capt. Levy was charged under the Uniform Code of Military Justice with violating Article 90²⁶ for disobeying a direct order, Article 133²⁷ for conduct unbecoming an officer, and Article 134²⁸ for making disloyal statements.²⁹ After Levy's Article 32 hearing in the New Year, the equivalent of a pre-trial hearing in civilian courts, Col. Fancy added two additional charges under Article 133 and 134. Historian Andrew Myers, unsympathetic to Levy and his antiwar stance, argued that the "military and civilian authorities [in Newberry County] coordinated efforts to undermine activists such as Howard Levy." He found that "Levy's work in voter registration attracted the attention of Army counterintelligence operatives. Rather than

Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994): 867-871.

²⁶ Article 90 of the Uniform Code of Military Justice, 10 USC § 890, reads:

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

²⁷ Article 133 of the Uniform Code of Military Justice, 10 USC § 933, reads:

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.

²⁸ Article 134 of the Uniform Code of Military Justice, 10 USC § 934, reads:

Though not specifically mentioned in this chapter, 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, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

²⁹ Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 194-195. See also, in Robert N. Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994): 867-871.

allowing the draftee to finish his two year term of service and leave, they honed in upon his antiwar pronouncements.”³⁰

Howard Levy contacted the American Civil Liberties Union (ACLU) and they agreed to take his case on. While Levy’s case was controversial within the ACLU, with some staffers in New York arguing that it did not bear directly on questions of civil liberties, four out of the five charges Levy faced bore directly on comments he made to other soldiers.³¹ The ACLU filed an injunction in Federal Court to stop the court-martial, which was scheduled to begin on May 10. On May 3, U.S. District Court Judge Howard F. Corcoran refused to issue an injunction, citing “the separation-of-powers doctrine” (or the political questions doctrine) and argued that Levy had not yet sought the full spectrum of “remedies within the military judicial system.” On May 9, the day before the court-martial, the U.S. Court of Appeals rejected ALCU attorney Anthony Amsterdam’s appeal that the court order a transfer of the court-martial from the military to the civilian judicial system.³² The court-martial was scheduled to begin on May 10 in Fort Jackson, South Carolina.

The Court-Martial

In a hot, cramped courtroom at Fort Jackson the court-martial of Capt. Howard Levy began on May 10, 1967. The national media were there to cover the trial, including veteran journalist Nicholas von Hoffman for the *Washington Post* and famed war correspondent Homer Bigart of the *New York Times*.³³

³⁰ Andrew H. Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 189, 197.

³¹ Homer Bigart noted that: “Even if the case fails to resolve the explosive Nuremberg issue, it may speed further reforms in military justice, centered around the question of freedom of speech for men in uniform. The application of the First Amendment to the military is quite vague, and there is general agreement that the constitutional rights of the soldier need further clarification”. Quoted in Homer Bigart, “Captain’s Trial Opened to ‘War Crime’ Evidence,” *New York Times*, 18 May 1967, 2.

³² “Federal Judge Refuses to Halt Court-Martial,” *Washington Post*, 4 May 1967, A3. , “Civil Hearing Rejected in Court-Martial Case,” *Washington Post*, 10 May 1967, A8.

³³ Andrew Kopkind described the court as “a low-ceilinged hut on a sandy knoll.” He wrote: “The court assembled each morning at 0900 hours, as everyone was fond of saying, in the way tourists on their first trip abroad enjoy the simplest Berlitz phrase. Newsmen and spectators drove to the court through fields of recruits doing calisthenics, romping over the ‘confidence course’ (formerly, the obstacle course), or charging aimlessly with fixed bayonets. ...” Andrew Kopkind, “The Doctor’s Plot,” *New York Review of Books*, 29 June 1967.

It was going to be an uphill battle for Levy and Charles Morgan to win in military court. The mechanisms of the court-martial process did not work in Levy's favor: the court was convened by the commanding officer, and a panel of ten officers, chosen by the commanding officer, would act as the jury. In the case of Dr. Levy, seven of the officers on the jury were white men from the South, five of them from South Carolina. In a case that so infuriated the brass because of Levy's civil rights work, this factor weighed heavily. Moreover, four of the ten officers had recently served in combat operations in Vietnam; one had been seriously wounded.³⁴

As Ira Glasser, who worked on the Levy case for the ACLU, pointed out, four of the charges under Articles 133 and 134 of the U.C.M.J. were so vague – words like “unbecoming,” “provocative,” “defamatory,” and “reproachful” – that they could “mean anything the commanding officer want[ed] them to mean.”³⁵ In fact, a heated confrontation occurred between Morgan and Col. Earl V. Brown when Morgan requested a definition of “disloyalty” and “disaffection” in his questioning of Capt. Robert Peters, a physician at Fort Jackson's hospital, on whether his “associations with Levy had caused him to ‘disaffect’”:

Peters: I don't know what the word means.

Morgan: Neither do I.

On this basis, Morgan asked Col. Brown for a definition from the court and he replied angrily that if Morgan could not deduce from questions what the legal definition was that he “should *withdraw* from this case.”³⁶ Morgan then moved for a mistrial and Col. Brown dismissed Morgan's motion and called for a recess. After the recess, Col. Brown said that the defense was entitled to a definition and gave a – in his words a “broad, general definition” – that described disaffection as “an action tending to ‘create hostility and disgust’ for legal authority.”³⁷ Col. Brown then stated to the court: “I instruct you to disregard my remarks pertaining to Mr. Morgan and divorce them from your consideration of the guilt of innocence of the accused.”³⁸ Homer Bigart framed the scene in a different light, omitting the clash

³⁴ Ira Glasser, “Justice and Captain Levy,” *Columbia Forum*, Spring 1969, 47.

³⁵ Ira Glasser, “Justice and Captain Levy,” *Columbia Forum*, Spring 1969, pp. 46-47.

³⁶ Quoted in “Deny Mistrial in Capt. Levy Loyalty Case,” *Chicago Tribune*, 30 May 1967, C5.

³⁷ Quoted in “Deny Mistrial in Capt. Levy Loyalty Case,” *Chicago Tribune*, 30 May 1967, C5.

³⁸ Quoted in “Deny Mistrial in Capt. Levy Loyalty Case,” *Chicago Tribune*, 30 May 1967, C5.

entirely from his story, writing only that Col. Brown had denied a motion for a change of venue after Lt. Col. Richard L. Coppedge told the court that a heavy sentence for Levy would have “deleterious effect” on morale for Army physicians.³⁹ The motion for the change of venue was part of the “intimidation” doctors on base were feeling. Capt. Peters testified that he would “seriously consider trying to evade” training the Green Berets aidmen because there was evidence they were misusing or, in his personal experience, wrongly utilizing their training⁴⁰ and that he had to cut his hair and sideburns because he was threatened on base by a soldier who had mistook him as Dr. Levy.⁴¹

Among the other major problems leading to a difficult confrontation with the court-martial system was the fact that Morgan was not able to see the key pieces of evidence contained in Levy’s 180-page G-2 intelligence dossier. Levy’s military lawyers were able to view the material, but because Morgan did not have the proper clearance and the files were classified, the JAG lawyers could not discuss the evidence with Morgan.⁴²

During the first week of the proceedings, the issue of individual responsibility (embodied in the precedent of the Nuremberg war crimes trials), medical ethics, and the Army’s allegations that Levy had issued statements causing disloyalty and disaffection were raised with the calling of over twelve witnesses. The prosecution, led by Capt. Richard M. Shusterman, argued, “A man who would rather not kill can be made to kill regardless of his personal beliefs.” He tried to demonstrate that Levy’s “personal ethics, his personal beliefs,

³⁹ Homer Bigart, “Colonel Fears Jailing of Levy Would Hurt Morale of Doctors,” *New York Times*, 30 May 1967, 22. On the same day, the *NYT* published below Bigart’s story an *Associated Press* story about an Army medic, Michael Bratcher, who refused to attend his clinical class on 10 April and had started a five-day hunger strike in protest of the Vietnam War. In a special court-martial, Bratcher was demoted rank from private first class to private and was fined \$60. He was subsequently not guilty of disobeying an order. See: “Army Demotes War Protester,” *New York Times*, 30 May 1967, 22.

⁴⁰ Peters testified he had to stop a Special Forces aidmen from bandaging a two-year old girl who had torn muscles in her wrist and was not properly treated before applying the bandage. Homer Bigart, “Colonel Fears Jailing of Levy Would Hurt Morale of Doctors,” *New York Times*, 30 May 1967, 22.

⁴¹ Col. Brown denied the motion for a change of venue on the basis that he had been hissed at on base and that he had seen “no real substantive evidence of intimidation”, quoted in Homer Bigart, “Colonel Fears Jailing of Levy Would Hurt Morale of Doctors,” *New York Times*, 30 May 1967, 22.

⁴² Ira Glasser, “Justice and Captain Levy,” *Columbia Forum*, Spring 1969, pp. 47-48. See also Bruce Galphin, “Capt. Levy a Victim of Racial Vendetta, His Brief Charges,” *The Washington Post*, 20 April 1969, 23.

would have no effect on an otherwise lawful order.”⁴³ Charles Morgan countered the Army’s argument by stating that after the Nuremberg trials “all people are now responsible for their acts.”⁴⁴

The prosecution called more than twelve Green Berets and other soldiers to testify that Levy had refused to train them or had expressed his antiwar views to them. An oft-quoted and potentially incriminating remark by Levy – that the Green Berets’ were “liars, killers, murderers of women, children and peasants” – was read in court.⁴⁵ Shusterman argued in a brief to the court that, “the military society, with its recognized, demonstrated need for uniformity and discipline is not unfamiliar to the notion that not even truth can be used to bring about a palpable injury to good order and discipline.”⁴⁶ Among the soldiers called, five African Americans testified that Levy had told them fighting for civil rights in the United States was more important than fighting in Vietnam. Pfc. Eddie Cordy, who had just been wounded in Vietnam, told the court-martial that after talking to Capt. Levy, he had sought two discharges from the Army before he was sent overseas. Another witness, Richard W. Gillum, former Special Forces medic, testified that Levy had compared the Green Berets to Nazi SS troopers and President Lyndon Johnson to Adolf Hitler.⁴⁷

One of the strongest witnesses in the Army’s case was Sgt. Geoffrey Hancock. Sgt. Hancock testified that he received a letter from Levy in September 1965 when he was an intelligence officer in Vietnam. Levy wrote that U.S. policy in Vietnam was a “diabolical evil” and stated, “Your real battle is back here in the United States but why must I fight it for you? The same people who suppress Negroes and poor whites here are doing it all over again

⁴³ Quoted in Nicholas Von Hoffman, “Nuremberg Raised at Capt. Levy’s Trial,” *Washington Post*, 16 May 1967, A4.

⁴⁴ Quoted in Nicholas Von Hoffman, “Nuremberg Raised at Capt. Levy’s Trial,” *Washington Post*, 16 May 1967, A4.

⁴⁵ Quoted in Nicholas Von Hoffman, “Nuremberg Raised at Capt. Levy’s Trial,” *Washington Post*, 16 May 1967, A4.

⁴⁶ Quoted Nicholas Von Hoffman, “Nuremberg Raised at Capt. Levy’s Trial,” *Washington Post*, 16 May 1967, A4.

⁴⁷ “Negro GI Talks At Army Trial,” *Chicago Daily Defender*, 17 May 1967, 2. Cordy testified that he met Levy in 1966. Cordy testified on 16 May. When cross-examined by Shusterman, Cordy admitted “I believe we’re fighting for a just cause over there. We (Negroes) have still got something to fight for here, but until we win over there we can’t fight it here”. Quoted in Jack Nelson, “Doctor Likened Johnson to Hitler, Court Told,” *L.A. Times*, 17 May 1967, 5.

all over the world and you're helping them.”⁴⁸ Sgt. Hancock, who was white, testified that his wife was a woman of color.⁴⁹ The letter, which was saved by Hancock's wife, and submitted by Hancock after Levy was charged, was entered as *prima facie* evidence that Levy had indeed promoted “disloyalty” and “disaffection” among the troops.

‘The Little Nuremberg’

On May 17, Col. Brown opened the door for the remaking of modern American military justice when he allowed Levy's defense team to introduce evidence that would demonstrate that the Green Berets were committing war crimes in Vietnam. “Never in a domestic trial has the commission of atrocities, as defined by the Nuremberg war crimes tribunal, been raised as a defense for the refusal to obey a military order,” noted Homer Bigart.⁵⁰ Col. Brown, sensitive to the arguments being made, told the court he would hear the defense's evidence that war crimes were being committed in Vietnam in an out-of-court hearing. He announced he would determine if there was sufficient evidence presented that demonstrated either a general pattern of atrocities or a policy of systematic abuses on the part of the Green Berets. Col. Brown stated if the Green Beret aidmen had been “trained to commit war crimes, then I think a doctor would be morally bound to refuse” orders to train them.⁵¹ The ruling, according to the *New York Times*, had “surprised” the defense because they had originally intended to demonstrate that Levy's training was for primarily combat soldiers and only secondary for its medical practicality. Before the out-of-court hearing,

⁴⁸ Quoted in Jack Nelson, “Doctor Likened Johnson to Hitler, Court Told,” *L.A. Times*, 17 May 1967, 5. See also, Homer Bigart, “Former Medic Testifies that Captain Compared Johnson with Hitler,” *NYT*, 17 May 1967, 2.

⁴⁹ Quoted in Jack Nelson, “Doctor Likened Johnson to Hitler, Court Told,” *L.A. Times*, 17 May 1967, 5. See also, Homer Bigart, “Former Medic Testifies that Captain Compared Johnson with Hitler,” *NYT*, 17 May 1967, 2.

⁵⁰ Homer Bigart, “Captain's Trial Opened to ‘War Crime’ Evidence,” *NYT*, 18 May 1967, 2.

⁵¹ Quoted in Robert N. Strassfeld, “The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy,” *Wisconsin Law Review* 839, (1994), 903. Strassfeld contended that Col. Earl Brown, as a law instructor at West Point in the late-1940s, “thought a lot about Nuremberg.” Moreover, Col. Brown had been influenced by the movie *Judgment at Nuremberg* and “had doubts about the wisdom, if not about the legality, of the Vietnam War. And Brown was worried about how *he* might be judge if he foreclosed any ventilation of the issue that Levy raised.”

however, Levy's father, Seymour Levy, a World War II veteran, testified on behalf of his son's loyalty as a Jewish American.⁵² Moreover, Morgan stated that since Levy was Jewish and atrocities were at issue, he had sought to "create an aura of Nuremberg" in the courtroom.⁵³

During the out-of-court hearing, the defense did not have enough time to properly gather evidence to demonstrate a *prima facie* case for war crimes and crimes against humanity. Morgan called Col. Roger A. Juel, a medical officer who directed the training program for Green Beret aidmen. Juel testified, rather unfortunately for the defense's case, that under no circumstances were Green Berets being trained to commit war crimes or crimes against humanity.⁵⁴ "After hearing Colonel Juel's testimony, Colonel Brown granted a recess until next Wednesday to permit the defense to revise its strategy," reported Homer Bigart.⁵⁵

"Morgan spent a good part of the next five days on the telephone – stretched out on his bed, like a fallen redwood, discussing war crimes with long distant voices," wrote Donald Duncan and J.A.C. Dunn. "He found many people anxious to charge war crimes in Vietnam, but, understandably, he wasn't swamped by people willing to come to Fort Jackson and confess committing them."⁵⁶ The race was on for the defense to come up with *prima facie* evidence that proved the Green Berets had engaged in a general pattern, or, as a matter of policy, had carried out war crimes and/or crimes against humanity. The opportunity presented itself to Morgan and Levy and they tried as best they could to mobilize various antiwar factions at home and around the world to help with the case. In other instances, surprising evidence was sent to Morgan from unexpected sources after reading about the extraordinary court-martial proceedings.

After the *New York Times* had reported that Morgan was on the hunt for evidence of war crimes in Vietnam, the attorney received a call from Ralph Schoenman, Bertrand Russell's personal secretary and official Secretariat of the International War Crimes Tribunal,

⁵² Homer Bigart, "Captain's Trial Opened to 'War Crime' Evidence," *NYT*, 18 May 1967, 2.

⁵³ Homer Bigart, "Court Martial: Levy Pleads the 'Nuremberg Defense' Complexion Changes Defense Strategy Soldier's Rights," *New York Times*, 21 May 1967, E4.

⁵⁴ Homer Bigart, "Captain's Trial Opened to 'War Crime' Evidence," *NYT*, 18 May 1967, 2.

⁵⁵ Homer Bigart, "Captain's Trial Opened to 'War Crime' Evidence," *NYT*, 18 May 1967, 2.

⁵⁶ Donald Duncan and J.A.C. Dunn, "Notes Toward a Definition of the Uniform Code of Military Justice, as Particularly Applied to the Person of Captain Howard Levy," *Ramparts*, July 1967, 56.

offering assistance. Schoenman asked Morgan if he wanted documents compiled for the Stockholm Session of the International War Crimes Tribunal. Moreover, the Tribunal's president, Jean-Paul Sartre cabled Morgan that the crimes of the Green Berets were "ONLY PART OF CRIME OF AGGRESSION" in Vietnam. On 22 May, it was reported the Bertrand Russell Peace Foundation sponsored International War Crimes Tribunal in Stockholm, Sweden, had sent material from the Tribunal. The statement from Russell said:

Capt. Howard Levy, facing trial in Columbia, S.C., because of his refusal to instruct conscripts for combat in Vietnam, has appealed to me to provide witness and evidence from the Stockholm session of the international war crimes tribunal in support of his defense that the U.S. Government is guilty of war crimes in Vietnam. This courageous U.S. Army officer has understood the criminality of U.S. action in Vietnam.⁵⁷

Bertrand Russell viewed the Levy trial as an important opportunity, like the cases of David Mitchell and the Fort Hood Three, to offer support to Americans challenging the war at home. Russell thought the most effective way the International War Crimes Tribunal could help end the war was by aiding and linking war crimes in Vietnam to the legality of the war as a whole. The Bertrand Russell Peace Foundation sent a large box of documents from the International War Crimes Tribunal – the first session of the Russell Tribunal ended the day Levy's court-martial began – and Jean Paul Sartre wrote a statement of support. Among the files Morgan received were documents the Bertrand Russell Peace Foundation had been carefully gathering since 1963 about the war in Vietnam. The bulk of the material was from the Stockholm Session of the Tribunal. This included evidence gathered by the investigative teams sent to North Vietnam, South Vietnam and Cambodia; information about the use of weapons such as anti-personnel weapons (or Cluster Bomb Units (CBUs)) and napalm, and their effects on the civilian population; proof of the bombing of civilians and medical facilities in North Vietnam and other various pieces of evidence. Unfortunately, the documents arrived too late.⁵⁸

⁵⁷ Quoted in "Russell 'War Crimes' Data Sent to Captain on Trial," *NYT*, 22 May 1967, 13. See also: Charles Morgan, *One Man, One Voice* (New York: Holt, Rinehart and Winston, 1979), 138.

⁵⁸ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 135, Robert N. Strassfeld, "The Vietnam War

Seymour Melman, a Columbia University professor, sent over 4000 newspaper articles that he had been compiling for the publication of *In the Name of America* sponsored by Clergy and Laymen Concerned About Vietnam. Melman and a group of Columbia graduate students had been compiling the material since October 1966. The articles covered an array of topics from the use of torture in South Vietnam, to the bombardment of undefended villages and the use of gas and CBUs, as well as other war crimes. Morgan would also submit Donald Duncan's *Ramparts* exposé from February 1966 and Robin Moore's book *The Green Berets*. Moreover, international lawyer Richard Falk and Institute for Policy Studies research Richard Barnet submitted a legal brief on behalf of Levy that outlined the relevant laws of war that Levy's defense had cited. Morgan also submitted names of 38 people to be subpoenaed if the out-of-court hearing determined there was sufficient evidence of war crimes by the Special Forces in Vietnam.⁵⁹

In an instance demonstrating how an antiwar feeling was taking hold in the U.S. military, Sp/4 Carl Rogers upon returning home from Vietnam in May 1967, read of the Howard Levy court-martial. He immediately contacted Levy's legal team to offer evidence in the trial. Rogers had been stationed at Cam Ranh Bay in South Vietnam beginning in May 1966 and worked as a chaplain's assistant. With the free time accorded to him, he began to read about the history of Vietnam and was particularly influenced by the writing of Bernard Fall. Rogers began writing letters to the editor challenging the positive coverage of the war after he read a *Newsweek* story on soldiers' enjoyable experience at Fort Jackson. After this, he began to interview members of his unit in Vietnam and accumulated hundreds of tapes and letters he began to send home. In one particular instance, he wrote a letter home on December 1, 1966, to his father, a reporter for the *Chardon Times-Leader*, about the visit of President Johnson to Cam Ranh Bay. Rogers' writings home began to come to the attention of his command and he, along with his chaplain, came to be viewed by their superiors as agitators. The duo was transferred from Cam Ranh Bay to Phang Rang, a less secure and safe

on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994): 905; Charles Morgan, *One Man, One Voice*, 139; and John Duffett, *Against the Crime of Silence*, 49-312.

⁵⁹ Robert N. Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994), 907-908. For Morgan's account of trying to obtain as much evidence as possible, see: Charles Morgan, *One Man, One Voice* (New York: Holt, Rinehart and Winston, 1979), 137-140.

base. It was here that Rogers got his first taste of combat as a result of field operations in which he frequently participated. On one particular occasion, he saw a dead Vietnamese with his ears cut off for trophies. Rogers photographed the scene and vowed to fight against the war from then on. He delivered the gruesome photographs to Charles Morgan to be used in Levy's trial and Morgan offered to fly him down to Fort Jackson to take the witness stand. Rogers did not make it on the witness stand, however, he would go on to join the veterans movement against the war and would come to meet Dr. Benjamin Spock and work for Negotiations Now!.⁶⁰

Morgan asked Col. Brown if, during the recess, if he could "travel to Vietnam to take depositions" from soldiers in the field. "Certainly not," the law officer replied. Therefore, the defense turned to *The Law of Land Warfare* (U.S. Army Field Manual (FM) 27-10). The Army Field Manual was the one straightforward domestic instrument in the civilian and military worlds that fully embraced and codified the Nuremberg Principles. Chapter VIII, Section II, Paragraph 499 defined a war crime as "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."⁶¹

Levy's parallel legal challenge in the civilian courts ran aground on May 22 when the Supreme Court refused to issue an injunction against the court-martial. The lawyers for the Justice Department argued during the appeal process that if the Appellate Courts intervened, they "would inject the civilian courts into the heart of military organization and discipline, which are based upon obedience to the commands of superior officers." However, Levy's

⁶⁰ Gerald Nicosia, *Home to War: A History of the Vietnam Veterans' Movement* (New York: Carroll & Graf Publishers, 2004), 19-22.

⁶¹ Paragraph 498 defines "Crimes Under International Law:

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise:

- a. Crimes against peace
- b. Crimes against humanity
- c. War crimes

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes."

Quoted in Seymour Melman, ed., *In the Name of America*, 53-54. See also Charles Morgan, *One Man, One Voice*, 138-139.

defense argued that the war was unconstitutional because it had not been declared by Congress, and that the military's charges against him violated his free speech.⁶² Therefore, like the cases of David Mitchell and the Fort Hood Three, the court refused to entertain key constitutional arguments, and in this case, deferred to the authority of the military courts to protect the institutional integrity of the military justice system.

When the court-martial resumed on May 24, Morgan called Donald Duncan, Robin Moore and Capt. Peter G. Bourne, the Army psychiatrist quoted earlier, to the stand. In what Homer Bigart facetiously called the "little Nuremberg," the expert witnesses provided gruesome details about Special Forces operations in Vietnam.⁶³ Donald Duncan testified at the court-martial of Captain Howard B. Levy. Covering the out-of-court hearing with Col. Earl V. Brown, the law officer of the general court-martial, Homer Bigart wrote "the 'Little Nuremberg' hearings on alleged war crimes, a hearing believed to be unprecedented in American military justice ..."⁶⁴

Donald Duncan reluctantly agreed to testify at the trial and he also suggested that Robin Moore be invited.⁶⁵ During his testimony, he recalled many of the incidents he wrote about in the February 1966 edition of *Ramparts* as well as his new book *The New Legions*. An incident Duncan referred to was near An Khe, where he was ordered to "get rid of" four Viet Cong prisoners his team had taken. Duncan testified that he interpreted this order to mean "shoot 'em or stick a knife in 'em" and that he had pretended he misunderstood the order. When his team returned to base camp, the Major chided Duncan, saying "You know, we almost told you right over the phone to do them in" and was told that "you wouldn't have had to do it; all you had to do was give them over to the Vietnamese." Furthermore, both Duncan and Robin Moore testified "that the Green Berets encouraged the mutilation of enemy dead by paying a bounty on ears clipped off the heads of slain Vietcong" and that the

⁶² "High Court Refused to Stop Levy Trial," *New York Times*, 23 May 1967, 32.

⁶³ Homer Bigart, "Green Berets Called Tolerant Of Brutality by South Vietnam," *New York Times* 25 May 1967, 2. See also: "Green Berets Callous, Combat Vet Tells Court," *Chicago Tribune*, 25 May 1967, E1, and, "Vietnam Vet Testifies About War Brutality," *Hartford Courant*, 25 May 1967, 8.

⁶⁴ Homer Bigart, "Green Berets Called Tolerant of Brutality by South Vietnam," *New York Times* 25 May 1967, 2.

⁶⁵ Robert N. Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994), 906. Charles Morgan, *One Man, One Voice* (New York: Holt, Rinehart and Winston, 1979), 140.

money, according to Duncan, was “supplied to the Special Forces by the Central Intelligence Agency.” Duncan testified that it was a \$10 bounty for each right ear. The irony was that Duncan had turned against the war while Moore was still an ardent supporter of it. Moore unwittingly contributed to the defense’s case. “They were in substantial agreement about the facts,” Morgan wrote in his memoir. “They deeply disagreed about their effect and the propriety of the war.” Morgan was able to reach Moore through his publisher, who “shrewdly inferred that the trial was a talk show where competing books might be reviewed and discussed.”⁶⁶ The issues at stake were far more important.

“Testimony by these three witnesses,” wrote Bigart, “was the core of the efforts by the defense to prove that the Green Berets were guilty of war crimes” and that Levy “was justified in refusing to train their medical aid men in the treatment of skin diseases.” It was significant that Morgan was able to gather three witnesses in such short order who all had personal knowledge of Green Beret operations. Bigart reported that the witnesses corroborated that “it was American policy in Vietnam to turn all prisoners over to the South Vietnamese even though the Americans knew that the prisoners would be mistreated.” However, according to Bigart, the defense “failed to produce a witness with first-hand knowledge of torture or any atrocious act committed directly by an American in Vietnam.”⁶⁷ This was clearly an understatement, given what the witnesses testified.

After the out-of-court “little Nuremberg,” Col. Brown ruled that the defense had failed to demonstrate that the Green Berets aidmen “were guilty of calculated atrocities in Vietnam”⁶⁸ and refused to hear the Nuremberg defense. Col. Brown issued the following statement:

While there have been, perhaps, instances of needles brutality in this struggle in Vietnam, about which the accused may have learned through conversations or publications ... my conclusion is that there is no evidence that would render the order to train aid men illegal on the ground that eventually these men would become engaged in war crimes or in some way prostitute their

⁶⁶ Charles Morgan, *One Man, One Voice* (New York: Holt, Rinehart and Winston, 1979), 140.

⁶⁷ Homer Bigart, “Green Berets Called Tolerant of Brutality by South Vietnam,” *New York Times* 25 May 1967, 2.

⁶⁸ Homer Bigart, “Charge of War Crimes in U.S. is Rejected in Trial of Captain,” *NYT*, 26 May 1967.

medical training by employing it in crimes against humanity. Consequently, on this issue, the accused's subjective beliefs may be heard only in mitigation of punishment if the trial reaches that state.⁶⁹

Nicholas von Hoffman reported that “today’s decision satisfied none of the infuriated people on both sides” of the debate about U.S. war crimes in Vietnam. Von Hoffman believed that much of the evidence that was presented spoke more to “the infinitely older crime of war.” Despite the outcome, there was a clear case being made that the U.S. was involved in atrocities in Vietnam as well as waging an illegal war. “In Morgan’s motel room there are piles and packages of letters purporting to be evidence. There are unspeakable pictures of mutilation and barbarism that will not now be put to exacting juridical test but will float out of here to be picked up and used by the world’s polemicists,” von Hoffman concluded.⁷⁰

The longtime maverick radical journalist I.F. Stone wrote in his *Weekly* that Col. Brown’s out-of-court hearing was designed as “a trap,” as a way to “win a quickie victory in the headlines as a counterbalance to the Russell war crimes trial.” For Stone, the issues involved were “still murky” and the amount of time offered Morgan to prove his case was “hardly fair.” The Nuremberg Principles and “their applicability to the Vietnam war is a matter of controversy” in military and civilian law, Stone wrote. “For the average person ‘Nuremberg’ connotes genocide and crematoria,” he added. “In this oversimplified sense, Vietnam offers no parallel. But legally Nuremberg stands for the proposition that a soldier cannot plead ‘superior orders’ if he commits a crime against the laws of war, or against

⁶⁹ Quoted in Homer Bigart, “Charge of War Crimes in U.S. is Rejected in Trial of Captain,” *New York Times*, 26 May 1967.

⁷⁰ Nicholas von Hoffman, “Judge Rules Levy Failed to Make War Crimes Case,” *Washington Post*, 26 May 1967, A1. Von Hoffman also chronicled the scene in and outside the courtroom on that day. For instance, according to von Hoffman, “Col. Brown had no sooner recessed the 10-minute session when Barbara Deming, the New England woman who had gone to North Vietnam, was on him. She wore a name tag that identified her as a representative of the far-left *Liberators* magazine. Her face twitched and her throat went dry and rasping as she shook and whispered, ‘Sir, sir, I ask you how you could say you found no evidence ... no evidence?’” Von Hoffman then went on to quote an anonymous infantryman who had been wounded in Vietnam:

Goddamn lies! I’ve heard the Vietcong call, ‘Medic! Medic!’ and shoot them when they come. In the end, all the medics die.

They talk about the Geneva Convention, but I was in a company that was wiped out. Sure, you don’t take prisoners – you kill them. I saw a Vietcong kill two Americans, run out of ammunition, throw down his gun and try to surrender. He was actually smiling. Sure, you kill prisoners”.

humanity, but is under obligation to refuse.”⁷¹ While no doubt correct, Stone on this occasion missed what should have been the main issue: that the war itself was illegal and therefore Levy was justified in refusing orders. While the U.S. military and civilian courts refused to adjudicate on this issue and the International Court of Justice in The Hague lay dormant throughout this period, the Lawyers Committee on American Policy Towards Vietnam just released their path breaking book *Vietnam and International Law* which argued the war was illegal.⁷²

At the time, rumors swirled around over the handling of the out-of-court hearing by Charles Morgan. “For tactical and political reasons (for example, dissension within the American Civil Liberties Union, for which Morgan is southern regional director), he decided to limit his testimony to criminal actions by the small special forces contingent in Vietnam,” surmised Andrew Kopkind in the *New York Review of Books*. “That eliminated evidence of saturation bombing, napalming and genocide.” More importantly, Kopkind may have added the legality of launching the war in the first instance under both domestic and international law. This line of argumentation was followed by Donald Duncan and J.A.C. Dunn, when they stated the out-of-court hearing sanctioned by Col. Brown presented Levy’s legal team the “opportunity to stage one of the great legal extravaganzas of all time,” however, “partially because of arguments within the national ACLU staff over the best posture to take, and partially, I believe, because he didn’t think any broader defense would help his client, Morgan chose to limit his presentation to the actions of the Special Forces in Vietnam. Since the only documentary evidence to prove such crimes was locked in the Army’s own files, the ‘Nuremberg’ episode of the Levy trial was doomed from the start.”⁷³ Despite their sound reasoning, the authors failed to give proper credit to Morgan’s exceptional legal skills.

On September 14, John de J. Pemberton, Jr., executive director of the ACLU responded directly to Kopkind’s otherwise “excellent reporting” on the Levy trial by stating:

⁷¹ “The Meaning of the Nuremberg Issue in the Capt. Levy Court Martial,” *I.F. Stone’s Weekly*, 29 May 1967, 2.

⁷² See Chapter One and Chapter Seven.

⁷³ Donald Duncan and J.A.C. Dunn, “Notes Toward a Definition of the Uniform Code of Military Justice, as Particularly Applied to the Person of Captain Howard Levy,” *Ramparts*, July 1967, 56.

Once a decision is made to offer legal representation, dissension and disagreement may continue, but the attorney handling the case takes on a special responsibility. His duties are to the client to which the organization has brought him and to the court. An organization that sought to sponsor litigation and then influence the tactical decisions of its attorneys when they represent individual litigants, would have to get out of the business. Attorneys of Charles Morgan's courage and integrity would leave the organization, and courts would lose respect for it.⁷⁴

All of these commentaries neglected the larger point that it had been Col. Brown who had imposed the limitations on the defense's ability to prove its case. He did so when he required that the defense to prove "that the special forces of the United States Army have been trained to commit war crimes."⁷⁵

With this ruling and the defeat of Levy's main argument, the defense would have to focus on the question of medical ethics and also demonstrate that the order to teach the aidmen was indeed illegal. Furthermore, Morgan would attempt to demonstrate that Levy's superior officer, Col. Henry F. Fancy, knowing that Levy would refuse the direct order to train the aidmen, issued the command in a calculated fashion as to increase the punitive measures.⁷⁶

Medical Ethics

"What is meant for the military," wrote journalist Elinor Langer in the pages of *Science*, "command, obedience, reliance on authority, willingness to kill – is not easily

⁷⁴ John de J. Pemberton, Jr., "In Response To: Doctor's Plot," *New York Review of Books*, 14 September 1967.

⁷⁵ Col. Brown quoted in Robert N. Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994): 904. Strassfeld concluded that "[t]he case did create an uproar within the ACLU, and Vietnam would remain a divisive issue within the ACLU beyond the *Levy* case. ... Despite the dissensions over whether the ACLU ought to directly represent clients like Levy in cases that raised controversial non-civil liberties issues, and over whether the ACLU should issue a statement distancing itself from Levy's defense on the non-free-speech issues, the Board accepted its obligation not to bring these issues to the public consciousness while the court-martial was in progress, for fear that it would jeopardize the defense. The documents in the ACLU file show considerable uneasiness within the organization about the Levy case, but do not support the contention that the ACLU interfered with or narrowed the Nuremberg defense." See also, Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 271-272.

⁷⁶ Homer Bigart, "Charge of War Crimes in U.S. is Rejected in Trial of Captain," *New York Times*, 26 May 1967.

reconcilable with the healing arts.”⁷⁷ Like the “little Nuremberg,” the issue of refusing orders based on medical ethics– the second pillar of Levy’s defense – came to the forefront of the trial between May 26 and June 1. Just as the Nuremberg “defense” was raised for the first time in the history of American military justice, the argument that the physician’s positive belief in medical ethics trumps subservience to orders by superior commanders was likewise introduced for the first time in military judicial history. Moreover, just as the first Nuremberg Trials of top Nazi officials led to the adoption of the Nuremberg Principles, the second Nuremberg Trial of Nazi medical professionals – the Nazi Doctors Trial – led to a reinvigorated debate within the medical profession about ethics and responsibility. Not as well known or publicized as its predecessor, the Nazi Doctor’s Trial was created with the same sense of urgency to create a new postwar world governed by international bodies and treaties and helped usher the creation of the World Medical Association. The Doctor’s Trial and the enunciation of the Nuremberg Code of 1947, which outlined acceptable research standards for physicians outside of clinical settings and defined the modern notion of informed voluntary consent, was emblematic of an awakening in the medical profession and the impetus behind renewed debates about medical and scientific ethics. While not specifically applicable to Dr. Levy’s case, and therefore not part of the defense, the Nuremberg Code has been viewed as the foundation of modern medical ethics or bioethics in the United States and was intimately connected with instilling patients with human rights through the setting limits in the doctor-patient relationship.⁷⁸ Despite its narrow focus, the

⁷⁷ According to Langer: “Whether medicine thus practised is capable of influencing the ‘hearts and minds of the people’ is an open question. It is medicine with strings, penicillin with bayonets; it is the paradox that bothered Howard Levy: in his words, ‘Kill, kill! Cure, cure!’” Elinor Langer, “The Court-Martial of Captain Levy: Medical Ethics v. Military Law,” *Science* Vol. 156, No. 3780, Jun. 9, 1967: 1346-1347.

⁷⁸ See, for instance, George J. Annas and Michael A. Grodin, eds., *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (Oxford: Oxford University Press, 1992); George J. Annas and Michael A. Grodin, “Medical ethics and human rights: legacies of Nuremberg,” *Hofstra Law & Policy Symposium* vol. 3, 1999: 111-123; George J. Annas, “The Legacy of the Nuremberg Doctors’ Trial to American Bioethics and Human Rights,” *Minnesota Journal of Science & Technology* 10 (2008): 19-40; Jay Katz, “The Nuremberg Code and the Nuremberg Trial,” *JAMA: the journal of the American Medical Association* Vol. 276, no. 20 (1996): 1662-1666; Jennifer Leaning, “War crimes and medical science,” *BMJ: British Medical Journal* Vol. 313, no. 7070 (1996): 1413-1415; Michael R. Marrus, “The Nuremberg Doctors’ Trial in Historical Context,” *Bulletin of the History of Medicine* Vol. 73, No. 1 (1999): 106-123; David H. Price, “War Is a Force That Gives Anthropology Ethics,” in David H. Price, *Weaponizing Anthropology: Social Science in Service of the Militarized State* (Oakland: A.K. Press, 2011), 21; Evelyne Shuster, “Fifty years later:

Nuremberg Code and the Doctor's Trial still created an ethos among medical professionals about ethics during wartime.

The core of Dr. Levy's refusal to continue training Green Berets in dermatology rested on three main contentions: the privacy of the patients paying Levy a visit would be compromised by the aidmen's presence in his clinic, the aidmen were not doctors or health professionals and therefore they lacked the proper training and knowledge to treat potential patients in dermatology, and, finally, the aidmen were not medics operating under the Geneva Conventions, but were combat soldiers using medicine to serve political ends. The fundamental issue involved the military's use of physicians to teach medicine to soldiers that would be used for more than medical purposes in counterinsurgency warfare. As Dr. Levy told Andrew Kopkind, "First, I don't think you can possibly train guys for five days in dermatology to a point where they'll do more good than harm. And second, I don't think medicine should be used for political purposes. You can't separate it from the war. It's part and parcel of the same thing."⁷⁹ The main arguments of the defense rested on the Geneva Conventions of 1949 and the Hippocratic Oath which was reformulated after the Nazi Doctor's Trial. The Geneva Conventions specifically protected medical personnel in the field and distinguished between combatants and non-combatants. Under Article 21 of the First Geneva Conventions, protections are forfeited if they commit "acts harmful to the enemy."⁸⁰ The Hippocratic Oath is considered the foundation of medical ethics and its basic tenet that physicians should "do no harm" was the essence of Levy's main position in refusing to train the aidmen. The Oath was substantially revised for use by the American medical profession in 1964 by Dr. Louis Lasagna, who would be called by the defense to testify on behalf of Dr.

the significance of the Nuremberg Code," *New England Journal of Medicine* Vol. 337, no. 20 (1997): 1436-1440; Evelyne Shuster, "The Nuremberg Code: Hippocratic ethics and human rights," *The Lancet* Vol. 351, no. 9107 (1998): 974-977; and Paul Weindling, "The origins of informed consent: the international scientific commission on medical war crimes, and the Nuremberg Code," *Bulletin of the History of Medicine* Vol. 75, no. 1 (2001): 37-71.

⁷⁹ Andrew Kopkind, "The Doctor's Plot," *New York Review of Books*, 29 June 1967. See also Robert N. Strassfeld, "The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy," *Wisconsin Law Review* 839, (1994), 924-925.

⁸⁰ Article 21, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Levy.⁸¹ Therefore, while Levy did not specifically refer to the Nuremberg Code, his actions are part of the same trajectory of a re-visioning and revolutionizing the physicians' place in society; especially during times of war and conflict.

The out-of-court medical ethics received much coverage and triggered debates in the mainstream press. The role of doctors serving the military was now on trial and the changing role of medical doctors in the military from previous conflicts was at the heart of the matter.⁸² Like so many other aspects of modern warfare, the Vietnam War was reshaping the role of the medical professional in combat. The base's Rabbi Joseph Feinstein testified that

⁸¹ The modern Hippocratic Oath, which dates to 5th century B.C. in Greece, was written in 1964 by Dr. Louis Lasagna, Dean of the School of Medicine at Tufts University, who would later testify on 29 May in Dr. Howard Levy's court-martial. It read at the time in 1967, and still in 2012:

I swear to fulfill, to the best of my ability and judgment, this covenant:

I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.

I will apply, for the benefit of the sick, all measures which are required, avoiding those twin traps of overtreatment and therapeutic nihilism.

I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.

I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.

I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.

I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.

If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter. May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help.

Cited, online: <http://guides.library.jhu.edu/content.php?pid=23699&sid=190964>

⁸² Peter Bourne, Army psychiatrist who was stationed with the Green Berets for one year in Vietnam and who also testified at the Levy trial, wrote that during World War II and the Korean war physicians "did not engage in combat; they carried no arms except to defend themselves or their patients, and their job in caring for the sick and wounded was carefully spelled out. At the same time, they were happy to train enlisted men who would both assist them in the care of patients and who would be qualified in first aid, able to go out into combat areas to retrieve casualties under fire." See: Peter Bourne, "The Hippocratic Oath: The Army Physician and Vietnam," *Ramparts*, July 1967, 57.

Capt. Levy “was a man of conscience who is anything but disloyal to his country.”⁸³ He added that Levy was far from the only person on base who disagreed with some aspect of the war in Vietnam. “They are afraid to speak up because of fear of retribution,” the Rabbi told the court.⁸⁴

The issue of medical ethics was also brought into focus by the testimony of Capt. Ivan Mauer. Mauer, who appeared noticeably “unhappy” with the line of questioning, stated two times that he would refuse to “instruct combat soldiers in the healing arts.” Mauer feared punitive reprisals by the Army brass for his candid assertions on the stand and rumors swirled around base that he would be sent to Vietnam because of it.⁸⁵ Throughout the four-week trial, numerous physicians, both civilian and military, would be called to testify about medical ethics and the use of training combat soldiers to use “the healing arts” and it was revealed that the court-martial of Levy would send a negative message to other Army physicians and that too harsh of a punishment would be bad for morale among the medical corpsmen.

The changing relationship between military doctors and the armed forces rattled other physicians on the base besides Dr. Levy. On the first day of the out-of-court hearing, the court heard from a physician who felt “intimidated” by the Levy trial and the rumored punitive measures against Captain Mauer who testified earlier on 15 May. Captain Ernest Preston Porter, an eye disease specialist, testified that he would not self-incriminate himself under the Fifth Amendment when he was asked if he would train Special Forces aidmen. Capt. Porter referred to a conversation he overheard that Capt. Mauer was going to be deployed to Vietnam for candidly stating he would refuse to teach combat soldiers medical

⁸³ Homer Bigart, “Army Trial Told of Doctor’s Fear,” *New York Times*, 27 May 1967, 3. Furthermore, a Sgt. Mitchell R. Helton’s wife was exposed naked to 8-10 Green Berets against her will by Levy’s replacement for a lesson in dermatology.

⁸⁴ Nicholas von Hoffman, “Intimidated, Levy Witness Says,” *Washington Post*, 27 May 1967, A2. Von Hoffman went on to write: “How extensive this discontent about the Army and the war may be here is unknown and perhaps unknowable. The situation is without recent precedents, drafting men for a war that at least one-fifth of the population is opposed to. To complicate matters more, the antiwar faction is concentrated among the most highly educated, the best trained – the very people, like the Howard Levys, whose services the Army must have” *Ibid.*

⁸⁵ It was later reported by another Army physician that Mauer was sent to Vietnam as a punishment for his honesty on the stand. This turned out to be false. See: Homer Bigart, “Army Trial Told of Doctor’s Fear,” *New York Times*, 27 May 1967, 3.

skills. Capt. Porter told the court that he was willing to teach basic first-aid to the Green Berets.⁸⁶

Like so many other polarizing issues of the period, there were those who thought the aidmen provided a valuable service in Vietnam and those who did not. On the same day that medical ethics were introduced at the court-martial, an editorial from Capt. Howard P. Schiele, then serving in Vietnam, appeared in the *Washington Post*. Capt. Schiele had served as a surgeon in the Medical corps in the Central Highlands and referred to the humanitarian work of the aidmen. He called into question Levy's experience in a warzone and argued: "If the United States gains some degree of political advantage when the population of an entire Montagnard village is immunized against plague, typhoid, smallpox and other scourges against which they have always been pitifully vulnerable, that fact is, I am confident, of small concern to these people when measured against the tremendous health benefits which will thereby accrue to them."⁸⁷ Much of the humanitarianism that Schiele highlighted in his *Washington Post* op-ed piece would be debated in the days ahead.

At the second day of hearing evidence regarding Levy's duty to medical ethics, Lt. Col. Richard L. Coppedge, who headed the training program for Green Beret aidmen at Fort Bragg between 1962 and 1966, testified that the use of "political medicine" was a specifically "American approach" to modern warfare, as opposed to the Viet Cong's use of terrorism to win the hearts and minds of the South Vietnamese. "It is evident that Viet Nam is the sort of struggle where there is more involved than a matter of weapons," Coppedge argued. "It is a social struggle and we've got to turn to social instruments, such as medicine."⁸⁸ Lt. Col. Coppedge testified that there was hesitation and resistance among doctors in the Army who were tasked to train the aidmen and said he understood their

⁸⁶ Homer Bigart, "Army Trial Told of Doctor's Fear," *NYT*, 27 May 1967, 3

⁸⁷ Captain Howard P. Schiele, 13 May 1967, published in *Washington Post*, 27 May 1967, A2. Capt. Schiele was responding to the petition circling around movement circles that was sponsored by The New York Medical Committee to End the War in Vietnam. Capt. Schiele went on to say: "Normally these Special Forces medics maintain a dispensary and eight-or-ten-bed ward within their own camp where Montagnard and Vietnamese civilians are treated with little regard for political ties. I have seen the widow of a Vietcong officer, recently killed in combat with Special Forces men, being cared for in a bed next to the wife of a loyal Montagnard soldier. ... An almost endless number of examples of the fine humanitarian work done by these medics could be cited by anyone who has had the opportunity to know them and work with them".

⁸⁸ Quoted in "Deny Mistrial in Capt. Levy Loyalty Case," *Chicago Tribune*, 30 May 1967, C5.

concerns. In Levy's case, Coppedge took responsibility for the fact that no one had communicated to the doctor the purpose of the training program or that because of the influx of physicians in the Army he was forced to skip over the Ft. Same six-week training course. Coppedge testified the physicians did not understand the program or the responsibilities of the Green Berets and that "political medicine" was used for humanitarian purposes. Coppedge concluded by arguing too severe a punishment for Levy would cause morale problems among the medical personnel on base and that the benefits and consequences should be weighed accordingly.⁸⁹

The following day the defense called four doctors to the stand to testify to the "deleterious effects" of the aidmen training program. They called Dr. John Mayer, professor of public health at Harvard; Dr. Victor Sidel, from Harvard medical school; Dr. Louis Lasanga, from John Hopkins medical school; and Dr. Benjamin Spock, the famous pediatrician. These four physicians testified that they would not teach Special Forces aidmen and that they thought their primary responsibility was combat operations. They took exception to the evidence presented that demonstrated in cases of emergency in the field, the aidmen would be forced to leave their patients to engage in fighting. "Physicians and medical auxiliaries should stay on the battlefield to continue to take care of their patients," Mayer testified. "[W]hen captured the physician should be repatriated while the auxiliaries remain in the prison camp providing the medical attention to the wounded. ...This is why the Geneva Convention tried to separate doctors from other types of officers."⁹⁰ Leaving your patient, the defense argued, was a violation of the Hippocratic Oath and medical ethics. The court was so unmoved by the defense that during the testimony of the four doctors in favor of Levy's position some of the jurors had fallen asleep during their testimony.⁹¹

The court-martial heard from many physicians about medical ethics and the military. Captain Peter Bourne, who testified six days earlier, argued that, "one of the dangers in

⁸⁹ Quoted in Homer Bigart, "Colonel Fears Jailing of Levy Would Hurt Morale of Doctors," *New York Times*, 30 May 1967, 22. Capt. Coppedge went on to say: "Captain Levy is interested in society, in the people around him, and this is the type of person we need."

⁹⁰ Quoted in Nicholas von Hoffman, "3 Medical Professors Back Levy at Trial," *Washington Post*, 31 May 1967, A3.

⁹¹ Quoted in Nicholas von Hoffman, "3 Medical Professors Back Levy at Trial," *Washington Post*, 31 May 1967, A3.

blurring the distinction is that it makes medical men liable to hostile attack. If the enemy feels he can shoot down our helicopter ambulances this will significantly cut down on our care.”⁹² Bourne went on to say that their material value in South Vietnam was “quite limited” and that the aidmen “drive into a village – it’s like a three-ring circus – and treat as many people as they can very rapidly ... then leave.”⁹³ Renowned child-rearing specialist Dr. Benjamin Spock added: “If the Green Beret medics were forced to subordinate medical judgment to military decisions ... it would be consistent with medical ethics to refuse to give such training.”⁹⁴

The Army countered with four doctors who testified the following day on behalf of the Special Forces program. The Army called Dr. William J. De Maria, from Duke University; Dr. Amos N. Johnson, the past president of the American Academy of General Practice; Dr. Edward Kimbrough, an orthopedic surgeon; and Sgt. George B. Curry. The prosecution’s witnesses all testified that if the aidmen did not claim protection under the Geneva Conventions they were not breaking any medical codes.⁹⁵ Sgt. George B. Curry, who was in charge of teaching Levy how to salute and wear his uniform, testified that he did not push for the charges against Levy just to “get” him.⁹⁶

Like the Nuremberg “defense,” Col. Brown rejected the medical ethics as applicable or legitimate to the facts of Levy’s case. He also told the 10-officer court-martial that members of the armed forces are able to express opinions, confidentially, “on all political subjects and candidates and in strong and provocative words.”⁹⁷ On June 2, the court-martial found Dr. Levy guilty of: (1) willfully disobeying a lawful order, (2) culpable negligence, (3)

⁹² Quoted in Nicholas von Hoffman, “3 Medical Professors Back Levy at Trial,” *Washington Post*, 31 May 1967, A3.

⁹³ Quoted in Jack Nelson, “Levy Defense Offers Case for Ethics, Rests,” *Los Angeles Times*, 31 May 1967, 18.

⁹⁴ Quoted in “Levy Defense Rests Case in Army Refusal,” *Chicago Tribune*, 31 May 1967, D1. See also: Homer Bigart, “Green Beret Role Scored at Trial,” *New York Times*, 31 May 1967, 13.

⁹⁵ Homer Bigart, “Army Supported at Trial of Levy,” *New York Times*, 1 June 1967, 3. See also: Nicholas von Hoffman, “Doctor Testifies at Levy Trial as Rebuttal Witness,” *Washington Post*, 1 June 1967, A3.

⁹⁶ Homer Bigart, “Army Supported at Trial of Levy,” *New York Times*, 1 June 1967, 3.

⁹⁷ Quoted in Homer Bigart, “Ethics Ruled Out As Levy Defense,” *New York Times*, 2 June 1967, 7. See also Nicholas von Hoffman, “Dr. Levy’s Trial Draws Laments, Second Guessers,” *Washington Post*, 2 June 1967, A3. Von Hoffman reported that: “At the officers’ club there were quiet shakings of the head.” Von Hoffman continued that the officers’ anonymous comments imply “that if they’d had the flannel-mouthed Army doctor from Brooklyn under their command, they could have managed him without this fuss” and quoted someone as saying “Levy had the wrong commanding officer”.

trying to promote disloyalty and disaffection within the ranks by making statements “prejudicial to good order and discipline,” and, (4) trying to promote disloyalty and disaffection within the ranks by making “intemperate, inflammatory, provoking and disloyal statements to Special Forces enlisted personnel.”⁹⁸ Levy was sentenced to three years hard labor, was demoted to the lowest rank, given a dishonorable discharge, and ordered to forfeit all pay and benefits.⁹⁹

Aftermath

In Morgan’s closing argument, he argued that the prosecution had only called thirteen witnesses who testified that they heard Levy make statements that they deemed “disloyal” and likely to cause “disaffection.” “Thirteen witnesses produced out of 12,500 [total patients Levy had seen in an official capacity] is pretty ludicrous for a pattern of subversion,” Morgan argued.¹⁰⁰ He concluded: “Sometimes ... martyrs are made by inadvertence, and around them develop movements that shake the world.”¹⁰¹ The comment proved to be prescient.

In the aftermath of the court-martial, Homer Bigart wrote of the significance of the Nuremberg “defense,” medical ethics, and the issue of free speech in the military. On the issue of medical ethics, Bigart wrote: “The argument was eloquent. Yet, in the minds of the 10 stony-faced career officers who sat in judgment on Captain Levy, there must have remained a simplistic but commonsense notion that the Green Beret medics did more good than harm. After all, they must have thought, a Green Beret medic who knew how to clean a wound and bandage it, was preferable to a Vietnamese witch doctor with his cow-dung poultices.”¹⁰² The insistence by Bigart, and the *New York Times* more generally, that these Green Beret aidmen were medics contradicted the evidence presented at the four week court-

⁹⁸ Homer Bigart, “Dr. Levy Convicted by Military Court; Sentencing Today,” *NYT*, 3 June 1967, 1. Bigart reported that Levy’s commanding officer, Col. Henry F. Fancy, had originally wanted to charge Levy under Article 15 of the U.C.M.J. or “dereliction of duty” with a light reprimand.

⁹⁹ See “Dr. Levy Gets 3 Years Hard Labor,” *Chicago Tribune*, 4 June 1967, 3, and, *NYT*, 5 June 1967, 22.

¹⁰⁰ Quoted in Homer Bigart, “Dr. Levy Convicted by Military Court; Sentencing Today,” *NYT*, 3 June 1967, 1.

¹⁰¹ Quoted in Homer Bigart, “Dr. Levy Convicted by Military Court; Sentencing Today,” *NYT*, 3 June 1967, 1.

¹⁰² Homer Bigart, “Military Justice: The Issues Went Beyond the Case of Captain Levy,” *New York Times*, E4.

martial. Moreover, the notion that all the aidmen were doing was cleaning wounds and putting on bandages was also inconsistent with the role of the Green Berets in Vietnam.¹⁰³

In the pages of the July edition of *Ramparts*, Peter Bourne, who testified at the Levy trial, on active duty in the Medical Corps between 1964 and 1967, wrote about the changing relationship of Army physicians and their craft with their new role as training combat soldiers in medicine to be used for a combination of strategic and ideological purposes. “Due to a sudden awareness by our military leaders that medicine can be used for politico-military ends, the physician in Vietnam has suddenly found himself an integral part of the offensive war effort.”¹⁰⁴ Bourne gave the example of witnessing a Green Beret aidmen treating wives of Vietcong fighters so that they could gather intelligence on their husbands.¹⁰⁵ The Army psychiatrist, who was discharged from the Army, continued:

The role of the physician, with his dedication to the service of humanity, is totally antithetical to that of a military officer. The physician’s primary commitment is the saving of lives, whereas the military officer is inevitably involved in the destruction of his fellow men. Perhaps most sacred to those who practice the art of medicine is the physician-patient relationship, in which one individual places himself in the hands of another whose ethical and scientific judgment he trusts. The autonomy of the physician and his ability to make personal judgment is an integral part of this relationship.¹⁰⁶

Sensing the mood in the Medical Corps and in medical schools across the country, Bourne wrote that the Army had miscalculated its assumptions about the amount of disaffection amongst Army physicians. “In fact Dr. Levy’s court-martial represents only the top of an iceberg of dissent which runs through the Medical Corps. It is my impression that the majority of draftee-physicians share his views to a greater or lesser extent and have either felt

¹⁰³ The same label of “medic” instead of aidmen was applied by Andrew Myers in his chapter on Levy. See *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 193-194.

¹⁰⁴ Peter Bourne, “The Hippocratic Oath: The Army Physician and Vietnam,” *Ramparts*, July 1967, 57.

¹⁰⁵ Bourne went on to say: “Not only was Dr. Levy asked to share his medical expertise with non-medical personnel - a direct violation of his Hippocratic oath - but he was also expected to condone the use of dangerous drugs, including narcotics, by non-professionals in a manner which no physician would allow in a civilian setting”. Peter Bourne, “The Hippocratic Oath: The Army Physician and Vietnam,” *Ramparts*, July 1967, 58.

¹⁰⁶ Peter Bourne, “The Hippocratic Oath: The Army Physician and Vietnam,” *Ramparts*, July 1967, 57.

too intimidated to express them or have never been put in a position of having to make the type of ethical decision which faced Dr. Levy.”¹⁰⁷

To try and quantify the impact of Dr. Howard Levy’s case is nearly impossible. Levy’s noncooperation with training the Special Forces acted as a lightning rod through which many strands of antiwar activism could organize around and new constituencies were mobilized. For a struggling movement against the war, Levy’s conscientious stand made him a larger-than-life figure that people could mobilize around. This was especially the case for newcomers uninitiated in radical politics, the movement, or any political action for that matter.

Levy particularly inspired doctors, medical students and other health professionals. The fact that Levy was a doctor who could be jailed for following what he believed to be ethics essential to the profession shook many people out of their complacency. On May 27, 1967, for instance, some eighty doctors, nurses and medical students donned their white robes and picketed the military’s recruitment booth at Times Square in solidarity with Dr. Levy. Members of the New York Medical Committee to End the War in Vietnam, they carried signs that read “Medicine for healing, not for killing” and “We support Levy’s right not to teach killers.” Counterdemonstrators held signs that said, “The only good Communist is a dead Communist” and “Hang Captain Levy.” It was clear to the picketers what the stakes were. Dr. David Dubnau, who worked for New York’s Public Health Research Institute, told the *New York Times* that the picketers were not opposed to military doctors teaching first aid to soldiers; however, “we object to giving them skills they can use selectively as a weapon” because “these are relatively sophisticated medical skills; there’s a question of whether these men have the knowledge to use them properly.”¹⁰⁸ The New York Medical Committee to End the War in Vietnam ended up joining forces with the Medical Committee for Human Rights (MCHR), which was formed during the Freedom Summer of 1964 in Mississippi, to create the National Committee for Howard Levy, M.D. The National Committee organized a visit by Committee members, including Dr. Benjamin Spock, in November 1967. Moreover,

¹⁰⁷ Peter Bourne, “The Hippocratic Oath: The Army Physician and Vietnam,” *Ramparts*, July 1967, 58.

¹⁰⁸ “Capt. Levy Backed By Pickets Here,” *New York Times*, 28 May 1967, 5.

the National Committee, moving beyond the single issue of supporting Levy, called for the abolition of the draft for medical professionals.¹⁰⁹

Commemorating the twenty-second anniversary of the dropping of atomic bomb on Hiroshima on August 5, the New York Medical Committee to End the War in Vietnam with the help of the Fifth Avenue Vietnam Peace Parade Committee, Veterans for Peace in Vietnam, Vietnam Veterans Against the War, and the Student Mobilization Committee to End the War in Vietnam mobilized people in the medical profession to demand Howard Levy be released on bail pending his appeal in the military and civilian courts. The flyer created for the march and rally featured the infamous picture of Dr. Levy being escorted out of the Ft. Jackson courthouse in shackles after he was convicted by the court-martial at Fort Jackson. Cried its bold words: “No More Hiroshimas! End the War in Vietnam Now! Bring Our Boys Home Alive! Join With Thousands of New Yorkers to Commemorate HIROSHIMA DAY, and to Protest Dr. Levy’s Confinement! Demand That Dr. Howard Levy Be Released on Bail Pending Appeal! ” The call-out also invited “Doctors and nurses [to] please wear professional attire.” Under Levy’s picture, the flyer informed readers that, “Dr. Levy refused to commit what he felt would be a violation of international laws – including the Nuremberg decisions and the Geneva Conventions of 1949 – and of his medical ethics.” Ingeniously, the call-out also included a portion to clip out to send money to Levy’s legal defense.¹¹⁰

Encouraged to wear their “professional attire” in solidarity with Dr. Levy, on August 5, doctors, nurses and medical students led the march holding signs and banners which read “Medicine is Not a Military Weapon” and “Free Captain Levy – End the War in Vietnam.” The march left from Columbus Circle at the entrance of Central Park through Times Square and ending at Bryant Park for a rally. Between 1000 and 3000 people turned out for the demonstration demanding that Levy be released on bail and were heckled by a few onlookers as “traitors” and “Communists.” At least 500 police appeared at the event.

¹⁰⁹John Dittmer, *The Good Doctors: The Medical Committee for Human Rights and the Struggle for Social Justice in Health Care* (New York: Bloomsbury Press, 2009), 169.

¹¹⁰“Free Howard Levy,” *Sir! No, Sir!* Library Fourth Floor – Pamphlets, Petitions and Flyers: http://sirnosir.com/archives_and_resources/library/pamphlets_publications/flyers/howard_levy.html.

At Bryant Park, a variety of speakers offered support to Dr. Levy. Seymour Levy, Levy's father and World War II Army sergeant, thanked the demonstrators. "This is the 63d day of Howard's incarceration," he told the crowd. "He'd be very lonely if he didn't have support such as yours." Another speaker, Dr. Arthur Black, an Army psychiatrist recently discharged from the Army after a year in a Saigon hospital, told the crowd that he regretted "somewhere along the line I did not have the courage of Dr. Howard Levy" and called the war a "national disaster."¹¹¹ Arthur Kaufman, a medical student and member of the National Committee for Howard Levy, M.D., announced his group would "broadcast in any way we can the outrage of his trial and what it implies for all who oppose the war in Vietnam." Kaufman presented a petition the group was beginning to circulate to medical and health professionals and the Committee's intention to organize delegations to protest Dr. Levy's incarceration. From the podium, Kaufman thundered: "Let us serve notice to the Army and to the administration that if they think Doctor Levy's non-cooperation is an isolated affair, they haven't seen anything yet."¹¹²

The May petition of medical school students from across the country, which garnered 250 signatures, was beginning to grow with the persecution of Levy. The petition, itself a source of information for medical professionals, reiterated Levy's contention that training Green Beret aidmen violated medical ethics. Arguing that Levy's "refusal is consistent with the most noble tradition of the healing arts; an unqualified concern for the sick," the petition quoted from the Special Forces Operations Field Manual (FM 31-32) and called the services the aidmen offered was "a barter item, a skill to be employed for psychological persuasion in the attainment of the military objectives." Moreover, the Committee noted that the aidmen are "primarily combat troops," therefore:

It is clearly stated in the Geneva Conventions of 1949 that medical personnel "must faithfully abstain from any direct or indirect hostile act in military operations. Any such interference would not only be treacherous, but might have serious consequences for the safety of the wounded and in general for the future respect due to medical services and the emblem protecting them." *The Special Forces aidmen, by using medical skills primarily for military and political ends,*

¹¹¹ Douglas Robinson, "Antiwar Parade Held in Midtown," *New York Times*, 6 August 1967.

¹¹² Arthur Kaufman quoted in *Liberation*, August 1967, 22.

*therefore violate basic tenets of medical ethics and of international law, as stated in the Geneva Convention.*¹¹³

Levy's actions inspired many others in the medical profession. Burt Austen, a biomedical engineering researcher from Downstate Medical Centre, where Levy went to medical school, attended a talk at the Medical Centre by a representative of the American Civil Liberties Union about Dr. Levy. "I became quite interested," he told journalist Andrew Kopkind. "I talked with him [the ACLU lawyer] for two hours or so after the meeting, and before long I was volunteering for work on the 'Committee for Howard Levy, M.D.'" Helping with the organization of the Hiroshima Day demonstration and a protest at Fort Jackson in November, Austen told Kopkind that this "was really the first time I had done anything like that..."¹¹⁴

Levy not only inspired doctors and other health professionals; he won the support of a group of New York University law students who created their own course on the "military threat to civil liberties." A third-year law student, Norman Siegel, volunteered on Levy's defense team over the summer and initiated the extra-curricular course through the N.Y.U. chapter of the Law Students Civil Rights Research Council. The first session took place in early-October and the law officer presiding over Levy's trial, Col. Earl Brown, who resigned from the military and was appointed assistant dean of the Columbia's Law School in New York, argued at that first session the military does protect soldiers' civil liberties. Brown would later sign an advertisement against the war in Vietnam that appeared in the February 15, 1968 edition of the *New York Times*. He claimed he had doubts about the war in Vietnam long before the Levy court-martial and after his resignation in August, he said "I still think the Vietnam war is a legal war, but I question the wisdom of pursuing it."¹¹⁵

The trial of Dr. Howard Levy drew the attention of the burgeoning underground G.I. press. On June 23, 1967, the very first issue of *The Bond*, a pioneering G.I. underground newspaper out of Berkeley, California, observed: "The need for an effective organization to

¹¹³ "Petition," *Liberation*, August 1967, 22.

¹¹⁴ Quoted in Andrew Kopkind, "The Trial of Captain Levy: II," *The New York Review of Books*, 11 April 1968.

¹¹⁵ For the law course, "N.Y.U. Law Students Set Up Their Own Course," *New York Times*, 23 October 1967, 17. For Col. Earl V. Brown, see: "A Statement on Viet Nam," *New York Times*, 15 February 1968, 17; Fred P. Graham, "500 Law Teachers Join War Protest," *New York Times*, 15 February 1968, 25; Richard Harwood, "Judge at Levy Court-Martial Now War Foe," *Los Angeles Times*, 23 February 1968, 16; and "Officer in Capt. Levy's Trial Now Opposes Vietnam War," *New York Times*, 24 February 1968, 5.

support the efforts of men with the Armed Forces who are engaged in anti-war activity has [been] demonstrated by several cases which have been brought to the public's attention." The article focused primarily on the Fort Hood Three and Capt. Howard Levy. In addition to highlighting their cases, the article revealed:

The Fort Hood Three are not the only military men who have suffered because of expressed opposition to the Vietnam War. More recently, Pfc Howard Petrick, also stationed at Fort Hood, is threatened with a court-martial for voicing anti-war and socialist ideas and for distributing radical literature. His locker, and those of several fellow GIs have been broken into and literature removed. On April 1, 1967, Petrick was advised that there was a definite prospect that he would be court-martialled on the charges of subversion, creating disaffection within the Armed Forces and making disloyal statements.¹¹⁶

The piece in *The Bond* also reported that after Capt. Levy was convicted and sentenced, "six soldiers from Fort Sill... sent a telegram in support of his courageous stand. ... Of these six, Pvt. Andrew Stapp, a revolutionary socialist was subsequently court-martialed and sentenced to 45 days hard labor for refusing an order to open his locker so his commanding officer could confiscate his antiwar literature."¹¹⁷

Andrew Myers notes that Levy's court-martial inspired the local antiwar movement around Fort Jackson and soldiers on base began to ask more questions about the war and the strict codes of conduct within the military. One important manifestation of the growing local antiwar movement on base and off, the U.F.O. coffee house was founded in January 1968. While Levy did not play a role in organizing the coffeehouse, it provided an important alternative space where servicemen and local activists met and discussed the war, the military and radical politics. Soon G.I. coffeehouses opened near bases across the United States, offering a safe haven for those with deepening doubts about the war. Military and local police authorities coordinated their efforts and the U.F.O. remained under constant surveillance. Arrests for loitering and other low level forms of harassment occurred on a daily basis. Despite arrests for loitering and other low-level forms of harassment in and

¹¹⁶ "Servicemen Need Help," *The Bond* No. 1, Vol.1, 23 June 1967.

¹¹⁷ "Servicemen Need Help," *The Bond* No. 1, Vol.1, 23 June 1967.

around the establishments, the coffeehouses continued to flourish throughout the remainder of the decade.¹¹⁸

Reflecting on the significance of Dr. Levy and the “disloyalty” trial while Levy was being detained at Fort Jackson, assistant editor of the *New Republic*, Andrew Kopkind wrote: “To the local radicals and political activists, he was the guru; for the scattered GI’s at the Post who dared make or continue friendships with him, Levy was a moral (emotional?) inspiration.”¹¹⁹ At Fort Jackson, where Levy was stationed and court-martialed, a group of Levy’s friends began organizing off-base and in February 1968 they tried to stage a “pray-in” at the chapel. Thirty soldiers initially went to participate, but they were flagged by Col. Chester Davis and ordered the soldiers to cancel the meeting. Two of them – Pfc. Robert P. Tater and Pvt. Stephen K. Kline, Jr. – dropped to their knees in prayer while the others dissipated. Col. Fancy brought charges against the two soldiers and Charles Morgan agreed to represent them. Upon hearing that Morgan was defending the soldiers, someone on base began posting signs on bulletin boards reading, simply, “Morgan’s Back.” Colonel Fancy, the same commanding officer who initiated the court-martial of Howard Levy, withdrew the charges of the two soldiers.¹²⁰ The pray-in movement had spread to Fort Ord, California, in March 1968 and it was clear that Levy was inspiring other GI’s to take stands against the war. Levy’s courage and principled stand was contagious.¹²¹

¹¹⁸ Andrew Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 200-203.

¹¹⁹ Andrew Kopkind, “The Trial of Captain Levy: II,” *The New York Review of Books*, 11 April 1968.

¹²⁰ Andrew Kopkind, “The Trial of Captain Levy: II,” *The New York Review of Books*, 11 April 1968. See also: Douglas Robinson, “Leaflets Bombard Fort Jackson G.I.’s Off Post,” *New York Times*, 24 February 1968, 6.

¹²¹ Andrew Kopkind put it this way, calling Levy’s opposition to Vietnam and trial were “as much a metaphor for a generation as a political leader. He ‘turns people on’ not by the force of his arguments (which have grown more sophisticated with his prison reading and reflecting) but by the power of his example. Everyone who was at the trial was touched in some way; many came to see that their perceptions of their lives were profoundly changed. Of course that happened in the context of the war and a society in crisis, but Levy supplied the live model.” Kopkind also cited the case of Captain Dale Noyd, who had just recently been sentenced to a year in prison at Clouis Air Force Base, New Mexico, as well as other cases with no references to the names of the soldiers who were convicted of refusing orders or other forms of resistance in the latter party of 1967 and early 1968. Andrew Kopkind, “The Trial of Captain Levy: II,” *The New York Review of Books*, 11 April 1968. See also Andrew Myers, *Black, White and Olive Drab: Racial Integration at Fort Jackson, South Carolina, and the Civil Rights Movement* (Charlottesville: University of Virginia Press, 2006), 201, and, Paul Cowan, *The New Republic*, 8 March 1968, 23.

After the two Fort Jackson soldiers were charged for their “pray-in” action, soldiers from Ft. Jackson and students from the University of South Carolina began organizing together by handing out leaflets in Columbia, South Carolina. One of the leaflets cautioned soldiers about harassment in the military. It read: “They are trying to change you. That’s what harassment is all about, and in the end they’ll tell you the way to be a man is to go out and kill you a gook. And you’ll nod. And the harassment will stop.”¹²² The leafleting on this particular day, which was captured by *New York Times* reporter Douglas Robinson who was covering Ft. Jackson, ended after a fistfight ensued. Robinson wrote: “The incident is typical of the increasing pressure on recruits by a small but active group of soldiers and students opposed to the war – pressure that utilizes the confusion and doubts arising from the war itself and from the criticism heard on all sides.”¹²³

Even though the *New York Times* sent Robinson to cover the latest on the “pray-in” action, the reporter ventured to the first G.I. coffee house – the U.F.O. – to talk to soldiers there about the growing antiwar opposition at Fort Jackson. Robinson, trying to undercut the significance of Levy’s opposition, reported that the “minuscule number” of G.I.’s “who express opposition” at Fort Jackson “deny that Captain Levy’s trial here had any effect on their own viewpoints. Only a few even knew him.” The brass at Fort Jackson attempted to contain the damage that Levy could cause to the soldiers on base. Perhaps most tellingly, Robinson concluded that “the memory of his trial, however, lingers in the minds of many of the officers at Fort Jackson,” referring to the fear that Charles Morgan would be returning to defend the “pray-in” soldiers.¹²⁴ Despite the “miniscule” number of soldiers who openly opposed the war at Fort Jackson, Levy’s trial reached a national and international audience. There were soldiers on other bases, as reflected in the pages of the burgeoning G.I. press, which saw Levy as a pioneer in soldier resistance. Moreover, the pray-in action which Robinson was sent to cover was inspired by Levy’s actions.

¹²² Douglas Robinson, “Leaflets Bombard Fort Jackson’s G.I.’s Off Post,” *New York Times*, 24 February 1968, 6.

¹²³ Douglas Robinson, “Leaflets Bombard Fort Jackson’s G.I.’s Off Post,” *New York Times*, 24 February 1968, 6.

¹²⁴ Douglas Robinson, “Leaflets Bombard Fort Jackson’s G.I.’s Off Post,” *New York Times*, 24 February 1968, 6.

Conclusion

In late-1966, top officials at Fort Jackson sought to teach Dr. Howard Levy a lesson and punish him for his civil right work, his antiwar views, and his principled stand for refusing to teach Special Forces aidmen in dermatology. The clear-cut case of disobedience backfired on the Army because of the national debate the court-martial created in the media, the military, the medical profession, and in the antiwar movement. At the end of the court-martial, many officers at Fort Jackson and the editors of the major national newspapers wished the trial had never happened due to the damage it caused.

While Levy was convicted and spent nearly three years in military and civilian prison, his case helped galvanize the nascent G.I. movement and the civilian antiwar movement by inspiring new constituencies and radicalizing formerly apolitical Americans. The court-martial provided doctors around the country the ability to debate medical ethics and the military as well as use Levy as an example for discussing the importance of the Geneva Conventions of 1949. The case of Howard Levy against the military and the controversy it stirred was able to cut across movements and issues of social, political and ethical concern.

By the end of 1967, Dr. Levy had been elevated to a heroic stature in the civilian and GI antiwar movements. *Time* magazine noted that during the March on the Pentagon, the Mobilization Committee was selling posters as a fundraiser. One of the posters, showcasing the “cashiered” picture of Dr. Levy being dragged in handcuffs from the court-house at Fort Jackson, read: “Join the New Action Army.” The fact *Time* noted that this infamous image could be “cashiered” by the movement, to be brought out and used in its mobilizing drives, speaks to the power of Levy as a symbol of antiwar resistance.¹²⁵

Levy’s legal battle would continue in both civilian and military courts with a series of appeals launched until 1974. On August 4, 1969, Supreme Court Justice William O. Douglas ordered Howard Levy released from prison on \$1000 bond, ten days before he was to be officially released after serving his sentence. In what was termed a “rare step,” Justice

¹²⁵ “Protest: The Banners of Dissent,” *Time*, 27 October 1967, 29.

Douglas ordered Levy released early in order to keep his case “alive” so his appeal regarding the constitutionality of UCMJ articles 133 and 134 could be heard by the Supreme Court. Justice Douglas stated that the points raised in Charles Morgan’s appeal on behalf of Levy seemed “substantial to me.” Levy walked out of prison on August 6.¹²⁶

¹²⁶ “Douglas Orders Levy Released to Assure Review,” *New York Times*, 5 August 1969, 9.

Chapter 5

Too Loud To Rise Above the Silence: The Johnson Administration versus the International War Crimes Tribunal

“The War Crimes Tribunal is under urgent preparation now,” Bertrand Russell, the famed British philosopher and mathematician, wrote in his “Appeal to the American Conscience” on June 18, 1966. With the war in Vietnam escalating daily, Russell regarded the “war against the people of Vietnam” as “barbaric” and “an aggressive war of conquest,” whereby the United States was acting “as the Japanese behaved in South-East Asia and the Nazis behaved in Eastern Europe” during World War II. “I have called on intellectuals and eminent independent men and women from all parts of the world to join an international War Crimes Tribunal which will hear evidence concerning crimes of the U.S. Government in Vietnam.”¹ The Russell Tribunal – also referred to as the International War Crimes Tribunal (IWCT) or simply the Tribunal – would be organized and facilitated by the efforts of the Bertrand Russell Peace Foundation (BRPF) and was largely coordinated by Ralph Schoenman, Russell’s personal secretary, from early-1966 to December 1967.

The Russell Tribunal, heavily influenced by the Nuremberg Trials of Nazi war criminals, sought to investigate alleged violations of the laws of war and international law by the United States in Southeast Asia. The Tribunal was a truly international undertaking organized by offices in both London and Paris, with seven major investigative teams composed of over 150 investigators sent to North and South Vietnam, Cambodia and Laos with a good deal of coordination and communication with top government officials of these countries. There was also a corresponding Tribunal organized in Japan by a group of peace activists and intellectuals who worked closely together with their European counterparts. The aging Russell, by now in his mid-90s, sent invitations to prominent individuals the world over, with twenty-six members participating from Great Britain, Scotland, France, Italy, West Germany, Japan, the Philippines, Pakistan, Yugoslavia, Israel, Mexico, Cuba, Turkey,

¹ Bertrand Russell, “Appeal to the American Conscience,” 18 June 1966 in Bertrand Russell, *War Crimes in Vietnam* (New York: Monthly Review Press, 1967), 116-124.

and the United States. In the end, press conferences would be held in Britain, France, Japan and the United States with evidence gathered from the investigative teams. The Tribunal's sessions would convene in Sweden in May and Denmark in late 1967. If there was one event or organizing initiative that channeled the collective energies of the international movement against the war in Vietnam, the Russell Tribunal was it.²

Despite the Tribunal's scale and breadth, much of the scholarship on the antiwar movement has spent little time discussing it. The earliest books about the anti-war movement, starting with Thomas Power's *The War at Home* (1973), did not refer to the tribunal. In 1984, Nancy Zaroulis and Gerald Sullivan proclaimed in their book, *Who Spoke Up?*, that the tribunal "had little immediate or discernible effect on public opinion."³ Other significant works on the anti-Vietnam War movement concurred with Zaroulis and Sullivan, that the Russell Tribunal had little effect on American public opinion.⁴ The most thorough, and perhaps most sympathetic, examination of the International War Crimes Tribunal concluded: "The Russell Tribunal presented important evidence of American war crimes, energized the West European and Japanese antiwar movements, but was unsuccessful in galvanizing a war resisters' movement in the United States or in encouraging a military withdrawal from Vietnam."⁵

² Ralph Schoenman, the Tribunal's executive secretary, captured the depth of the Tribunal's organizing capabilities: "The investigators were many nationalities. They were surgeons, biochemists, radiologists, doctors, agronomists, lawyers, sociologists, physicists, chemists, writers and experts on the region. Our legal, historical and scientific Commissions brought together research and reports, collected data which filled many trunks and file cabinets. Witnesses from North and South Vietnam, hundreds of thousands of feet of film showing the bombings, the weapons, the victims and the resistance, were all placed in public evidence. The properties, precise effects and use of poison chemicals and gases hitherto unknown in war were revealed in meticulous and documented detail." See, Ralph Schoenman, "Foreword," in John Duffett, *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal*, (New York: Simon and Schuster, 1970), 8-9.

³ Nancy Zaroulis and Gerald Sullivan's *Who Spoke Up? American Protest Against the War in Vietnam, 1963-1975* (Garden City: Doubleday & Company, Inc., 1984), 154.

⁴ See, for instance, DeBenedetti, *An American Ordeal*, 208, and, Wells, *The War Within*, 141-142. Andrew Hunt, *Dave Dellinger: The Life and Times of a Nonviolent Revolutionary* (New York: New York University Press, 2006), 167.

⁵ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 187. There are other sources which treat the Russell Tribunal more in depth and offer an excellent analysis, see: Mary Hershberger, *Traveling to Vietnam: American Peace Activists and the War* (Syracuse: Syracuse University Press, 1998), pp. 91-93, and, Harish C. Mehta, "North Vietnam's Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal," *Peace & Change* Vol. 37, no. 1 (2012): 64-94.

Critics of the anti-Vietnam War movement found in the Russell Tribunal a perfect example of how the American and international left misrepresented atrocities and war crimes in Southeast Asia. Guenter Lewy, in an epic revisionist apologia for the war, found the Russell Tribunal to be “sensationalist” and that it by and large “relied on evidence supplied by VC/NVA sources or collected in North Vietnam by persons closely aligned politically with the communist camp; the imprecision and slanted nature of these reports was obvious to most.”⁶ “During the Vietnam war,” argued Paul Hollander, Bertrand Russell’s “anti-Americanism rose to a paroxysm prompting him to assert that the United States waged war in Vietnam a manner indistinguishable from that of the Nazis in Eastern Europe.” Hollander concluded that “Russell’s anti-Americanism belongs to the most extreme, bizarre, and irrational type...”⁷ More recently, Gary Kulik dismissed the Russell Tribunal as representative of the “far-left wing of the antiwar movement” and its reliance on evidence produced or facilitated through the communist governments of North Vietnam and the National Liberation Front. Without meaningfully addressing the evidence presented, Kulik concludes that “few today would find the Russell Tribunal’s conclusions fair.”⁸

The Russell Tribunal did indeed work closely with the Vietnamese communists and it did have little effect on U.S. public opinion. Even members of the American peace movement were critical of the Tribunal. In May 1967 Richard Falk, an antiwar critic of the Johnson administration and international law professor at Princeton University, wrote in the *Yale Law Journal* that the proposed Russell Tribunal “is a juridical farce” referring to the character of the Tribunal. However, Falk conceded “the fact that it is plausible to contemplate such a proceeding and to obtain for its tribunal several celebrated individuals bears witness to the general perception of the war.”⁹ From a juridical perspective these criticisms were valid and they have remained constant criticisms since 1966. However, this was not the purpose of the Tribunal. “The Tribunal never pretended to be a trial,” wrote

⁶ Guenter Lewy, *America in Vietnam* (Oxford: Oxford University Press, 1978), 224, 311.

⁷ Paul Hollander, *Anti-Americanism: Irrational and Rational* (New Brunswick: Transaction Publishers, 1995), 374-375.

⁸ Gary Kulik, “*War Stories*”: *False Atrocity Tales, Swift Boaters, and Winter Soldiers – What Really Happened in Vietnam* (Washington: Potomac Books, Inc., 2009), 119-120.

⁹ Richard Falk, “International Law and the United States Role in the Viet Nam War: A Response to Professor Moore,” *The Yale Law Journal* 76.6 (1967): 1101.

Ralph Schoenman in 1970. “On the contrary, we proclaimed our conviction that terrible crimes were occurring and that we were in possession of evidence of such magnitude that it was essential to investigate the charges” at the Tribunal.¹⁰ While Schoenman did not speak for all the members of the Tribunal, in fact many wished to appear in public with a sense of impartiality to the investigation of war crimes, the point should be emphasized that the goal of the Tribunal was to contribute to ending the war in Vietnam through the disseminating of its findings. If taken seriously by the American media, the evidence, after critical review, could have spoken for itself. Instead the media focused on the personalities of the Tribunal’s membership, especially the alleged “anti-Americanism” of Lord Russell, and the leftist rhetoric of the Tribunal’s purposes and aims.

This chapter will examine more closely the Tribunal’s significance by exploring the Johnson administration’s counter-offensive against it and their desire to contain the impact of the potentially damning evidence presented by the Bertrand Russell Peace Foundation’s investigative teams and witnesses. Attempting to influence the outcome of the Russell Tribunal, an informal network established under the guidance of Undersecretary George Ball was hastily organized in July and August 1966. It involved the backroom diplomacy employed by U.S. officials in embassies as varied as France, Britain, Sweden, Denmark, Switzerland, Japan, Pakistan, India, Tanzania, Ethiopia, Senegal, and Zambia to disrupt, discredit and ultimately prevent the Tribunal from convening. The Tribunal was taken less seriously in the United States because the Johnson administration’s campaign against it – which involved members of the White House, State Department, Defense Department, United States Information Agency (USIA), Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and U.S. armed forces – largely succeeded in preventing the Tribunal from achieving large-scale publicity in the United States. Such a strategy contributed thwarted the American people’s understanding of how the war was being fought. Broader works on the antiwar movement – such as Tom Well’s *The War Within* and Melvin Small’s *Antiwarriors* – have briefly discussed the Johnson administration’s campaign to

¹⁰ Ralph Schoenman, “Foreword,” in John Duffett, *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal*, (New York: Simon and Schuster, 1970), 7.

discredit the Tribunal through the press; however, no work has fully explored the ways in which the Johnson administration reacted to the Tribunal.¹¹

The Johnson administration adopted the official position of ignoring the Tribunal in public and responding to it in measured ways if asked about it by reporters. In private, officials voiced a great deal of concern about the potential of the Tribunal to influence domestic and world public opinion about the war. In March 1967, as the Tribunal was hurriedly arranging its proceedings, Harvey A. DeWeerd produced a report for the RAND Corporation, the Pentagon's think-tank in California. "Whatever its outcome," DeWeerd noted, "the trial is certain to provide embarrassments for the Government of the United States."¹² Such embarrassments had to be tightly controlled and detailed reports were submitted by the CIA, NSA, or the State Department on the Tribunal's investigative teams being sent to Southeast Asia and their attendant press conferences. Furthermore, detailed State Department cables from the U.S. embassies in Stockholm and Copenhagen reported daily on the Tribunal's proceedings in the spring and fall of 1967.

A main pillar of the U.S. government's strategy for counteracting the Russell Tribunal rested in its reliance on a sympathetic mainstream press. In an article representative of this kind of Tribunal coverage, Bernard Levin asked in the pages *New York Times Magazine*:

How has it come about that a man possessed of one of the finest, most acute minds of our time – of any time – has fallen into a state of such gullibility, lack of discrimination, twisted logic and rancorous hatred of the United States that he has turned into a full-time purveyor of political garbage indistinguishable from the routine products of the Soviet machine?¹³

Referring to Russell as a prosecutor, judge and jury influenced by an almost "insane paranoia" and the Tribunal itself a "pathetic ceremony," Levin reduced the seriousness of the

¹¹ An early notable exception was William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, Part IV: July 1965 to January 1968* (Princeton: Princeton University Press, 1995), pp. 431-434, 700. For more recent work, see the excellent work of Harish C. Mehta, "North Vietnam's Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal," *Peace & Change* Vol. 37, no. 1 (2012): 64-94.

¹² Harvey A. DeWeerd, "Lord Russell's War Crimes Tribunal," March 1967, (Santa Monica: RAND Corporation, 1967), available online: <http://www.rand.org/pubs/papers/P3561>.

¹³ Bernard Levin, "Bertrand Russell: Prosecutor, Judge and Jury," *New York Times Magazine*, 19 February 1967.

questions being posed by Russell and the Tribunal about U.S. intervention in Vietnam to an attack focused on discrediting Russell. Perhaps this article could be dismissed as merely a piece of bad journalism or character assassination; however, it was wholly influenced by the State Department as part of its campaign to discredit the Russell Tribunal by soliciting pro-U.S. government articles in the press. Undersecretary of State Nicholas Katzenbach wrote to President Johnson that the administration was gaining some traction with regard to press reports slamming the Tribunal. In a memorandum, Katzenbach noted that that week's *New York Times Magazine* showcased "a long, highly critical article" on the Tribunal by the British journalist Bernard Levin. "We provided background material for this article," Katzenbach assured Johnson. Walt W. Rostow, Johnson's national security adviser, called the Levin article "helpful."¹⁴ Government collusion with the press underscores the relentless efforts of the Johnson administration to control the flow of information about the event.

The Russell Tribunal, and Russell himself, became vilified as "anti-American" by establishment contemporaries and in the historical literature sympathetic to the Vietnam War. Levin's article is the most extreme example whereby the State Department helped discredit Russell, but by no means was it the only article critical of the Tribunal. Character assassination reigned supreme among the critics and the Johnson administration in their efforts to delegitimize the Tribunal and Russell's criticisms. On a more structural level, equating the criticisms of the war – especially those charging the U.S. with committing war crimes in Vietnam – with anti-Americanism or being dupes of communist propaganda should be seen as part and parcel with a growing acceptance of exceptionalism in the postwar era. In fact, criticisms of Russell rested on a premise that the United States was incapable of committing war crimes in any systematic way. The propagandistic nature of the reporting on the Tribunal, and the manner in which the government intervened in that coverage, demonstrates the determination to influence public opinion in a pro-American way. This helps us understand why exactly the Tribunal was taken less seriously in the United States.

¹⁴ Nicholas Deb Katzenbach to Lyndon Johnson, 17 February 1967, and, Walt W. Rostow to Lyndon Johnson, 18 February 1967, Lyndon Baines Johnson Library (LBJL), National Security File, Country File, Vietnam Box 191. Hereafter referred to as LBJL.

The Russell Tribunal also demonstrates how the nation-state interacted with its citizenry as new forms of citizen power emerged during the Cold War. For example, the Russell Tribunal is an interesting case study for how Western governments – governments otherwise critical of the American war in Vietnam – would react to an international solidarity movement with the Vietnamese people in a post-Nuremberg era. The Tribunal represented an affront to the traditional roles of the nation-state in the international system which was supposed to be the official arbiter of justice in a world of states. The Tribunal and the various Western governments’ reaction to it demonstrated the pre-eminence of the state over the citizen and the lack of attention to the laws of war in international affairs. The mechanisms of the state apparatus with regard to foreign affairs – the issuance of passports, visas, border control, intelligence gathering, and diplomacy between states – was exercised to the full extent by the United States and its allies in attempting to block the Tribunal from convening as this chapter will demonstrate. Originally envisioned as transpiring in the United States, the Russell Tribunal debated holding its sessions in many European countries such as France, Britain, Switzerland, Sweden, Denmark, and even at Auschwitz. The U.S. State Department worked to ensure that all “friendly governments” and allies would not allow the Tribunal to take place within their borders and pressured leaders of countries that sponsored the Bertrand Russell Peace Foundation in order to withdraw their membership and funding from the organization or publicly condemn the Tribunal. In a February 14, 1968, C.I.A. memorandum “Peace Movements in Foreign Countries,” the Agency recapped the effectiveness of various international movements against the war in Vietnam and observed:

Peace activists thrive on publicity, and there is no doubt that the attendant publicity breeds more peace activity. The peace movement thus is influential to the extent that it causes difficulties for various governments in countries that are either allied to or friendly with the US and occasionally breeds strains in their relations with the US. In no case, however, have these difficulties caused a change in these friendly governments’ policy.¹⁵

The CIA, reporting extensively on the workings of the Tribunal, identified the major constraint for its effectiveness. Governments such as France, whose president was publicly

¹⁵ C.I.A. memorandum, “Peace Movements in Foreign Countries,” 14 February 1968, in CREST, NARA II, College Park, Maryland.

critical of the war in Vietnam, never considered allowing the Tribunal to convene on its soil because, among other reasons, it would upset Washington.

The public reason for noncooperation with the IWCT by the Swedish, French, Swiss and Danish governments was that the Russell Tribunal could not “promote a peaceful solution” to the war in Vietnam and that only their diplomatic entreaties could bring about a productive solution to the conflict. The diplomatic history of the Vietnam War is replete with entreaties by friendly European governments to end the war. In each case, any diplomatic solutions that did not conform to the Johnson administration’s prescriptions to end the conflict on its terms was shunned and even ridiculed by top officials. The United States, given its dominance in international affairs after World War II, exercised tremendous influence with regard to diplomacy. The Western European countries – the United Kingdom in particular – were always left fuming off the main stage of diplomacy, but never publicly broke with the Johnson administration.¹⁶ They refrained from doing so, in large part, to bolster their own international prestige based on their narrow self-interest of appearing as an honest power broker. Such an equation was not likely to end the conflict, given the Vietnamese were engaged in a nationalistic revolution for independence from what they viewed as foreign domination. After examining the traffic over State Department cables, and the reactions by key allies such as Britain, France, Japan, Sweden and Denmark, it is clear the Russell Tribunal could have been a foil to an otherwise complicated relationship with the United States. However, as the CIA concluded at the beginning of 1968, no instance of international protest against the war affected Western Europe’s basic relations with the United States. The only reason the Tribunal was able to meet in Sweden and Denmark was because of domestic opposition in those countries to the war in Vietnam and because it would have caused an

¹⁶ See, for instance, John Dumbrell and Sylvia Ellis, “British Involvement in Vietnam Peace Initiatives, 1966–1967: Marigolds, Sunflowers, and ‘Kosygin Week,’” *Diplomatic History* Vol. 27, no. 1 (2003): 113-149. Fredrik Logevall’s *Choosing War: The Lost Chance for Peace and the Escalation of War in Vietnam* (Berkeley: University of California Press, 1999) offers us an excellent analysis of the diplomacy between the United States and its Western European allies. See also George C. Herring, “Fighting Without Allies: The International Dimensions of America’s Failure in Vietnam,” in Marc Jason Gilbert, ed., *Why The North Won the Vietnam War* (New York: Palgrave, 2002), 77-92.

uproar if the Tribunal was blocked due to the belief in free speech and freedom of assembly.¹⁷

By documenting the crimes committed in Vietnam by the U.S. government, the Russell Tribunal, and the work of the Bertrand Russell Peace Foundation, sought to build another tier of diplomacy and international solidarity with the Vietnamese people to end the bloodshed. This was a different role than non-government organizations such as the International Committee of the Red Cross (ICRC) or the later formed human rights organizations Amnesty International or Human Rights Watch which attempted to be impartial to both sides in a conflict. To organize a war crimes tribunal during a war, not after (as happened with the Nuremberg Trials), in order to bring about an end to the war, amounted to a radical idea. On July 15, 1966, Stokely Carmichael, chairman of the Student Nonviolent Coordinating Committee, concurred. He wrote to Bertrand Russell, “We of SNCC want to be able to say when the Nuremberg Trials take place in the United States, that we opposed the criminal acts of Vietnam during the war and not after.”¹⁸ After all, by 1966 and 1967 it was clear that the North Vietnamese and the National Liberation Front would not capitulate at the negotiating table with the United States. The Johnson administration continually insisted it wanted peace in Vietnam as it escalated the air war in North Vietnam and tripled the escalation in South Vietnam.

The Russell Tribunal should not remain merely a footnote in the literature on the anti-Vietnam War Movement. In fact, a close examination of how the Johnson administration undermined the Tribunal demonstrates the depths of its engagement in attempting to control domestic and international opinion concerning the Vietnam War. More importantly, it highlights Washington’s commitment to conceal military tactics it employed in its war in Southeast Asia. While there are many legalistic critiques one can make about the efficacy of international citizens’ tribunals, the language employed by conference organizers, and the

¹⁷ See Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), Chapters 13 and 14.

¹⁸ In Stokely Carmichael’s correspondence with Bertrand Russell and Ralph Schoenman it was apparent Carmichael was linking the Vietnamese struggle for independence to the emerging Black Power movement in the United States. Stokely Carmichael to Bertrand Russell, 15 July 1966, Bertrand Russell Papers, McMaster University, International War Crimes Tribunal: Members Correspondence. Box 371 – 170052.

one-sided nature of the Tribunal's investigation, one must not overlook how closely the Johnson administration sought to keep the brutality of its war close to its proverbial chest.

Organizing the Tribunal

By the early 1960s, Bertrand Russell established himself, in the words of one RAND analyst, "as an unofficial adviser and expert on world affairs." In the aftermath of World War II, Russell had initially supported the United States against Stalinism and even advocated the use of nuclear weapons to check the power of Soviet Russia. After the Soviets developed and tested their first nuclear weapon, Russell became a staunch opponent of these weapons of mass destruction. On July 9, 1955, he issued a joint statement with Albert Einstein in which they stated: "We are speaking on this occasion, not as members of this or that nation, continent, or creed, but as human beings, members of the species Man, whose continued existence is in doubt."¹⁹ The threat of nuclear warfare and its potential to bring about the destruction of humanity compelled many peace advocates a decade later to question the efficacy of war as a solution to global problems. A new kind of internationalism began to emerge within this new danger. By the time of the Cuban Missile Crisis in October 1962, Russell commenced working non-stop on issues of war and peace and nuclear disarmament. By early 1963, he set his sights on U.S. intervention in Southeast Asia. To lessen the burden on Russell, now in his early nineties, he and Ralph Schoenman launched the Bertrand Russell Peace Foundation and the Atlantic Peace Foundation in September 1963.²⁰ Ralph Schoenman was a controversial figure in the antiwar movement. He was a graduate of Princeton and was influenced politically and philosophically by Trotskyism. He had an overbearing demeanor and was virulent in his criticisms of those who did not agree with his position. He was a talented organizer and dedicated leftist; however, he alienated many who eventually would

¹⁹ The Russell-Einstein Manifesto, signed by eleven prominent scientists, directly led to the convening of the Pugwash conference in Nova Scotia in 1957 and the permanent Pugwash Conferences on Sciences and World Affairs. The manifesto is available online: <http://www.pugwash.org/about/manifesto.htm>. See also: Sandra Ionno Butcher, "The Origins of the Russell-Einstein Manifesto," *Pugwash History Series*, Number One, May 2005, online: <http://www.pugwash.org/publication/phs/history9.pdf>.

²⁰ For the founding of the Bertrand Russell Peace Foundation, see: Bertrand Russell, *The Autobiography of Bertrand Russell: The Final Years, 1944-1969* (New York: Bantam Books, 1970), 220-227.

sign on to work for the Tribunal. The first fact-finding mission sponsored by the BRPF sent staffer Christopher Farley to Vietnam in November 1964.

Russell began protesting U.S. intervention in South Vietnam as early as 1963, condemning the use of chemicals and napalm. Writing in 1963 on the role of “the Western press in Vietnam,” Russell observed that while it was from these news sources that he “first became aware of the barbarous character of the war ... they had no intention of forming a coherent picture of the war from these reports and every intention of preventing others from doing so.” Russell wrote to the *New York Times* on March 28, 1963: “The United States Government is conducting a war of annihilation in Vietnam. The sole purpose of this war is to retain a brutal and feudal regime in the South and to exterminate all those who resist the dictatorship of the South. A further purpose is an invasion of the North, which is in Communist hands.” Russell maintained that the U.S. was intervening in Vietnam because of its “economic interests” and argued the war “is an atrocity” highlighting the use of “napalm jelly” and the use of “chemical warfare” to destroy “crops and livestock and starve the population.” Russell complained that the “American Government has suppressed the truth about the conduct of this war...How long will Americans lend themselves to this sort of barbarism?”²¹

The *New York Times* printed the letter with a corresponding editorial chastising Russell as living in “never-never land.” The editorial defended the American “advisory” role in South Vietnam and their “bearing, moderation and judgment” in doing “a great deal of good.” Moreover, the *Times* argued the United States was in South Vietnam “to prevent an armed takeover of the country by Communist guerillas, encouraged, and in part supplied, trained, led and organized from North Vietnam or Communist China, or both.” They believed that the use of napalm “has certainly killed innocent people – as other weapons have done in all wars” and that the “American advisers” opposed the use of napalm except against “clearly identified military targets.” As for the use of “defoliation chemicals” they were just “common weed killers.” The editorial unapologetically characterized Russell’s letter as stemming from “an unfortunate and...an unthinking receptivity to the most transparent

²¹ Bertrand Russell, *New York Times*, 8 April 1963, 46.

Communist propaganda” and then went so far as to claim that “Russell’s letter represents something far beyond reasoned criticism. It represents distortions or half-truths from the first to last sentences.”²² The *Times*’ response was indicative of the way in which the paper had accepted the benevolence of U.S. foreign policy during the Cold War and attacked critics who questions the goals of foreign interventionism.

Russell’s growing obsession with the American war in South Vietnam developed into a campaign to gather and disseminate as much information about the war as possible. Between 1963 and 1966, this trajectory would eventually lead to the creation of the International War Crimes Tribunal. “The more I discovered, the more appalling American intentions and practice appeared. I learned not only of barbaric practices, but also of the most cynical and ruthless suppression of a small nation’s desire for independence,” he wrote. Russell characterized the failure of the U.S. to follow the prescriptions of the Geneva Accords, the support it gave to the dictatorship of Ngo Dinh Diem and the attendant police state, and the war against the regime’s opponents as “intolerable crimes.” Therefore, Russell and the staffers at the BRPF concluded “that the war must be ended quickly” and they sought out and actively supported the Democratic Republic of Vietnam and the National Liberation Front.²³ The BRPF set up the Vietnam Solidarity Campaign and Russell established contacts with the Democratic Republic of Vietnam in London, the DRV Chargé d’Affaires in Paris, and members of the National Liberation Front. For instance, in July and September 1965, Ralph Schoenman met with Ma Thi Chu and Dinh Ba Thi of the NLF Central Committee and South Vietnamese journalist Pham Van Chuong to discuss the ways in which the BRPF could help facilitate the flow of information about atrocities in South Vietnam.²⁴

The concept for Russell’s “war crimes tribunal” would not crystallize, however, until late 1965 and early 1966. Influenced by M.S. Arnoni, the American radical journalist and editor of the *Minority of One* magazine, who on September 4, 1965 wrote an editorial calling

²² See Bertrand Russell’s letters to the *New York Times* in Chapter One, “The Press and Vietnam, March-July 1963,” in Bertrand Russell, *War Crimes in Vietnam* (New York: Monthly Review Press, 1967), 29-41.

²³ Bertrand Russell, *The Autobiography of Bertrand Russell: The Final Years, 1944-1969* (New York: Bantam Books, 1970), 236-237.

²⁴ Harish C. Mehta, “North Vietnam’s Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal,” *Peace & Change* Vol. 37, no. 1 (January 2012): 71.

for a war crimes trial as had happened at Nuremberg to try U.S. officials for their role in the planning of the Vietnam War. Russell found the proposal interesting; however, he wrote to Arnoni that the type of international organizing effort needed to effectively prepare for such proceedings “requires about three months’ preparation.” Moreover, because the war “is changing rapidly and also because our resources are already stretched to the limit, I fear that it will not be possible for me to take up your suggestion.”²⁵ It took some time wherein a culmination of events and people’s efforts finally persuaded Russell to begin organizing the International War Crimes Tribunal in the winter of 1966. The escalation of the war in Vietnam in early 1966, the actions of draft resister David Mitchell, and pressure from respected friends such as London School of Economics professor Ralph Milliband all contributed to Russell’s decision to act. Russell wrote in the fall of that year that he had “called for an international War Crimes Tribunal to be held in 1967 because, once again, crimes of great magnitude have been taking place.”²⁶

Lord Russell initially thought the Tribunal would convene in the United States and sought to support Mitchell’s draft resistance, regarding it as a source of inspiration. A letter signed Bertrand Russell to North Vietnamese Premier Pham Van Dong in January 1966 announced that the Bertrand Russell Peace Foundation was making preparations for “conferences of solidarity” in the U.K. and Western Europe. “Our links with the U.S. movement are strong,” the letter read. “Now, a young American, Mr. David Mitchell, has challenged the American authorities by refusing to serve in the U.S. army on the ground that the U.S. Government is engaged in war crimes.”²⁷ In an interview published in the January-February 1967 edition of *New Left Review*, Jean-Paul Sartre, who would be the Tribunal’s President, pointed to “the action of David Mitchell and of others” as the source from which

²⁵ Russell quoted in Ronald W. Clark, *The Life of Bertrand Russell* (London: Jonathan Cape Ltd, 1975), 624.

²⁶ Bertrand Russell, “Postscript: The International War Crimes Tribunal,” in *War Crimes in Vietnam* (New York: Monthly Review Press, 1967), 125. For the sequence of events that finally led Russell to form the IWCT, see: Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 105-107; Ronald W. Clark, *The Life of Bertrand Russell* (London: Jonathan Cape Ltd, 1975), 623-625; and Caroline Moorehead, *Bertrand Russell: A Life* (New York: Viking, 1993), 523-524.

²⁷ Bertrand Russell to Pham Van Dong, 25 January 1966. In Nicholas Griffin, ed., *The Selected Letters of Bertrand Russell: The Public Years, 1914-1970* (London: Routledge, 2001), 585. Griffin, the editor of the Russell letters thinks that, stylistically, the letter is more consistent with Ralph Schoenman than with Russell.

“the idea of our tribunal sprang.” Moreover, Sartre hoped that the Tribunal would give further credence to others to follow in the footsteps of Mitchell and refuse to participate with the draft.²⁸

The support of the Democratic Republic of Vietnam and the National Liberation Front also proved to be an integral part of organizing the Tribunal as the BRPF was motivated by the idea of self-determination for the Vietnamese people. Viewing the United States government as the largest single obstacle to this reality, the Tribunal sought to uncover and expose as much information as could be obtained to end the war. Until very recently, the extent of the support for the Tribunal from Ho Chi Minh and the NLF remained locked away in the Vietnamese archives. According to the historian Harish C. Mehta, who has been through these records, the North Vietnamese “enthusiastically” backed the Tribunal and offered more than just moral support. The DRV “hoped that the evidence generated by the tribunal would help the American antiwar movement persuade the U.S. government to stop bombing the North Vietnamese and withdraw U.S. forces from Vietnam.” In fact, Ho Chi Minh agreed to contribute \$10,200 (U.S. dollars) to the BRPF and absorbed the expenses of hosting the investigating teams. Russell seemed more than prepared to acknowledge the financial contribution of the DRV, yet Ho Chi Minh thought it better to keep this information out of the public domain.²⁹

When Russell announced on June 7, 1966, that he was holding an International War Crimes Tribunal, he did so against the backdrop of further escalation by the United States in Vietnam, a growing anti-war movement in America, and a widening credibility gap between the Johnson Administration and the public. The announcement also coincided with the broadcast over Radio Hanoi telling listeners that the DRV was planning to start trying U.S. Navy and Air Force pilots as “war criminals.” On June 14, 1966, the Central Intelligence Agency in its weekly “Situation in Vietnam” report for the National Security Council reported that the North Vietnamese during the preceding week “have issued a series of strong propaganda statements calling the US pilots... ‘war criminals’” and recommending

²⁸ Jean-Paul Sartre, “Imperialist Morality,” *New Left Review* I/41, January-February 1967.

²⁹ Harish C. Mehta, “North Vietnam’s Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal,” *Peace & Change* Vol. 37, no. 1 (January 2012): 65, 71.

they be tried as such. The CIA noted that the “statements may be an attempt by the regime to garner maximum propaganda effect from the current efforts of leftist British philosopher Bertrand Russell to arrange a mock trial of US ‘war criminals.’”³⁰ The announcement by the North Vietnamese angered top Johnson administration officials. Stern warnings came from Secretary Rusk, Ambassador-at-large Averell Harriman, and eighteen Senate “doves” including Frank Church, William Fulbright, Robert F. Kennedy, Edward Kennedy, Wayne Morse and Ernest Gruening, among others.³¹ Amidst wide speculation in the U.S. media, and after the public condemnations, the North Vietnamese eased back and never ended up organizing war crimes trials of downed American pilots.

While the North Vietnamese pulled away from trying U.S. pilots, Russell pushed full steam ahead in planning for the upcoming hearings. The first editorial appearing in the *New York Times* on August 17 denounced the tribunal as a “self-appointed war crimes tribunal” and that it attempted to usurp the role of the United Nations General Assembly.³² Instead of focusing on potential crimes and the implications of these to the international community on August 18 and 19, the American public learned the tribunal had received the endorsements of Soviet Premier Aleksei Kosygin and the South Vietnamese National Liberation Front.³³ Selectively emphasizing certain facts while ignoring others attempted to directly delegitimize the Tribunal and made an indirect connection with the international communist revolution in order rebuff the efforts of Lord Russell. From the original announcement to the final verdict of the Tribunal in December 1967, the press superficially discounted the Tribunal and personally attacked Bertrand Russell. It never took seriously the question that the United

³⁰ On June 19, 1966, the CIA echoed the previous week’s concerns about the possible trial of U.S. pilots, stating: “The Vietnamese propaganda frequently links its own threats to try US pilots with the scheduled mock trial in Britain.” See: Central Intelligence Agency memorandum to National Security Council “The Situation in Vietnam,” 14 June 1966, and, “The Situation in Vietnam, 19 June, 1966, in CREST, NARA II, College Park Maryland.

³¹ For Rusk, see *The Washington Post*, 15 July 1966; for Senate “doves” see *The Washington Post*, 16 July 1966; and for Harriman, see *The Chicago Tribune*, 17 July 1966.

³² Joseph Lewis Simon. “Trial of US Leaders,” *New York Times*, 17 August 1966, 30.

³³ “War Crimes Trial Plan is Endorsed by Kosygin,” *New York Times*, 18 August 1966, 2, and, “Vietcong Hail Russell Plan to ‘Try’ American Leaders,” *New York Times*, 19 August 1966, 3. Earlier on 24 July 1966 the American public learned Hanoi had created its own War Crimes Panel, independent of the IWCT, and investigated and reported on U.S. war crimes. “Hanoi Appoints Panel to Study US War Crimes,” *New York Times*, 1.

States may be breaking international law. No concrete analysis of the prospect that war crimes were being committed could be found. Instead, the press focused on the illegality or unofficial standing of the tribunal in the eyes of the international community. Such slanted coverage would shape the American public's view, and to a large extent, the more moderate wings of the anti-war movement. It also aided the Johnson administration's efforts to discredit the hearings.

Criticizing Russell: The Politics of Anti-Anti-Americanism

The varied criticisms and attacks leveled against Lord Russell and the War Crimes Tribunal in the United States and elsewhere highlight the limitations of the truncated discourse on American power in the Cold War, and of the war in Vietnam in particular. The critics did not share much in common politically and their criticisms were not uniform. Each shared some belief in the exceptionalist discourse on the United States' role in the world and situated the war crimes tribunal in terms of the Cold War geopolitical rivalry. The assemblage of critiques and attacks against the Tribunal came from such diverse sources as the philosopher Sidney Hook, William F. Buckley, the *New York Times*, the *Washington Post*, *Time*, *Newsweek*, the *Economist*, and others. The criticism ranged from legitimate concerns over legalistic and procedural matters related to holding a war crimes tribunal to more outlandish, hyperbolic attacks and character assassination of Russell and other tribunal members such as Jean-Paul Sartre. The legalistic and procedural limitations of an unofficial international tribunal were not unknown to Tribunal members. More often than not, however, these critiques also included some combination of the other operative criticisms that ranged from accusations of anti-Americanism and of Russell being pathologically insane to the notion he had been commandeered by the "American anti-American" Ralph Schoenman. Moreover, some found it hypocritical that Russell supported the United States in the first decade of the Cold War, only to turn against it in its second.

The editors at the *Washington Post* were able to include all of the above, calling the proposal for the war crimes tribunal "an accessory of Communist propaganda." They found

“no warrant in law or precedent for such a proceeding” and they projected that “the purpose...is to pillory the United States rather than to promote international justice.” They cautioned their readers that while the “conflict in Vietnam has been a dirty one with many regrettable side-effects,” the United States had nonetheless faced the scrutiny of the “most thoroughly covered war in history” while the communists’ had not.³⁴ Such criticisms appear measured – even downright tame – compared to the hysterical rants of other commentators and pundits.

Sidney Hook, the anti-Communist American philosopher, argued in the October 24, 1966, edition of *The New Leader* that the Russell Tribunal had no “moral standing in court” and “there is a good deal of evidence to show that he [Russell] has become almost pathologically anti-American, not against individual Americans, but against the American nation – its leaders and policies, and its people to the extent that they support these leaders and policies.” Hook criticized Russell’s statements for “simplism of ... thought and the virulence of its language, matching the crudest Communist propaganda leaflets.” He decried the fact that Lord Russell had already made statements that President Johnson and Secretaries Rusk and McNamara were guilty of waging an aggressive war in Vietnam. Hook argued, on the other hand, that Johnson “intervened to repel actual aggression –to counteract actions that unleashed war” like Truman had done in Korea. Moreover, Hook took issue with Russell’s statements pointing to “indiscriminate warfare against the Vietnamese people.” “If this were true,” Hook countered, “North Vietnamese centers of population would long since have been destroyed.” Hook had clearly overlooked the substance of Russell’s critique as he largely focused on the war in South Vietnam, where the majority of the fighting took place.³⁵ Hook’s arguments were of little concern to Russell, who never publicly responded, telling Robert Scheer he did not have time to engage in such back and forth with the American philosopher.

The Tribunal, under immense scrutiny, faced substantial setbacks in the fall of 1966. The famous Sicilian social activist Danilo Dolci resigned from the Tribunal because he had not been consulted sufficiently and felt that decisions had been made before the members of

³⁴ “‘Trial’ by Propaganda,” *The Washington Post*, 17 August 1966, A24.

³⁵ Sidney Hook, “Lord Russell and the War Crimes ‘Trial,’” *The New Leader*, 24 October 1966, 6-11.

the Tribunal could agree on the strategy moving forward.³⁶ Morris Amchan, former Deputy Chief Counsel for War Crimes at Nuremburg, wrote a strongly worded condemnation to the *New York Times* on October 15, before the Tribunal had officially announced its procedural commitments. “Implicit in Lord Russell’s argument is the assumption that the substantive truth regarding the alleged crimes can be ascertained without paying any attention to its procedural safeguards,” Amchan insisted. “Here lies the fallacy of his position.”³⁷ On November 13, at the Russell Tribunal’s organizational and procedural meeting, Russell appeared to be responding to the criticism of the Tribunal that appeared in the Western media. In a preparatory memorandum to Tribunal members, Russell wrote that the “International War Crimes Tribunal is recommended to function not as a Court, conducting a trial, but as a commission of enquiry... as an international commission of investigation or enquiry into war crimes in Vietnam.”³⁸ This was much more analogous to the convening of a grand jury in the United States.

More significant setbacks occurred with the resignation of four African leaders from the Bertrand Russell Peace Foundation because they were not consulted that their names would be used to promote the International War Crimes Tribunal. The issue revolved around the usage of BRPF stationery in the official correspondence of the Tribunal. At the time, Russell alleged that the resignations had been instigated by backroom dealings of the Johnson administration. He declared that one of the African leaders had sent him a Xeroxed copy of his letter to Lyndon Johnson and questioned how they would have got a hold of it without it being sent from the United States.³⁹ A claim, however, that fed the impression that Russell was paranoid.

While the State Department played a direct role, as we will see, in the resignations of the four African presidents, criticisms continued to mount. Calling the IWCT “the grotesque

³⁶ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 118-119.

³⁷ Morris Amchan, “Judicial Fallacy in Russell Tribunal,” *New York Times*, 15 October 1966, 28.

³⁸ Bertrand Russell, “Draft Proposals on Basic Structure, Plan of Work, Declaration of Aims, Time-Table and Procedures,” 13 November 1966, in Russell Archives II, Box 384 Vietnam Essays, Meetings and Reports, McMaster University, Hamilton, Ontario.

³⁹ Harish C. Mehta, “North Vietnam’s Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal,” *Peace & Change* Vol.37, no. 1 (January 2012): 81.

plan” to “‘try’ President Johnson for his Vietnam policies,” it pleased *New York Times* editors to learn that the Tribunal was “running into heavy weather.” Citing the resignation of the four African leaders, the editors accused the pronouncements by Tribunal members after the London meeting as having “already convicted the United States.” Therefore, the “‘Tribunal’ will be treated for what it is,” they charged, “a propaganda demonstration.” They then went on to condemn the Tribunal for its lack of international legitimacy in law and precedent and asked whether “this unsavory business” is the idea of Russell or the “anti-American American” Ralph Schoenman.⁴⁰

Other criticisms of the Tribunal and Lord Russell varied in significant respects, but all rested on the assumption that American goals in Southeast Asia were just. By year’s end, the *Economist* claimed that Tribunal organizers were struggling to find a venue, pleading with a number of foreign heads of state to host the event. Early planning assumed the event would be held in Paris, but organizers also contacted Sweden and Britain. The *Economist* reported that American officials wanted the French “to find administrative ways” to prevent the Tribunal from convening. They further highlighted the “fairly common impression” held by most commentators and the Johnson administration that dismissed the Tribunal as “simply another anti-American jamboree.” However, instead of just writing off Tribunal members and the BRPF as a bunch of “Communists,” the magazine said such labels “won’t do” and distinguished between the work of the Foundation and the Tribunal. Instead, the *Economist* concluded there were a number of suspected Trotskyist tribunal members – Ken Coates, BRPF staffer; Isaac Deutscher, biographer of Trotsky; and Geoff Coggan, Tribunal press officer – however, “the notion of the foundation as a like-minded gang of hard-faced men is tenable only by those who have never actually met them.” So while the *Economist* did not engage in psychological critiques or character assassinations of Russell and the Tribunal members, they left the question of funding from the Communist sources open and discredited the Tribunal on procedural and legalistic grounds. They warned that the Tribunal would “exclusively” examine “the actions of [the] anti-communists in Vietnam” and not those of the North Vietnamese or NLF. They claimed that the investigative teams of the Tribunal will

⁴⁰ “That War Crimes Tribunal,” *New York Times*, 21 November 1966, 44.

be “welcomed” in the communist controlled areas of North and South Vietnam and will base its evidence on these fact-finding missions. This allegation is despite the fact that Russell had, up until this point, based the majority of his information about the war from the western print media. Regardless, the article concluded that Washington was “loftily ignoring the whole thing” in public.⁴¹ After such criticism, it is no doubt clear why the Russell Tribunal received so little coverage in the United States. Organizing an investigation into U.S. war crimes and aggression in Vietnam aroused the hostility of the national media which fundamentally agreed with the premises of U.S. policy in Vietnam.

The New Year brought increased, if not more bizarre, criticisms of Russell and the Tribunal in the American media. *Look* magazine focused on the intimate life of Russell, writing that before his marriage to his third wife he had been more attracted to her sister. Robert Scheer, who would write a lengthy piece on Russell in the May edition of *Ramparts*, thought this was “a significant detail, no doubt, but a spokesman for Russell’s office pointed out that Lady Russell had no sister.”⁴²

Others, such as John Chamberlain writing in the *Washington Post*, focused on the apparent hypocrisy of Russell’s support for the United States over the Soviet Union in the late 1940s and condemned the “road-show ‘Nuremberg Trial’ of Lyndon Johnson.” He also criticized Jean-Paul Sartre’s and Simon de Beauvoir’s “blind hatred for America” and questioned whether they knew Russell condemned communism in the 1940s and early 1950s. However, Chamberlain took it to the next level when he invoked the idea that because Russell was once fired from teaching at the College of the City of New York in 1940 for his religious and moral views, and that his wife had been criticized for knitting too distractingly in a series of lectures sponsored by Dr. Albert Barnes, that Russell became an “anti-American.” “Maybe certain American individuals did do Russell a wrong in the 1940s. But why should he take it out on Lyndon Johnson in 1967, especially when Mr. Johnson is

⁴¹ “Russell Tribunal: The Accusers,” *The Economist*, 31 December 1966, 1386-87.

⁴² Robert Scheer, “Lord Russell,” *Ramparts*, May 1967, 17.

fighting a far more restrained way against Communists now than Russell himself was advocating when he urged the [total] destruction of Moscow in 1948?" he wrote.⁴³

The most revealing of the criticism came in the aforementioned article in the *New York Times Magazine* by British intellectual Bernard Levin. Before publishing his article with background information supplied by the State Department, he co-signed a letter to the editor of the *London Times* supporting the U.S. war in Vietnam. "American conduct of the war in Vietnam has been subjected to a good deal of criticism," the letter states.

But much of it is, almost ostentatiously, malicious and no more; much of it represents the impact of suspect information upon uncritical minds; and much of it, coming from conformist protesters, accords better with emotional habit than with any real concern for either truth of humanity. At the moment, when there is this revival of anti-American propaganda in the matter, the undersigned, acquaintances without organization or secretariat, but knowing that they speak for a much larger body of opinion, feel that it is high time to call a halt. The organizers of and participators in this vast, though ill-aimed, propaganda barrage should not deceive themselves into imagining that they have silenced the voices of reason.⁴⁴

This letter is worth quoting because it represents attempts by pro-war intellectuals to discredit legitimate dissent. While the letter specifically refers to the Russell Tribunal, it lumps all of the other forms of dissent and critical journalism together as based on "suspect information" and emotionalism. Widespread criticism of the letter prompted its authors to pen a follow-up arguing "it is surely the duty of non-pacifists to support Allied resistance to an enemy whose victory would, in any long run, entail suffering no less extreme, more widespread, and far more difficult to halt or mitigate."⁴⁵ Evoking the language of World War II where an Allied victory was clear cut does not take into consideration the dramatic changes in the geopolitical landscape of the 1950s and 1960s and it says even less about how the United States and the Allies would suffer from Vietnamese independence in a world decolonizing.

⁴³ John Chamberlin, "These Days: Bertrand Russell's Strange Switch," *Washington Post*, 20 January 1967, A18.

⁴⁴ Bernard Levin, et al, "Backing For U.S. Policies in Vietnam," *The Times* (London), 21 January 1967, 9,

⁴⁵ Bernard Levin, et al, "American Policies in Vietnam," *The Times* (London), 3 February 1967, 11.

In this highly charged atmosphere, Robert Scheer interviewed Lord Russell in February 1967 for *Ramparts* magazine. This came in the wake of months of criticism and outright attacks launched against Russell. “I didn’t relish the possibility of having to send back [to *Ramparts*] an interview with a man I fully thought could be mad,” Scheer writes. “Perhaps mad is too harsh a word, but it is in the spirit of most journalistic accounts of Russell’s activities.”⁴⁶ Scheer’s view had been shaped by the portrait being painted of Russell.

Far from finding a deranged philosopher, Scheer found himself “drawn into his world of terribly simple logic and moral consistency.” He took issue with the critics for dwelling on Lord Russell’s “style” rather than the substance of “the issues which he has raised.” Scheer demonstrated Russell’s criticisms of the United States were based on logical and measured assessments of American power. The article pointed out that while Russell once supported the United States dropping an atomic bomb over Soviet Russia in the early days of the Cold War, his ideas shifted with the explosion of the Soviet bomb and the death of Josef Stalin. Moreover, far from a single-minded unanimity that the United States had turned evil, Russell criticized the suppression of the Hungarian uprising of 1956. “The Cold War intellectuals had loved Russell on Hungary,” Scheer retorts, “but when he came to turn the same moral and logical guns on U.S. involvement in Cuba and Vietnam, they pronounced him a ‘non-person.’”

The interview focused on Vietnam and Russell’s ideas of American foreign policy and the Cold War. Russell proclaimed his support for North Vietnam because they had been under attack by the West; however, he thought that given the nature of Hanoi’s war economy, its developmental programs had been “overstated” by the left. Despite this, Russell believed the Vietnamese struggle was one for self-determination and criticized Great Power politics for the current situation. While he held the United States responsible for the conflict in Vietnam, he also clarified: “On the whole I think the Russians are bad. I think the Chinese are bad. I think everybody has some badness in them, and I think as they get more power it will get worse.” He argued that he could not hold the National Liberation Front in South

⁴⁶ Robert Scheer, “Lord Russell,” *Ramparts*, May 1967, 16

Vietnam to the same standards as the Great Powers because they're fighting for independence in an anti-colonial struggle. Moreover, the NLF had not been poisoned with power. "The big nations, the ones that have power," Russell said, "all seem to engage in betraying one another."⁴⁷

Robert Scheer was himself critical of the Russell Tribunal. While he thought the "Tribunal has done important work," such as sending investigative teams to North Vietnam to collect information about American bombing and exposing the use of fragmentation bombs, he nonetheless voiced concerns about the IWCT. Scheer believed Ralph Schoenman was his own worst enemy and probably did more harm than good for the organization of the Tribunal. He concluded that the "Tribunal has to date failed in its potential for confronting America with the enormity of its actions in Vietnam." The main reason for the failure, according to Scheer, had to do with the "poor organization of the Tribunal," which had been divided on sectarian lines between the offices in London and Paris. While the strong personalities involved in organizing the Tribunal no doubt contributed to a lack of cooperation, the poor organization was also the result of the counter-organizing efforts of the Johnson administration.

Johnson Administration Responds to the Russell Tribunal

The Johnson administration took the proposed Tribunal seriously and acted secretly to deter it from convening. Officials planned to discredit Tribunal members by influencing the media and through a policy of never publicly acknowledging the Tribunal unless asked by the media. By July 1966, the administration initiated a campaign aimed at discrediting Bertrand Russell and the Tribunal, engaging in diplomatic maneuvering to prevent countries from hosting the proceedings, by sending messages via embassies abroad to potential members to dissuade them from joining or funding the tribunal, and by studying legal remedies in various democratic countries to help prevent the Tribunal (such as laws

⁴⁷ Robert Scheer, "Lord Russell," *Ramparts*, May 1967, 16.

against the defamation of U.S. officials such as Lyndon Johnson, Dean Rusk and Robert McNamara).

When Russell announced the Tribunal in June 1966, Secretary of State Dean Rusk ordered the Department's legal adviser Richard Kearney to find "what legal remedies" could be available in U.S., British and French law to thwart or prosecute the Tribunal members. At the time, it was still not clear where the Tribunal would take place, and on July 15, 1966, Kearney replied to Rusk with the various laws in both the U.K. and France that could be used to bar the Tribunal. "There are many in the United States who would be disturbed at the thought of a high United States Government official seeking to mute foreign criticisms of his official conduct" by "means that would be so plainly unconstitutional under United States law," Kearney wrote to Rusk. Therefore, Kearney recommended that "the bringing of any suit against those involved in the mock trial would itself result in very unfavorable publicity for the United States both at home and abroad, as well as focus attention on Lord Russell's activities. He and his cohorts would undoubtedly find this most welcome."⁴⁸

Key officials in the Johnson administration scrambled in late July to prepare a coordinated response, surveying all the possible options to discredit and prevent the Tribunal. In early August, Under Secretary of State George Ball accepted an appointment to lead an inter-agency group consisting of top officials from the State Department, the Department of Defense, the Central Intelligence Agency and the United States Information Agency to form a coordinated response to this brewing information war. A series of telephone conversations between August 3 and 5 cemented the structure of the inter-agency group. On August 3, Secretary of Defense Robert McNamara told Ball that before the end of the day the two of them and Secretary Rusk should determine what response, if any, the government should pursue. Two days later, McNamara dispatched Adam Yarmolinski, his second in command at the Pentagon, to assist Ball. In a telephone conversation, Yarmolinski told Ball that he had been talking about the Tribunal with Averell Harriman and that "we could not ignore the war crimes trial – it could hurt us a good deal in Europe and Asia." Ball responded that he "did

⁴⁸ Richard D. Kearney to Dean Rusk, "Legal Remedies available against Persons conducting a Mock 'Trial' of United States Officials for 'War Crimes' in Viet Nam – Information Memorandum," 15 July 1966, in LBJL, Papers of William C. Gibbons, Box 19.

not want to dignify” the Tribunal. Yarmolinski wanted to make sure “it is not completely a one-sided show” and relayed Harriman’s suggestion that a group of international jurists could respond to the event. Ten minutes later, Ball called C.I.A. director Richard Helms to notify him that Yarmolinski would be representing the Department of the Defense and that Frank Sieverts would represent the State Department. Helms offered Cord Myer from the C.I.A. and the inter-agency group was formed to respond to the Russell Tribunal. Leonard Marks would round out the team from the United States Information Agency.⁴⁹ As the interagency group was developing, the CIA reported to the National Security Council on August 3 that Russell was attempting to organize the Tribunal in Paris for November. “The North Vietnamese have enthusiastically encouraged Russell to conduct this kind of a propaganda show,” the report noted, “and according to the Reuters dispatch, Hanoi will fly some 200 North Vietnamese who have been hurt in US bombing raids to Paris to ‘testify.’”⁵⁰

For the remainder of August, the interagency group worked to formulate its response. The Russell Tribunal became the focus of conversation between the White House’s Deputy Assistant Secretary for Public Affairs and the Government of Vietnam’s Ambassador to the United States Vu Van Thai. Vu believed that “no official notice” of the Tribunal should be made by the GVN or the U.S. and that even offering a defense at the Tribunal of the U.S. “can only play into the enemy’s hands. The more extreme and one sided this affair appears to be, the better,” Vu stated. Vu proposed that a “distinguished private group” organize a “separate affair” that focused on “How to bring peace to Viet-Nam” and feature prominent Asian and Western intellectuals.⁵¹

On August 19, Leonard Marks, Director of the United States Information Agency, wrote to Ball with his suggestions for how the U.S. government should respond. Marks stated that the “US Government will be under great pressure, from within and without, to react or to ‘do something’ about Russell’s propaganda circus.” However, the government could not

⁴⁹ See George Ball telecons: George Ball and Robert McNamara, 3 August 1966; George Ball and Robert McNamara 5 August 1966; George Ball and Adam Yarmolinski, 5 August 1966; George Ball and Richard Helms, 5 August 1966 in LBJL, Papers of George W. Ball, Box 7

⁵⁰ CIA to NSC, “The Situation in Vietnam, 3 August 1966, in CREST, National Archives and Research Administration II, College Park, Maryland.

⁵¹ Harold Kaplan (Deputy Assistant Secretary for Public Affairs), “Proposed Agenda Item for Monday, August 22,” 18 August 1966, Secret, in LBJL, Papers of William C. Gibbons, Box 20.

“dignify the ‘trials’ and give them free publicity by any official reaction” and offer the Tribunal “legitimacy.” Marks argued that having statements by “private Americans” in newspapers seemed a good idea and that prominent individuals “depreciating the proceedings” would be beneficial in the United States, Europe, Latin America and Asia. Moreover, all diplomatic posts should be furnished with background information on the Tribunal and its participants and that these posts should “arrange and encourage” critical editorials and news coverage and dig up any information about the Tribunal such as its financial donors.⁵²

On August 25, the inter-agency team held a meeting to discuss the next steps against the Tribunal. “We have made a start and I intend to keep the pressure on so that we lose no momentum,” participant Leonard Marks reported to White House Press Secretary Bill Moyers.⁵³ Frank Sieverts updated George Ball the same day on the workings of the inter-agency group. Sieverts told Ball the C.I.A. would compile dossiers on the principle people involved in the Tribunal, the proposed judges and general information on the Bertrand Russell Peace Foundation. Moreover, the Agency would utilize its staff in Mexico City to “persuade” former Mexican President Lazaro Cardenas not to participate in the event. Furthermore, Sieverts suggested that the State Department approach heads of state listed as sponsors of the Bertrand Russell Peace Foundation and ask them to remove their sponsorship of the organization.⁵⁴ The State Department would use the full force of American diplomacy via its embassies abroad to influence countries supportive of the Peace Foundation.

By the end of August, the inter-agency’s members had reported to George Ball and the government’s formulated a systematic counter-response to the Tribunal. Secretary Rusk wrote to President Johnson:

An interagency (State, USIA, CIA, Defense) group headed by George Ball is looking into what we can do to reduce the impact of Bertrand Russell’s announced mock “war crimes trials.” We are quietly exploring with the British and French available legal steps that could be taken to forestall this spectacle. We

⁵² Leonard H. Marks to George Ball, 19 August 1966, LBJL, Confidential File, ND 19-1, Box 74

⁵³ Leonard H. Marks (USIA) to Bill Moyers, 25 August 1966, LBJL, Confidential File, ND 19-1, Box 74.

⁵⁴ Frank A. Sieverts to Dean Rusk, 25 August 1966, in LBJL, Papers of William C. Gibbons, Box 20.

also plan to stimulate press articles criticising the “trials” and detailing the unsavory and left-wing background of the organizers and judges.⁵⁵

Such reports no doubt furnished comforting bedtime reading for President Johnson. By September, the administration faced increased pressure to end the war. French President Charles de Gaulle, for instance, had visited Cambodia and began actively calling for the United States to withdrawal from Vietnam as he had called for an end to hostilities in 1963-1964.⁵⁶

On September 9, the White House received Bertrand Russell’s official invitation to President Johnson to appear at the IWCT to defend himself against the accusations being leveled by the philosopher. “Here, then, is the challenge before you: Will you appear before a wider justice than you recognize and risk a more profound condemnation than you may be able to understand?” Russell wrote to Johnson.⁵⁷ A week later, on September 16, referring to the “highly offensive letter signed by Bertrand Russell,” George Ball wrote to Johnson that the letter was written on official Bertrand Russell Peace Foundation letterhead and that this could be used against the Tribunal. Ball instructed the State Department to follow-up with those foreign heads of state who were listed as sponsors of the BRPF. Ball informed Johnson:

We have authorized our ambassadors in Ethiopia, India, Pakistan, Senegal, Tanzania and Zambia to approach the chief of state to call his attention to the manner in which his name is misused to circulate pro-communist, anti-American propaganda... We are pointing out that the “Foundation” has been captured by a group of extreme left-wingers of the pro-Chicom stripe, several of them

⁵⁵ Dean Rusk to Lyndon Johnson, “Items for Evening Reading,” 29 August 1966, in LBJL, Papers of William C. Gibbons, Box 20.

⁵⁶ For de Gaulle’s trip to Cambodia and calls for American withdraw from Vietnam, see Max Paul Friedman, *Rethinking Anti-Americanism: The History of an Exceptional Concept in American Foreign Relations* (Cambridge: Cambridge University Press, 2012), 186-187. For de Gaulle’s view of the Vietnam War more generally in this period, see: Friedman, *Rethinking Anti-Americanism*, Chapter 5; Jeremi Suri, *Power and Protest: Global Revolution and the Rise of Détente* (Cambridge: Harvard University Press, 2003), 45-61, 133; and Fredrik Logevall, “De Gaulle, Neutralization, and American Involvement in Vietnam, 1963-1964,” *Pacific Historical Review* Vol. 61, no. 1 (1992): 69-102.

⁵⁷ Russell to Johnson, quoted in Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 115. The full text of the letter is available in John Duffett, ed., *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (New York: Simon and Schuster, 1970), 18-20.

American citizens, who are using the 94-year old Russell's name, perhaps without his full comprehension.⁵⁸

The appeal to the African leaders paid off. On October 19, President Julius Nyerere of Tanzania informed the BRPF that he wished to be removed as a sponsor of the Foundation and that his name should be removed from its letterhead. As authors Arthur and Judith Klinghoffer note, "Nyerere's name was on the letterhead with his approval, but he had never authorized its use in conjunction with the tribunal." After nearly a month of back-and-forth between the BRPF's and Nyerere's offices, on November 14, a day after the International War Crimes Tribunal had its preliminary meeting in London, Nyerere issued a press release condemning it. "I object to a serious matter like the Vietnam situation being dealt with by trickery and dishonesty," he proclaimed. Nyerere argued that the Tribunal would not lead to a peaceful settlement in the war and would only further "anti-American propaganda."⁵⁹ While the Klinghoffers represent Nyerere's decision to go public against the Tribunal as stemming from his disappointment of being misrepresented by the Tribunal through the use of his name on the BRPF letterhead, internal U.S. government records indicate that Nyerere had been contacted in mid-September by U.S. embassy officials in Tanzania. As noted earlier, one of the four African leaders sent Russell the Xeroxed copy of Russell's letter to Johnson, indicating the U.S. government was behind the affair. On November 14, the State Department announced:

Thanks to the efforts of our Ambassadors, a "preliminary meeting" of Bertrand Russell's "War Crimes Tribunal" began in London yesterday under a cloud caused by the announcement that three African Presidents – Kaunda, Nyerere, and Senghor – had withdrawn their sponsorship from the proceedings. They join Hailie Selassie whose disavowal of the project had been announced previously in Addis Ababa.⁶⁰

Despite the criticism and resignations, the Tribunal carried on. In late-October and November, the Central Intelligence Agency noted that the "North Vietnamese are attempting

⁵⁸ George Ball to Lyndon Johnson, "Items for Evening Reading," 16 September 1966, in LBJL, Papers of William C. Gibbons, Box 21.

⁵⁹ Julius Nyerere quoted in Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 116.

⁶⁰ Benjamin H. Read (Executive Secretary), "State Department Activities Report," 14 November 1966, Secret, in LBJL, Papers of William C. Gibbons, Box 22.

to drum up support and enthusiasm among international leftist groups for the upcoming mock ‘war crimes’ trial of leading US political figures sponsored by the Bertrand Russell Peace Foundation.” However, the Agency did not have a clear idea where or when the Tribunal would take place or the extent of Hanoi’s participation. The week before the IWCT was to have its preliminary meeting in London, the C.I.A. reported to the National Security Council that the North Vietnamese were “stepping up its propaganda support” for the Tribunal and that Hanoi radio “has given heavy play in the past few weeks to alleged civilian casualties caused by recent US bombing raids – particularly charging that there have been bombings of schools.” On November 30, a memo from Sherman Kent, Director of National Estimates for the Agency, to Richard Helms, described the Agency’s estimates of what the North Vietnamese political and military strategy could be in the coming months. “The standard estimate,” Kent wrote, “has been that Hanoi believes that a combination of US and international opinion will eventually force the US to offer important concessions to disengage from the war.” With regard to international opinion, Kent maintained that:

If Hanoi’s leaders expected [sic] a year ago that a ground swell of international opinion would eventually overwhelm the US, they must now be quite disappointed. Undoubtedly fate has dealt them some unkind blows: some of the more strident voices, Nkrumah’s, Ben Bella’s, Sukarno’s are silent, and Hanoi pays some price, for example in India, for its close alliance with China. Finally, Hanoi’s own intransigence has repeatedly denied potential supporters the opportunity and the means to bring real diplomatic pressures on the US. It is perhaps indicative of the state of affairs, that outside the Communist world, Bertrand Russell is currently Hanoi’s loudest and most colorful champion.⁶¹

Despite efforts by the U.S. government to disrupt and discredit the Russell Tribunal, on December 12, D.W. Ropa from the National Security Council staff wrote to the National Security Adviser Walt W. Rostow that “Russell and his fellow ‘jurists’ have a pretty clear propaganda field at this point in the absence of a well-organized counter effort. The Agency is monitoring preparations for the tribunal and otherwise attempting to discredit it” and that even the best efforts of the C.I.A. are “not likely to impede seriously the propaganda impact

⁶¹ Sherman Kent (CIA, Director of National Estimates) to Richard Helms (CIA Director), “The View From Hanoi,” 30 November 1966. See also: CIA to NSC, “The Situation in Vietnam, 28 October 1966, and, CIA to NSC, “The Situation in Vietnam,” 7 November 1966, in CREST, NARA II, College Park Maryland.

of the tribunal if it does take place.” Ropa feared that the Johnson administration needed “to be more extensively prepared than at present to counteract even its [the Tribunal’s] momentary impact.”⁶²

From what is available in the declassified documents, it does not appear that top officials in the Johnson administration moved to do any more than what Ball’s inter-agency group had already done. In a telephone conversation between President Johnson and United Nations Ambassador Arthur Goldberg, the president noted the failed attempt at diplomacy with Hanoi arguing that “Hanoi is not ready” to negotiate. Johnson, wishing to escalate the war and fuming about the same international opinion pushing for de-escalation and negotiation, articulated his dilemma: “I think I’m going to be tried not by Bertrand Russell but by Mrs. Goldberg for killing her boy without giving him the weapons to protect himself.” To which Goldberg responded, simply, “Bertrand Russell has become a nut.”⁶³

The New Year brought some successes for the Johnson administration’s attempt to disrupt and discredit the Russell Tribunal. On January 9, the American Embassy in New Delhi reported that the Secretary to President Radhakrishnan, Nagandra Singh, approached U.S. officials asking if they still had wanted a “public statement disassociating [the] President” from the IWCT. After the Secretary stated that India’s official response to date “was thoroughly inadequate,” U.S. officials responded that the government would “very much appreciate” a public response. “Good, it will be done,” Singh responded. India’s President did so on January 28, stating that “he nor the Government of India is in any way associated with the activities of the [Bertrand Russell Peace] Foundation in respect of the so-called International War Crimes Tribunal.”⁶⁴

In Europe, French authorities wanted to send a message of goodwill to their American counterparts and a stern warning to Ralph Schoenman when they detained him overnight at Orly Airport, on the outskirts of Paris, as he was transferring planes to Phnom Penh. Two

⁶² D.W. Ropa to Walt W. Rostow, “The Bertrand Russell ‘Trial,’” 12 December 1966, in LBJL, National Security File, Country File, Vietnam Box 191.

⁶³ “Editorial Note,” Foreign Relations of the United States, 1964–1968, Volume IV, Vietnam, 1966, Document 356, available online: <http://history.state.gov/historicaldocuments/frus1964-68v04/d356>.

⁶⁴ See American Embassy – New Delhi to Secretary of State, 9 January 1967, and, Secretary of State to Chester Bowles, 3 February 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

days later, the French Government made it known to the U.S. Embassy that Schoenman's detention "was meant to be a friendly gesture to [the] U.S." After the incident, the Department of State cabled its Embassy in London that, as a result of the "good scare thrown into him by episode at Orly," there should be no move on Schoenman in London by the U.S. government to ask the British "to expel him or help us get his passport" as this "runs the risk of making him a martyr at USG request."⁶⁵

On February 17, Undersecretary of State Nicholas Katzenbach wrote to President Johnson that, along with the Bernard Levin article in the *New York Times Magazine*, the previous week the Pakistani Government "publicly disavowed the Russell 'war crimes tribunal'" and reiterated that the earlier dissociation of African heads of state from the BRPF "was the result of careful approaches by our Embassies." Moreover, the Tribunal's plan to meet in March in Paris had been rebuked by the French government which "made it clear they [the Tribunal] would not be welcome" in France. The governments of England and Sweden "have taken similar attitudes" toward the Tribunal seeking to plan their event in each country "in part the result of approaches by our Embassies."⁶⁶

Despite the large amount of criticism, and the public disavowals by foreign governments, the *New York Times* received many letters to the editor defending the Russell Tribunal. On March 12, six letters appeared from prominent Americans. A letter signed by seventeen members of the Western Reserve University Faculty stated that "the appalling fact is that, by its actions in Vietnam, the American government has forfeited any claim to moral superiority over the barbarism against which we are supposedly defending Western

⁶⁵ For the French authorities detaining Schoenman, see: American Embassy – Paris to Secretary of State, 11 January 1967. For Schoenman in London, see: Department of State to American Embassy – London, 17 January 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland. Ralph Schoenman became the source of derision amongst members the U.S. national security state. His passport was revoked for traveling to North Vietnam and Cuba and was the subject of the majority of a Central Intelligence Agency report on the international connections of the American peace movement. See: Central Intelligence Agency, 28 February 1968, International Connections of US Peace Groups – III, LBJL NSF, Intelligence File, box 3.

⁶⁶ Nicholas Deb Katzenbach to Lyndon Johnson, 17 February 1967, LBJL, National Security File, Country File, Vietnam Box 191. For the Pakistani Government's statement that it was "in no way associated" with the IWCT, see: American Embassy – Rawalpindi to Secretary of State, 10 February 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

Civilization.”⁶⁷ Joseph Heller, author of *Catch-22*, wrote that “Russell’s wildest anti-US utterings, for example, are no more grotesquely improbable than the official explanations of our war in Vietnam.”⁶⁸

The IWCT Confronts Western Europe: The Politics of Friendly Governments during the Vietnam War

As soon as it was clear the Tribunal would not convene in the United States in early 1966, the BRPF moved to open offices in France and began organizing plans for Paris in March. Russell had also written many countries in Europe as fall back options in case France refused to host the Tribunal. From the earliest days after the announcement by Lord Russell of the International War Crimes Tribunal, no government in Western Europe wanted to be an accessory to what was perceived as such an unprecedented display of anti-Americanism. The Tribunal’s location remained a matter of concern for Lord Russell and as events unfolded became a matter a public controversy in France, Britain and Sweden.

When the State Department canvassed its legal office for a list of the applicable laws in both France and the United Kingdom to bar the Tribunal from taking place in early-July 1966, French officials followed suit. The French government, however, did not want to appear to be interfering with a private event and looked for legal or administrative ways to halt the IWCT. According to Max Paul Friedman, immediately after the French government found out the Tribunal’s plans in August 1966, they attempted to stop the Tribunal with tactics “ranging from discreet personal approaches to Russell and Sartre to imposing visas controls and invoking legal prohibitions on impersonating a judge.”⁶⁹ On August 5, Etienne Ma’anach, director of the Asian section of the French Foreign Ministry, queried its legal office and the lawyers returned with a number of legal suggestions: a law enacted in 1881 that made it illegal to insult a foreign head of state, an administrative discretionary power that

⁶⁷ “In Defence of Bertrand Russell,” *New York Times*, 12 March 1967, 12.

⁶⁸ Joseph Heller, *New York Times*, 12 March 1967, 22.

⁶⁹ Max Paul Friedman, *Rethinking Anti-Americanism: the History of an Exceptional Concept in American Foreign Relations*(Cambridge: Cambridge University Press, 2012), 212.

could bar the Tribunal under issues related to “public order,” a suit could be filed for defamation of U.S. leaders, or the charge of “interfering with public services” could all be theoretically used by the government. After reviewing the possible options, Ma’anach wrote on August 19 that “we have the greatest interest in keeping intact a position of perfect objectivity...in view of preserving, in our country, the chances we have of contributing to the pacification of Indochina.” Ma’anach believed that France had an excellent opportunity to play a mediator role in the war in Southeast Asia and this would be compromised “if America ended up believing that French authorities let [American] leaders be ‘put on trial’ on [French] territory at a moment where, up against serious difficulties, [Americans] are particularly sensible to foreign reactions.”⁷⁰ The French Foreign Ministry contacted the North Vietnamese in late-August and informed them that no visas would be granted by the French government for any North Vietnamese participants in the Tribunal. By November, the Foreign Ministry informed the American Embassy that the Tribunal would be barred from using France as a staging ground.⁷¹

These moves by the French government were unknown to the BRPF as they moved ahead with their preliminary preparations. Lord Russell sent French President Charles de Gaulle a letter on November 25 asking for his assistance in issuing visas to North and South Vietnamese delegations for the first session of the Tribunal in March 1967. President de Gaulle did not dignify the letter with a response and in a series of actions, the French government persuaded each venue the BRPF rented to cancel its booking for the Tribunal session. Unaware of the extent to which the French government would interfere with the Tribunal and in response to de Gaulle’s non-reply to Russell’s letter, the organizers first rented the Maison de la Mutualité and then a hall at the Continental Hotel in Paris between April 10 and 24. After the Tribunal organizers rented out the Mutualité, French authorities went “into action on a number of fronts.” The French Government approached the la Mutualité owners stating that “the French Government could not permit the holding of a trial

⁷⁰ Quoted in Bethany S. Keenan, “‘Vietnam is Fighting for Us’: French Identities and the U.S.-Vietnam War, 1965—1973,” Unpublished Dissertation, The University of North Carolina at Chapel Hill, 2009, 207-208.

⁷¹ Bethany S. Keenan, “‘Vietnam is Fighting for Us’: French Identities and the U.S.-Vietnam War, 1965—1973,” Unpublished Dissertation, The University of North Carolina at Chapel Hill, 2009, 207-208.

in a public building.” Moreover, French authorities would also refuse visas to participants who needed them and requested the names of possible American Tribunal members to their American counterparts.⁷² After being approached by the French government, the owner of the Continental Hotel said he canceled the booking because “I am pro-American” and that he did not understand what event the booking was for.⁷³ On March 16, the Government of France reassured the U.S. embassy that the Russell Tribunal would be barred from convening in France and that it would do “everything to stop [the] proceedings such as ‘keeping [Ralph] Schoenman out of Paris.’”⁷⁴

At the urging of Secretary Rusk, a number of key U.S. Embassies around the world approached their host governments about the Russell Tribunal. The Government of Japan, for instance, informed the American Embassy that “Japanese security *organs* are investigating” whether the IWCT would have a session in Japan and if so, the “government will find some way to prevent the Tribunal from meeting in Japan.” On March 20, the U.S. Embassy in Bern, Switzerland, reported to Rusk that Swiss authorities were contacted to host the Tribunal. The cable stated that as early as February 27, the Swiss Federal Council voted to refuse the Tribunal space to meet because: “1) It involves partisan political attitudes of Viet-Nam conflict and would not serve any true efforts toward peace; and 2) it in no way constitutes a tribunal established by a recognized competent international judicial authority.”⁷⁵

This was all good news for a U.S. government actively seeking to disrupt the Tribunal’s organizing plans. Matters were about to come to a head in France when it became

⁷² American Embassy – Paris to Secretary of State, 24 March 1967 and Secretary of State to American Embassy – Paris, 24 March 1967. See also: American Embassy – Paris to Rusk, 14 April 1967 for an update on the tactics employed to prevent the Tribunal by French authorities. All cables from RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

⁷³ “Russell ‘Tribunal’ Loses Paris Hotel ‘Courtroom,’ *New York Times*, 12 April 1967, 2.

⁷⁴ American Embassy – Paris to Secretary of State, 16 March 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

⁷⁵ On the Japanese Government’s commitment to stop the Tribunal from convening, see: American Embassy – Tokyo to Secretary of State, 17 March 1967. And, for the Swiss Government’s reaction, see: American Embassy – Bern to Secretary of State, 20 March 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

transparently clear the French authorities were blocking Tribunal members from entering the country. In April, the French government granted a one-day transit visas to Vladimir Dedijer, only to deny him a visitor's visa.⁷⁶ The denial led to a public controversy involving Jean-Paul Sartre and Charles de Gaulle when the philosopher wrote an innocuous letter to the French president on April 13 asking for visas for participants in the Russell Tribunal (particularly Dedijer). The General responded on April 19 and the letter would not get to Sartre for three days.

Despite Dedijer's visa problems, the Tribunal proceeded as usual and planned to hold its first session at Issy-les-Moulineaux, a suburb of Paris, from April 29 – May 9. Since the canceling of the previous two venues, the Tribunal organizers modified its booking strategy and approached the Tribunal as a private event, with media attendance via invitation only, whereby the IWCT would not be a "Tribunal" as such, nor would it attempt to "defame" President Lyndon Johnson. By this point, so far as the U.S. officials understood the situation, French authorities could not, under these new circumstances, bar the Tribunal from happening. They were, however, denying visas to members who needed them. Moreover, police detained Ralph Schoenman in Paris once more while he was on his way to Prague. The new strategy by Tribunal authorities did not, however, fool the French or the Americans. U.S. officials argued to their French counterparts that the "end result would be the same" as the "world press would carry daily reports on [the] meeting condemning US policies in Vietnam and [the] American public would not make distinction whether meetings were held privately" or not.⁷⁷

On the same day Sartre received de Gaulle's letter, French authorities publicly announced on April 22 the Tribunal would be barred from convening in France. In de Gaulle's response to Sartre he stated that the activities of the Tribunal "might lead the government to restrict their usual liberty of assembly and expression." However, for de

⁷⁶ For more on the French government's reaction, see Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 120-122.

⁷⁷ American Embassy – Paris to Secretary of State, 12 April 1967, and, American Embassy to Secretary of State, 20 April 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

Gaulle, the question was not one of assembly and free speech, but that the government “must be on guard lest a State with which it is linked and which, despite all differences of opinion, remains its traditional friend, should on French territory become the subject of a proceedings exceeding the limits of international law and custom.” Therefore, for de Gaulle, the main contention centered on the Tribunal’s legal legitimacy. “I have no need to tell you that justice of any sort, in principle as in execution, emanates from the State. Without impugning the motives which have inspired Lord Russell and his friends, I must recognize the fact that they have no power whatsoever, nor are they the holders of any international mandate, and that therefore they are unable to carry out any legal action,” he wrote.⁷⁸ For de Gaulle, the power and preeminence of the state trumped the machinations of the internationalists in his country and elsewhere.

Sartre responded by writing an open letter to de Gaulle in *Le Nouvel Observateur* on April 26 and used the opportunity to challenge de Gaulle and his government. Sartre wrote that “A country ... cannot be confined to its government. The course of action which consists of condemning United States policy in words and cautious phrases while forbidding the people from showing their opposition to the Vietnam war openly, is completely anti-democratic.” Sartre asked why de Gaulle feared the Tribunal and offered his own answer: “Because we present a problem that no Western government wants to see formulated: that of war crimes, which once again they all want to be left free to commit.”⁷⁹ For American officials at the embassy in Paris, Sartre’s comments provided “an excellent example of how

⁷⁸ Quoted in Charles de Gaulle to Jean-Paul Sartre, 19 April 1967, in John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: O’Hare Books, 1968), 28. See also: Bethany S. Keenan, “‘Vietnam is Fighting for Us’: French Identities and the U.S.-Vietnam War, 1965—1973,” Unpublished Dissertation, The University of North Carolina at Chapel Hill, 2009, 208-210; Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 121; and Maurice Vaisse, “De Gaulle and the Vietnam War,” in Lloyd C. Gardner and Ted Gittinger, eds., *The Search for Peace in Vietnam, 1964-1968* (College Station: Texas A&M University Press, 2004), 164.

⁷⁹ Jean-Paul Sartre quoted from *Le Nouvel Observateur* on April 26 in John Duffett, ed., *Against the Crime of Silence*, 29-36.

biased the viewpoints of many intelligent Frenchmen (and other Europeans) have become on the Vietnam War.”⁸⁰

The British government had a similar reaction upon being asked by Lord Russell to grant visas to delegates for a Russell Tribunal session in the U.K. On November 25, hedging his bets on the same day he wrote to de Gaulle, Lord Russell contacted Roy Jenkins, British Home Secretary, about organizing a session in London. Earlier on September 20, George Ball, head of the Johnson administration’s interagency group to combat the Russell Tribunal, met with Jenkins to convey the U.S. government’s position on the Tribunal and its displeasure if it convened in England. Therefore, the home secretary responded to Lord Russell over a month later on January 5, 1967, stating that “I have carefully considered your request, in consultation with the Foreign Secretary, and I have come to the conclusion that it would not be in the national interest to grant the facilities you seek.”⁸¹

Tribunal organizers eventually found a reluctant Swedish government to host the IWCT and its sessions in Stockholm. In November, Russell sent a letter to Swedish Prime Minister Tage Erlander in order for him to consider hosting the Tribunal in Stockholm. After France closed its doors, Erlander made a public appeal to the Tribunal’s organizers that they “cannot promote a peaceful solution” to the war in Vietnam. “I wish to firmly assert once again that the government does not want the Tribunal to have its meetings in Sweden,”

⁸⁰ American Embassy – Paris to Department of State, 29 April 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland. The full comment read:

Comment : There is no indication of a change in the French Government’s policy on public protest demonstrations despite Sartre’s statement. Sartre’s denial of the intention of the Tribunal to portray itself as a court is purely semantic in that the end propaganda results are not affected by his rather legalistic definition of terms. This article is an excellent example of how biased the viewpoints of many intelligent Frenchmen (and other Europeans) have become on the Vietnam War. Here is an appeal to the principles of moral law and justice that should lend itself to an objective study of world events, but it falls flat on its face in that it not once considers the South Vietnamese position as a victim of subversion or the atrocities committed by North Vietnam and the Liberation Front. Such is the onesided highly moralistic, but not realistic, point of view that motivates so many Frenchmen to protest against the United States.

⁸¹ Quoted in Roy Jenkins to Bertrand Russell, 5 January 1967, in John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: O’Hare Books, 1968), 20. For Ball’s meeting with Jenkins, see: George Ball to Lyndon Johnson, “Items for Evening Reading,” 16 September 1966, in in LBJL, Papers of William C. Gibbons, Box 21. See also Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 121-122.

Erlander said. The organizers called the Prime Minister's bluff and proceeded apace. Erlander publicly conceded the day after his announcement, after meeting with the Swedish support group for the Tribunal, that nothing in Swedish law could preemptively halt the Tribunal. Erlander continued to maintain that the government may withhold visas from members who needed them.⁸² President Johnson and the State Department were less than pleased.

Erlander made his announcement on the same day he and President Johnson attended the funeral of former German Chancellor Konrad Adenauer in Bonn, Germany. A nervous Swedish prime minister sought to explain himself to President Johnson at lunch only to be "interrupted" by former Israeli Prime Minister Ben Gurion. According to the Lyndon Johnson's daily diary, "the PM of Sweden was desperately anxious to explain to him why they are accepting a Bertrand Russell investigation due to their complex laws. ... So the President later this day dispatched Rostow in the middle of the night to find the PM of Sweden and tell him how concerned the President was." Rostow engaged Erlander and, according to Fredrik Logevall, "conveyed LBJ's concerns about the Russell Tribunal and warned that Swedish-American relations were bound to suffer if Stockholm did not rescind the invitation." Rostow, unable to change Erlander's mind, reported to Johnson that "the Swedes are properly churned up on the Russell business" and that "Honestly, Sir, I delivered the message loud and clear. ... I have no trouble at all being tough when I am carrying out your instructions."⁸³

⁸² See two separate cables on the same day informing Secretary Rusk of Erlander's public statement and eventually capitulation: American Embassy – Stockholm to Secretary of State, 25 April 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland. The Klinghoffer's write that Tribunal organizers looked to Switzerland, Denmark and Sweden. According to the Klinghoffer's: "More immediate was the Stockholm option. The Swedish government had been asked to approve a session in Stockholm and Schoenman had announced that it was the main alternative to Paris. When France rejected the tribunal and the Swedish government reluctantly agreed to Stockholm hearings, a home had finally been found. Sartre was completely surprised by this turn of events, thinking that de Gaulle's refusal was the coup de grace for the Tribunal. Sartre and other tribunal members then reluctantly packed and headed for the Swedish capital." Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 122. Chapter 13, "The Swedish Context," outlines the position of the Swedish government towards the Russell Tribunal.

⁸³ Lyndon Johnson Daily Diary, 25 April 1967, in LBJL, The President's Daily Diary, 4/16/67-6/30/67, Box 11; Walt W. Rostow to Lyndon Johnson, 27 April 1967, in LBJL, National Security File, Memos to the President,

Prime Minister Erlander agreed to let the Tribunal take place on the condition that no U.S. officials would be judged and that the IWCT would adhere to strict guidelines of objectivity and the presentation of facts. This flip-flop also engendered consternation among the American media. “Sweden stains its neutrality and compromises its claim on American friendship by offering hospitality to Bertrand Russell’s ‘war crimes’ trial,” the editors of the *Washington Post* proclaimed. They deplored the “pseudo-respectability” the Tribunal will receive “simply for being held on other than Communist soil.” Given the political climate in Sweden and the fact Erlander faced domestic pressure, such comments show a peculiar disdain for Swedish democracy. Moreover, the editors showing equal scorn for Lord Russell referred to him as being “once known as a great philosopher.”⁸⁴ Neither such criticisms nor the logistical nightmares in pulling off the Tribunal fazed the philosopher. “The continuing carnage in Vietnam makes it imperative, in my opinion, for us to press on, as quickly as possible, with the public work of the Tribunal,” he wrote to the organizers in Sweden.⁸⁵

The Stockholm Sessions

The International War Crimes Tribunal belatedly started on May 2 and convened eight days of hearings after the initial stumbling blocks between the organizers and the

Walt Rostow, Box 15; Fredrik Logevall, “The ASPEN Channel and the Problem of the Bombing,” in Lloyd C. Gardner and Ted Gittinger, eds., *The Search for Peace in Vietnam, 1964-1968*. (College Station: Texas A&M University Press, 2004), 192-194; Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 139-141.

⁸⁴ “Shame on Sweden,” *Washington Post*, 27 April 1967, A20.

⁸⁵ Russell went on to outline the financial burdens the Tribunal had incurred and that they should be treated “as a challenge to be overcome.” Partly financed by the BRPF and publication of the third installment of his Autobiography and *War Crimes in Vietnam*, the Tribunal was able to secure enough money to continue on through various fundraising initiatives in Sweden and an advance from a French bank. Bertrand Russell to Tribunal Members, 26 April 1967, and, 4 May 1967 in Russell Archives II, Box 371 IWCT: Members’ Correspondence, March 1967-October 1968, McMaster University, Hamilton, Ontario. According to Robert Scheer, who visited the London offices of the BRPF in February, “The entire organization is terribly amateurish and amazingly poorly financed for what is supposed to be a worldwide operation. ... It is sad to think that people throughout the world expect this one-woman office to save the peace, and ironical that it has actually done a better job of it than the more highly endowed peace operations throughout the world.” Robert Scheer, “Lord Russell,” *Ramparts*, May 1967, 19.

Swedish government were overcome.⁸⁶ The Tribunal opened with a statement from Bertrand Russell read in absentia, followed by a memorable opening statement by Sartre, the IWCT's President. Sartre lamented the fact that since the Nuremberg trials no international body had been established to fill the "void" left by the hanging of top Nazi officials and the outbreak of the Cold War. He proclaimed the Tribunal was filling this vacuum within the international community and responded to critics that the group's "legitimacy derives equally from its total powerlessness, and from its universality."⁸⁷

The Stockholm session of the International War Crimes Tribunal addressed three questions: Has the government of the United States committed acts of aggression against Vietnam under the terms of international law? Has there been, and if so on what scale, bombardment of purely civilian targets, for example, hospitals, schools, medical establishments, dams, etc? Have the governments of Australia, New Zealand and South Korea been accomplices of the United States in the aggression against Vietnam in violation of international law?⁸⁸ The session heard from a variety of witnesses and experts on a multitude of topics such as: reports on the laws of war, the history of U.S. involvement in Indochina, the U.S. presence in Cambodia, and the U.S. bombing of North and South

⁸⁶ A pre-Tribunal press conference almost undid the entire preparations. A statement from Bertrand Russell and presentations from Ralph Schoenman and Lawrence Daly condemned the United States for war crimes before the Tribunal even began. The Swedish support committee worked on overdrive and Jean-Paul Sartre made statements distancing the Tribunal from such comments by the key organizers. There were of course other stumbling blocks, such as the last minute nature of arranging the Tribunal in Sweden meant that many of its official participants had to rearrange their schedules. Isaac Deutscher arrived 4 days late and other members such as Stokely Carmichael, James Baldwin, Lazaro Cardenas, Amado Hernandez and Wolfgang Abendroth did not make it. Courtland Cox of SNCC took Carmichael's place and Sara Lidman replaced Abendroth. There were also last minute additions to the participants list: Melba Hernandez, Peter Weiss, Carl Oglesby, Leo Matarasso, and Gisele Halimi. For these and other logistical nightmares, see Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 123-125. The American Embassy was informed by its Swedish counterparts that a "split in Russell Committee here became apparent" when Peter Weiss distanced himself from Lawrence Daly's comments. Daly argued that the International War Crimes Tribunal was indeed a "Tribunal." The comments forced the President of the Wood, Paper and Pulp Union to publicly condemn the remarks and claim that it would withdraw its funding from the Tribunal if it moves beyond an "Objective Investigation." American Embassy – Stockholm to Secretary of State, 27 April 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

⁸⁷ Jean-Paul Sartre, "Inaugural Statement," in John Duffett, ed., *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (New York: Simon and Schuster, 1970), 40-45.

⁸⁸ "Verdict of the Stockholm Session of the International War Crimes Tribunal," Russell Archives II, Series 384 Vietnam Essays, Meetings and Reports, Bertrand Russell Archives, McMaster University.

Vietnam with testimony from Vietnamese victims of that bombing. The most influential reports and testimony concerned the use of fragmentation bombs or Cluster Bomb Units (CBUs). So controversial were these new munitions, the Pentagon was forced to respond.

The Department of Defense, in response to claims by the Tribunal in Stockholm that fragmentation bombs had been dropped on North Vietnam, “denied they were directed against civilians.” The *New York Times* reported on May 6 that the Johnson Administration refused to comment on the tribunal or to be “drawn into a point by point reply to the charges made at the tribunal that the United States has systematically and deliberately attacked North Vietnam’s river dikes and flood control dams.” The Pentagon’s spokesperson stated instead the anti-personnel bombs were targeted at trucks, parked aircraft, ammunition, fuel tanks, radar equipment and anti-aircraft gun sites.⁸⁹ The following day the *New York Times* reported that the Russell Tribunal was “absolutely astonished” to hear that the Pentagon had denied reports that fragmentation bombs were directed toward civilian targets. Vladimir Dedijer, the Yugoslav writer, had declared that in the face of such denials by the Pentagon the tribunal was “prepared to present all our evidence and witnesses...directly to a Congressional committee or any official body designated by the US government.”⁹⁰ Still reeling on the heels of the acknowledgement that U.S. bombing indeed killed Vietnamese civilians after the press reports by Harrison Salisbury, the Defense Department reiterated on May 7 that its bombs were not targeted at civilians and that it “did not wish to reply to the accusations of the Russell Tribunal in Stockholm.”⁹¹

The Department of State reported in late-February the IWCT focused on the use of CBUs after the first and second investigative teams of the Russell Tribunal returned from North Vietnam. In a cable from the U.S. Embassy in Paris on February 24, officials warned Secretary Rusk that “the accounts of civilian bombing casualties incites more emotion and hostility in France against the United States than the other questions being investigated by

⁸⁹ Hendrick Smith, “Charge at ‘Trial’ is Denied by US,” *New York Times*, 6 May 1967, 3.

⁹⁰ Dana Adams Schmidt, “Russell Tribunal ‘Astonished’ by Denial of Attacks on Civilians,” *New York Times*, 7 May 1967, 3. See also Valdimir Dedijer’s “Statement on the Pentagon’s Denial of the Use of CBUs,” in John Duffett, ed., *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (New York: Simon and Schuster, 1970), 267-269.

⁹¹ “Pentagon Repeats Denial,” *New York Times*, 7 May 1967, 3.

the Tribunal.” Moreover, before it was clear exactly where the Tribunal would meet, on April 20, Henry Cabot Lodge, Jr., American Ambassador to Saigon, cabled Rusk noting that “much ‘evidence’ has been gathered [by the IWCT] that the U.S. is utilizing anti-personnel bombs against the NVN [North Vietnamese] population” and pointed to Lawrence Daly’s March 3 article in the *New Statesmen* as an example. Informing Rusk that the CBUs “as devices are unclassified,” the way the Air Force and Navy use them in air operations is “still secret.” Lodge, after conferring with the 7th Air Force Headquarters, informed Rusk that the CBUs “are being used only for flak-suppression to eliminate gun-crews firing against attacking aircraft.” He reports:

7th Air Force Headquarters states that the “Tribunal” reports must refer to the CBU-24/B anti-personnel device. The CBU-24/B contains 665 BLU-26 bomblets. Each about tennis-ball size and containing hundreds of buckshot-size pellets. The CBU-24/B dispenser opens at approximately 1500 feet and scatters the BLU-26 bomblets which in turn explode on impact and release the pellets. The device has been in use in SVN since November and NV since May 1966.

However, Lodge failed to mention that the earlier version, CBU-20, had been used in operations since the beginning of American escalation in 1965. Bernard Fall described one such mission in the pages of *Ramparts* magazine in December 1965. Despite leaving out this important piece of information, Lodge recommended that, in order to counter the propaganda effect of the IWCT, a “low-key but widely disseminated statement” on the use of the CBUs be released as a way to “take some of the sting out of” the allegations because it “might be more effective than defensive rebuttals after the charges are made.”⁹² The State or Defense Departments did not heed Lodge’s warning and the irony of the Defense Department two-day tit-for-tat row with the Tribunal only served to recognize it and treat it as a legitimate threat.

The day after the Defense Department’s non-reply reply to the Russell Tribunal, a joint State Department and USIA memorandum to the National Security Council, all U.S. intelligence agencies, and embassies pointed out that the “biased and propagandistic nature”

⁹² Henry Cabot Lodge, Jr., to Dean Rusk, 20 April 1967, and, American Embassy – Paris to Department of State, 24 February 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland. For an early account of the use of CBUs in South Vietnam, see: Bernard Fall, “This Isn’t Munich, It’s Spain,” *Ramparts*, December 1965, 23-29.

of the Tribunal “has been fully documented in the press, so there is no reason for statements to this effect to be attributed to U.S. officials, either for the record or on background.” The U.S. government hoped “to continue to avoid focusing attention on the Tribunal, or raising its stature, by making it the subject of official U.S. notice.”⁹³ The Tribunal so irked the Secretary of State that he failed to heed his own warnings to his Embassies abroad. Asked by reporters about the Tribunal, Secretary Rusk was quoted in *Newsweek* stating, “I do not intend to play games with a ninety-four year old English philosopher.”⁹⁴

The media’s response to the Tribunal legitimated the efforts of the Johnson administration’s almost year-long campaign to discredit Russell Tribunal. “It is not likely that President Johnson or secretaries Rusk and McNamara will be losing any sleep over their so-called trial for war crimes, which opened today in Stockholm,” Eric Sevareid reported on the first day of the Tribunal for CBS *Evening News*. He concluded, much like most the mainstream media, that the Tribunal “is an anti-American propaganda ploy.”⁹⁵ As the Tribunal wrapped up, C.L. Sulzberger’s argued that “the meaning of [the tribunal] was propagandistic, not judicial.”⁹⁶

The weekly news magazines did not hold back any punches. On May 8, *Newsweek* called the Tribunal a “do-it-yourself Nuremberg” where Ralph Schoenman and Lord Russell were “already sure who the criminals are.” *Time* magazine reached into its linguistic bag of tricks to write that “Jean-Paul Sartre, long a Communist crony, called together a sullen séance of left-wing conjurers who had reached their verdict long before the trial started.” *Newsweek* followed up its first week of reporting to reassure Americans that the “testimony was sometimes dull, sometimes vivid, and always anti-American.”⁹⁷

Bertrand Russell was the subject of a lengthy discussion on anti-Americanism on *Firing Line*, William Buckley, Jr.’s hour-long debate program. Buckley interviewed Robert Scheer for a whole segment concerning the “nature of anti-Americanism” and whether

⁹³ Dean Rusk, “Bertrand Russell ‘war crimes tribunal,’ 8 May 1967, LBJL, National Security File, Country File, Vietnam Box 191. Secret

⁹⁴ “The Games Men Play,” *Newsweek*, 15 May 1967, 44.

⁹⁵ Transcript in LBJL.

⁹⁶ C.L. Sulzberger, “Foreign Affairs: Corpse on Horseback,” *New York Times*, 12 May 1967, 46.

⁹⁷ *Newsweek*, 8 May 1967, 54; *Time*, 12 May 1967, 30; and *Newsweek*, 15 May 1967, 43-44.

Ramparts magazine was “anti-American.”⁹⁸ One example Buckley used was Scheer’s May article on Russell, with Norman Rockwell painting a portrait of Russell for the cover. While Buckley failed to provide a precise definition of the term anti-Americanism, the program exemplifies how Max Paul Friedman’s myth of anti-Americanism fed Buckley’s view that criticisms of U.S. foreign policy by foreigners was anti-American and criticism by U.S. citizens was disloyal, anti-democratic and therefore anti-American. For instance, while Buckley tried to bait Scheer to admit he was anti-American, he used Lord Russell as a symbol of anti-Americanism and argued Russell demonstrated contempt for the American people and advocated for the failure of American policy in Indochina.⁹⁹

Buckley’s argument that Lord Russell, Robert Scheer and *Ramparts* magazine were anti-American is critical for our understanding of how the term is employed. First, Lord Russell was anti-democratic because the American people voted for President Johnson in 1964 and the policy in Southeast Asia was his prerogative to formulate and execute. Therefore, at his estimate, because “60 or 70 per cent of the American people are behind LBJ” Russell must feel contempt for the United States and its citizenry. The majoritarian argument was utilized by a number of denigrators of the antiwar movement and is an informative example in so far as the legality of the war in Vietnam was not dependent on whether the war was democratically agreed to within a nation-state or whether the war was

⁹⁸ Buckley’s interest in *Ramparts*, Scheer and Lord Russell stems not only because he was a key conservative commentator during the cold war, but because he was once a CIA agent working Mexico under E. Howard Hunt. Buckley’s conception of the United States and what was American was informed by the belief, whether a Democrat or Republican was in office, that “the United States has a stake in freedom throughout the world, and therefore to the extent that anybody’s freedom is diminished” so is American freedom. Therefore, the United States had to undertake robust economic and military interventionism throughout the world. Peter Richardson, chronicler of *Ramparts* magazine, argued that Buckley’s interests in the magazine stemmed not only from his connections with the CIA, but that he was also intimately involved in publishing the *National Review*. Moreover, *Ramparts* under its founder Edward M. Keating was a Catholic magazine. Buckley, a Catholic, wrote his first book, *God and Man at Yale*, and “may have supported Keating’s original urge to sponsor a Catholic literary quarterly, but he had every reason to deplore its transformation into a nonchalant, very cheeky, increasingly secular, and unabashedly left-wing publication under Hinckle and Scheer.” For Richardson’s discussion of the *Firing Line* segment with Scheer, see Richardson, *A Bomb in Every Issue: How the Short, Unruly Life of Ramparts Magazine Changed America* (New York: New Press, 2009), 87-89. For an excellent analysis of the CIA’s interest and surveillance of *Ramparts*, see Rhodri Jeffreys-Jones, *The CIA and American Democracy* (New Haven: Yale University Press, 1989), 153-172.

⁹⁹ Program 059, “Is Ramparts Magazine Un-American,” *Firing Line*, 26 June 1967. The full transcript is available online at the Hoover Institution, Stanford University, Firing Line Archives, <http://hoohila.stanford.edu/firingline/programView2.php?programID=79>.

popular among its population. The whole system of international law and international relations set-up in the aftermath of World War II was created to subvert this idea. Moreover, Russell's conception of the IWCT was dependent on the American people getting active because of the information the Tribunal would disseminate. Far from contempt, Russell felt admiration for the American people and their democracy from below.

More importantly, Buckley argued that Lord Russell –as well as Robert Scheer and *Ramparts* – are anti-American because they not only criticized American policy, but they also offered a radical critique of American power that took aim at both the means and ends of U.S. policy in Indochina. “When you are constantly moving in the direction of criticizing the United States,” Buckley told Scheer, “and actually hoping for a destruction not merely of policy as Democrats and Republicans alike disagree about it, but actually as a fundamental commitment” to subvert U.S. interests, then you are guilty of being an anti-American. Therefore, in Buckley's world, it was American and patriotic to agree with “an evolutionary democracy in South Vietnam” as opposed “to something that goes on under Ho Chi Minh in the North, or [Castro] in Cuba.”¹⁰⁰

Scheer, on the other hand, found Buckley's comments, worldview and material support for American foreign policy to be inherently anti-democratic and anti-American. On Lord Russell, Scheer countered that he wrote the piece he did because critics should “look not to some ingrained psychological need on the part of [Russell] to attack the United States, but rather to American foreign policy and why it would cause Russell to engage in this criticism.”¹⁰¹ Suffice it to say, there was little that could bridge this large gulf in opinion about Russell and what exactly is meant by anti-Americanism.

The Road to Roskilde

The Russell Tribunal was easily contained and discredited in the United States. On June 16, Dean Rusk met with the Swedish Ambassador, Hubert de Besche, in the secretary's office in Foggy Bottom to discuss the Swedish session of the Russell Tribunal. The

¹⁰⁰ Program 059, “Is Ramparts Magazine Un-American,” *Firing Line*, 26 June 1967.

¹⁰¹ Program 059, “Is Ramparts Magazine Un-American,” *Firing Line*, 26 June 1967.

Ambassador told Rusk he thought the Tribunal “had not met with the success its sponsors had anticipated.” Rusk responded that the matter “was over and done with now” and added that even “the Soviets chose to ignore it.” Asking the Ambassador if the Tribunal planned another session in Sweden, he responded that they “got the message they were not welcome” in his country and that he “understood they wanted to go to Copenhagen.” Over the summer, the organizers in the Paris offices of the Russell Tribunal moved to relocate the next session to the Danish capital. Moreover, the Japan Committee to Investigate War Crimes in Vietnam, established October 13, 1966, held its own sessions in connection with the IWCT in late-August.¹⁰²

In June, Swedish Prime Minister Erlander informed Vladimir Dedijer that his country would not be a willing host to a second set of hearings for the International War Crimes Tribunal. It appeared to Tribunal members that the headaches from organizing the previous session would repeat themselves in preparation for the follow meetings. On June 6, Danish Prime Minister Jens Otto Krag officially turned down the request by the Danish support group to hold the Tribunal’s second session there in October. The support committee promised to push forward despite the Prime Minister’s official rebuke and the U.S. Embassy in Copenhagen informed Rusk that certain “hair-line fissures” could be detected in Krag’s reply to the support committee. Nonetheless, Denmark and its prime minister, members of the NATO alliance, were still considered “a good friend to the United States.” However, U.S. officials expected “the leftists will raise the pressure” on the government much like they did in Sweden.¹⁰³

The “hair-line fissures” opened up over the summer both in the Danish position and internally within the IWCT organizing structure. After the Stockholm Session, organizers in the French offices, which made up the Executive Committee of the Tribunal, wrestled control over the direction of the IWCT from the London offices. Luminaries such as Sartre, de

¹⁰² “Memorandum of Conversation,” 23 June 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

¹⁰³ American Embassy – Copenhagen to Secretary of State, 6 June 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

Beauvoir and Dedijer tried to shut Ralph Schoenman out of organizing decisions and Russell was sidelined by his inability to participate in person at Stockholm. Thomas L Hughes, head of the State Department's Bureau of Intelligence and Research (INR) even commented on the fact Russell and Schoenman were "eased into the background" in preparations for the Copenhagen session.¹⁰⁴

In the middle of the summer, uncertainties remained on just how the second session of the Tribunal would take shape and where. The Danish Prime Minister continued to insist the Tribunal could not meet in Copenhagen. The well organized Danish support committee pushed ahead anticipating the Danish government would ultimately capitulate much like the Swedes had done in spring. The pressures were working. The U.S. Embassy reported to Rusk on August 15 that "the anticipated erosion in Prime Minister Krag's earlier strong surface opposition...has apparently taken place." Speaking with Danish "security officials," the U.S. Embassy reported that "Krag has hedged on his willingness to employ the juridical and technical means to prevent it."¹⁰⁵ The cables represent a fervent disdain for Danish democracy and is indicative of the general approach to foreign affairs within the U.S. State Department when U.S. interests were subverted.

¹⁰⁴ In a summary report to Rusk in late-November on the organizational difficulties plaguing the Russell Tribunal's, Hughes concluded:

One thing is certain: the Roskilde session marks the decline in the influence of Lord Russell and Ralph Schoenman, and a corresponding gain in coherence by the Tribunal. The confusion bordering on pandemonium which marred the first session was due in large part to Schoenman's deficiencies as an organizer and spokesman. After the Stockholm meeting the Tribunal members voted – with Schoenman and a few others strongly opposed – to move its headquarters from London to Paris, and it seems clear that the Tribunal is now virtually independent of the Bertrand Russell Peace Foundation which sired it.

Thomas L. Hughes to Dean Rusk, 17 November 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

Between August and September, it was decided at the Tribunal's Paris offices, fully outside of the purview of Lord Russell, that the next set of hearings would take place in Denmark. Lord Russell, perhaps understanding that his influence was waning, reported to the French office that it seemed strange they were willfully adhering to the demands of the Swedish Prime Minister. For Lord Russell's response to moving the session from Sweden to Denmark, see Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 152-153.

¹⁰⁵ American Embassy – Copenhagen to Department of State, 15 August 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

Meanwhile in Japan, according to translated documents obtained by Japanese security officials, the Japan Committee to Investigate War Crimes in Vietnam voted on June 17 to hold a “Tokyo Trial of War Crimes in Vietnam.” The Committee of 529 academics, activists, writers and artists had earlier sent investigative teams to North Vietnam to determine whether the Johnson administration’s war in Vietnam constituted a war of aggression, if they were using chemical weapons and the extent to which the Japanese Government was complicit in the American war. Dean Rusk reported to the Embassy in Tokyo a month later that, as far as the U.S. was informed, the Tokyo session was not a “full session” of the IWCT and that it acted only as an “interim session” to hear the “evidence” collected by the Japanese Committee. While no domestic laws in Japan could bar the sessions from taking place, much like in the Western European countries, Japanese officials reported to their American counterparts a week before the sessions were to convene that they had instructed all their embassies abroad “to refuse visas for persons invited to attend” and to refuse entry “on arrival” for those who did not require visas. The officials began working on overdrive to determine who could possibly be invited to attend and who was already in the country. The official rationale of blocking foreign Tribunal members as that they would interfere “with Japanese internal politics.”¹⁰⁶ Dave Dellinger was one such activist present for the sessions.

The Johnson administration’s interagency activities aimed at discrediting the Russell Tribunal appeared to die down after the Stockholm Session. Rusk assumed the major responsibilities of communicating the administration’s views to its Embassies abroad. However, the interagency group was still active and reporting in preparation for the Denmark sessions. On September 1, the National Security Agency (NSA) monitored the fifth investigation team sent by the Russell Tribunal to Hanoi from August 2-8. In its report, the NSA remarked that the investigating team examined bomb damage around Hanoi and that “the group was taken to Bai Lai Village, Quang Qai District, Ha Tay Province which they were told had been bombed with cluster bomb units on 26 July and 1 August. Nine persons

¹⁰⁶ American Embassy – Tokyo to Department of State, 3 July 1967; Dean Rusk to American Embassy – Tokyo, 5 August 1967; and American Embassy – Tokyo to Secretary of State, 21 August 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

were said to have been killed and twenty one wounded. The village was quite remote and had no apparent military significance.”¹⁰⁷

In September, the French offices of the Russell Tribunal finally agreed that Denmark was the best option to hold the second session of the IWCT. The Danish support group sufficiently laid the foundation for the Tribunal after the debacle in April and early May in France and Sweden. On September 20, some of the Tribunal members met in Brussels to plan the next round of hearings. At the insistence of David Dellinger, who had attended American-Vietnamese meetings in Bratislava, Czechoslovakia, Tribunal members agreed to hold the sessions after major actions in the United States such as “Stop the Draft Week” and the massive demonstration being planned at the Pentagon on October 21.¹⁰⁸

After the meeting of Tribunal organizers, the U.S. Embassy in Copenhagen reported to Rusk that the Tribunal had “faltered” over finding a venue, fundraising, and the right date to convene the sessions. Within the same week, however, Tribunal members booked a location in Copenhagen for late-November.¹⁰⁹ At the same time, Prime Minister Krag met with Dean Rusk at the Waldorf-Astoria in midtown Manhattan during the meetings of the United Nations General Assembly. Krag assured Rusk that “the Tribunal was not welcome in Denmark” and that the Government considered “using its visa procedures to bar some witnesses.” He noted that while the Danes could bar members of the DRV and NLF, they could not deny entry to such prominent figures as Jean-Paul Sartre. An aide also spoke up, stating that a NATO member could not be seen restricting free speech and freedom of assembly. On September 29, Prime Minister Krag, wanting to appear as the good ally, officially denied the visas to fifteen of the Tribunal’s participants. Ebbe Reich, of the Danish

¹⁰⁷ Memos to President Lyndon B. Johnson, “Road Conditions and Bombing Effects in the Vicinity of Hanoi,” 1 September 1967, Folder 39, Box 01, Veteran Members of the 109th Quartermaster Company (Air Delivery) Collection, The Vietnam Center and Archive, Texas Tech University. Available online : <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=0010139021>.

¹⁰⁸ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 152-153.

¹⁰⁹ American Embassy – Copenhagen to Department of State, 22 September 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

support committee, announced that the move would not deter the organizers and that, if need be, the witnesses would participate from Malmo, Sweden, in pre-recorded interviews.¹¹⁰

Throughout October, planning continued unabated by organizers in Denmark and at the offices of the IWCT. Danish domestic pressure, as in Sweden, had forced the Prime Minister's hand. On October 31, Krag publicly announced that he would lift all visa requirements for Tribunal participants. Immediately following Krag's public remarks, the American Ambassador to Denmark was "summoned" by Foreign Minister Tabor to discuss the Tribunal. According to the Ambassador, "a few minutes after my arrival" they were joined by the Prime Minister; "obviously a pre-arrangement" the Ambassador reported. Krag stated that he had to reverse his previous public stance after meeting with the Danish support group of the IWCT. The U.S. Ambassador "expressed disappointment" and used the recent case of violent demonstrations at the American Embassy in Copenhagen on October 21 and the Social Democratic Youth Organizations (DSU) sponsorship of a German campaign for U.S. soldiers to desert there "as one more example...of [a] growing anti-American campaign in Denmark." In his comments to Rusk, the Ambassador called Krag's "explanation" a "pathetic and transparent attempt" to "worm his way out of previous statements." He informed Rusk that he was "disappointed with questionable and surprising operation" to lure him into a last minute meeting with the Prime Minister and that it indicated the "nervousness and weakness" of Krag and his government in the face of domestic pressure.¹¹¹ Despite Krag's backtracking, he influenced where the Russell Tribunal would be held: in Roskilde, twenty-five miles outside of the capital.¹¹²

The second session of the International War Crimes Tribunal convened between November 20 and December 1. The tribunal had some personnel adjustments: Isaac Deutscher died in August and Ralph Schoenman was barred from entering the country due to

¹¹⁰ "Memorandum of Conversation," 27 September 1967, and, American Embassy – Copenhagen to Department of State, 29 September 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

¹¹¹ American Embassy – Copenhagen to Secretary of State, 1 November 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

¹¹² Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 152-153.

a lack of a visa. The U.S. State Department revoked Schoenman's passport in October after he had been arrested in Bolivia while he was there supporting the French radical Régis Debray while on trial there.¹¹³ The Roskilde session focused on three questions: Have prisoners of war captured by the armed forces of the U.S. been subjected to treatment prohibited by the Laws of War? Have the armed forces of the U.S. subjected the civilian population to inhuman treatment prohibited by the Laws of War? Does the combination of crimes constitute the crime of Genocide? The Tribunal presented evidence on the types of weapons that were used in Vietnam such as napalm, Agent Orange, white phosphorous, and cluster bombs; testimony by Vietnam veterans focused on the mistreatment of prisoners of war; the U.S. intervention in Laos; and the complicity of the governments such as Thailand, the Philippines, and Japan in the war. The most controversial aspect of the new round of hearings was the Tribunal's attention to the question of whether the United States was committing genocide in Vietnam.¹¹⁴

"The so-called international war crimes tribunal convened today," the *New York Times* reported. They printed a short article on the resumption of the Tribunal and did not even bother sending a correspondent. The article stated that Schoenman was barred from entering Denmark and quoted Kaj Hansen, owner of the hall where the meeting was held, that the Tribunal was "one-sided" because the United States was not represented there.¹¹⁵ After two days of the Tribunal, Secretary Rusk cabled the American Embassy informing them that "there has been no [repeat] no mention of tribunal so far in major US newspapers or other US media. We intend continue avoid any comment on 'tribunal' and recommend Embassy do likewise."¹¹⁶

The IWCT's second session found the United States guilty on all counts. First, it found the governments of Japan, Thailand, and the Philippines were "guilty of complicity in

¹¹³ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 154-155.

¹¹⁴ See John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal*, (New York: Simon and Schuster, 1970), 311-653.

¹¹⁵ "Russell Tribunal Starts 2D Session," *New York Times*, 21 November 1967, 6.

¹¹⁶ Dean Rusk to American Embassy – Copenhagen, 22 November 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

the aggression committed by the United States Government against Vietnam.” Second, the U.S. government was found guilty of “aggression against the people of Laos.” Third, the U.S. government was found to have “used or experimented with weapons prohibited by the laws of war.” Highlighted for specific condemnation was the use of napalm and white phosphorous. Fourth and fifth, the U.S. armed forces were found guilty of violating the third Geneva Convention of 1949 for the mistreatment of Prisoners of War and for the indiscriminate destruction of the civilian population as prohibited under the fourth Geneva Convention of 1949. Finally, the U.S. was found guilty of committing genocide in Vietnam.¹¹⁷

As Secretary Rusk noted, the second session received only limited press in the United States. The response was expected. The *New York Times*, printing the *Reuters* dispatch, reported the Tribunal’s finding of guilt on all counts at Roskilde and Stockholm the previous May. “Neither tribunal had any official standing,” they argued.¹¹⁸ The *Economist* likened the tribunal to “such propaganda trials as the communist Chinese ‘trial’ of Americans for supposed germ warfare during the Korean war.” Despite pronouncements to the contrary from Tribunal members, the *Economist* nonetheless concluded that Tribunal “sponsors have made surprisingly little effort to safeguard even an appearance of impartiality.” Attempting to further delegitimize the tribunal, the weekly concluded that “the most the tribunal can achieve is to bolster morale in North Vietnam and the communist countries.”¹¹⁹

The movement and progressive presses treated the Russell Tribunal more fairly. *Liberation* magazine focused an entire issue in December/January 1967-68 on the Russell Tribunal. Featuring a full scale report on the Tribunal Dellinger argued: “I doubt if Americans will ever be able to comprehend the depravity represented by United States actions in Vietnam or the nightmare of Vietnamese suffering, as both were revealed at the Tribunal.” He believed that “anyone who reads the documents reproduced in this issue will

¹¹⁷ “Summary and Verdict of Second Session,” in John Duffett, ed., *Against the Crime of Silence*, 643-650.

¹¹⁸ “Russell ‘Tribunal’ Finds U.S. Guilty of War Crimes,” *New York Times*, 2 December 1967, 3.

¹¹⁹ “Russell Tribunal: Guess the Verdict.” *The Economist*, 9 December 1967, 1048.

realize that this dereliction condemns the mass media and seriously handicaps the developing American conscience but does not nullify the work of the tribunal.”¹²⁰

Conclusion

As Noam Chomsky pointed out in the preface to the second edition of the Tribunal’s proceedings, people in the United States “were given no opportunity” to read about “the terrible crimes recorded in the proceedings of the Tribunal.” For Chomsky, the enormity of the evidence presented “was suppressed by the self-censorship of the mass media” and “were barely reviewed.”¹²¹ As the war escalated, the position of critics such as Richard Falk, who was once critical of the Tribunal, evolved. He noted that “although the Russell Tribunal operated on the basis of one-sided adjudicative machinery and procedure, nevertheless it did turn up a good deal of evidence about the manner in which the war was conducted and developed persuasively some of the legal implications it seems reasonable to draw from that war.”¹²² By 1971, Richard Falk wrote in the pages of *The Progressive* that the Russell Tribunal’s findings “stand up well under the test of time and independent scrutiny,” however, “they were mainly ignored at the time, except for purposes of discrediting.”¹²³

The press coverage of the Russell Tribunal was abysmal. The evidence could have spoke for itself, however, the majority of the press reports tried to discredit the Tribunal and its membership by engaging in any number of tactics: character assassination, criticizing the procedural limitations of the Tribunal, calling the Tribunal communist propaganda or anti-American, or in some cases colluding with the Johnson administration such as in the article written by Bernard Levin in the *New York Times Magazine*. To the papers’ credit, they did report on the tit-for-tat argument with the Pentagon over the use of anti-personnel or Cluster Bomb Units in Vietnam. However, the matter was quickly dropped after the Pentagon

¹²⁰ Dave Dellinger, “Unmasking Genocide,” *Liberation*, (December 1967/January 1968): 3.

¹²¹ Noam Chomsky, “Preface,” in John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal*, (New York: Simon and Schuster, 1970), xiii.

¹²² Richard Falk, “The Six Legal Dimensions of the Vietnam War,” in Richard Falk, ed., *The Vietnam War and International Law, Volume 2* (Princeton: Princeton University Press, 1969), 252.

¹²³ Richard Falk, “The American POWs: Pawns in Power Politics,” *The Progressive*, March 1971, 16.

refused to answer any more questions on the matter. Therefore, the Russell Tribunal could not rely on effectively influencing American public opinion in the face of a concerted effort on the part of the media and Johnson Administration to discredit the proceedings. This was the cornerstone of the tribunal and without effectively influencing American public opinion; no amount of pressure by the international antiwar movement could influence the U.S. Government to withdraw its forces from Vietnam.

The U.S. government played it calm and cool in public and largely ignored the Tribunal's proceedings. However, the Johnson administration's interagency response to the Russell Tribunal, beginning in July and taking off in August 1966 was largely successful in discrediting and disrupting the Tribunal. While the Tribunal did convene in Stockholm, Sweden, and Roskilde, Denmark, the only major influence the Tribunal had was outside of the United States. Except for the American peace movement, Americans did not pay attention to the proceedings. Moreover, the Johnson administration flexed its considerable muscle in the diplomatic arena to prevent the Tribunal from transpiring in France or the United Kingdom where it would have had a much larger impact. Therefore the Johnson administration relied on its traditional friends and allies to adopt policies that supported the United States' opposition to the Russell Tribunal. This was despite the fact French President Charles de Gaulle was publicly outspoken against the war and the United Kingdom's Harold Wilson remained a quiet dissenter. The backroom diplomacy demonstrated the strength of the Cold War alliances set-up after World War II. In fact, the precedent created by the French and the British in barring the Tribunal persuaded Canada to invoke the precedent when it attempted to bar similar war crimes hearings organized separately by the Lawyers Committee on U.S. Policy Towards Vietnam, the Citizens' Commission of Inquiry into U.S. War Crimes in Vietnam, and the Vietnam Veterans Against the War's Winter Soldier Investigation hearings in 1970 and 1971.¹²⁴

In a February 14, 1968, Central Intelligence Agency memorandum to President Johnson on "Peace Movements in Foreign Countries," the Agency argued that the second session of the IWCT was a "complete failure." It concluded:

¹²⁴ "War Crimes Tribunal to Examine Alleged United States Atrocities in Vietnam," 17 April 1970. RG 76, Volume 995 (National Committee for Citizen Commission), Canadian National Archives.

2. What the Tribunal was really after, however, was world-wide publicity blackening the United States and its allies in Asia. It wanted to engender opposition, especially in Western Europe, to US policy in Vietnam by means of a massive propaganda campaign which would portray the United States, its President and other leaders, and its soldiers in the field as barbarians and monsters. In this effort, the IWCT was a complete failure. Most of the publicity it did obtain was pointed at its own internal bickering and the fiasco of Ralph Schoenman's unsuccessful attempt to get into Denmark in order to participate. Schoenman, an American citizen, is the personal secretary of Lord Bertrand Russell, the prime mover of the Tribunal. Western press attention to these details – rather than the “testimony” – drew sharp censure from the Tribunal. The Tribunal also complained about the almost complete lack of attention given it in the London and Paris press. These complaints fell on deaf ears. When the Western European papers did refer to the IWCT, they called it “circus Schoenman.”¹²⁵

¹²⁵ C.I.A. memorandum, “Peace Movements in Foreign Countries,” 14 February 1968, in CREST, NARA II, College Park, Maryland.

Chapter 6

Movement Books: The Radical Challenge to the Vietnam War

The dissemination of information about the Vietnam War by the antiwar movement is striking not only for its scope, breadth, and volume, but also because U.S. history offers no similar precedent of so much written material in opposition to an American war. The act of researching and writing about the war or how-to-guides for the movement represents a form of activism that became an integral part of how people got information about the war. Not everyone traveled to Vietnam – it being half a world away, often fraught with perilous conditions during the war – and those who did spent weeks or months trying to obtain visas. Therefore, information about the war while it was in progress was limited to U.S. government public statements and reports, dispatches from war correspondents in the field in Vietnam, academic studies, or through the burgeoning world of antiwar movement publications. While much has been written on the new left, countercultural, and the GI underground presses, virtually nothing has been written in any systematic way about the role of the antiwar movement books.¹

The following chapter will explore the books that were produced to inform the movement about itself and about the illegality of the war in Vietnam. Of utmost importance to this narrative is the process by which the materials were generated, because these works were products of, by, and for the movement against the war, yet many authors also aimed

¹ There are a variety of excellent books on the new left and countercultural underground presses. See for instance: Roger Lewis, *Outlaws of America: The underground press and its context* (Harmondsworth: Penguin Books, 1972), John McMillian, *Smoking typewriters the Sixties underground press and the rise of alternative media in America* (Oxford: Oxford University Press, 2011), Abe Peck, *Uncovering the sixties: the life and times of the underground press* (New York: Citadel Press, 1985), Geoffrey Rips, Anne Janowitz, and Nancy Peters, *The Campaign Against the Underground Press* (San Francisco: City Lights Books, 1981), and, Bob Ken Wachsberger, ed., *Insider histories of the Vietnam era underground press* (East Lansing: Michigan State University Press, 2011). Likewise, there are a variety of excellent works on the GI underground press. See for instance: David Cortright, *Soldiers in Revolt: the American Military Today* (New York: Anchor Press, 1975), James Lewes, *Protest and Survive: Underground GI Newspapers during the Vietnam War* (Westport: Praeger, 2003), Richard Moser, *The New Winter Soldiers: GI and Veteran Dissent During the Vietnam War* (New Brunswick: Rutgers University Press, 1996), and, Bob Ostertag, *People's Movements, Peoples Press: The Journalism of Social Justice Movements* (Boston: Beacon Press, 2006).

their books at the broader American public. In other words, the books represent a form of antiwar praxis whereby the ideas and theories of the movement converged with action from below to create a multitude of publications that challenged almost every aspect of the war, as well as informed the movement and the people on such aspects as how to organize in the anti-draft and GI movements. Historian John Tirman has written that a virtual “cottage industry” created within the antiwar movement gathered and spread information about the war. John Prados, as well as many others, have noted that the antiwar activists were perhaps the best-informed segment of American society on the war.² For our purposes, it is crucial to explore the gathering of information about war crimes, the Nuremberg Principles and the movement itself, and how this process contributed to the growth of antiwar ideas. While a few key articles will be highlighted, the main focus here will be on published books, as they proved critical to reaching a wider audience.

The growth and reach of the underground press was impressive. Historian John McMillian estimates there were several hundred civilian underground newspapers across the United States whereby two wire service – the Underground Press Syndicate and the Liberation News Service – distributed articles across the country for publication.³ Moreover, historian Richard Moser estimated that there were over three hundred underground GI newspapers in existence during the war. Some of these were one-off mimeograph sheets, other such as *The Bond* had a claimed readership of over 10,000 GIs.⁴ Despite this amazing circulation and reach, movement books were critical because they had a far better chance of speaking to people both within and outside of the movement. Underground newspapers focusing in new left politics, the counterculture, or to GIs were specifically focused and targeted to a particular audience. This did not mean that they were not read outside of their intended subscribers; however, in the age before the internet, books carried a certain cultural

² John Tirman, *The Deaths of Others: The Fate of Civilians in America's Wars* (Oxford: Oxford University Press, 2011), 170; John Prados, *The Blood Road*, 137; and Noam Chomsky and Edward S. Herman, *The Political Economy of Human Rights: Volume I: The Washington Connection and Third World Fascism* (Montreal: Black Rose Books, 1979), 299.

³ John McMillian, *Smoking Typewriters: The Sixties Underground Press and the Rise of Alternative Media in America* (Oxford: Oxford University Press, 2011), 4-6.

⁴ Richard Moser, *The New Winter Soldiers: GI and Veteran Dissent During the Vietnam War* (New Brunswick: Rutgers University Press, 1996), 96-97.

weight in American society and could be picked up by almost anyone in bookstores or libraries. The printed word was king in this period, and while most movement activists never signed a book contract, it is important to look at those who did and what they had to say because their work was unparalleled in U.S. history. Never before had an American war been the cause of so much critical reflection, and often times books grew out of articles written for alternative magazines such as *The Nation*, *The Progressive*, *the New York Review of Books*, *Ramparts*, *Liberation*, *Viet-Report* and others. The amount of information produced by the movement was staggering: books, pamphlets, broadsides, documentary films, newspapers, slick magazines, poster campaigns, newsletters, newspaper advertisements, photo slide shows. Advertisements for such materials appeared at the end of various newsletters, newspapers and magazines such as *Liberation*, or *Fellowship* magazine run by the Fellowship of Reconciliation (FOR), or the publications of other groups like the American Friends Service Committee (AFSC), with information on how to order copies of the books or reprints of important articles. Moreover, excerpts from books and articles were made into pamphlets or one-page mimeograph sheets to distribute on street corners and antiwar rallies. This was movement praxis and what was produced was distributed everywhere: at conferences, teach-ins, rallies, demonstrations, schools, libraries, churches, community halls, draft induction centers, draft counseling centers, barracks, and in Vietnam. The information about the war and about the movement was vital to countering the official narrative about the war.

The standards by which mainstream or profit-driven commercial publications are judged cannot be applied to these movement publications. For instance, Bob Ostertag persuasively argues in *People's Movements, Peoples Press: The Journalism of Social Justice Movements*: "Social movement journalism seeks to promote ideas, not profits" and therefore "the standards typically used to assess the importance of mainstream publications – total circulation, advertising revenue, length of book, longevity, 'professionalism,' 'objectivity,' and 'lack of bias'" are not useful guides informing us about the success of a particular work.⁵ These books and articles were resources intended to be informative about the war in Vietnam

⁵ Bob Ostertag, *People's Movements, Peoples Press: The Journalism of Social Justice Movements* (Boston: Beacon Press, 2006), 1-3.

or about aspects of the antiwar movement such as anti-draft organizing designed to help build awareness about the issues and move people to action against the war.

There were numerous publications about the war that were not produced by the movement that were nonetheless integral to how activists and ordinary Americans made informed decisions about what was happening there. Bernard Fall was perhaps the most influential of the early writers who offered a balance appraisal of the situation in Vietnam. His books like *Street Without Joy* (1964), *Vietnam Witness: 1953-1966* (1966) *The Two Viet-Nams: A Political and Military Analysis* (1967), and other articles compiled in *Last Reflections on a War* (1967) published posthumously after a land mine took his life in Vietnam on February 21, 1967, informed many readers across the political spectrum. Moreover, Fall's collaboration with Marcus Raskin on the release of *The Viet-Nam Reader: Articles and Documents on American Foreign Policy and the Viet-Nam Crisis* (1965), offered the first serious compendium on the war to date. Other books by war correspondents, particularly those who offered more sophisticated analyses of the deepening war in Indochina, helped inform the movement. Influential works appearing during the war included David Halberstam's *The Making of a Quagmire* (1965), Malcolm Browne's *The New Face of War* (1965), Felix Greene's *Vietnam! Vietnam! In Photographs and Text* (1966), James Cameron's *Here Is Your Enemy: Complete Report from North Vietnam* (1966), Jonathan Schell's two masterpieces, *The Village of Ben Suc* (1967) and *The Military Half: An Account of the Destruction in Quang Ngai and Quang Tin* (1968), and former air force bomber Frank Harvey's *Air War: Vietnam* (1967). To this list of key contributions one might add early movement publications such as Robert Scheer's "How the United States Got Involved in Vietnam" for the Center for the Study of Democratic Institutions in 1965, as well as the books published after an illegal trip to Hanoi by Staughton Lynd and Tom Hayden in *The Other Side* (1966) and Herbert Aptheker *Mission to Hanoi* (1966).

Despite these impressive offerings, the first part of this chapter will zero in on two key works: Howard Zinn's *Vietnam: The Logic of Withdrawal* (1967) and Alice Lynd's edited collection *We Won't Go: Personal Accounts of War Objectors* (1968). Both products of the antiwar movement, the two books were designed to inform and spur people to action

against the war by highlighting the major tenets of the Nuremberg Principles. For instance, Howard Zinn's *Vietnam* was the first major work to articulate the argument that the United States should unconditionally withdraw from Vietnam. A more experienced movement activist at the time of the book's publication, Zinn's point of view had been shaped by his experiences as a World War II bombardier who dropped napalm over France, who was active in the southern civil rights movement, and who increasingly became involved in the antiwar movement in Boston. Drawn primarily from articles previously published in alternative magazines, the book attacked the basis of the Cold War anti-communist consensus and laid the foundation for a historical assessment of the notion that the United States intervened in South Vietnam because of the aggressive war launched by North Vietnam. Contrasting the conventional wisdom of pundits and policymakers, Zinn argued that the United States had been the aggressors in Vietnam, and the actions of the communists had occurred largely in response to American intervention. Alice Lynd's edited collection *We Won't Go* came directly from her work counseling draft-age men in New Haven and Chicago. Lynd wanted to offer men facing the draft, their families, and the movement a resource that compiled the stories of different draft and military resisters to demonstrate that those contemplating refusing military service in Vietnam were not alone. The book served as a how-to-guide that offered practical, first-hand accounts of what it meant to resist the Vietnam War. Moreover, a detailed appendix provided readers with a helpful section quoting the Nuremberg Principles and other laws of war relevant in draft and military resister court cases. While no two books can adequately capture the whole canvass of movement publications during the American war in Southeast Asia, these two offer us a more detailed glimpse into how the books came into being and how successful they were in offering the movement the ideas it needed to flourish.

Part One

Howard Zinn and the Logic of Withdrawal from Vietnam

Howard Zinn emerged during the Vietnam War as one of the preminent critics of the use of American military power and interventionism in the post-World War II era. In writing about

the war in Vietnam, he specifically challenged the myth of American exceptionalism that was latent in the entrenched Cold War anti-communist consensus. Zinn's position as a World War II bombardier, a skilled educator and historian who taught in the South at Spelman College and then at Boston University, his participation in the grassroots African American freedom struggle in the south and then anti-Vietnam War movement in the north gave him a certain set of experiences to deconstruct American power. Zinn's F.B.I. file is replete with investigative reports chronicling his suspected membership in the Communist Party, his organizing efforts in the civil rights movement, his writings on the F.B.I. and J. Edgar Hoover, his support for the Cuban Revolution, and his almost daily antiwar activities.⁶

Like many white participants in the southern civil rights movement who found themselves in the northern United States by the time of the Americanization of the war in Vietnam in 1965, Zinn's attention had increasingly been diverted to the war in Southeast Asia. After Zinn was fired from Spelman College and took his new position at Boston University in fall of 1964, he eventually became consumed with local antiwar organizing in Boston. When Boston-area college students were being criticized in the media for organizing anti-Vietnam War rallies and demonstrations in 1965, Zinn wrote an article entitled "Don't Call Students Communists" in the *Boston Globe*. Zinn's piece historicized the bubbling dissent on campuses in Boston and around the United States and defended the students' actions against the critics who dismissed antiwar activists as "communists." Comparing the new student radicals to those of the 1930s, Zinn observed: "They have no commitment to any other country, no passion for any existing social system, no adherence to any rigid doctrine." Emphasizing humanity over dogma, Zinn insisted, enabled campus activists to denounce the immorality of all modern wars, be they launched by Moscow, Beijing or Washington. "These students are convinced that the Communists will use any means to gain their ends," he writes. "Yet, when they see American planes bombing Vietnamese villages, and Marines throwing grenades down tunnels in which crouch[ed] helpless women and

⁶ See, for instance, M.A. Jones to Mr. DeLoach, 5 November 1965, in Howard Zinn's Federal Bureau of Investigation File.

children [hide], they are driven to conclude that the United States too will use any means to gain its ends.”⁷

In the summer of 1966 Zinn received an invitation from the Japanese peace group Beheiren, along with Ralph Featherstone of the Student Non-Violent Coordinating Committee (SNCC), to visit the country on a speaking tour. Beheiren (short for Betonamu Ni Heiwa O Shimin Bunka Dantai Rengo or the Federation of Citizens and Cultural Organizations for Peace in Vietnam) was a broad-based Japanese group formed in opposition to the war in Vietnam. One of a growing number of international organizations, Beheiren combined politics of old and new left traditions in its critique of American intervention in Southeast Asia.⁸ Zinn traveled with his wife, Roz, in August 1966 where they met David Dellinger for the first time.⁹ Speaking in Hiroshima on August 6, the twenty-first anniversary of the dropping of the atomic bomb, at the World Conference Against Atomic and Hydrogen Bombs, Zinn argued that as someone who studies American history, “Vietnam represents the lowest point of American morality in its entire history.” After reciting some lessons from history about the illiberalism of U.S. foreign policy and of racism at home in America and

⁷ Howard Zinn, “Don’t Call Students Communists,” *Boston Globe*, 24 October 1965. Because the article was critical of FBI Director J. Edgar Hoover, he “inquired as to what do we [the F.B.I. field office in Boston] have in files on Zinn.” M.A. Jones to Mr. DeLoach, 5 November 1965, in Howard Zinn’s Federal Bureau of Investigation File. The Boston office concludes: “Zinn’s continued demonstration of procommunist and anti-U.S. sympathies appears to stem from his activities at Spelman College, Atlanta, Georgia, which involved such activities as: organizing a seminar in Atlanta, Georgia, on “American Policy Toward Cuba” at which one of the speakers denounced U.S. policy toward Cuba; calling for a demonstration in front of the White House in February, 1962, by students from all over the United States demanding the end of the nuclear testing; attempting to recruit students to go to the 8th World Youth Festival to be held in Finland in the Summer of 1963 and being host at a demonstration held in the student cafeteria at Spelman College in honor of four members of a Soviet delegation then visiting the U.S. (100-360217-32).”

⁸ For more information on Beheiren, see Howard Zinn’s F.B.I. file: Legat, Tokyo (105-4019) to Director, FBI, 26 October 1966, and, SA Darrel B. Currie Investigative Report, 7 March 1967.

⁹ For Zinn’s trip to Japan, see Howard Zinn, *You Can’t Be Neutral on a Moving Train: A Personal History of Our Times* (Boston: Beacon Press, 2002), 108-110; Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), Chapter One, “The View from Japan”; Howard Zinn, “Of Fish and Fishermen,” *Ramparts*, December 1966, 6-9; Andrew Hunt, *Dave Dellinger: The Life and Times of a Nonviolent Revolutionary* (New York: New York University Press, 2006), 153; and Martin Duberman, *Howard Zinn: A Life on the Left* (New York: New Press, 2012), 121-122. Zinn’s interactions with Beheiren in the summer of 1966 saw him invited back in November-December 1967 to help three sailors who went AWOL from the U.S.S. Intrepid. Zinn could not go because of his classes at Boston University, but he recommended fellow colleague Ernest Young. See, *You Can’t Be Neutral on a Moving Train*, 112-114.

the growing resistance to segregation in the south and the war in Vietnam in the north, Zinn argued:

We have learned – and this day of August 6 in Hiroshima burn the lesson deep – that even so-called “just” wars let loose the most savage emotions. So war itself, any kind of war – must be avoided, no matter what reason is given, no matter what excuse is given because war is the indiscriminate, blind use of violence. The world must be changed. It cannot be changed without disorder. It cannot be changed without mass movements. It cannot, in many cases, be changed without revolution. But it must be changed without war.¹⁰

Following his trip to Japan, Zinn continued to speak and organize against U.S. escalation in Vietnam. He had grown increasingly “frustrated by the fact that no major public figure, no leading periodical, no published book, however critical of the war, dared to say what seemed so clear to me – that the United States must simply *get out* of Vietnam as quickly as possible, to save American lives, to save Vietnamese lives.”¹¹

In the fall of 1966, Zinn focused his intellectual energies on preparing what would become one of the most significant books on the Vietnam War published in the 1960s, *Vietnam: The Logic of Withdrawal*. The short book, released in March 1967, arose from Zinn’s writings and antiwar activism during 1965 and 1966, particularly his articles in *The Nation*, *Commonweal*, *The Register-Leader*, and *Ramparts*. Widely circulated in movement circles and beyond, the book went through eight printings and sold more than 50,000 copies. The book influenced the very movement that inspired it. Shaped by vivid memories of his bombing missions over Europe in World War II, Zinn understood the contradictions of wars waged in the name of freedom and democracy. With twenty-years of reflection on his participation in the war, he became increasingly disturbed by the constant refrain that the United States was the leader of the “free world” and the use of a kind of triumphalism derived from the United States’ victory in World War II used to fight in multiple hot wars in the 1950s and 1960s. At the time, while flying missions over Europe, Zinn “believed fervently that Hitler’s force had to be met with force.” However, he now concluded for this

¹⁰ Speech by Howard Zinn, International Session, 21st Atomic Bombing Anniversary, World Conference Against A- & H-Bombs, Hiroshima, August 5-7, 1966, Howard Zinn Papers 542, Box 37, Folder 10 .

¹¹ Howard Zinn, *You Can’t Be Neutral on a Moving Train: A Personal History of Our Times* (Boston: Beacon Press, 2002), 110.

experience “that innocent and well-meaning people ... are capable of the most brutal acts and the most self-righteous excuses, whether they be Germans, Japanese, Russians, or Americans.” Moreover, after enlisting in the air force, he came to understand that “one of the guiding rules for an Air Force in possession of large quantities of bombs is: Get rid of them – anywhere.” Because of this logic, Zinn argued that “the claims of statesmen and military men to be bombing only ‘military targets’ should not be taken seriously.” Therefore, he believed that “war is a monstrously wasteful way of achieving a social objective, always involving indiscriminate mass slaughter unconnected with that objective” and that the war he had experience fighting in offered “stark moral issues” and “presented agonizing moral questions.”¹²

Two major contributions came from *Vietnam: The Logic of Withdrawal*. First, Zinn argued that the United States should withdraw unconditionally from Vietnam and finance the reconstruction of the country. This amounted to a radical departure from the mainstream discourse in the United States on solutions to ending the conflict. The main currents of the debate never had unconditional withdrawal on the agenda, even within the broader antiwar movement. The conventional debate pitted those who advocated winning the war against proponents of negotiating with Hanoi (and in some circles, with the National Liberation Front). Zinn’s book was the first to advance an argument that had been percolating on the fringes of the antiwar movement since 1965: unconditional withdrawal was the only solution to the worsening conflict in Vietnam.¹³ As we will see, the idea began to gain traction in America, thanks largely to Zinn’s book.

Second, Zinn interrogates the official justifications for the war sold to Congress and the American people and he offers a powerful counter-narrative to the Johnson administration’s arguments between 1965 and 1966. He systematically examines and refutes the use of the Munich Analogy, the domino theory, and the use of violence in modern warfare by the United States military. Taken together, these criticisms all led to the book’s

¹² Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 4- 5. For Zinn’s views on WWII as a means to justify American power and benevolence, see pp. 29, 60. Zinn’s views on World War II and his counter-argument that it was “The Best of Wars” can be found in the opening chapter of the same name in *Postwar America: 1945-1971* (Indianapolis: The Bobbs-Merrill Company, Inc., 1973), 3-36.

¹³ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 105-119.

second central argument: that the United States did not intervene in Vietnam to stop the war of aggression being waged by the North Vietnamese in South Vietnam. Zinn believed the official U.S. government rationale purposefully misread and ignored the central facts and recent history of the conflict after World War II. After laying out the key arguments put forth by the White House and State Department between the February 1965 White Paper and Secretary Rusk's testimony at the Senate Foreign Relations Committee on January 28, 1966, Zinn concludes that the

evidence points to a conclusion most Americans find distasteful: that the United States, by 1966, had taken on the French burden in Vietnam and, with a shadow government as a front [the Republic of Vietnam], was putting down a nationalist-Communist revolution with the classic ferocity of a Western imperial power. Almost everybody in the world but Americans could see that, whatever the characteristic of the Vietcong, they were Vietnamese, while the Americans, destroying land and people on a frightening scale, were the only ones who matched the accusation of "outside aggression."¹⁴

Zinn took issue with the evidence ushered by the Johnson administration in 1965 proving that the Southern rebellion was led by the North: the infiltration of men and supplies as described in the White Paper. Zinn presented the evidence rendered by I.F. Stone in his *Weekly* and the Mansfield Report tabled in early January 1966, citing the discrepancy between infiltrators from North Vietnam with the increases in U.S. troops from 1959 to 1964. As Zinn pointed out, by the time of the Mansfield Report, it was estimated there were 14,000 North Vietnamese Army regulars in South Vietnam. Zinn compared this with the more than 170,000 U.S. soldiers and approximately 21,000 South Korean troops in South Vietnam and concluded that by the end of 1966, the United States "had taken over the bulk of military operations" from the ARVN, having 300,000 troops in South Vietnam by the time of publication. He thought the evidence was clear that while the National Liberation Front received more aid from the North Vietnam, the manpower was still primarily "a guerrilla

¹⁴ Zinn counters the evidence and statements presented by Johnson administration officials and pro-war intellectuals with evidence and arguments presented by the French historian Philippe Devillers, the French soldier-scholar Bernard Fall, Jean Lacouture, David Halberstam, I.F. Stone, and the Mansfield Report tabled in Congress in January 1966 to demonstrate that the revolution in South Vietnam, far from being "aggression from the North," was an indigenous Southern rebellion. Howard Zinn, *Vietnam: The Logic of Withdrawal* (Cambridge: South End Press, 2002), 80. See Chapter 7: "A Double Deception: The Problem of Aggression," 67-82.

army of Southerners.” With such inconsistencies, Zinn concludes: “To use the relatively small amount of aid given the Vietcong by North Vietnam, or the weapons now increasingly coming to them from Communist countries, as evidence of ‘outside aggression’ would be to deny the whole history of revolutions, which almost always have received help from the outside.” He pointed specifically to the American Revolution and military aid provided by the French to support his claim. The steadily increasing number of U.S. combat troops, the growing reliance on American bombers and fighter jets to fly missions over North and South Vietnam, and an estimated two billion dollars per month being spent on the war had transformed it, in Zinn’s view, into “an American war.”¹⁵ While this position would later gain greater acceptance, it represented a controversial and groundbreaking argument in 1967 that attempted to widen the boundaries of debate within the United States.

The power of Zinn’s book lay in its ability to move beyond a mere criticism of the war in Vietnam to offer a prescient refutation of the Cold War anti-communist consensus that pervaded American politics since the Truman administration. Earlier, in September 1966, Zinn wrote an essay in the *New York Times* titled “Historian as Citizen” whereby he criticized historians when they make “moral judgments” they do so by individualizing or isolating horrific acts by the Nazis, for instance, so that guilt “sticks to no one else.” For Zinn, such uses of morality by historians actually weaken “moral responsibility in the present.” “It is racism, nationalism, militarism (among other elements) which we find reprehensible in Nazism,” Zinn argued. “To put it that way is alarming, because those elements are discoverable not just in the past, but now, not just in Germany, but in all the great powers, including the United States.”¹⁶ He took this argument further in *Vietnam: The Logic of Withdrawal* by pointing out that all the Great Powers – the USSR, China, France, Britain, and the United States – engage in power politics and the use of *realpolitik* in their foreign affairs. Resorting to the use of international armed conflict and interventionism, the United States – like the world’s communist powers – utilized war to achieve its foreign policy ends. Zinn used twenty-six pieces of evidence from the national papers and first-hand accounts of independent observers to demonstrate that the United States’ was committing

¹⁵ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 78-80.

¹⁶ Howard Zinn, “Historian as Citizen,” *New York Times*, 25 September 1966.

war crimes in Vietnam. For Zinn, this proved that the United States, like the other Great Powers, “will use any means to gain its ends.”¹⁷

Zinn arrived at the troubling conclusion from his work as a historian “that there is no necessary relationship between liberalism in domestic policy and humaneness in foreign policy.”¹⁸ He drew on his personal experiences in Japan in the summer of 1966 and his civil rights activism in the South to counter notions of American exceptionalism and benevolence in its application of foreign policy abroad and liberalism at home. While in Japan, Zinn recognized that the American people were sheltered from the cruel realities of war because of its geographical location. While people in the U.S. “still cling to the romance of war,” Zinn observed, the “Japanese have had a more intimate association with death, both as killers and as victims.” Referring to Japan’s imperial aggressions during the 1930s, their use of violence during the Pacific War in the 1940s as well as the Japanese experience of U.S. fire bombings and the use of the atomic bombs over Hiroshima and Nagasaki at the war’s end, Zinn noted that many of those he spoke to during his visit argued that “you are behaving in Asia as we once did.” He wrote of almost non-stop conversations into the early hours of the morning whereby students and intellectuals were eager to impress upon him that because their country had been down the same road the United States was traveling, there was still time to turn back and abandon its disastrous war in Vietnam. Zinn added that there was almost unanimous opposition to U.S. policy in Southeast Asia everywhere they traveled in Japan. He referred to a poll reported by the *New York Times* on September 28, 1966, that a majority of the Japanese people opposed the war despite the fact that the Sato government was an ardent supporter. Zinn found that the Japanese people’s intimate connection with war and violence “wore off all the sheen” that pervaded American notions of war and conflict. This proved such a striking revelation for Zinn that he included it as his first chapter in the book.¹⁹

Another series of revelations that shaped Zinn’s worldview during this period was his experiences in the American South as a professor at Spelman College and his civil rights

¹⁷ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 51. See Chapter 6: “Violence: The Moral Equation,” 51-66.

¹⁸ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 6.

¹⁹ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Boston: Beacon Press, 1967), 9-10, 14.

activism. He compared the struggle for black freedom in the U.S. to the Johnson administration's arguments for intervening in South Vietnam to preserve the freedom of non-communist Vietnamese and found that the government's statements on Vietnam rung hollow to African Americans. As one of the only white adult advisers to the Student Nonviolent Coordinating Committee, he wrote with some authority when he concluded that U.S. government pronouncements on Vietnam could be "summed up in one word: hypocrisy." Zinn posed a provocative rhetorical question: "If the government is dedicated to the expansion of freedom in far-off parts of the world, then why is it not equally dedicated to freedom for the Negro at home?"²⁰ He pointed to the "pitiful sums of money spent" on fifteen million poor black people in the U.S. to the two billion dollars per month spent on the American war effort in Vietnam. He drew attention to the 300,000-plus American soldiers in Vietnam to protect South Vietnamese peoples from their own people, while the federal government frequently refused "to send even a handful of marshals to protect Negroes from violence."²¹ A simple but important argument to make, Zinn linked inequality at home to inequality being exported by U.S. foreign policy abroad. In other words, Zinn connected domestic policy to foreign policy in his overall argument that the United States should withdraw from Vietnam because the war was illegal, immoral, and unjust because of the resources the war took away from poor blacks at home.

How does one measure, or quantify, the influence of *Vietnam: The Logic of Withdrawal*. The material from which these essays were taken was no doubt the content of many speeches and talks at teach-ins and other public meetings.²² The book itself sold 50,000 copies and went through eight printings. Two Beacon Press staffers traveled around the United States with trunk-loads of books to sell it at antiwar rallies and conferences.²³ One American was so concerned that a pamphlet entitled "Can We Withdraw? The Logic of Withdrawal" was on the windshield wipers of his car that he sent it to J. Edgar Hoover at the

²⁰ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Cambridge: South End Press, 2002), 23.

²¹ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Cambridge: South End Press, 2002), 22-23.

²² See, for instance, Howard Zinn Investigative Report 7 March 1968, in Howard Zinn's Federal Bureau of Investigation (F.B.I.) file.

²³ Howard Zinn, *You Can't Be Neutral on a Moving Train*, 111.

F.B.I. The pamphlet consisted of excerpts of Zinn's book.²⁴ Senator Ernest Gruening of Alaska inserted a portion of the book into the Congressional Record.²⁵ Hence, the ideas Zinn so desperately hoped would reach a wide audience actually enjoyed some success in penetrating different segments of the American population. The final chapter, "A Speech for LBJ," was reprinted, made into pamphlets and was distributed throughout the United States. A disc jockey at KNEW in Oakland, Sean King, requested permission to distribute 100,000 copies of the speech as part of his radio show. "Your speech," King wrote, "is going to [be] read on the air frequently ... with an invitation to listeners to write or call for the reprint and mail it to the White House."²⁶ During the same period, in Santa Barbara, Bill Jacques from Beacon Press wrote to Zinn that 100,000 copies of the speech had been distributed by the Community Council to End the War in Vietnam in just three weeks. Stemming from a November 22 full-page advertisement in the *Santa Barbara News-Press*, readers called the council requesting information relating to withdrawal from Vietnam and got Zinn's piece in the mail.²⁷ Activists and antiwar organizers mimeographed and sent sheets of the "Speech" to the White House in innumerable numbers. In one week in late December 1967, the White House received 139 "A Speech for LBJ" reprints.²⁸ This widespread coverage proved the tip of the iceberg.²⁹

Adding to the book's publicity, multiple advertisements taken out by Beacon Press appeared in the *New York Times*, *The New York Review of Books*, and the *New Republic*, asking readers to "SEND THIS BOOK TO LBJ: It's less expensive than a telegram." The advertisement campaign was a success: between May 29 and September 13, 337 books were

²⁴ [Redacted] to J. Edgar Hoover, 9 September 1967, in Howard Zinn's Federal Bureau of Investigation (F.B.I.) file.

²⁵ Howard Zinn, *You Can't Be Neutral on a Moving Train*, 111.

²⁶ William Jacques (Beacon Press, Promotion Manager) to Howard Zinn, "a lot of free publicity – and perhaps an increased sale," 15 November 1967, Howard Zinn Papers 542, Box 12, Folder 9.

²⁷ Bill Jacques to Howard Zinn, 7 December 1967, Howard Zinn Papers 542, Box 12, Folder 9.

²⁸ Memo To President Lyndon B. Johnson From Whitney Shoemaker, "Weekly Summary Of Presidential Mail For The Week Ending December 28, 1967," 29 December 1967, Folder 20, Box 05, Larry Berman Collection (Presidential Archives Research), The Vietnam Center and Archive, Texas Tech University, <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=0240520016>.

²⁹ For another account of the impact of Zinn's book, see Davis D. Joyce, *Howard Zinn: A Radical American Vision* (Amherst: Prometheus Books, 2003), 97-102.

sent to the White House. Upon receiving the summary of the campaign from Beacon Press, Zinn wrote on the letter: “Yes, let the copies pile up in the White House.”³⁰

In the aftermath of the book’s publication, every member of Congress received their own copy of *Vietnam: The Logic of Withdrawal* due to the generosity of Jeanie Lee and Peter Kneaskern, a businessman and his wife, from North Royalton, Ohio. They had met Zinn Cleveland and found both the book and Zinn compelling. In the accompanying letter to each member of Congress (535 in total), they wrote: “We Challenge You to investigate fully the logic and facts that are the foundation of the dominant attitude that compelled half a million people to spend their time and their own money to gather in New York and San Francisco and demonstrate their opposition to the Foreign Policy War.” They argued “that for every person who participated” in the demonstrations, there were “at least 50 others, like ourselves, who are equally opposed to the War.”³¹ There were numerous other copies of the book sent to Capitol Hill by other individuals who sent the book or the final chapter to their Senators and Representatives.³²

Perhaps the most telling impact of the book and Zinn’s growing popularity could be found in a series of polls conducted in local newspapers in the United States asking if the government should escalate the war, de-escalate, or withdraw completely. First appearing in the *Cleveland Plain Dealer* on May 28, 1967, papers published short arguments made by Representative Mendel Rivers to escalate, Senator William Fulbright to de-escalate, and Zinn to unconditionally withdraw from Vietnam. “Too many have already died,” Zinn argued in his section. “Too many have suffered ... Whatever the consequences, they will not be worse than what is going on today, which is the acre-by-acre destruction of that land and its people

³⁰The advertisement ran once in the *New York Times* on May 29, twice in the *New York Review of Books* on June 15 and August 3, and three times in the *New Republic* on June 10, June 24, and July 15. According to John Huenefeld of Beacon Press, a grand total of \$436.05 in sales resulted from the campaign. The *NYT* ads sold 37 paperbacks, the *New York Review of Books* sold 1 hardcover and 72 paperbacks, and the *New Republic* sold 3 hardcovers and 224 paperbacks. Huenefeld wrote that “[t]he Boston Area Faculty Group on Public Issues contributed \$1000 to underwrite the costs of this campaign – with the understanding that Beacon Press would use all the resulting sales income from that \$1000 campaign to extend the campaign through additional repetition of the ad.” John Huenefeld to Howard Zinn, “‘VIETNAM’ Coupon Ad,” 13 September 1967, Howard Zinn Papers, Box 12, Folder 6,

³¹Jeanie Lee and Peter Kneaskern to Howard Zinn, 19 May 1967, Howard Zinn Papers 542, Box 12, Folder 9

³²Numerous letters in Howard Zinn’s papers demonstrate that individuals took it upon themselves to send the book or parts of the book to their elected representatives. See Howard Zinn Papers 542, Box 12, Folder 9.

under the most concentrated barrage of bombs any country has ever endured.” Zinn used this opportunity to broach many of the popular arguments for the war and the supposed devastation that withdrawal would cause the Vietnamese and American prestige at home and abroad. Focusing on the argument that the U.S. made “a commitment to defend Vietnam against aggression,” he concisely deconstructed the use of the Munich Analogy:

Vietnam is not the victim of an attack from outside. That is why the analogy with Czechoslovakia and the Munich Pact is false: Germany at that time was trying to take over another country; the Viet Cong today are trying to take over their own country. What we have here is a popular revolution that started inside South Vietnam against the dictatorship of Diem. The United States, just as it had helped the French in their war to keep control of Vietnam, supported Diem, and then Ky, in fighting the rebellion. None of these regimes we supported has been popular in Vietnam; that is why the American Army has had to take over the war.³³

The argument was pervasive because *The Cleveland Plain Dealer* reported on June 3 that in the poll that garnered 9,000 responses from its readers, 5,798 gave Zinn’s position “solid backing.” Rep. River’s call for escalation drew 1,716 votes of support and Sen. Fulbright brought in 1,648 votes. While this was, as the paper reported, 1.7 percent of the paper’s subscribers, the poll demonstrated that a space was being created for such a radical proposal and it had the potential to draw public support. This came at a time, as the paper reported, when a recent Louis Harris poll showed 72 percent of Americans were “in basic agreement with President Johnson’s Vietnam policy.”³⁴ A week after the *Plain Dealer’s* poll, local columnist Wes Lawrence wrote in dismay at the lack of attention the Vietnam poll received among the paper’s readership. However, he concluded: “I think if I were a member of Congress or the administration I would find more than a little significance in this result of the vote ... minority opinions when they are those of people who think for themselves have a way of becoming majority opinions in the long run.”³⁵

³³ “Zinn: Withdraw,” *The Cleveland Plain Dealer*, 28 May 1967, 1

³⁴ The paper reported that after the votes were counted, “a random telephone survey of 182 readers suggested that the light poll may have been due to disinterest, confusion, lack of understanding or a combination of all three.” “Readers Favor U.S. Pullout in Viet,” *The Cleveland Plain Dealer*, 3 June 1967, 10. The results were also reported in the *New York Times*, see: “Withdrawal Backed in a Vietnam Survey,” *New York Times*, 4 June 1967, 8.

³⁵ Lawrence writes: “A reader survey to discover why so few bothered to vote showed that of the person who read *The Plain Dealer* a week ago Sunday only a little more than 25% read the proposals for ending the

The same articles were used to poll readers of the *The Croton-Cortlandt News*, the Charleston, West Virginia, *Gazette-Mail*, and the *Greenfield Recorder*. The *Croton-Cortlandt News* poll revealed that 112 of the 174 polled voted for withdrawal (six percent of the newspapers total readership responded to the poll).³⁶ In the Charleston *Gazette-Mail*, eighty percent of the readers polled supported withdrawal (901 votes out of 1,108 ballots cast).³⁷ To these votes can also be added the Dearborn, Michigan, referendum in November 1966 that asked voters: “Are you in favor of an immediate cease-fire and withdrawal of U.S. troops from Viet Nam so the Vietnamese people can settle their own problems?” Of those who voted, 41 percent (34,791) voted in favor of withdrawal. Zinn used this vote in his book to demonstrate that the idea of withdrawal could become a popular demand. He quoted the mayor of Dearborn, an ex-Marine, who launched the ballot initiative: “I think the war is illegal. If I were a young fellow, I certainly wouldn’t go to Viet Nam. I’d rather spend three years on a rock pile [in prison] than to fight some poor little barefoot guys who have never done anything to us.”³⁸

The concept of withdrawing from Vietnam had achieved traction among the mainstream. In an October 23, 1967 editorial in *The Boston Globe*, Walter Lippmann wrote, “An American decision to pull back from the mainland would transform our relations with the rest of the world.” Whether the famed columnist was responding to the recent March on the Pentagon, or continued escalation of the war, or arguments such as Howard Zinn’s, he felt that withdrawal would remove “the bone of contention with world opinion” caused by the American war in Vietnam. Although his proposal called for negotiations before withdrawal, Lippmann believed that if the Johnson administration would “pull back” from Vietnam, “we may confidently expect to find willing and friendly supporters and helpers in

Vietnam war ... even though readers’ attention had been drawn to the forthcoming articles on page one on each of three preceding days. And of those who did read the articles, only 20% took the trouble to send in the ballot provided by the paper.” Wes Lawrence, “Indifference to Viet Slaughter,” *The Cleveland Plain Dealer*, 6 June 1967.

³⁶ “Readers Favor U.S. Withdrawal,” *The Croton-Cortlandt News*, 27 July 1967.

³⁷ “Readers Support Viet Withdrawal,” *Gazette-Mail* [Charleston, W.VA], 13 August 1967. The paper reported this was over one percent of the total subscribers.

³⁸ Howard Zinn, *Vietnam: The Logic of Withdrawal* (Cambridge: South End Press, 2002), 116.

the difficult and delicate negotiations which will be required to work out the political and military terms and conditions of the great strategic operation.”³⁹

Perhaps most importantly, Zinn’s book attracted the attention of some active-duty soldiers and Vietnam veterans who took the time to write him. Michael L. Magie, who served in Vietnam from July 1963 to July 1964, was so inspired by Zinn’s book that he wrote a letter to President Johnson, Premier Kosygin of the Soviet Union, Chairman Mao Tse-tung of China, President de Gaulle of France, and Prime Minister Wilson of the U.K. “I frankly hope that this book and books like it in your various languages will help to subvert you and your governments whenever you are or threaten to become immoral, monolithic, and unrepresentative,” he wrote. “I write in the interests of your sanity and of mine.” Magie accused each leader of betraying their statements professing values such as “the preservation of human life, self-determination, economic security, the end of race and class oppression, and freedom of thought, speech and press in all countries of the world.”⁴⁰

On October 3, 1967, Captain Dale E. Noyd wrote to Zinn from Cannon Air Force Base in New Mexico where he was re-stationed after numerous attempts applying for conscientious objector status. “You have written a beautiful book on the war in Vietnam; perhaps I found it so moving because I share your perspective. Thank you for writing it. I only wish we could persuade a million of our countrymen to read it,” he wrote to Zinn.⁴¹ Zinn responded asking for information on Noyd’s case. At this particular moment, the eleven-year Air Force pilot was in a state of limbo because his opposition to the war drove him to refuse to teach pilots. After being removed from his position at the Air Force Academy, he filed suit in civilian courts seeking status as a conscientious objector with the help of the American Civil Liberties Union. He received orders to participate in training flights in F-100s on August 28, 1967, and complied. This is the period when he would have read Zinn’s book. In a letter Noyd wrote to his ACLU lawyer, John deJ. Pemberton, Jr., he

³⁹ Lippmann concluded that: “Such a change of policy would not reduce the prestige and influence of the United States. If the change is carried out openly, boldly and frankly and in the style of a great power announcing and explaining a great decision which will bring peace to the world, the prestige and the good name of this country will rise.” Walter Lippmann, “Admit Viet error and get out,” *The Boston Globe*, 23 October 1967.

⁴⁰ Michael L. Magie to Howard Zinn, 4 September 1967, Howard Zinn Papers 542, Box 12, Folder 9

⁴¹ Dale E. Noyd to Howard Zinn, 3 October 1967, Tamiment Library, NYU, Howard Zinn Papers, Collection 542, Box 33, Folder 5.

suggested Zinn be hit “up for a membership” in the ACLU “considering his academic interest in civil liberties.” He went on to say,

Here in the world of violence, I’ve spent the week strafing and bombing. (Psychologically, I’m no longer a fighter pilot – but I can still do it.) I have about ten more missions to go before I complete the training, and it’s still difficult to predict the date. The schedule is unpredictable – I fly twice a day for several days and then stop flying for days. I could finish in a week or it could drag on as long as they wish. Sharon & I are almost looking forward to an end of the limbo.⁴²

Inspired by Zinn to chart his own destiny, Noyd refused direct orders to assume his role as instructor after the completion of the training on December 5. Three months later, he was sentenced to one year at hard labor and was dismissed from the service.⁴³ While Noyd had no doubt made up his mind about the war in Vietnam, books such as Howard Zinn’s *Vietnam: The Logic of Withdrawal* strengthened his analysis and convictions he was doing the right thing. Noyd’s life-changing split with the Air Force over the war in Vietnam, featured in Alice Lynd’s riveting collection *We Won’t Go: Personal Accounts of War Objectors*, forms a link to the next book we will examine.

Alice Lynd and We Won’t Go

In the spring and summer of 1965, the widening American war in Vietnam left Alice Lynd deeply troubled. One spring day, a friend of the Lynds’ visited them at their New Haven home to discuss a recent trip to Jakarta she had taken to meet with representatives of the Democratic Republic of Vietnam and the National Liberation Front. Their friend had been part of a recent Women’s Strike for Peace (WSP) delegation organized to meet with the Vietnamese about the war and formulate strategies to end it. This trip, the first of its kind linking American peace activists with Vietnamese communists, left a powerful impression on participants. The guest told the Lynds that she found it remarkable that “Vietnamese women

⁴² Dale E. Noyd to John deJ. Pemberton, Jr., 28 October 1967, Tamiment Library, NYU, Howard Zinn Papers, Collection 542, Box 33, Folder 5.

⁴³ For an excellent account of Dale Noyd’s journey, see Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 257-266.

would go out at night and talk with South Vietnamese soldiers [ARVN], trying to persuade them to side with the villagers rather than fight.” As Lynd later recounted, this story had a profound impact on her. While Staughton was already involved in the nascent antiwar movement, and the Lynds had publicly refused to pay the portion of their taxes apportioned to the Defense Department, Alice asked herself what she could do to follow the courageous examples of these Vietnamese women. “I was not going to sit in at a draft board and get arrested. What could I do, consistent with being a mother of two children, and a teacher of young children?”⁴⁴

The answer would come later that summer.

The Lynds attended the Assembly of Unrepresented People in Washington, D.C., between August 6 and 9, 1965. The announcement for the Assembly made explicit the organizers’ belief that the war in Vietnam was unconstitutional and therefore illegal:

In Mississippi and Washington the few make the decisions for the many. Mississippi Negroes are denied the vote; the voice of thirty percent of Americans now opposed to the undeclared war in Vietnam is not heeded and all Americans are denied access to facts concerning the truth military and political situation. We must make it plain to the Administration that we will not be accomplices to a war we did not declare.⁴⁵

Strategically organized during the twentieth anniversary of the atomic bombings of Hiroshima and Nagasaki, the event combined workshops, demonstrations, and civil disobedience in an attempt to mobilize an antiwar coalition and declare peace with the people of Vietnam. On the final day, the organizers planned to march to Capitol Hill and deliver the

⁴⁴ Alice Lynd and Staughton Lynd, *Stepping Stones: A Memoir of a Life Together* (Lanham: Lexington Books, 2009), 84-85. In the late-winter and early-spring of 1965, Staughton and his wife Alice began to publicly refuse to pay their taxes because of American policy in Vietnam. A year later, 350 citizens together refused to pay their taxes because of the Vietnam War. Those who refused to pay their taxes were Lynd, folk singer Joan Baez, and pacifist A.J. Muste. The campaign was launched by the Committee for Non-Violent Action (CNVA) and an advertisement in the *Washington Post*, entitled “The Time Has Come,” stated that those who signed “recognized[d] the gravity of this step. However, we prefer to risk violating the Internal Revenue Code, rather than to participate, by voluntarily paying our taxes, in the serious crimes against humanity being committed by our Government.” The advertisement also connected their taxes to “the spectacle of the United States invasion of the Dominican Republic.” See: “350 Bulk at Taxes in a War Protest,” *New York Times*, 15 April 1966, 12. For an excellent analysis of the WSP delegation to Jakarta and meeting with the DRV and NLF, see Amy Swerdlow, *Women Strike for Peace: Traditional Motherhood and Radical Politics in the 1960s* (Chicago: University of Chicago Press, 1993), 214-218.

⁴⁵ “Call For An Assembly of Unrepresented People in Washington, D.C., August 6-9,” *Liberation: An Independent Monthly* Vol. X, No.5, (August 1965), 3.

“Declaration of Conscience,” started by A.J. Muste in late 1964 to call for an end to the war in Vietnam. So far, it had garnered 6,000 signatures.⁴⁶

One workshop that Alice Lynd attended was facilitated by the Central Committee of Conscientious Objectors (CCCO). Formed in 1948 after the passage of the Selective Service Act, the CCCO also produced the widely distributed and oft-reprinted *Handbook for Conscientious Objectors*. The workshop facilitators argued they needed draft counselors and she volunteered. Returning to New Haven, she put a small draft counselor sign in a window at the Lynds’ home, which was just five blocks from the Yale campus. By this point, Staughton had established a name for himself as a prominent critic of the war in Vietnam, with students frequently coming and going from their house. In the fall and winter of 1966, both Staughton and Alice hosted small discussion groups about the war and the draft at their home. After one discussion with a group of Yale divinity students, who were exempt from the draft, Lynd felt particularly moved by a young woman who spoke of a friend that went to jail instead of registering for the Selective Service System. The woman felt that such a tactic was a waste of energy because her friend was now idle behind bars instead of participating in the movement. After the discussion, Alice suggested to Staughton that his next book should be about war resisters, their motivations, and how they came to the decisions they made about the war and the draft. Staughton turned the proposal around and suggested that Alice should be the one to undertake such a project. “I’ll help you,” Staughton said to Alice.⁴⁷

Setting out in earnest in October 1966, Alice Lynd began compiling material that would compose the edited collection *We Won’t Go: Personal Accounts of War Objectors* released by Beacon Press in September 1968. Alice attended the major anti-draft conferences such as the Easter Conference on Non-Cooperation with Conscription in New York from October 28-30, and the We Won’t Go Conference in Chicago in December. She contacted lawyers involved with draft and military resister cases, attorneys such as Stanley Faulkner who represented the Fort Hood Three and Robert Luftig. She sent letters to resisters she

⁴⁶ For an excellent account of the Assembly, see Carl Mirra, *The Admirable Radical: Staughton Lynd and Cold War Dissent, 1945-1970* (Kent: The Kent State University Press, 2010), 93-97.

⁴⁷ Alice Lynd and Staughton Lynd, *Stepping Stones: A Memoir of a Life Together* (Lanham: Lexington Books, 2009), 85, and, Alice Lynd, “Accompanying War Objectors,” in Staughton Lynd, *Accompanying: Pathways to Social Change* (Oakland: PM Press, 2012), 72.

personally knew asking them to contribute to the book and placed advertisements in the Students for a Democratic Society publication *New Left Notes* and in *WIN* magazine asking for submissions. She collected flyers, legal briefs, petitions, antiwar newspaper advertisements, “Dear Draft Board” letters that non-cooperators sent to their local boards, public statements, diary entries and other documents. “I looked for a range of different actions and reasons for refusing military service,” she writes. “Some men refused to register. Some sought to be recognized as conscientious objectors ... Some men objected to participation in the Vietnam War, or wars that violated international law. Some men went into the military but refused a particular assignment. Some went to prison.”⁴⁸ As she compiled sources for her book, Lynd found a wealth of material on resisting the war, yet it had not been assembled in one place for easy access by the people who needed it the most: draft-age men.

Lynd’s experience as a draft counselor and her participation in antiwar conferences gave her a unique perspective to analyze the burgeoning anti-draft movement and her correspondence with lawyers such as Stanley Faulkner and the Fort Hood Three Defense Committee, of which Staughton was the co-chairman, gave her insights into the world of military resisters. One important project the Lynds’ undertook was hosting a series of seminars at their home in December through the winter focused on the draft and conscientious objection. Inspired by what they had already been doing with students at their home, the seminars were a way that the Lynds could offer their knowledge about the war, pacifism, conscientious objection and draft regulations for people who needed to clarify their own ideas and positions. Staughton announced the series at the November 22 “We Won’t Go” meeting at Yale’s Dwight Hall where twenty-three students launched the anti-draft pledge campaign previously mentioned in chapter two.⁴⁹

⁴⁸ Alice Lynd and Staughton Lynd, *Stepping Stones: A Memoir of a Life Together* (Lanham: Lexington Books, 2009), 85-86, and, Alice Lynd, “Accompanying War Objectors,” in Staughton Lynd, *Accompanying: Pathways to Social Change* (Oakland: PM Press, 2012), 72.

⁴⁹After much publicity in New Haven, the seminars were criticized as offering a “cram course for conscientious objectors” or was described as “how to avoid the draft” classes. Lynd wrote in *The Yale Daily News* that while he personally supported a “conscientious refusal of induction,” he and his wife by no means offered a blanket endorsement to young men to refuse induction. Instead, the Lynds believed “that whatever decision a person

Alice Lynd's participation as a counselor and chronicler of the anti-draft movement is demonstrative of the tensions that existed for, and between, women in the movement. Much has been written on women's frustrations in the new left, the antiwar movement, and the anti-draft movement in particular, and how this experience led women to demand respect from the men they were struggling with and also for greater leadership roles in anti-draft and other movement organizations. Lynd was not a second wave feminist and found the nascent women's liberation movement to be troubling in certain respects. Searching to create a "beloved community," she argued that since the draft affected both men and women, "wives and girl friends" needed to "be involved in their partner's searchings and decisions about the draft." She believed that "if a life is to be built together the basis for decisions needs to be shared and differences recognized and understood."⁵⁰ However, for some younger women increasingly alienated within a movement of which they were an integral part, forced to do the "shit work" in anti-draft organizations or who were intimately involved with men but left out of key organizational decision-making processes, such ideas seemed antiquated as they sought out a greater stake in the movement. For instance, at the Chicago "We Won't Go" conference in December 1966, Lynd attended the only workshop on women in the anti-draft movement and was, according to Sara Evans, "thoroughly disgusted" by the increasing call for independence for women in the movement. Lynd thought that women should support their partners in their struggle against the draft. For some, the tensions were irreconcilable by

comes to about the war he makes that decision after careful consideration of the alternatives. He should not make the assumption he has no choice." This was very much in line with Alice's theory of draft counseling.

The first seminar took place on November 30 and included thirty students as well as two wives. The seminar lasted for two hours and was described by one of the participants in the *New Haven Journal Courier* as "low-key and reserved." "The students approached the war and pacifism philosophically and most had not made up their mind as to how they would react to induction," the paper noted. The *Journal-Courier* reported that, according to another attendee, there was an "unusual expression of patriotism shown" in the form of what the war was doing to the United States at home and abroad. The group believed, according to students afterward, that antiwar protests on campus, such as the weekly silent vigils at New Haven Green, "were not producing response or concern in the New Haven community." For the criticisms of the seminars, see "Lynd Clarifies," *Yale Daily News*, 28 November 1966, 2. For Alice Lynd's approach to draft counseling, see Alice Lynd, "Accompanying War Objectors," in Staughton Lynd, *Accompanying: Pathways to Social Change* (Oakland: PM Press, 2012), pp. 71-74. For press reports of the first seminar, see "Lynd Holds 1st 'Panel' on Draft," *New Haven Journal-Courier*, 1 December 1966, 1.

⁵⁰ Alice Lynd, *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), xiii.

1967-1968 and the women's liberation movement exploded onto the scene in New York and grew throughout the United States by the end of the decade.⁵¹

It was no coincidence Alice decided to title her collection *We Won't Go*. The book was a product of Alice's desire to engage in deeper opposition to the war in Vietnam. However, she held no pretensions about such work and approached it the same way she approached draft counseling. She deplored the practice of movement organizers who pushed young men facing the draft to refuse induction because they themselves did not have to live with the consequences of possibly going to jail or ostracism from one's family or community. "This is not a book of answers but of questions and some examples of personal attempts to deal with them," she explained while brainstorming ideas. She wanted the book to be an "encouragement" to young men, and an act of "solidarity."⁵² She believed the book was for draft-age men facing military service, for draft counselors, ministers, school and vocational advisers, and radical community organizers. Most importantly, she prepared the book for "concerned relatives and friends" believing that "communication [was] the essential ingredient" for men of draft-age with their families. Alice thought the book was perfect for these men to give to their parents to prove that they were not alone, crazy, or duped by communist propaganda.⁵³ She believed the "common themes" of the book were: "World brotherhood," "Brutalization," "Manhood," "Personal responsibility rather than [being a] pawn," and "Depersonalization."⁵⁴ Such subjects speak of the loneliness of the early resisters and the pressures brought to bear on the decision-making of such young people. The subjects

⁵¹ Alice Lynd quoted in Sara Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* (New York: Vintage Books, 1980), 184. For an excellent discussion of women in the antiwar movement and women's relationships to one another, see Evans, *Personal Politics*, 179-185; Amy Swerdlow, *Women Strike for Peace: Traditional Motherhood and Radical Politics in the 1960s* (Chicago: University of Chicago Press, 1993); Amy Swerdlow, "'Not My Son, Not Your Son, Not Their Sons': Mothers Against the Vietnam Draft," in Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992); Alice Echols, "'Women Power' and Women's Liberation: Exploring the Relationship Between the Antiwar Movement and the Women's Liberation Movement," in Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992); and Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 180-191.

⁵² "Outline for Book," 9 November 1966, and "Purpose Choice," no date, Alice Niles Lynd and Staughton Lynd Papers DG 099, SCPC, Box 10.

⁵³ "Who The book is for," no date, Alice Niles Lynd and Staughton Lynd Papers DG 099, SCPC, Box 10.

⁵⁴ "Common Themes," Alice Niles Lynd and Staughton Lynd Papers DG 099, SCPC, Box 10.

speak to the fact that while the Selective Service System and the military focused on one's manhood and duty to the nation-state, the book focused on the antiwar movements' embrace of the Nuremberg Principles and its centering of personal responsibility during wartime and the breakdown of nationalism and borders in the fight for a common humanity.⁵⁵ In the *New Left Notes* advertisement seeking submissions, Lynd wrote:

The desire to write this book grows out of the sense that those who are now grappling alone or in small groups should know of the existence and experiences of men who have already made this confrontation, with the hope that such sharing may provide help to those who are now sifting out what to do and understanding support for those who may be in need of it.⁵⁶

The editors at Beacon Press in Boston saw this advertisement and contacted Alice to see if she had a publisher. She did not, and they eagerly agreed to publish the book.⁵⁷

Alice assembled, edited and published *We Won't Go* while pregnant with her third child, and she gave birth to Martha during the process. Alice "worked under pressure to get the book finished" so that it could be of use to men of draft-age.⁵⁸ The book offered readers a unique collection of personal stories and accounts based on people's lived experiences in opposing the draft or refusing orders in the military. In the anti-draft movement, organizers began to understand that the telling of personal stories in public meetings or in one-on-one conversations helped mobilize support more effectively than impersonalized, fact-based

⁵⁵ In page after page of Alice's handwritten notes preparing for the book, she writes of a "blessed community," a "human society" of "world citizen[s] rather than nation[s]." She writes of personal responsibility imbued in the Nuremberg Principles. On one particular page, written on 1 November 1966, Alice writes:

I do not feel I can say, if your conscience tells you to kill go ahead and kill. I can understand why a man would feel he had to act in defense of people under attack or oppression. I don't feel comfortable about saying to a person, do whatever your conscience tells you, because I feel society has to require some limits.

But within all societies killing members of that society is a crime. This is a law writ on the hearts of men, understood throughout humanity, perhaps a part of collective rather than individual conscience. The time has come when we must recognize all men as part of human society and act towards them as members of our society, not as outsiders to whom we have no social responsibilities.

"Untitled," 1 November 1966, Alice Niles Lynd and Staughton Lynd Papers DG 099, SCPC, Box 10. Alice's handwritten notes found within Box 10 is full of such statements as quoted above.

⁵⁶ "A Book on DRAFT RESISTANCE," *New Left Notes*, 3 February 1967, 2.

⁵⁷ Alice Lynd and Staughton Lynd, *Stepping Stones: A Memoir of a Life Together* (Lanham: Lexington Books, 2009), 86.

⁵⁸ Alice Lynd and Staughton Lynd, *Stepping Stones: A Memoir of a Life Together* (Lanham: Lexington Books, 2009), 86.

accounts. Individual stories connected better with people who faced similar situations. The book also acted as a practical guide and resource for the movement.⁵⁹ In a detailed appendix, Lynd included documents of immediate importance for committed antiwar activists as well as those who feared being drafted into the military. She selected “Documents Related to War Crimes” such as the Kellogg-Briand Pact of 1928, the Charter of the United Nations, Nuremberg Principles of 1950, selections from the four Geneva Conventions of 1949, the Geneva Accords of 1954, and the Army Field Manual FM 27-10 of July 1956. Moreover, she appended the full application of Conscientious Objection and the full *Seeger* Supreme Court decision of March 8, 1965, which effectively removed the belief in a “Supreme Being” as part of official definition of conscientious objection and broadened “the application of ‘religious training and belief’” to include ethical considerations. The appendices final section listed important groups such as the American Civil Liberties Association; religious and pacifist organizations like the American Friends Service Committee and the War Resisters League; organizations to contact to immigrate to Canada, such as the Toronto Anti-Draft Programme; and a list of radical antiwar organizations such as SDS and Resist.⁶⁰

The personal accounts, the heart of the book, provided a “human face” vital to beaming the messages, tactics and strategies of the antiwar movement to a broader audience. The book presented more than twenty-five personal narratives of resisters from a wide variety of political and non-political persuasions. The book had a universal appeal: Pacifists and non-pacifists alike, draftees and enlistees, and military personnel could all appreciate the stories in the book. It also included various “We Won’t Go” statements from students in 1966 and 1967 as well as statements from three wives and partners of war objectors. The title itself was inclusive of the various types of resisters, using the term “war objector” – instead of “war resister,” or “draft resister,” or “military resister”, or “conscientious objector” – encompassed all of the types of resisters that she took great pains to include. She included

⁵⁹ At the time, there was a growing availability of information on the Selective Service System and applying for conscientious objection. The CCCO released its Handbook, the Mennonite Central Committee had its own publication, Michael Hardwood had published the *Students’ Guide to Military Service*, the National Service Board for Religious Objectors (NSBRO) had a handbook on conscientious objection, and the National Lawyers Guild produced many pamphlets such as “Know Your Rights Under Selective Service.” However, these were largely how-to-guides that lacked the personal touch that Lynd offered readers in her book.

⁶⁰ Alice Lynd, ed., *We Won’t Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), 269-331.

pacifist non-cooperators such as Gene Keyes and Tom Cornell; non-pacifist non-cooperators such as David Mitchell and Muhammad Ali; military resisters such as the Fort Hood Three, Robert Luftig and Gene Fast (who went AWOL from the army); military selective conscientious objectors such as Dale Noyd.

After the initial idea for the book in October 1966 and its release almost two years later, the draft resistance movement “mushroomed,” Lynd wrote in the introduction. “Draft information and counseling are much more available. More and more young people are responding to the tension between what is and what could be by saying to themselves, *you* are the agent for change.”⁶¹ Lynd used her royalties to send the book to every major anti-draft group, antiwar organization and civil liberties office in the country.⁶²

While sales figures for *We Won't Go* are unavailable, books such as this, distributed widely by Lynd to every major antiwar organization in the United States and in Canada, would have been shared within movement circles and essential reading for any serious draft counselor and antiwar activist. Moreover, the American Library Association (ALA) voted *We Won't Go* one of the “Best Books for Young Adults” in 1968. “Told with utter sincerity, these are the personal accounts of Vietnam protesters,” the ALA wrote in its blurb announcing the book had been selected one of the best for 1968.⁶³

More importantly, *We Won't Go* must be viewed in hindsight as the product of the movement and the process of assembling the collection should be seen as a vital and highly effective form of antiwar organizing. The project, and its participants, enjoyed an enormous boost of support and legitimization from Lynd and her efforts to take each case seriously. She was a committed and well respected draft counselor who helped numerous draftees in New Haven and Chicago clarify their ideas about the draft. The book offered those fearing

⁶¹ Alice Lynd, ed., *We Won't Go: Personal Accounts of War Objectors* (Boston: Beacon Press, 1968), xii.

⁶² Groups such as: the ACLU, AFSC, Catholic Worker, CCCO, Emergency Civil Liberties Committee, FOR, the Fort Hood Three Defense Committee, the Guardian newspaper, the Institute for the Study of Nonviolence, NSBRO, SDS, the Toronto Anti-Draft Programme, the Committee to Aid American War Objectors in Vancouver, the Montreal Council to Aid War Resisters, the WILPF, WSP, Resist, the Movement (San Francisco), WRL, *The Bond* GI underground newspaper, War Resisters International (U.K.), and a plethora of new anti-draft resistance groups that sprung up in 1967 and 1968 in Chicago, Wisconsin, New York, San Francisco, Boston, and elsewhere Alice Lynd to Beacon Press, “Organizations” and “Additional draft resistance groups,” undated, Alice Niles Lynd and Staughton Lynd Papers DG 099, SCPC, Box 10.

⁶³ “Best Books for Young Adults, 1968,” American Library Association Pamphlet, in Alice Niles Lynd and Staughton Lynd Papers DG 099, SCPC, Box 10.

induction and those inducted across the country an invaluable resource that could potentially reach them anywhere in the country if they could get access to the book. By 1968-1969, Alice turned to writing manuals for other draft counselors, a process that involved lengthy discussions about the most effective practices for counseling. Now recognized as one of America's preeminent counselors, she offered a unique, egalitarian counseling-style whereby she met those seeking her assistance as equals. She emphasized the dual roles of "two experts": the counselor as expert in the Selective Service laws and conscientious objector regulations, and the counselee as an expert in their life circumstances. In Chicago, she worked for both the Midwest Committee for Draft Counselors, a local affiliate of the Central Committee for Conscientious Objectors (CCCO), as well as the American Friends Service Committee (AFSC). Every Wednesday, the Lynds continued offering advice and spurring conversations at their home where they offered an "open house."⁶⁴

While working on *We Won't Go*, Alice developed personal relationships with the resisters either through correspondence, direct meetings, or visiting some in jail. In the case of David Mitchell, she developed a relationship through correspondence with Ellen Schneider, David's wife, which proved especially helpful after Mitchell had been sent to jail. Alice's warmth and compassion furnished an example of personal behavior worthy of emulation.

Part One Conclusion

The books covered in detail so far in this chapter are but a small sampling of the numerous movement books published during the Johnson administration. Howard Zinn's *Vietnam: The Logic of Withdrawal* and Alice Lynd's *We Won't Go* are logical choices to survey in more depth because they demonstrate how movement books were intertwined with movement organizing, not only in the gathering of information, but in its dissemination as well. While perhaps not commercially successful as books by war correspondents, these books played a role in better educating the movement about the war and about itself. This was a form of

⁶⁴ Alice Lynd, "Accompanying War Objectors," in Staughton Lynd, *Accompanying: Pathways to Social Change* (Oakland: PM Press, 2012), 72-74.

empowerment for a movement constantly under attack by politicians, the media, intellectuals, and the national security state. These books led to a sense of urgency and seriousness in the movement and ensured that it would live on and inspire others well after the 1960s. For instance, Anthony Arnove published *Iraq: The Logic of Withdrawal* in the spring of 2006 inspired by Zinn's book (Howard would even write the Foreword). Alice Lynd continued counseling after the war in Vietnam; this time as a paralegal, and eventually a labor lawyer, in Youngstown, Ohio. With Staughton, they offered their skills in an area of the country hard-hit by de-industrialization where the steel mills and unionized workers were under the assault in the late-1970s and early-1980s. The Lynds went on to counsel prisoners on death row and they viewed this as a form of accompanying them in their struggle. Once again, she brought her egalitarian counseling methods, developed in the turbulent years that she compiled and edited *We Won't Go*, to bear with those whose rights she so tirelessly championed.⁶⁵

Part Two: The War Is a Crime

The second half of this chapter will examine the major works published during the Johnson administration between 1966 and 1968 seeking to expose American criminality in Vietnam and, thus, better educate the movement and the general population about the laws of war and international law. Each of the works focused on grave breaches of the laws of war and international law by the U.S. government and the United States armed forces. Some examples included day-to-day war crimes such as the mistreatment, torture or summarily executing POWs, the bombardment by air, sea, and land of undefended villages, the entire 'pacification' program known as 'Strategic Hamlets' or "New Look" villages, the covert wars as they were exposed in Laos as early as 1964 and Cambodia as early as 1966 and the whole array of other crimes which made up the American war in Vietnam.⁶⁶ These books

⁶⁵ See Alice Lynd and Staughton Lynd, *Stepping Stones: A Memoir of a Life Together*(Lanham: Lexington Books, 2009)

⁶⁶ This is by no means an accepted viewpoint and remains controversial to this day. The first major historical work which has tried to deal objectively with the question of American war crimes in Vietnam is Nick Turse, *Killing Anything That Moves*. See also Deborah Nelson *The War Behind Me: Vietnam Veterans Confront the*

staked out controversial positions during the Cold War as U.S. war crimes were presented as mere isolated incidents in the national media. Moreover, as we have already seen, events such as the Russell Tribunal was easily shrugged-off as “anti-American propaganda” and the extensive reporting by Harrison Salisbury from North Vietnam exposing civilians being killed by American bombs were ridiculed in the American press and by Congressmen as “communist propaganda.”

The tendency in both the historical literature and in popular perceptions about the war has been to focus on the My Lai massacre as one of the sole manifestations of American war crimes in Vietnam.⁶⁷ As part two of this chapter will demonstrate, even before the exposure of the My Lai massacre in November 1969 there was enough information in print to demonstrate that the massacre was *not* an aberration – that war crimes had been committed almost on a daily basis in South Vietnam. The presidency of Richard Nixon and the disclosures of the My Lai massacre ushered in a new era of the war and one that can only be understood within the context provided within this thesis. Therefore, this thesis discusses neither the massacre, nor the major events during Nixon’s tenure in office.

Despite the strict control of information by the U.S. government during the Vietnam War, these movement publications countered the official narrative of the war through the testimony of Vietnamese peasants, fact-finding missions, legal analyses, conferences, reports, and other publications. A variety of intellectuals, lawyers, journalists, physicians, scientists and Vietnam veterans and ordinary Americans assumed leading roles in trying to expose what they saw as sanctioned illegal behavior by the United States government and the U.S.

Truth about U.S. War Crimes (New York: Basic Books, 2008) and the Pulitzer Prize winning Tiger Force exposés in the *Toledo Blade* by Michael D. Sallah, Mitch Weiss and Joe Mahr in 2003. This was turned into a book by Michael Sallah and Mitch Weiss, *Tiger Force: A True Story of Men and War* (New York: Little, Brown, 2006). Contemporaries wrote a plethora of crucial books after the My Lai massacre that are out of the scope of this thesis: Noam Chomsky was a prolific writer on the war, writing scathing indictments of U.S. war crimes in Vietnam in *At War With Asia* (New York: Pantheon Books, 1970) and *For Reasons of State* (New York: Pantheon Books, 1973). Edward S. Herman wrote a thin, but gripping account *Atrocities in Vietnam: Myths and Realities* (Philadelphia: Pilgrim Press, 1970). See also publication of the proceedings of the two major Vietnam Veterans war crimes commissions in 1970 and 1971. The Citizens’ Commission of Inquiry into U.S. War Crimes in Vietnam (CCI) transcripts of the National Veterans’ Inquiry in December 1970 is available in James Simon Kunen, *Standard Operating Procedure: Notes of a Draft-age American* (New York: Avon, 1971) and the Vietnam Veterans Against the War (VVAW) early-1971 Winter Soldier Investigation in *The Winter Soldier Investigation: An Inquiry into American War Crimes* (Boston: Beacon Press, 1972).

⁶⁷ See Nick Turse’s excellent rebuttal of this argument in *Kill Anything that Moves*.

forces in the post-Nuremberg era. The movement publications had a powerful effect on facilitating the flow of information about atrocities in Southeast Asia and demonstrated the growing international consciousness of the need to prosecute the war crimes, crimes against humanity and crimes against peace not just of dictators, but of leaders, government officials and the top ranking military officials in liberal democracies. Consequently, what came to be an unofficial war crimes movement from below placed extraordinary political pressure on the United States government as the Johnson administration went to great lengths to contain the threat these revelations posed on U.S. foreign policy. Tribunals, reports, and investigative teams discredited the Johnson administrations insistence that American fighter planes were not killing civilians, but rather merely bombing “concrete and steel” or that the military was restrained in the tactics it was employing. In so doing, books played an unprecedented role in facilitating the flow of information from Southeast Asia directly to the American public.

“The Whole Thing Was a Lie!”: Donald Duncan and the Antiwar Veteran

Donald Duncan, the highly decorated Special Forces Master Sergeant, wrote the first exposé of any Vietnam veteran in *Ramparts* magazine in February 1966. The piece was expanded into a book titled *The New Legions* released in 1967 and he wrote many articles on the war as the newly appointed military affairs editor of *Ramparts*.⁶⁸ The exposé deserves more attention because of its impact.

⁶⁸ In the same issue that Duncan’s exposé was featured, he critically reviewed Robin Moore’s 1965 *The Green Berets*. Duncan did not pull any punches, calling Moore “a willing victim of Special Forces propaganda” and that he had “perpetuated a Special Forces self-created myth.” In August 1962, while Robin Moore was living in Jamaica, he met with Vice President Lyndon Johnson and his military aide Colonel William Jackson as they were representing the United States at Jamaica’s independence celebrations. Moore told the vice president and colonel that he was interested in writing a book about the Special Forces. He had just finished a book on guerrilla warfare in the Caribbean and gave each a copy of *The Devil to Pay*. From this meeting, Robin Moore was able to pass his idea to the proper Pentagon officials and in the spring of 1963 found himself meeting a “hard-bitten” Special Forces major who accepted his proposal to write about the Green Berets. As part of writing about the Green Berets, the major required – as order by Major General William P. Yarborough – Moore to go through the three week airborne school at Fort Benning in Georgia and then on to the Special Warfare Center at Fort Bragg in North Carolina. After graduation, on 6 January 1964, Moore was sent to Vietnam for six months. According to Moore, “In spite of the fact that correspondents traditionally are never armed, I never made a move without an automatic rifle – which accounts for the fact that I made it home to write this book. Toward the end of the tour, A detachment began paying me the supreme compliment of sending me in place of another sergeant as the second American with an all-Vietnamese or montagnard patrol.” According to Duncan, Moore “tries to leave the reader with the impression that the school which he attended at

Duncan had seen the dark side of counterinsurgency in Vietnam and came home an ardent, if somewhat reluctant, opponent of the war in Vietnam. Duncan's writings and activism cemented him as one of the most prescient critics of the war and propelled him into the spotlight. Coming home from the war, he did not remain idle as he became an influential grassroots organizer on the West Coast and was a regular movement speaker at rallies and demonstrations and on college campuses. He first spoke at an antiwar demonstration in Oakland on November 20, 1965, not long after getting out of the service. The march, organized by the Vietnam Day Committee, drew 8,000 demonstrators, according to the *New York Times*. Speaking to a crowd of cheering activists, as well as 1000 National Guardsmen and 1100 police at the event, Duncan proclaimed: "I was marching for 18 months in Vietnam. It's a pleasure to march today for something that makes sense."⁶⁹ Afterward, Robert Scheer, staff writer for *Ramparts*, got a hold of him and convinced him to write about why he had left the service and was speaking out against the war.⁷⁰

Writing with an authority no antiwar activist could claim, Duncan exposed classified information, challenged the Johnson administration's narrative about why it was fighting in Vietnam, and wrote candidly about torture and the killing of Prisoners of War (P.O.W.s), the culture of the American Armed Forces and the racism inherent in U.S. operations in Southeast Asia, and the narrow-mindedness of policies based on anti-communism. He argued that the South Vietnamese resistance was an indigenous movement and wrote that the effect of the bombing was imperiling the stated mission. For instance, Duncan exposed U.S. missions into North Vietnam under the auspices of the Studies and Observation Group (SOG) set up by the Military Assistance Command, Vietnam (MACV) in 1964. "SOG was a combined forces effort. The CIA, Air Force (US), Navy, Army and detached Special Forces personnel were all in on the act," he wrote. As the historian John Prados notes, the S.O.G.

Fort Bragg trained him as an expert in the use of all foreign weapons (the crossbow, the longbow, etc), an expert in the use of special demolitions, and an expert in karate and judo. Skyhook and Halo-Scuba infiltration are a couple of other little goodies he mastered while at Fort Bragg. Anybody familiar with any of these subjects recognizes that the time necessary to gain an expertise in even one would require the total amount of time he spent at the school." See: Donald Duncan, "The Army's Longest Recruiting Pamphlet," *Ramparts*, February 1966, 66, and, Robin Moore, *The Green Berets* (New York: Crown Publishers, Inc., 1965), 11-15.

⁶⁹ Wallace Turner, "8,000 War Critics March on Coast," *New York Times*, 21 November 1965, 32.

⁷⁰ James Ridgeway, "The Ramparts Story:...Um; Very Interesting," *New York Times Magazine* 20 April 1969, 37.

was set up as a part of OPlan 64-A which sought covert means for subverting the North Vietnamese.⁷¹ It was while working for the S.O.G. during his second assignment under Project Delta that Duncan better understood why the U.S. was in Vietnam and the true nature of the war. He was one of the “specially selected” Special Forces officers who trained small teams of ARVN forces to be infiltrated into Laos to perform “reconnaissance” missions along the Ho Chi Minh Trail. During one operation, when the team of Vietnamese soldiers was ready to depart, the U.S. personnel were pulled from the mission because “it was an election year and it would cause great embarrassment if Americans were captured in Laos.” This amounted to a startling revelation. “It suddenly occurred to me that the denial of American participation was not based on whether it was right or wrong for us to be going to Laos. The primary concern was the possible embarrassment to President Johnson during an election campaign,” he wrote. Of the forty men who were sent on the mission, six returned and the rest were killed or captured, a piece of classified information previously unknown to the American public.⁷² Such information drastically undercut the premise that the Johnson administration was dragged into a quagmire in Vietnam. Duncan was in the middle of the action in 1964 performing the very operations designed to stem the tide of communist advances in South Vietnam. Attempting to covertly undermine the North Vietnamese, these operations only cemented the United States’ long-term presence in Southeast Asia because President Johnson did not want to rock the boat at home or abroad during an election year.

In Vietnam, Duncan observed the National Liberation Front’s strength grow by the time he left in late-1965. Confirming what other observers such as Bernard Fall had been writing for years, he argued that the NLF had significant popular support in South Vietnam, in stark contrast to what he and all of the other U.S. personnel in Vietnam were told by their superiors. Soldiers had been routinely told that a majority of South Vietnamese people opposed the NLF and only cooperated with guerrillas through fear and intimidation. Duncan concluded that NLF forces, which “started as small teams,” had evolved into “battalion and

⁷¹ Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966, 16. For an excellent account of the SOG, see John Prados, *The Blood Road: The Ho Chi Minh Trail and the Vietnam War* (New York: John Wiley & Sons, Inc., 1999), pp. 78-83, 106.

⁷² Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966, 16-17.

regimental strength.” By the time he had left South Vietnam, “the Viet Cong could put troops in the field in division strength in almost any province.” This led him to conclude that “such growth is not only impossible without popular support, it actually requires an overwhelming mandate.”⁷³ This information called into question a crucial rationale for U.S. involvement: halting the NLF’s rule of the countryside by stopping further atrocities, terrorism, and intimidation. In reference to the terrorism employed by the Vietcong through the killing and kidnapping of village chiefs and their families, Duncan stated that these chiefs had been “appointed, not elected.” Few resided in the villages over which they presided, and often turned out to be “outsiders being rewarded for political favors.” After restless nights escaping detection in the jungles of South Vietnam and seeing off numerous comrades to their deaths in poorly planned missions into Laos, he felt Vietcong terrorism a weak justification for U.S. intervention because “our own military consider such actions good strategy when the tables are reversed.”⁷⁴ The arguments for war by Duncan’s superiors began to lose their shine after his participation. For him, Americans needed to ask “whether communism is spreading in spite of our involvement or because of it.”⁷⁵

The release of the exposé presented an opportunity for *Ramparts* to break a major story on the war and they laid the groundwork for its maximum exposure. The magazine employed Marc Stone, a public-relations officer from New York City and brother of Judy and I.F. Stone, to manage a carefully constructed media bazaar. On the eve of the launch of the article, Stone set up an exclusive interview with Duncan and Jack Raymond of the *New York Times* at a hotel in Washington, D.C. The interview ran on the same day that Stone organized a press conference featuring Duncan and *Ramparts* announcing the launch of the February edition.⁷⁶ Raymond, quoting extensively from the piece, reported that Pentagon spokesmen had “no comment” on the information provided by Duncan. “Qualified sources,” he added, “could recall no other instance in which a veteran of combat in Vietnam had so sharply and publicly assailed the United States intervention there.” Asking Duncan if his

⁷³ Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966, 20-21.

⁷⁴ Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966, 20-21.

⁷⁵ Donald Duncan, “The Whole Thing Was a Lie!” *Ramparts*, February 1966, 23.

⁷⁶ James Ridgeway, “The Ramparts Story:…Um; Very Interesting,” *New York Times Magazine* 20 April 1969, 37.

references to operations and the existence of the Studies and Observation Group “did not constitute breaches of security,” the veteran answered boldly, “Radio Hanoi had reported on the Laotian infiltration effort. Only six out of the 40 men involved returned” and that “[a]s for the S.O.G. project to get the troops into North Vietnam, he said ‘Hanoi knows that happened. It’s time the American people knew it, too.’”⁷⁷ The S.O.G. group undercut the entire rationale of the Johnson administration’s claims in 1965 that it was responding to “aggression from the North.”

At the press conference, Duncan urged the Johnson administration to recognize the National Liberation Front and repeated that a majority of South Vietnamese people sided with the NLF over the Saigon government. He reaffirmed his position that he opposed Communism, but it was none of the United States’ business what political program the South Vietnamese or any other country followed. The press conference drew the attention of the *Washington Post*, the *New York Times*, and the *Los Angeles Times* among other news outlets. Afterward, asked for comment, Major General William P. Yarborough (the commander of the Special Forces Center at Fort Bragg, North Carolina, when Duncan was there) expressed “shock” over the “distortions, misstatements and disclosures of sensitive information” and Brigadier General Joseph W. Stilwell (the current commander at Fort Bragg) rejected the charges by Duncan. The Pentagon released a statement quoting the two generals “emphatically” denying “that methods of torture are taught to Special Forces personnel. On the contrary, they are taught that torture is a stupid and ineffective way of eliciting information.”⁷⁸ Despite such official denials, Duncan’s revelations later received corroboration at a series of independent hearings between 1970 and 1972, organized by antiwar Vietnam veterans.

The brass’s denials notwithstanding, the authenticity of Duncan’s account drew wide praise. Senator Ernest Gruening inserted Duncan’s entire article into the *Congressional Record* on February 10, citing many important passages. “These are important observations

⁷⁷ Jack Raymond, “Veteran of Special Forces Denounces U.S. Policy in Vietnam as a ‘Lie’”, *New York Times* 10 February 1966, 2.

⁷⁸ See: *New York Times*, 11 February 1966, 8; *Washington Post*, 11 February 1966, A6; and *L.A. Times* 11 February 1966, 9.

by a fighting man who served 18 months on active combat duty in Vietnam,” Gruening said. “The position of the United States in Vietnam and its future course of action should be judged in the light of these observations....”⁷⁹ In a February 16 *New York Times* advertisement, *Ramparts* offered readers the February edition free of charge if they signed up for a year’s subscription and played up Duncan’s credibility. “Sgt. Duncan, the first man so qualified – and courageous enough – to come forth and speak, documents his story point by point. It is unquestionably authentic and utterly believable,” it said.⁸⁰ Duncan’s article even prompted one fellow Green Beret, Gary Rader, to question the war. In the fall of 1966, Rader went on active duty at Ft. Bragg, N.C. “While I was there,” he recalled, “I spoke to a great number of Green Berets who were Vietnam returnees. Many of them quite candidly reinforced what Duncan had said.” He ended up burning his draft card in Sheep’s Meadow in Central Park as part of the April 15, 1967 Spring Mobilization march, which drew upwards of 500,000 people.⁸¹

Duncan rose to prominence in this period, thanks largely to his firsthand knowledge of the role of the Special Forces in Vietnam. He also led by example, which in turn inspired others to act. He was an embodiment of the Nuremberg Principles in practice. While he never refused orders in the field, he turned down a major promotion because the war violated his conscience and the laws of war. As Duncan explains in *The New Legions*, he was an eager recruit for the Special Forces who loved his job. Duncan’s experiences and disillusionment in Vietnam led him to work full-time opposing the war. In this capacity, he acted as an effective bridge between the civilian, GI, and veteran antiwar movements. He supported the Fort Hood

⁷⁹ See *Congressional Record*, 10 February 1966, found in CREST, National Archives Research Administration II, College Park, Maryland.

⁸⁰The advertisement also plugged Duncan’s speaking engagement at Town Hall in New York City on 3 March 1966 with I.F. Stone and Stanley K. Sheinbaum. *New York Times*, 16 February 1966, L26.

⁸¹ Rader was classified I-A in the summer of 1965 and joined a Special Forces reserve unit where he began part-time training. Rader’s decision to participate in the 15 April 1967 draft card burning came in early April after he had gone through the dehumanizing reservist training at Ft. Bragg and at a reserve meeting the commander stated that any reservist wearing long hair could also wear diapers the next time the commander had seen him. Therefore, Rader had had enough and on 15 April went to Central Park in his Green Berets uniform, covered with a black jacket, and got in touch with the Cornell University contingent and burned his draft card. On 17 April, Rader wrote his letter of resignation to his commander at Ft. Bragg. Rader quoted in Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1971), 96.

Three and testified at the out-of-court ‘little Nuremberg’ at Dr. Howard Levy’s court-martial. At this hearing, Robin Moore corroborated many of Duncan’s observations.

And yet, despite his ever expanding role in the antiwar movement, he still regarded himself as a reluctant activist, and did not say yes to every invitation that came his way. For instance, he was asked to testify at the court-martial of the Fort Hood Three and refused. While he sent a letter of support that appeared in the booklet produced by the Fort Hood Three Defense Committee, he likely refused because of his cautious approach at this early stage. In another instance, Duncan said no to a request by a Fifth Avenue Peace Parade Committee organizer in the summer of 1966 to re-print the *Ramparts* article for distribution to soldiers about to embark to Vietnam. “To think that such a campaign will convince any significant number of these men to lay down their weapons and refuse to serve is naïve and unrealistic,” he wrote to the organizer. Duncan felt these soldiers “were the products of at least eighteen years” of Cold War propaganda, and to place doubt in their minds as they entered into combat would risk their very survival and that of their comrades. A realist, Duncan understood that “the few” who have refused have faced “severe” punishment. “Theirs is a lonely and isolated position and takes a bravery far beyond that required to face bullets,” he wrote.⁸² Still missing in this early period, of course, was the weight of the antiwar movement that military resisters could lean on that developed over the following two years. Ever selective, Duncan also initially refused to participate in Dr. Levy’s court-martial, but some well-placed phone calls by Charles Moran, Levy’s lawyer, and pressure by peace activists and *Ramparts* staffers, convinced him otherwise.⁸³

Duncan continued to expose the effects of the U.S. covert wars in Southeast Asia. His *Ramparts* article broke new ground exposing the U.S. backed operations into Laos as early as 1964 and in July 1966 he also reported on the U.S. air war in Cambodia when he traveled there with the group “Americans Want to Know” on a fact-finding mission.⁸⁴ Furthermore,

⁸² Donald Duncan to Mr. Forest, 25 June 1966, AJ Muste Papers, SCPC, Box 45, Microfilm Reel 89-25, D (General Correspondence)

⁸³ See Charles Morgan, *One Man, Once Voice* (New York: Holt, Rinehart and Winston, 1979), 140, and Robert N. Strassfeld, “The Vietnam War on Trial: The Court-Martial of Dr. Howard Levy,” *Wisconsin Law Review* 839, (1994), 906.

⁸⁴ In July 1966, Donald Duncan traveled to Cambodia with the group “Americans Want to Know.”

he gave credence to the international antiwar movement when he testified as a witness in the Roskilde Session of the International War Crimes Tribunal in late-November 1967. At Roskilde he offered a lengthy testimony, complete with cross-examination, of much of the material he wrote about in the article and his book. Duncan's infamous exposé and his book *The New Legions* gave legitimacy to accusations of the antiwar movement.⁸⁵ Intensely

The trip to Cambodia was organized by Dagmar Wilson of Women Strike for Peace, who proposed the fact-finding mission, and was chaired by Ossie Davis and Wilson. The five person delegation included Donald Duncan, Floyd McKissick (the new director of Congress Of Racial Equality), Kay Boyle (author), Rabbi Isreal Dresner (of Temple Sharon Shalom in Springfield, New Jersey), and Russell Johnson (the Peace Education Secretary of New England American Friends Service Committee). The group landed in Phnom Penh on 27 July 1966 and toured areas along the Vietnam and Cambodian border for two weeks. Duncan had spent time touring border areas of South Vietnam and Laos trying to examine whether there were Vietnamese troop movements in the areas, search trucks traveling through Cambodia, and examined the village of Thloc Trach which had been attacked by U.S. helicopters. With huts still smoldering, and villagers weeping and stunned, the group saw a woman who was machine-gunned down while running from her home. Donald Duncan would speak about his fact-finding mission to Cambodia in New York City at Palm Gardens on 27 September 1966. For Duncan's presentation in New York, see: *NYT*, 25 September 1966, 194. For a first-hand account of the trip, see: Russell Johnson, "Mission to Cambodia," *Liberation*, September 1966, pp. 12-18. For other publicity the trip stirred, see: *NYT* 11 July 1966, 5; *L.A. Times* 26 July 1966, 2; *NYT* 26 July 1966, 24; and *WP* 10 August 1966, A18. See also: Mary Hershberger, *Traveling to Vietnam: American Peace Activists and the War* (Syracuse: Syracuse University Press, 1999), 63-64. According to Hershberger: "From their observations they concluded that small groups of Vietnamese did move across the border – the Cambodians freely acknowledged that – but that the Vietnamese presence in Cambodia left no military or political marks in Cambodia itself; it was the repeated American bombing that was polarizing political forces there."

⁸⁵ The list of Duncan's various activities during his time in the anti-Vietnam War movement, and the various people and organizations he inspired is a long one indeed. He was a source of inspiration to countless active-duty GI's and veterans. Following the *Ramparts* story, a paid advertisement from Veteran For Peace in Vietnam was printed in the *Chicago Daily Defender* featuring a large photo of Duncan with the signatures of veterans. The ad called for a cease-fire, an agreement to negotiate with all forces, including the N.L.F., and clear support for the 1954 Geneva Accords. *Chicago Daily Defender* 22 March 1966, 9.

The former Green Beret was also very influential in the civilian antiwar movement. Duncan spoke at the unveiling of the sixty-five foot "tower of protest" against the Vietnam War on the Sunset Strip in Los Angeles (*L.A. Times* 27 February 1966, B and *NYT* 27 February 1966, 36.); at U.C.L.A. on 28 February 1966, sponsored by the University Committee on Vietnam (a faculty group) in front of 2000 people (*L.A. Times* 1 March 1966, 3.); at a packed Town Hall in New York City on 3 March 1966 where he called for negotiations with the N.L.F. and reinforced that the N.L.F. was the more popular than Saigon. According to the *New York Times*, "[i]n his speech last night Mr. Duncan accused the United States Government of withholding the truth from the American people about the origins of the war, the actual military situation and the true attitude of the Vietnamese people." (*NYT* 4 March 1966, 3.) Donald Duncan was a featured speaker at the Second International Days of Protest at the New York City rally and march on 26 March 1966 down 5th Avenue to Central Park where the rally was held. The previous day fifteen veterans and reservists burned their discharge papers at Union Square in New York City with the group Veterans and Reservists to End the War in Vietnam (the group had fifty members and a mailing list of 400). Other marches and rallies were planned throughout the weekend in Boston, Ann Arbor, Chicago, Berkeley, San Francisco, Washington, D.C., Oklahoma City, Detroit, Cambridge, and in international cities such as Tokyo, Stockholm, London, Oslo, Lyon, France, Toronto and Ottawa. (*NYT* 26 March 1966, 2 and *NYT* 27 March 1966, 1.) The New York City march was estimated to have from 20 000 to 31 000 present. According to the *New York Times*, Duncan was quoted as saying he was "not

personal, the book displayed Duncan's creative and lucid writing style. Transporting the reader into the thick jungles and covert operations in the heat of Southeast Asia or to the maniacal, rapacious Special Forces' training at Fort Bragg, we get a sense of the difficulties of fighting a counterinsurgency. Moreover, the book became required reading for U.S. pilots shot down over Vietnam along with other books critical of the war.⁸⁶ Despite the books appeal to war enthusiasts and antiwar activists, it was not as widely distributed as the *Ramparts* exposé.

“The Citizens’ White Paper”: The Lawyers Committee on American Policy Towards Vietnam

After two years of organizing and publishing controversial legal memorandums arguing the war in Vietnam was illegal under international and domestic law, the Lawyers Committee on American Policy Towards Vietnam released *Vietnam and International Law: An Analysis of the Legality of the U.S. Military Involvement* in May 1967. Published by O'Hare, the book went through two editions and sold at least 5000 copies by the end of the year. Released during the crucial period in the escalation of the war in Vietnam and the crystallization of dissent in the antiwar movement, the Lawyers Committee offered a cogent legal analysis representative of the debates between the Committee and the largely pro-war legal profession and the various State Department legal memoranda. The book was more effective for the antiwar movement's own internal education efforts and enhancing the intellectual and activist arguments against the war. In a statement indicative of the times, the dense legal analysis was reviewed more in the international media than in the United States.

Richard Falk noted in the preface that the publishing the book was an “unusual” act for an ad hoc group of international lawyers as part of a campaign “to go on record...that their own government is waging war in violation of international law.” The project drew Falk

against our soldiers in Vietnam...but against their being in Vietnam.” He told the crowd that Chinese influence in the region was rising as a result of American intervention in Vietnam, rather than checking it. He argued that “[a]ll we are accomplishing is the extermination of the Vietnamese peasants.” (NYT 27 March 1966, 1.)

⁸⁶ Among other readers, it was reported in April 1969 that Duncan's book, *The New Legions*, along with Arthur Schlesinger, Jr. and Wilfred Burchett were sanctioned reading material handed to American P.O.W.'s who were shot down over Hanoi. Jack Anderson, “U.S. POWs in Hanoi,” *Washington Post*, 6 April 1969, 35.

and other participants out of a “sense of concern that arises when we contemplate a third world war fought with nuclear weapons.” In antiwar movement circles, the prospect of nuclear war between the U.S. and China or Russia over Vietnam seemed a likely scenario. Hence, Falk called on “citizens to organize themselves so as to be able to insist effectively that their own government adhere to international law.”⁸⁷ The Lawyers Committee faced a difficult challenge. With their shorter legal brief inserted into the Congressional Record and their *New York Times* advertisement vexing pro-war lawyers, the book amounted to “a big, fat, thick brief (and a good one),” wrote Carey McWilliams, editor of *The Nation* magazine, lawyer and veteran journalist. Having been asked for his advice by Joseph Crown of the Lawyers Committee, McWilliams wearily replied that “getting it reviewed is going to be a difficult job.”⁸⁸

Basing its findings on two years of research, government hearings and reports, investigative journalism and legal analysis, the Lawyers Committee reached unmistakable conclusion that the consequences of U.S. intervention in Vietnam “has been to *prevent* the self-determination of the Vietnamese people, to *prevent* the existence of a reunited and independent Vietnam, and to transform instead the temporary zone of South Vietnam into a separate country that is militarily hostile to North Vietnam.”⁸⁹ While the book does not cite

⁸⁷ Richard Falk, “Preface,” in *Vietnam and International Law: An Analysis of the Legality of the U.S. Military Involvement* (Flanders: O’Hare, 1967), 11-13.

⁸⁸ Joseph Crown, secretary for the Lawyers Committee, asked McWilliams for advice on post-publication publicity strategies. Among other ideas, he suggested that they send the book to prominent people in the United States and get blurbs about the book before sending it to newspapers and magazines for reviews Carey McWilliams to Joseph Crown, 17 January 1967, Lawyers Committee on American Policy Towards Vietnam Papers, Box 5, Butler Library, Columbia University.

⁸⁹ For a quick synopsis of the book’s main arguments, they are conveniently outlined as *the* index of the book. The book is divided into the various arguments made by the Lawyers Committee in direct response to the State Department’s March 1966 legal analysis justifying its bombing of North Vietnam. After outlining the need for a thorough legal analysis of the war in Vietnam and assembling an outline of the “Basic Facts” between pre-1939 and 1956, the Lawyers Committee argues: The military intervention by the United States in Vietnam violates the Charter of the United Nations; The military intervention by the United States in Vietnam violates the Geneva Accords of 1954; The United States started its war actions against North Vietnam as a “reprisal.” This reprisal was unlawful; Even if the United States were lawfully participating in the collective self-defense of South Vietnam, certain of its methods of warfare would nevertheless be unlawful; Foreign military intervention in a civil war is illegal under international law; The SEATO Treaty of 1954 does not “commit” the United States to take military action in Vietnam; The United States has not fulfilled its obligations toward the United Nations. The Security Council has not tacitly approved the military course of the United States in Vietnam; The United States failed to seek a peaceful solution, as prescribed by the Charter of the United Nations; Presidents Eisenhower and Kennedy did not “commit” the United States to war action in Vietnam; To the extent that the

the Nuremberg Principles, it was written with the “ethos of Nuremberg” at its core. While the two other major edited collections explored below – the Russell Tribunal’s proceedings in *Against the Crime of Silence* and the CALCAV commission’s war crimes study *In the Name of America* – dealt primarily with violations of the laws of war under the Hague Conventions of 1899 and 1907, Geneva Conventions of 1949, the Lawyers Committee offers a comprehensive analysis of the crime against peace and effectively argues the United States launched a war of aggression against Vietnam. The outlawing of waging aggressive war was central to the Nuremberg Trial and was codified in the Nuremberg Principles and therefore was central to the Lawyers Committees’ analysis of the war in Vietnam. The focus on the crime against peace was crucial because since the Nuremberg Trials, the international community was stalled on how to define a war of aggression and proposals on how to implement a major contribution of the Nazi trials lay dormant since the mid-1950s because of the superpower rivalry.⁹⁰

The group of distinguished international lawyers also proposed a solution to the conflict in Vietnam by reiterating the bare minimum standards for both sides of the war to follow to bring the war to an end. First and foremost, both sides in the conflict had “to de-escalate.” However, they saw the United States as “the state most actively engaged” in the war; pointing out that they “monopolized control” of the skies over both North and South Vietnam (even though the Democratic Republic of Vietnam had a small air force). Therefore, the Lawyers Committee argued that the United States had to initiate the de-escalation first by stopping the bombing of North Vietnam. The second step after de-escalation was the United States recognizing the National Liberation Front as a party to negotiations in any political and diplomatic settlement to the conflict.⁹¹ While these were not new standards, they were worth repeating, especially after a legal analysis that thoroughly discredited the claims of the

war actions by the United States violate international treaties, they also violate the United States Constitution. For the conclusion quoted in the body of the text, see: *Vietnam and International Law: An Analysis of the Legality of the U.S. Military Involvement* (Flanders: O’Hare, 1967), 23.

⁹⁰ Michael Mandel, “Aggressors’ Rights: The Doctrine of ‘Equality between Belligerents’ and the Legacy of Nuremberg,” *Leiden Journal of International Law* Vol. 24, no. 3 (2011): 627-650.

⁹¹ *Vietnam and International Law: An Analysis of the Legality of the U.S. Military Involvement* (Flanders: O’Hare, 1967), 83-86.

U.S. government and its war in Vietnam. In their public statements, the Lawyers Committee took their proposal for peace further.

The Committee's demands had escalated in tandem with the war in Vietnam. In early 1966, they demanded that President Johnson unconditionally halt the bombing of North Vietnam and recognize the National Liberation Front as an equal negotiating partner alongside the government of South Vietnam. In early-1967, the Committee advanced a more thorough blueprint for peace in their January 15 *New York Times* advertisement: (1) an unconditional halt of the bombing of North Vietnam; (2) the replacement of U.S. military forces with the International Control Commission; (3) the de-escalation of military operations in South Vietnam; (4) the recognition of the National Liberation Front; and (5) a commitment to negotiate on the basis of the 1954 Geneva Accords. By June 1968, the Committee, in a letter to Senator Fulbright, argued that the "American people should not be misled" by President Johnson who speaks of peace "while pursuing a policy of military escalation and military victory." Instead, the "just, moral and lawful settlement" included: "(1) an immediate and unconditional termination of bombing of North Vietnam; (2) an unconditional commitment to a complete withdrawal from Vietnam; and (3) a commitment to accept a new government in South Vietnam chosen by the South Vietnamese themselves without any outside interference."⁹² The Lawyers Committee is a prime example of a group of liberals who were politicized by the war in Vietnam.

Following the publication of *Vietnam and International Law*, the Lawyers Committee began sending out copies of the book to Senators such as William Fulbright and sent six copies to the International War Crimes Tribunal.⁹³ Widely reviewed in the highly specialized law reviews in the United States, the book had difficulty in finding a receptive audience in the national newspapers. Despite the publicity the ad hoc group of lawyers drew with its earlier legal briefs and *New York Times* advertisement, the lack of attention within the

⁹² For the 1966 position, see: Douglas Robinson, "Legality of Vietnam War Questioned," *New York Times*, 5 February 1966, 6; 1967, see: "U.S. intervention in Vietnam is *illegal*," *New York Times*, 15 January 1967, E9. For 1968, see: William L. Standard and Joseph H. Crown to J. William Fulbright, 28 June 1968, Box 5, Lawyers Committee on American Policy Towards Vietnam Papers, Butler Library, Columbia University.

⁹³ Joseph Crown to Bertrand Russell, 10 May 1967, Lawyers Committee on American Policy Toward Vietnam Papers, Box 5, Butler Library, Columbia University.

mainstream is hardly surprising given the extent to which the Johnson administration colluded with the pro-war American Bar Association and other sympathetic legal scholars. Moreover, arguing the war in Vietnam was illegal, violating Constitutional and international law, was a controversial idea in an American media establishment which accepted the basic premise that the war was caused because of North Vietnamese, Chinese, and Soviet aggression in South Vietnam.⁹⁴

In the United States, none of the major newspapers reviewed the book or even discussed it. In an article representative of the tenor of intellectual engagement with anti-interventionist ideas, *Time* magazine relegated the Lawyers Committee to the category of “among other antiwar groups” when it mentioned them in passing during a long and sympathetic review of the pro-intervention legal analysis *Law and Viet Nam* by Roger Hull and John Novogrod.⁹⁵ While Hull and Novogrod, two Yale educated lawyers, argued that the war was legal under international law, they did not mention or cite the Lawyers Committee’s *Vietnam and International Law*. While the book might easily be dismissed and considered historically insignificant, the fact that it was published at all during the Cold War was an important statement. With the residue of McCarthyism and the anti-communism consensus still permeating U.S. society, not to mention the peace movement, the book is a testament to the courage and professionalism of these international lawyers. They could have simply remained silent, but their conscience and belief in American ideals could not let them do so. The book won praise by some in important places. For instance, Senator Mark O. Hatfield, a Republican from Oregon, wrote in *Saturday Review* that the book was written by “responsible critics who demand to be heard.” “Their examination of State Department

⁹⁴ Noam Chomsky and Edward S. Herman argued that “even at the peak period of peace-movement activism there was virtually no opposition to the war within intellectual culture on the grounds that aggression is wrong ... the fact of U.S. aggression was unrecognized. There was much debate during the war over whether the North Vietnamese were guilty of aggression in Vietnam, and as we have seen, even the South Vietnamese were condemned for “internal aggression” (Adlai Stevenson); but there was *no discussion* of whether the United States was guilty of aggression in its direct attack against South Vietnam, then all of Indochina.” *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988), 184.

⁹⁵ “Thesis Turned Book,” *Time*, 1 March 1968, 67.

arguments, memoranda, and interpretations make one wonder about the credentials of those who are representing U.S. interest abroad, he noted.”⁹⁶

It is also important to underscore that at the time, the Lawyers Committee was operating within the framework of an American exceptionalist approach to international law and foreign relations. It was not a foregone conclusion the Committees’ arguments would be ignored because the group believed that the United States deeply respected the rule of law; after all it was instrumental in convening the Nuremberg Trials. In the preface to the book’s second edition, Falk called it the “citizens’ white paper” and lamented that the book received more attention internationally than in the United States.⁹⁷ “We have been encouraged,” he

⁹⁶ Mark O. Hatfield, “Vietnam: Chartered on a Distorted Map,” *Saturday Review*, 1 July 1967, 20-23.

⁹⁷ In the United Kingdom, there was a lively debate in the pages of the *London Times*. On August 4, David Weitzman and other international lawyers wrote of the “formidable and impressive” arguments of the Lawyers Committee and on August 24 Labour MP Philip Noel-Baker called the book “unanswerable.” It took such comments from an international newspaper for there to be a debate between Americans on the issues. After such a positive response, Harvard professor of Law R.R. Baxter felt compelled to respond that the views articulated by the Lawyers Committee are “not the view of the matter entertained by the great majority of American international lawyers.” Noting the pre-eminence of the members of the Consultative Council – Professor Quincy Wright and Hans Morgenthau –Baxter comments that the group “does not include a single member of the law faculties of Harvard, Yale, Columbia, Michigan, Chicago, California, or Pennsylvania.” Ironically, after making such a claim, Baxter immediately moves to claim that the prestige of the members does not matter when determining violations of international law. Nonetheless, Baxter goes on to argue that whether the war in Vietnam is an internal civil war or an international conflict between two states, the United States’ intervention is justified either way. Moreover, he concludes that because the United States and the Republic of Vietnam signed the Geneva Accords of 1954, they could not be bound by them. Finally, he accuses the Lawyers Committee of bending the law “to the pattern of their own political convictions.”

In response to Professor Baxter, the American historian Henry Steele Commager, who opposed the Vietnam War on constitutional grounds, wrote that the law professor “disposes of the question of legality in a cavalier manner, and his short-hand attempt to provide a legal basis for the war should not go unchallenged.” Therefore, Commager writes, referring to the Tonkin Gulf Resolution, that the arguments employed by the Johnson administration hold no water. The SEATO Treaty, as a regional agreement, is subordinate to the dictates of the United Nations Charter under Article 53. Moreover, citing Article 51, Commager highlights the fact that South Vietnam (if it were an independent state) had every right to respond with force to repel aggression. However, South Vietnam was not a member of the U.N., “nor bound by its Charter.” With regard to United States’ intervention into the conflict, citing Article 39 that the “Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression...” and that “[n]eedless to say the Security Council has not acted on Vietnam.” Richard Falk took the criticism of Professor Baxter even further, arguing “it is essential to relate legal claims to the facts.” After briefly outlining the facts as presented by the Lawyers Committee, Falk argued: “In such circumstances to regard the Saigon regime as the victim of aggression is to exclude factual considerations from legal analysis. Such intellectual habits can only lead international lawyers to become national apologists, a rather obsolete indulgence in the nuclear age.” See: David Weitzman, et al., *London Times*, 4 August 1967, 9; Philip Noel-Baker, 24 August 1967, 7; R.R. Baxter, *The London Times*, 5 September 1967, 9; Henry Steel Commager, *The London Times*, 8 September 1967, 11. Philip Noel-Baker responded in kind to Baxter’s criticisms of his letter on 12 September 1967 in the *London Times*, 9; and Richard Falk, *The London Times*, 9 October 1967.

wrote, “by the serious and sympathetic reception it has received from international lawyers throughout the world.”⁹⁸ As the war escalated, it was clear to the Lawyers Committee that the United States had lost its way during the Cold War. Richard Falk was perhaps the most radicalized from the experience and most active in opposing the war.

On a purely practical level, the book’s chief contribution was to bolster the legal arguments in draft and military resister cases. For instance, after the indictment of the Boston Five – Benjamin Spock, Rev. William Sloane Coffin, Mitchell Goodman, Michael Ferber, and Marcus Raskin – for conspiracy to aid and abet violations of the Selective Service Act, the Lawyers Committee called a press conference in support of the men. “The defendants now charged with criminal activity have partly based their opposition to the draft on their belief that citizens should not participate in an illegal war and that citizens have an obligation to oppose their own government when it attempts to wage an illegal war,” Richard Falk announced. He argued in his statement that *Vietnam and International Law* provides a definitive legal basis for such resistance and demonstrates conclusively that intervention in Vietnam violated the United Nations Charter, the Geneva Accords, the Nuremberg Judgment, the SEATO Treaty, and the United States Constitution. Falk said:

This opposition rests upon the legal foundation created by the Nuremberg Judgment which held, among its conclusions, that a citizen does not enjoy immunity from international legal obligations merely because he carries out the orders of his own national government. It is an international crime of the gravest character for citizens to participate in an illegal war and it is therefore potentially a criminal act to conform to the draft law that these defendants have urged young Americans to violate. In effect, Nuremberg compels individuals to give priority to the obligations of international law when those obligations conflict with the policies of the national government. The American public has occasion to be grateful to Dr. Spock and the other defendants for having underscored this higher claim of allegiance to international law and the United Nations Charter in the nuclear age by calling upon those subject to the draft to refuse service.

For this reason, Falk pointed out that growing numbers of draft-age men were refusing service in Vietnam and increasing numbers of adult supporters who were over draft age were risking imprisonment for supporting the draft resisters. He criticized the federal courts for

⁹⁸ Richard Falk, “Preface to the Second Edition,” 7.

deferring their responsibility “to adjudicate the issue of whether the United States involvement in Vietnam accords with international law.” He insisted that U.S. citizens deserved a “fair determination” of the crucial Constitutional questions at stake and quoted from the dissenting opinions of Supreme Court Justices Stewart and Douglas in the case of the Fort Hood Three.⁹⁹ Both Michael Ferber and Dr. Spock of the Boston Five announced before their conspiracy trial that they planned to demonstrate the war was illegal under international law, including the Nuremberg Principles. Dr. Spock told an audience at the University of Kansas in April that the preferable legal defense included the use of the Nuremberg Principles first and then issues of constitutionality including the war powers and the first amendment.¹⁰⁰

A Moral Crisis: War Crimes In the Name of America

“We represent three major religious traditions in the United States – Catholicism, Protestantism, and Judaism. On many issues we are divided, but on the issue of Vietnam we are not,” proclaimed Robert McAfee Brown, Abraham J. Heschel and Michael Novak in June 1967. The three religious leaders worked to advance a moral and religious argument for a “negotiated peace” in Vietnam in their short book *Vietnam: Crisis of Conscience*. Writing under the auspices of Clergy and Laymen Concerned About Vietnam (CALCAV), they charged that the Vietnam War was “impossible to justify.” Heschel, citing the legal briefs of the Lawyers Committee on American Policy Towards Vietnam, argued that the war in Vietnam violates international law, the laws of war and the U.S. Constitution. Pointing to the fact that the State Department does not hold a “monopoly on wisdom and vision,” he observed there is a crisis in America. “Responsibility is the essence of being a person, the essence of being human, and many of us are agonized by a grave *crisis of responsibility*,” he wrote. “Horried by the atrocities of this war, we are also dismayed by the ineffectiveness of

⁹⁹ “Press Release,” 18 January 1968, Box 5, Lawyers Committee on American Policy Towards Vietnam Papers, Butler Library, Columbia University.

¹⁰⁰ See Michael Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: The University of North Carolina Press, 2003), 286.

our protests, by the feebleness of our dissent. Have we done our utmost in expressing our anguish? Does our outcry match the outrage?”¹⁰¹ This clarion call to action against the war came from the dovish wing of America’s large and divided religious community. Simultaneously, CALCAV was in the midst of preparing another, much larger study of the American war in Vietnam seeking to document grave breaches of the laws of war by American forces in Vietnam.

The release of a major war crimes study by CALCAV demonstrated the group’s departure from its “traditional liberal approach.” Between October 1966, when CALCAV commissioned the study, and February 1968, when the book was published, CALCAV had undergone a tactical and strategic shift exemplified by its support for civil disobedience, amnesty for war resisters, and its decision to bring the issue of war crimes in Vietnam to the forefront of its analysis of the war. As historian Mitchell K. Hall noted in his history of the organization, the group “remained rooted in the religious community and diligently pursued moderate forms of dissent, particularly through electoral politics.”¹⁰² However, as Hall notes, the organization’s more radical shift began to alienate its mainly middle class, church-going constituency. For instance, in an example of CALCAV’s turn towards a more radical approach, they released a controversial statement on “Conscience and Conscription” in October 1967 which advocated draft-age men to refuse induction into the armed forces and advanced their belief in the need for the adoption of selective conscientious objection by the military and the Selective Service System.¹⁰³

In August 1966, CALCAV’s steering committee “proposed a study into the moral consequences of American behavior in Viet Nam” and estimated the project would cost about \$10,000 to conduct. The proposal called for assessing U.S. actions in Vietnam vis-à-vis the 1949 Geneva Conventions and the Nuremberg Principles of 1950 and determined that

¹⁰¹ Robert McAfee Brown, Abraham J. Heschel and Michael Novak, *Vietnam: Crisis of Conscience* (New York: Association Press, Herder and Herder, ad Behrman House, 1967), 58-59.

¹⁰² Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 53-54.

¹⁰³ Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 55. For the full text of the statement, see: Conscience and Conscription, A Statement by Clergy and Laymen Concerned About Vietnam, 25 October 1967, Folder 50, Box 12, Social Movements Collection, The Vietnam Center and Archive, Texas Tech University. Accessed 18 Dec. 2013. <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=14511250011>.

sources of information “should be primarily reports published by principle newspapers and wire services.”¹⁰⁴ The steering committee commissioned Professor Seymour Melman in October to act as Research Director and over the next year he and five Columbia University research assistants collected thousands of newspaper and magazine articles as well as selections from books such as Malcolm Browne’s *The New Face of War* documenting war crimes. They collected the sources and categorized them chronologically and thematically: use of napalm, aerial bombardment, torture, and the like.¹⁰⁵ Melman was attempting “to collect enough data to reveal patterns of conduct which transcend any individual act of war.” His approach relied on the belief that “individual acts thus are less important in themselves than in relation to each other, as they pattern out into modes of action.”¹⁰⁶

The book needed considerable fundraising to complete and was a constant strain on the financial resources of the organization. The slim publication, *Vietnam: Crisis of Conscience*, was also commissioned as a fundraiser for CALCAV, with all of its royalties going to the organization. In a fundraising letter for the book, Melman noted that after compiling the published material and having it vetted by international law professors, “we find that the United States is plainly involved in systematic violation of the laws of war.” Moreover, “the documentation and its publication with the report by a committee of eminent clergymen will serve as a major attack on the moral authority and credibility of the Johnson administration and its policies.” Melman observed that the use of the book, while intended for general consumption, was particularly suited for lawyers and their legal briefs in draft resistance cases. Before the book was published, Melman sent the bounded articles to Charles Morgan in May 1967 in preparation for Dr. Howard Levy’s court-martial.¹⁰⁷

¹⁰⁴ Richard Fernandez to Rabbi Michael Robinson, 22 August 1966, Series III, Box 7 in the Clergy and Laity Concerned Records (DG 120), Swarthmore College Peace Collection.

¹⁰⁵ Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 53-54. In the Seymour Melman Papers at Columbia University, each source is meticulously kept by theme in chronological order typed on cue cards, with a master list for each theme. See Seymour Melman Papers, Boxes 5-9, Butler Library, Columbia University.

¹⁰⁶ Seymour Melman, “Introduction,” *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 18.

¹⁰⁷ By July 1967, for instance, the group had fundraised \$4000 out of an estimated \$12,000 to publish the book. The deficit of \$8,000 meant that Melman and his research team were volunteering their time as the book was near completion. The fundraising efforts were not bearing fruit. CALCAV was forced to obtain a \$10,000 loan from Irving Fain, a wealthy businessman from Rhode Island. Seymour Melman to Irving Laucks, 10 July 1967,

In the late summer, Richard Falk read the manuscript and asked if he could write a brief introduction on the laws of war to put them into context for the reader. He was both impressed and horrified with what he saw. “Reading about the conduct of warfare in Vietnam creates an overwhelming presumption that the United States government and its military command are authorizing combat tactics that flagrantly and persistently violate the rules of war in a great variety of respects,” he argued.¹⁰⁸ In October, the completed manuscript went to Turnpike Press for an initial run of 20,000 copies. While many in CALCAV felt relieved and enthusiastic about promoting the finished project, Rabbi Abraham Heschel had advised the organization delay publication because he feared it could precipitate a rightwing backlash.¹⁰⁹

Like all of the other important movement works highlighting the issue of war crimes and illegality in the war in Vietnam, this was an important statement. Heschel’s fears of a backlash against CALCAV and the book spoke to the prevalence of the constraining Cold War anti-communist consensus. Despite the misgivings, what was inside the book was too important not to be released. The 421-page book contained thousands of excerpts from the mainstream print media and published books. Therefore, the information on violations of the Geneva Conventions and Hague Conventions was not hidden from the American public; in fact this was the point. It was here, in plain sight all along but people had been blinded by twenty-years of Cold War dogma. Journalists who had been constrained by Vietnam War triumphalism and their editors focused solely on the trees; Melman and CALCAV wanted to reveal the forest to the American public. While the book has been criticized for not including first-hand accounts of war crimes, A.C.L.U. lawyer Charles Morgan argued the reports provided a *prima facie* case that the United States armed forces were committing war crimes in Vietnam. “Whether factual or not, newspaper articles may place readers on notice and,

Series III, Box 7 in the Clergy and Laity Concerned Records (DG 120), Swarthmore College Peace Collection. For the \$10,000 loan, see: Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 61.

¹⁰⁸ Richard Falk, “International Law and the Conduct of the Vietnam War,” *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 22.

¹⁰⁹ Tom Wells, *The War Within: America’s Battle Over Vietnam* (Lincoln: iUniverse, Inc., 2005), 228.

thereupon, place them under a burden to inquire. The phrase ‘I didn’t know’ provides those with notice no defense when charged with complicity,” he wrote.¹¹⁰

In the Name of America focused on two categories of crimes laid out in the Nuremberg Principles of 1950: war crimes and crimes against humanity. Divided into sixteen chapters, the book dealt with a wide variety of U.S. criminal behavior in Vietnam: Prisoners of War and Wounded in the Field; Civilians, Suspects and Combatants; Use of Gas; Destroying Huts and Villages; Scorched Earth; Pillage; Use of Artillery; Coastal Bombardment; Aerial Bombardment; Weapons (such as napalm, white phosphorous, the M-16 automatic assault rifle, and fragmentation bombs); Defoliation and Crop Destruction; Forced Transfer of villagers into strategic or ‘New Life’ hamlets; the creation of Refugees; and the treatment of Civilian victims and medical facilities. Each chapter began with a section outlining the relevant laws of war that covered each specific category. An extensive thirty-two page section with excerpts of the international humanitarian laws including the 1907 Hague Convention, the 1949 Geneva Conventions, the 1950 Nuremberg Principles, and the July 18, 1956, Army Field Manual 27-10 “Law of Land Warfare” was included. In the space provided, I picked three examples worth exploring from 1965.

The report included an article from *Newsweek* dated September 16, 1965, which highlighted the fact that the U.S. military had “repeatedly” attempted to pressure the South Vietnamese forces “to improve its treatment of prisoners.” Under Article 12 of the Third Geneva Convention of 1949, when prisoners of war are transferred to another authority, “irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them [the POWs].” The *Newsweek* article concluded that despite the U.S. armed forces’ best efforts:

such pressure has had scant effect and individual Americans in South Vietnam are often made accomplices to their allies’ brutality. U.S. helicopter pilots have reportedly found themselves obliged to stand by while Viet Cong prisoners were

¹¹⁰ Charles Moran, *One Man, One Voice* (New York: Holt, Rinehart and Winston, 1979), 139. For a recent criticism of *In the Name of America*’s lacking first-hand reports, Harish Mehta argued that because the book “used secondary sources such as journalists’ reports” they lacked “the authenticity and rigor that are emblematic of the scientific and medical evidence compiled” by the International War Crimes Tribunal and the publication of its proceedings. Harish C. Mehta, “North Vietnam’s Informal Diplomacy with Bertrand Russell: Peace Activism and the International War Crimes Tribunal,” *Peace & Change* Vol. 37, no. 1 (2012): 67.

thrown out of their planes by South Vietnamese troops. And on one operation witnessed by a U.S. photographer, a U.S. enlisted man and an Australian officer made no protest when a Vietnamese officer shot a suspected guerrilla out of hand.¹¹¹

The book reported on the indiscriminate use of air power in South Vietnam. In one article by Charles Mohr in the *New York Times* on September 5, 1965, he reports U.S. Air Force statistics “that during August it destroyed 5,349 ‘structures’ or buildings and damaged 2,400 others. Thousands of more huts and buildings were knocked out by naval and marine air attacks.” Mohr reported that more than 11,000 sorties were flown a month, as compared to 2,000 in January. The Air Force estimated the bombings netted 15,000 “confirmed” kills since January. While Mohr argues that the use of “close air support” providing ground troops engaged in combat with support from the air has “done magnificent work,” he reports that the growing use of air power “to harass and interdict suspected Vietcong troop concentrations, buildings and transport” is simply “strategic bombing in a friendly, allied country.” The use of such force abandoned the principle of “winning the hearts and minds” and had caused agonizing worry among some American soldiers because “no one here seriously doubts that significant numbers of innocent civilians are dying every day in South Vietnam” as well as creating large numbers of internal refugees who flee to government controlled strategic hamlets. After one bombing mission involving four Navy planes against a hamlet along the Mekong Delta near Phuong Hiep, the planes poured rockets, napalm, and general purpose bombs on the area. One of the pilots was asked if any civilians had been killed, “Who the hell knows,” he responded. The cavalier use of indiscriminate bombing is specifically prohibited by the Hague Conventions Number IV of 1907. Article 23 specifically forbids “(b) To kill treacherously individuals belonging to the hostile nation or army; (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering; (g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” Article 25 states: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is

¹¹¹ *Newsweek*, 13 September 1965, quoted on page 85. Article 12, Third Geneva Convention of 1949 quoted on page 56. *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968).

prohibited.” Such instances if they occurred, as they reported by Mohr and others, were war crimes. They were never reported as such, despite the fact he observed that “no one” doubted “that significant numbers of innocent civilians are dying every day.” Mohr provided a brief portrait of one such victim in the Mekong Delta, a woman who lost two children due to American bombing in April. She reported that another five children had been killed in the same strike. She also had “both arms burned off by napalm and her eyelids so badly burned that she cannot close them. When it is time for her to sleep her family puts a blanket over her head.”¹¹² Such was the American way of war in Vietnam.

The final example is an article by *New York Times* correspondent Neil Sheehan from November 30, 1965, where he reported on the destruction of five fishing hamlets on the coast of the South China Sea in Duchai, Quang Ngai province. Sheehan wrote of the destruction of the fishing hamlets caused by the blasting of the five-inch guns of Navy’s Seventh Fleet destroyers and U.S. and South Vietnamese aerial bombardment between September and October. He estimated that between 184 and 600 civilians had been killed by the shelling and reported that Vietnamese government officials could not confirm the exact number of civilians killed. “Many more civilians would have been killed if a majority of the inhabitants had not abandoned their homes in terror and fled to nearby Government-controlled areas,” Sheehan observed. He reported that at least ten other hamlets in Quang Ngai had “been destroyed as thoroughly as the five in Duchai” and another twenty-five hamlets had been “heavily damaged.”¹¹³ U.S. officials claimed that the National Liberation Front had occupied the hamlets in May and in August they decided to unleash the five-inch guns to clear the area so that ARVN troops could re-take the hamlets. Such indiscriminate naval shelling of coastal areas, even in cases of military necessity, is prohibited under the Hague Convention Number IX of 1907. Chapter I, Article I states that “the bombardment by naval forces of undefended

¹¹² Charles Mohr, *New York Times*, 5 September 1965, quoted pp. 209-2011, and, Hague Convention No. IV, Annex, Regulations Respecting the Laws and Customs of War on Land, 18 October 1907, Articles 23 and 25, quoted in *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 173.

¹¹³ Neil Sheehan, “Rubble Depicts the Agony of a Town in Vietnam,” *New York Times*, 30 November 1965, 2, quoted in *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 166-167.

ports, towns, villages, dwellings or buildings is forbidden.” Article II, paragraph I states that, for instance, “military works” or “depots of arms or war material” are acceptable targets under strict guidelines for naval commanders to follow such as the issuing of a “summons [to local authorities] followed by a reasonable time of waiting” before the attacks can commence. However, paragraph III places further restrictions on the use of force: “If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.”¹¹⁴ However, Sheehan wrote of Duchai’s “decapitated” palm trees and “solid brick and stucco houses, the product of generations of hard-earned savings by its fishermen, were reduced to rubble or blasted into skeletons” because of the naval shelling or dropping of 750 and 1000 pound bombs.¹¹⁵

Many years later, reflecting on this article, Sheehan wrote, in the context of growing pressure for an inquiry into U.S. war crimes in Vietnam in 1971:

When I wrote my story describing the agony of the fisher folk, however, it did not occur to me that I had discovered a possible war crime. The thought also does not seem to have occurred to my editors or to most readers of *The Times*. None of the similar stories that I and other reporters wrote later on provoked any outrage, except among that minority with the field of vision to see what was happening.

Sheehan concluded: “Looking back, one realizes that the war-crimes issue was always present. Our vision was so narrowly focused on the unfolding details of the war that we lacked the perspective to see it, or when the problem was held up to us, we paid no heed.”¹¹⁶ The other 400-plus pages of *In the Name of America* proves chilling reading not so much for what they articles states so matter-of-factly, but for what they omit: any question of whether any of this was legal.

¹¹⁴ Chapter I, Article I and Article II, Hague Convention No. IX, Concerning Bombardment by Naval Forces in Time of War, 18 October 1907, quoted in *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 165.

¹¹⁵ Neil Sheehan, “Rubble Depicts the Agony of a Town in Vietnam,” *New York Times*, 30 November 1965, 2.

¹¹⁶ Neil Sheehan, “Should We Have War Crimes Trials?,” *The New York Times Book Review*, 28 March 1971, 1.

CALCAV's exposure of war crimes hidden in plain sight in the dispatches of war correspondents in Vietnam and indictment of the moral crisis hanging like an albatross over the United States led to the drafting of the "Commentary by Religious Leaders on the Erosion of Moral Constraint in Vietnam" by Robert McAfee Brown. Signed by twenty-nine prominent Christian and Jewish leaders, the statement argued that the news dispatches in the book demonstrated the lawlessness and barbarity of the war in Vietnam and put into focus the fact "we cannot wait for the time-consuming procedures of international tribunals" to condemn the war. The clergymen took the evidence and argued "in instance after instance the United States has far exceeded the bounds of what is morally permissible in Vietnam." Most importantly, they noted, as the articles make clear, that "the major suffering and destruction are located not in the north but in the south" of Vietnam.¹¹⁷ Clearly, the war and the suffering it was causing needed to be stopped and the words of highly respected religious leaders could not be so easily dismissed.

At a news conference in late-January, Rev. John C. Bennett, president of the Union Theological Seminary, stated that the book represented "an appeal to conscience" and that the "destruction that we are causing in South Vietnam is clearly disproportionate to our original purpose of trying to help the people of South Vietnam." Asked for comment on the publication of the book, the Defense Department "deferred" an official response to the State Department. "It is understandable how people might be offended on moral grounds when reading these clippings," noted a State Department spokesman in the *New York Times*. However, he added the claims made in the book that U.S. forces were committing war crimes were "absolutely unsupportable."¹¹⁸ If this were indeed the case, the spokesperson called into question the accuracy of entire national mainstream news media and its coverage of the war as every single major paper in the United States was included in the book.

The controversy concerned the issue of how to interpret the information being printed. While war correspondents' filed daily stories reporting on instances of war crimes such as complicity in torture, or the indiscriminate bombing of villages by air, land and sea,

¹¹⁷ *In the Name of America: The Conduct of the War in Vietnam by the Armed Forces of the United States as Shown by Published Reports* (Annandale: Turnpike Press, 1968), 2, 9.

¹¹⁸ Edward B. Fiske, "Clerics Accuse U.S. of War Crimes," *New York Times*, 4 February 1968, 1.

the “pacification” program, “search and destroy” missions, and “free strike” or “free fire zones,” only a minority ever questioned if these operations were legal under the laws of war. For instance, Mohr’s dispatch from late-1965 highlighted the fact that the indiscriminate bombing of villages and the daily killing of civilians negatively affected the main mission of U.S. forces, not that it was possibly illegal. While news dispatches and commentary in the national media routinely criticized the tactics employed by the U.S. military in Vietnam, U.S. strategic interests in Southeast Asia were never a matter of controversy. It was never a question of whether the military tactics employed, which were possible war crimes, were also part of the “supreme international crime” of intervening in Vietnam in the first instance as documented by the Lawyers Committee on American Policy Towards Vietnam. The significance of publishing a book strictly of dispatches and selections from books by war correspondents was powerful because it demonstrated not only that a pattern of criminality did emerge, but that despite the best efforts of the media to treat each incident as an isolated affair could not be ignored any longer after three years of attacks on a mainly peasant population in South Vietnam. Moreover, the publication was one form of activism and its power was enhanced when the information was utilized with other forms of political organizing against the war.

The book appeared in conjunction with the CALCAV’s second mobilization in Washington, D.C., on February 5-6, 1968. The group had brought together 2500 members of the group for two days of lobbying on Capitol Hill and demonstrations in the nations’ capital. Each member of Congress received a copy of the freshly printed *In the Name of America* and it was a centerpiece of the mobilization where a series of sessions were held on the religious community and the war, fifteen films related to Vietnam were screened, and Rabbi Maurice Eisendrath reported on his trip to Vietnam. The Mobilization featured a powerful silent vigil at Arlington National Cemetery with notable figures such as Martin Luther King, Jr., in attendance. “At the end of the meeting, letters, petitions, a large scroll, and a bag full of letters in support of draft resisters were delivered to Assistant Deputy Attorney General John R. McDonough and two other Department of Justice officials,” noted Mitchell K. Hall. After this largely successful event, CALCAV became much more of a target for the F.B.I., who

until this moment was weary of “infiltrating” the group due to its national stature. By March 1968, the group boasted 90 local affiliates and a mailing list of 20,000.¹¹⁹

Against the Crime of Silence

The proceedings of Bertrand Russell’s International War Crimes Tribunal (IWCT) was published by O’Hare in 1968 and edited by John Duffett. Duffett had directed the filming of the Tribunal’s proceedings and was tasked with culling the large amount of material presented and transcribing it into a publication as quickly as possible.¹²⁰ Titled *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal*, the advertisement called the book “the most important work ever published on Vietnam” and “an invaluable reference” for every American. When the book was released, the publisher sold the book together with the Lawyers Committee’s *Vietnam and International Law*.¹²¹

Providing significant information about the use of napalm, cluster or anti-personnel bombs, the effects of defoliation, and the complicity of the governments of Japan, Thailand, the Philippines, Australia, and New Zealand, the most important testimony came from the U.S. soldiers who served in Vietnam. Attempts were made to find U.S. soldiers to testify at the Stockholm sessions, inviting Donald Duncan for instance in April 1967. The idea was abandoned until Roskilde where Spc. David Tuck, Sgt. Peter Martinsen, and Msg. Donald Duncan testified. The depositions of other soldiers were submitted by Gisele Halimi after she toured the United States for the Russell Tribunal seeking soldiers willing to testify. Some veterans that were interviewed did not want to participate in the Tribunal because they viewed it as too political and/or because they were afraid of a possible backlash against themselves or their families.¹²²

¹¹⁹ For the mobilization and the release of the book, see: Tom Wells, *The War Within: America’s Battle Over Vietnam* (Lincoln: iUniverse, Inc., 2005), 228, and, Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 60-64.

¹²⁰ Ralph Schoenman and Leonard Liggio to Joseph Crown, 15 March 1968, Lawyers Committee on American Policy Toward Vietnam Papers, Box 5, Butler Library, Columbia University.

¹²¹ Advertisement in *The Guardian*, 8 March 1968, 16.

¹²² For David Tuck, pp.403-425; Peter Martinsen, pp. 425-457; Donald Duncan pp. 457-513; and “Report of the Commission of Inquiry to the United States” by Gisele Halimi, pp. 514-519 in John Duffett, ed., *Against the*

“The most sensational propaganda at the recent Russell Tribunal in Denmark...was given by three former United States soldiers,” officials at the American embassy in Copenhagen cabled the Department of State in a summary report. The cable noted that Tuck’s testimony had been transcribed and handed out at the Tribunal and an “[i]nformal translation” of Martinsen’s testimony appeared in the Communist daily *Land og Fog* on November 24. The cable reported: “The various materials and reports available indicate that both Martinsen and Tuck admit having committed acts against Vietnamese prisoners and civilians which may have been punishable under military law. Duncan, on the other hand, appears to have been careful not to implicate himself directly, but confined his testimony to the alleged activities of other unnamed persons and the Special Forces and CIA operations.”¹²³

While Duncan reiterated much of the material discussed earlier in this chapter, David Tuck, who served in Vietnam between January 8, 1966, and February 9, 1967, testified about the execution of wounded North Vietnamese Army (NVA) soldiers, the torture by ARVN soldiers of POWs at Camp Holloway with U.S. interrogator’s supervising in February 1966, an incident in which a NVA POW was thrown out of a helicopter he was riding in, and Tuck’s shooting of an unarmed Vietnamese woman on the orders of his superior at Duc Co. He testified to the cutting off of ears of dead Vietnamese for trophies, the situation of refugees as he witnessed it, the use of tear gas, racism, and the “mad minute” whereby if sniper fire came in from a village soldiers were ordered to open up with all the firepower they had for one minute into the village. “It was standard policy in my outfit not to take any prisoners,” Tuck told the tribunal. “We were told by the officers that we had better not take any prisoners unless it was a North Vietnamese officer.”¹²⁴ Testifying about the class and racial composition of the military, Tuck, an African American, stated that in his infantry

Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen (New York: Simon and Schuster, 1970).

¹²³ American Embassy – Copenhagen to Department of State, 8 December 1967, RG 59 General Records of the Department of State, Central Foreign Policy Files, 1967-1969, Box 2714, National Archives and Research Administration II, College Park, Maryland.

¹²⁴ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 406.

company, 117 of 156 soldiers were black. While Tuck did not witness overt racism in the field, he noted

It was common practice to put the people whom they consider expendable in the infantry. This is the black soldier, the Puerto Ricans and the hillbillies. ... The war is very popular in the United States and if the Johnson administration use the middle-class white people, then the parents of these people when they sustain casualties would be complaining about this and would demand that the war be over with. So, therefore, they put the expendables in the infantry, but I noticed that when I came back from the war and saw on T.V., I saw very few black soldiers. It always seems to be mostly white, but I know with my own eyes this is not true.¹²⁵

Sgt. Peter Martinsen, a former Prisoner of War interrogator for the 541st Military Intelligence Detachment, enlisted in the Army in June 1963 and served in Vietnam between September 1966 and June 1967. He testified that he had interrogated “several hundred” Vietnamese POWs and screened “several thousand” to determine whether they should be interrogated. He stated that he engaged in beatings and psychological torture and witnessed the use of the U.S. field telephone on POWs as a form of electrical torture – known euphemistically as “ring[ing] him up.” He also testified to the fact that American Army officers and their Vietnamese counterparts had tortured POWs to death, including an incident during Operation Cedar Falls in January 1967 where Martinsen saw electrical torture and bamboo splints placed up a POWs finger nails to get him to talk. He testified that after Cedar Falls, “the use of extreme forms of electrical torture became less frequent. But it was understood that if we did not leave marks we could do exactly as we pleased.” He said that this meant beatings with open fists and the continued use of the field telephone on less extreme or fatal doses.¹²⁶ According to Martinsen, because the U.S. interrogators did not speak the language, a Vietnamese interrogator was always present. “This creates much

¹²⁵ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 408.

¹²⁶ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 428.

difficulty,” he said, “and a lot of misinterpretation during the interrogations” which resulted in more hostile interrogations.¹²⁷

In one particular instance where Martinsen participated directly during Operation Manhattan in May 1967, a Vietnamese revolutionary was found hiding in a drainage ditch with a gun after a village sweep. When the suspect would not talk after being beaten with a wooden mallet found in a house in the village, Martinsen had the prisoner dig his own grave with a gun pointed directly at his head while he was being interrogated. Speaking Vietnamese, he counted down the minutes the prisoner had to live, explaining exactly how they would die. The prisoner broke down, crying in the grave he was digging for himself. This was “breaking the prisoner,” Martinsen explained. “This is the absolute power the interrogator has,” he told the Tribunal. “The prisoner was quite certain he was going to die. ... I have read the 1949 Geneva Conventions...coercion is quite illegal. It is a war crime.”¹²⁸ In the end, he explained, even with the use of torture “you don’t get the information anyway. If you torture a prisoner, a prisoner will tell you everything he thinks you want to know, to keep you from giving him pain.”¹²⁹ Responding to questions and cross-examinations, he stated that commanding officers from MACV down to the “lower echelons” knew that torture was occurring.¹³⁰ He told the Tribunal that he had enlisted in the Army and was ardently pro-war until he got to Vietnam where he learned some of the language and spoke to the people there. “If this government [the Republic of Vietnam] wants us there,” he said, “the people don’t.”¹³¹

Reaction to the IWCT across the political spectrum generally ranged from ambivalence to outright attack. While the news media effectively wrote the Russell Tribunal off as “anti-American propaganda,” some members of the American peace movement also

¹²⁷ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 429.

¹²⁸ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 430-431.

¹²⁹ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 432-433.

¹³⁰ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 450-451.

¹³¹ John Duffett, ed., *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm-Copenhagen* (New York: Simon and Schuster, 1970), 434.

questioned how effective a war crimes tribunal in Europe could be at influencing opinion in the United States if it did not at least question crimes committed by the revolutionary forces in Vietnam.¹³² However, after the proceedings were published, there was more of an opportunity to compare the evidence provided by the Tribunal with other available sources. Law professors Anthony D'Amato, Harvey L. Gould, and Larry D. Woods lent further credence to the Russell Tribunal proceedings in the *California Law Review*.¹³³ The authors

¹³² I cover the media's reaction to the IWCT in chapter five. A series of objections and critiques were raised by members of the American peace movement and independent media who were invited to participate on the Tribunal. These critics are interesting because they give us a sense of the pressures put on the movement and how the Russell Tribunal would be received in the United States. The sympathetic critics reflected the same sense of urgency with which Tribunal members organized their efforts; however, the disagreements emerged from the tactics of the Tribunal, or with the organizing style of Ralph Schoenman (who dealt with all of the correspondence). Herbert Marcuse, the influential Marxist and professor at Stanford, wrote that while on one hand he had "been consistently in outspoken opposition to the butchery in Vietnam," he would nonetheless have to decline to participate because he would have to "give up my position as Professor at a state university in perhaps the most reactionary area of the United States." See Herbert Marcuse to Bertrand Russell, 24 February 1967, Bertrand Russell Papers, McMaster University, International War Crimes Tribunal: Refusals. Box 372 - 171034

One of the most representative articulations by a critic sympathetic with the Russell Tribunal was by the playwright Arthur Miller. Miller responded to his invitation to participate on the Tribunal in November 1966 and cautioned that unless the Tribunal could not "enlist some typical pro-war advocacy" as well as include "personalities who have a claim to non-partisanship," the Tribunal could be written off "as simply one more 'propaganda' effort against the Johnson Administration." Finally, Miller found that while international opinion is important "in the long run," the most "critical factor at this moment as compared with the sentiment inside this country." Arthur Miller to Bertrand Russell, 2 November 1967, Bertrand Russell Papers, McMaster University, International War Crimes Tribunal: Members Correspondence, Box 372 - 171059.

Staughton Lynd took a principled stand against the aims of the Tribunal. He asked in his reply in January: "is it the position of the Tribunal that the N.L.F. is completely innocent? that when a little child is killed by American napalm it is clearly a crime, but that if that same child were killed by an N.L.F. terrorist it would be no crime at all?" Moreover, Lynd wrote: "I consider this to be a very dangerous position. I believe it amounts to judging one side (the N.L.F.) by its ends, the other side (the United States) by its means. Precisely that double standard is what I had thought all of us, in this post-Stalin era, wished to avoid." Even though his friends Dave Dellinger and Howard Zinn had counseled Lynd to participate on the Tribunal, he nevertheless declined. Lynd was increasingly concerned with the positions of the New Leftist's in the United States who argued that the National Liberation Front was justified in using any means to acquire independence. Lynd was not opposed to the National Liberation Front in South Vietnam and Vietnamese self-determination, throughout 1965 and 1966 he advocated for the Johnson administration to recognize the NLF and negotiate with them. Staughton Lynd to Bertrand Russell, 13 January 1967, Bertrand Russell Papers, McMaster University, International War Crimes Tribunal: Refusals, Box 372 - 171021; James Finn, *Protest: Pacifism and Politics* (New York: Random House, 1967), 225. See also Staughton Lynd and Alice Lynd, *Stepping Stones: Memoirs of a Life Together* (Lanham: Lexington Books, 2009), 88-90; Carl Mirra, *The Admirable Radical: Staughton Lynd and Cold War Dissent* (Kent: The Kent State University Press, 2010), pp. 91-93, 132-136; and Andrew Hunt, *Dave Dellinger: The Life and Times of a Nonviolent Revolutionary* (New York: New York University Press, 2006), 167. See also: Staughton Lynd, "The War Crimes Tribunal: A Dissent," *Liberation*, December 1967/January 1968, 77.

¹³³ D'Amato argued that: "Although this was an unofficial 'tribunal,' the proceedings were at least as formal as many of the commissions and meetings which produced affidavits, depositions, and written testimony that were

found that certain pieces of evidence collected by the Bertrand Russell Peace Foundation had been substantiated by 1969.¹³⁴ D'Amato found that, weighed against other evidence available in the public record, the Tribunal had corroborated that certain violations of the laws of war had occurred. He believed that the proceedings, analyzed alongside other reports from antiwar activists and journalists in newspapers and magazines "lends credibility to the whole."¹³⁵ With regard to three areas – the treatment of prisoners of war, the bombardment of non-military targets, and the use of chemical weapons – D'Amato found that the evidence presented at the Tribunal was sufficient to demonstrate violations of the laws of war. For instance, he found that Mary McCarthy, Harrison Salisbury, and the investigative teams of the Russell Tribunal all reported the bombing of the leprosarium in Quyuh Lap. "Although the health center is known throughout the world of medicine and science, is marked by the red cross, and has given fame to the small town of Quyuh Lap where it is the only notable structure, it was the target of 39 separate bombing missions."¹³⁶

Writing in the preface of the second edition of Tribunal's proceedings, Noam Chomsky observed that that the material presented "an eloquent and dramatic appeal to

admitted in the various post-World War war crimes trials. Additionally there is evidence of consistency of the witnesses' testimony at the Russell proceedings and in books, newspapers, and before American courts. Most importantly, the great detail and close questioning by members of the panel at Copenhagen and Stockholm of the many witnesses' testimony give that testimony high credibility value, for at Nuremberg and Tokyo, it will be recalled, the tribunals placed decisive weight on the intrinsic credibility of testimony." Anthony A. D'Amato, Harvey L. Gould, and Larry D. Woods, "War Crimes and Vietnam: The" Nuremberg Defense" and the Military Service Resister," *California Law Review* 57.5 (1969): 1074.

¹³⁴ D'Amato, Anthony A., Harvey L. Gould, and Larry D. Woods. "War Crimes and Vietnam: The" Nuremberg Defense" and the Military Service Resister," *California Law Review* 57.5 (1969): 1055-1110.

¹³⁵ Anthony A. D'Amato, Harvey L. Gould, and Larry D. Woods, "War Crimes and Vietnam: The" Nuremberg Defense" and the Military Service Resister," *California Law Review* 57.5 (1969): 1074.

¹³⁶ Anthony A. D'Amato, Harvey L. Gould, and Larry D. Woods, "War Crimes and Vietnam: The" Nuremberg Defense" and the Military Service Resister," *California Law Review* 57.5 (1969): 1086. For the first category D'Amato analyzed, the treatment of prisoners of war, referencing the three soldiers testifying at the Roskilde Session, he found "direct evidence of the murder of prisoners by Americans," torture and beatings. Furthermore, he cited Peter Hamill of the *New York Post* who wrote in 1966 concerning the lack of P.O.W. camps compared to those of the Second World War. Hamill wrote that P.O.W.'s are "usually executed." With regard to the second category, the bombardment of civilian targets, he compared the findings of the Russell Tribunal, Harrison Salisbury, Mary McCarthy, and *Life* magazine, among others. D'Amato concluded: "Official American response to the evidence of bombing of nonmilitary targets has either been to deny the allegations...or to claim that the bombing of such targets was "accidental." Finally, concerning the allegations of the use of chemical weapons, D'Amato concludes that it is irrefutable the U.S. military's use of certain gases, defoliants and napalm are utilized against "the proscriptions of customary international law and the Geneva Protocol [of 1925]." For D'Amato's assessment of the three categories, see pp. 1077-1095.

renounce the crime of silence.” He praised the work of the IWCT for forcing the Pentagon to admit that it used anti-personnel weapons in Vietnam, exploding “beyond repair” the President Johnson’s claims that U.S. war planes had bombed only “steel and concrete.” Chomsky argued that the two main books documenting U.S. war crimes in Vietnam, *Against the Crime of Silence* and CALCAV’s *In the Name of America* “helped to crumble the defences erected by the government, with the partial collusion of the media, to keep the reality of the war from popular consciousness.”¹³⁷ Chomsky would later be pegged as a candidate for a follow-up tribunal in 1970 by the Bertrand Russell Peace Foundation to investigate U.S. crimes in Laos and Cambodia. However, the follow-up tribunal never got off the ground.¹³⁸ Significant movement books published during and after 1968 – Richard Falk, Gabriel Kolko and Robert Jay Lifton’s *Crimes of War*, Edward S. Herman’s *Atrocities in Vietnam*, and Chomsky’s own essays in *American Power and the New Mandarins* and *At War With Asia* – all relied on the proceedings of the Russell Tribunal for evidence in their own critiques of the war.

Conclusion

Despite the growing exposure of war crimes and the illegality of the war in Vietnam, by the beginning of 1968 an overwhelming sense of despair hung over the antiwar movement. The sense that years of organizing, mobilizing, and exposing criminality was not breaking through to the general population in the United States was palpable. Temple University professor Mark Sacharoff lamented this fact to CALCAV’s Richard Fernandez in a March 10, 1968, letter – six days before the infamous massacre at My Lai – arguing that despite press reports citing atrocities, the majority of the American public “appears to have no conception of the scale and ramifications of this brutality and ruthlessness.” Citing *In the Name of America* and “numerous books” documenting these facts, Sacharoff asks who “do

¹³⁷ Noam Chomsky, “Foreword,” in John Duffett, *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal*, (New York: Simon and Schuster, 1970), xiii-xiv.

¹³⁸ Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens’ Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002), 163-164.

these horrifying accounts reach?” Answering his own question he explains they reach the already “well-informed” and active in the movement. By this time, 525,000 troops were in Vietnam and Sacharoff believed more needed to be done. He proposed to Fernandez that hearings should be held in order to “compile expert testimony on U.S. conduct of the war from a wide variety of respected Americans” such as war correspondents, scholars, soldiers, doctors, and politicians. Comparing this idea to the International War Crimes Tribunal, which was “very sketchily and somewhat hostilely reported here,” his idea would bring “a large number of reputable Americans” to testify against the war in Vietnam which “would be much more credible than the testimony of Europeans [at the IWCT], many of whom could be suspected, rightly or wrongly, of harboring anti-American sentiment...”¹³⁹ Such sentiments about the Russell Tribunal were common within the peace movement, yet instead of writing it off completely, the IWCT actually opened up space to organize better and more effective hearings on war crimes in Vietnam in the United States. Sacharoff’s proposal, one of many during this period, was revisited by CALCAV after My Lai.

It is no doubt correct to assume that the audience for the books explored in this chapter were the already initiated into the antiwar movement or at the very least those who were curious about the war and its various effects. This does not undermine the tremendous work that went into each publication because the major constituencies reading them were from the various strands of the antiwar movement. The production and dissemination of information was an integral recruiting tactic for the movement and the growing realization of the war’s brutality coupled with the sense of futility and powerlessness within the movement propelled it to take bolder and more dramatic acts of resistances which raised the stakes at home to end the war. Liberals, for instance, in Clergy and Laymen Concerned About Vietnam or the Lawyers Committee on American Policy Toward Vietnam were radicalized by the revelations that the war was illegal or that war crimes were being committed on nearly a daily basis.

The research and writing of the books was an important form of activism, spurred by other inspiring tactics such as draft and military resistance and the stark reality heinous

¹³⁹ Mark Sacharoff to Richard Fernandez, 10 March 1968, Series III, Box 12 in the Clergy and Laity Concerned Records (DG 120), Swarthmore College Peace Collection.

crimes were being committed by the United States military. However, the publications' power resided in the ability to act upon the information that was provided. Each report and exposé built off one another to provide a picture of the war that was disturbing to those who took the realities of modern warfare seriously. Writing as early as July 1966, Dave Dellinger argued that "the flagrant violations of human decency involved in the administration's relentless war against the Vietnamese people" was the single greatest factor in uniting the tenuous coalition of antiwar forces in the United States.¹⁴⁰ By 1968 this coalition included not only committed pacifists, new and old leftists, and radical intellectuals, but religious organizations, liberal intellectuals, and increasingly active duty GIs and Vietnam veterans. This was due in no small measure to the large amount of information being disseminated and acted upon by the antiwar movement.

¹⁴⁰ Dave Dellinger, "Introduction," "The Fort Hood Three: The Case of the Three G.I.'s Who Said "No" to the War in Vietnam," in the Alice Niles Lynd and Staughton Lynd Papers Papers (DG 099), Swarthmore College Peace Collection, Box 16, Reference – Fort Hood Three.

Conclusion

A radical idea emerged during the Vietnam War: draftees and enlistees into the United States military have a legal and moral responsibility to refuse orders on the basis of post-World War II international law and the laws of war. I have argued that the use of the Nuremberg Principles, international law, and the laws of war by draft and military resisters and their adult supporters in religious, civil liberties, and antiwar organizations reconceptualised the relationship between citizen and state during the Vietnam War. The Nuremberg Principles in particular offered a set of guidelines that transcended the dictates of the nation-state, the draft and the military in its efforts to mobilize manpower to fight the war in Vietnam. This was a tremendous effort during a period of stultifying Cold War anti-communist consensus in the United States and took the dedicated efforts of grassroots antiwar organizers beginning in the early 1960s to challenge the U.S. war in Vietnam on the basis of these principles.

In the three cases covered in depth in this thesis – draft noncooperator David Mitchell, military resisters David Samas, James Johnson, and Dennis Mora (the Fort Hood Three), and Captain Howard Levy – each challenged the war in the courts on the grounds of international law and the Nuremberg principles. In each case, they failed to arouse any positive judicial decisions and spent time in jail for their actions. In the case of Mitchell, in U.S. District Court and the Court of Appeals in 1965 and 1966 he was not able to present evidence challenging the war's legality as it was held to be “immaterial” and “irrelevant.” Mitchell's challenge to the Supreme Court was denied without comment (although Justice William O. Douglas dissented). In the court-martial of the Fort Hood Three, the presiding law officer threw out the argument that the war in Vietnam was illegal and told their attorney: “I rule that it is a matter of law, that the war in Vietnam is legal, and I forbid you to argue that it isn't.” The concurrent challenge by the Fort Hood Three in the civilian courts was dismissed all the way up to the Supreme Court, again without comment. However, to the dissent of Justice Douglas was added the dissent of legal traditionalist Justice Potter Stewart. Justice Stewart raised very serious questions of law and concluded: “We cannot make these

problems go away simply by refusing to hear the case of three obscure Army privates.”¹ While the dissenting opinions were a major breakthrough in the judicial impasse for soldiers and citizens alike wishing to challenge the legality of the Vietnam War, there would be no serious questioning on this point by the judiciary during the war. In the civilian courts, judges relied on the “political questions” doctrine which deferred decision-making on the war’s legality to the political branches of government.² In the court-martial of Captain Howard Levy, the defense team was given an opportunity in two out-of-court hearings to present evidence that war crimes were being committed in Vietnam and that training Green Berets to use medicine to “win the hearts and minds” of the Vietnamese was against medical ethics. However, in each case, the presiding law officer ruled that Levy did not make his case.

The war resisters and their support networks seized the crucial space they created to spread information about the war in Vietnam and the connections to the Nuremberg Principles, the United Nations Charter and the laws of war such as the Geneva Conventions of 1949 and the Hague Conventions of 1899 and 1907. A whole body of material was produced in support of this refusal to serve in Vietnam and included mimeographed flyers, petitions, newspaper advertisements, personal and organizational public statements, “Dear draft board” letters, legal briefs and memorandums of law, magazine articles in the alternative and underground presses. Moreover, books such as Alice Lynd’s edited collection *We Won’t Go* disseminated the personal stories of draft and military resisters as well as the CALCAV sponsored *In the Name of America*, the proceedings of the Russell Tribunal *Against the Crime of Silence* and the Lawyers Committee on American Policy Towards Vietnam’s *Vietnam and International Law* each added to the cause by offering critical information about international law and war crimes in Vietnam. This was unprecedented in

¹ *Mora v. McNamara*, 389 U.S. 934, 88 S. Ct. 282, 19 L. Ed. 2d 287 (Supreme Court 1967). For the quotes from the Mitchell and Fort Hood Three cases, see Beverly Woodward, “Nuremberg Law and U.S. Courts,” *Dissent*, March-April 1989, 129

² See Louis Loeb, “The Courts and Vietnam,” *American University Law Review* Vol. 18 (1968): 376-397; Stanley Faulkner, “The War in Vietnam: Is It Constitutional?” *The Georgetown Law Journal* Vol. 56 (1968): 1132-1143; Richard Falk, “The Nuremberg Defense in the Pentagon Papers Case,” *Columbia Journal of Transnational Law*, Vol. 13, No. 2 (1974): 214; John Norton Moore, *Law and the Indo-China War* (Princeton: Princeton University Press, 1972). See Chapter 13, pp. 570-598; and Rodric B. Schoen, “A Strange Silence: Vietnam and the Supreme Court,” *Washburn Law Journal* 33 (1994): 275-322.

American history and helps explain the spread of antiwar ideas and how this diverse group of characters and organizations eventually linked up to form an historic antiwar coalition against the American war in Southeast Asia.

By 1968 with three years of draft and military resister court cases based on the Nuremberg Principles, domestic and international law, lawyers and legal observers concluded the strategies being used were not effective. In early 1968, William V. O'Brien, professor of Government at Georgetown University, concluded after reviewing the three cases mentioned above:

In view of the uncertainty of the outcome of a defense based on the international illegality of U.S. conduct in Vietnam, it would seem preferable, again as practical matter, to claim general conscientious objection, or to emphasize the alleged unconstitutionality of a particular war. Such a course of action would rely upon Nuremberg Principles and international law only as a secondary argument. The foregoing conclusions are reached with reluctance and concern over the present relationship between U.S. municipal [domestic] law and international law, which creates a serious dilemma for any American who takes seriously international law and official U.S. pronouncements supporting it.³

In other words, O'Brien argued that a more effective strategy would be for resisters to simply apply for traditional conscientious objector status. By and large, this was good advice as the Federal government was scoring easy victories in the courts. Between 1965 and 1972, there were roughly 100,000 Selective Service Act offenders. This included people who burned or returned their draft cards, those who did not sign up for the draft on their eighteen birthday, or others who failed to report for induction. Of these people, 22,500 were indicted, 8,000 of them were convicted in the courts and 4,000 subsequently went to prison. A clear majority of those who were indicted, seventy-two percent, were not pacifists or were not members of the historic peace churches. This was unprecedented in U.S. history.⁴

³ William V. O'Brien, "Selective conscientious objection and international law," *The Georgetown Law Journal* Vol. 56 (1967): 1130. This is an extended article which first appeared in James Finn, ed., *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (New York: Pegasus, 1968).

⁴ John Whiteclay Chambers II, "Conscientious Objection and the American State from Colonial Times to the Present," in Charles C. Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993), 41.

In the absence of court intervention and the jailing of war resisters, it was also clear to many liberal and radical groups across the United States that normal channels of protest were not going to bring the war to an end. The war continued to escalate, draft calls mounted, U.S. soldiers were being killed in increasing numbers, and Vietnamese civilians were facing the brunt of an American assault on South and North Vietnam. Slowly information was released about the covert wars in Cambodia and Laos. The more radical elements of the movement by the spring of 1967 were calling for a move from “Protest to Resistance” in open defiance of the Selective Service Act and more moderate liberal groups like Clergy and Laymen Concerned About Vietnam moved in the direction of supporting civil disobedience despite the alienating effects it would have on its constituency. In April, Martin Luther King, Jr., publicly opposed the war in Vietnam and in May he argued that “every young man who believes this war [in Vietnam] is abominable and unjust should file as a conscientious objector.”⁵ This blanket call for anyone who opposed the war to apply for C.O. status caused consternation within Congress as resistance to the war was becoming more visible. The work of draft resistance groups, draft counseling groups, antiwar organizations, civil rights organizations, and the jailing of resisters led to a dramatic increase in the number of conscientious objector applications and also held the tenuous antiwar coalition together. As John Whiteclay Chambers II demonstrates, in 1966 out of a ratio of 100 inductions into the military there were 6.10 conscientious objector exemptions. In 1967, 1968, 1969 the exemptions rose to 8.10, 8.50, and 13.45 respectively. In 1970, the number jumped to 25.55 followed by 42.62 in 1970. By 1971, the Selective Service was exempting more CO applicants than they were inducting into the armed forces at a ratio of 130.72/100. These were also unprecedented numbers.⁶ In total, there were 170,000 conscientious objector applications approved during the war. Another 300,000 C.O. applications or deferment

⁵ Martin Luther King, Jr., quoted in James Finn, ed., *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (New York: Pegasus, 1968), viii.

⁶ John Whiteclay Chambers II, “Conscientious Objection and the American State from Colonial Times to the Present,” in Charles C. Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993), 42.

requests were denied.⁷ There was a total of 600,000 resisters who illegally evaded the draft and out of these roughly 40,000 fled to Canada (including draft dodgers and military deserters), and another 20,000 who went underground in the United States or elsewhere. Within the military itself, there were 17,000 in service applications for conscientious objector status between 1967 and 1973 (829, 1387, 2556, 3196, 4381, 2673, and 2056 respectively). The breakdown of the numbers corresponds to the breakdown in discipline in the military and growing disaffection from the war in Vietnam.⁸

“Of all the issues that have risen out of the conflict in Vietnam to trouble America, none holds a more secure place in the history of man’s moral searchings than selective conscientious objection to war,” investigative journalist Walter Goodman wrote in a feature article in *New York Times Magazine* in 1969. He wrote of the cases of Green Beret Gerry Condon, Capt. Howard Levy, Capt. Dale Noyd, and David Mitchell. Despite the fact that Condon and Noyd were the only examples used in the article who actually applied for conscientious objector status, Goodman still used the term to describe Mitchell and Levy when it was more appropriate to call them selective war objectors.⁹ Goodman’s confusion, as well as many of the other commentators, arose because he saw this new group of resisters as illegitimate and therefore piggybacking on hard-won gains for traditional conscientious objectors since World War I. For Goodman, the state’s granting of conscientious objector status to “avowed pacifists” in the Anabaptist churches “is a privilege” and “not a right to which they are necessarily entitled under the law.”¹⁰ This interpretation misses the key distinction that needs to be made when discussing draft and military resistance during the Vietnam War.

There were indeed traditional CO’s from the Anabaptist churches – Mennonites, Quakers, Brethren, and the Hutterites – who applied for and received CO status during the

⁷ Marilyn Young, John Fitzgerald, and A. Tom Grunfeld, *The Vietnam War: A History in Documents* (Oxford: Oxford University Press, 2002), 117.

⁸ David Cortright, *Soldiers in Revolt: GI Resistance During the Vietnam War* (Chicago: Haymarket Books, 2005), 15-17.

⁹ Walter Goodman, “Choose Your War; Or, the Case of the Selective C.O.,” *New York Times Magazine*, 23 March 1969, 34.

¹⁰ Walter Goodman, “Choose Your War; Or, the Case of the Selective C.O.,” *New York Times Magazine*, 23 March 1969, 34.

Vietnam War. There were others, who are technically called selective conscientious objectors such as Gerry Condon and Dale Noyd who applied and did not receive CO status. However, the key figures explored in this thesis –Mitchell, the Fort Hood Three and Levy –did not attempt to apply for CO status because they knew they would have been denied. Their refusal of orders was based on assertions the war in Vietnam was illegal under domestic and international law and based on the Nuremberg Principles. The distinction is important because the central arguments made by the selective war objectors was the war in Vietnam war illegal and no military or civilian court decided on this issue under the “political questions doctrine.” However, the selective conscientious objectors followed a path similar to what William V. O’Brien outlined above during and after 1967. A soldier such as Capt. Dale Noyd applied for CO status, was denied and challenged this denial in the courts. He did not use as his primary argument the illegality of the war, but the fact that his CO application was denied. While the military and the civilian courts found that Noyd was not “opposed to participation in war in any form” as defined in the legal definition of CO status, he was court-martialed and sent to jail. However, Noyd’s resistance was still within the realm of the “ethos of Nuremberg” and to the movement he was still nonetheless a selective conscientious objector.

Goodman goes on to criticize the resisters – both pacifists and non-pacifists – who used the Nuremberg Principles in their defense. “It is now part of international law that if an individual is charged with violating the rules of a just war, it is not a complete defense to say that he was merely following orders,” Goodman explains. However, despite the fact he acknowledges this is part of international law, he offers the common refrain to refute this use of legal precedent to argue that “a major difficulty with raising the specter of the Nuremberg trials is that it puts the S.C.O. [selective conscientious objector] in the invidious position of equating the United States with Nazi Germany.”¹¹ Goodman analysis mischaracterizes both the Nuremberg Principles and also the use and difficulty of utilizing them to justify a selective objector’s position. In both instances, Goodman treads on similar ground as many other critics of military and draft resisters.

¹¹ Walter Goodman, “Choose Your War; Or, the Case of the Selective C.O.,” *New York Times Magazine*, 23 March 1969, 34.

First, the Nuremberg Principles do not state that individuals must violate “the rules of a just war,” they specifically refer to three categories of crimes created after World War II: crimes against peace, crimes against humanity and war crimes. These are quite specific and different crimes under international law and the laws of war which were codified to replace notions of “just” and “unjust” war theory from the middle ages. Goodman is correct, however, in stating it is no longer acceptable to argue the defense of following superior orders if charged with violating one of these three crimes. Second, the use of the Nuremberg Principles by draft and military resisters does not mean they have to compare U.S. actions in Vietnam to Nazi actions in Europe. This was an easy way of minimizing the applicability of international law and the laws of war to the conflict in Vietnam. “You do not have to prove that Johnson is a Hitler or that the U.S. set out deliberately, as did the Nazis, to exterminate a whole people,” I.F. Stone wrote during the court-martial of Howard Levy. Instead, Stone believed that “legally Nuremberg stands for the proposition that a soldier cannot plead ‘superior orders’ if he commits a crime against the laws of war, or against humanity, but is under obligation to refuse.”¹² While this particular article by Stone leaves out the crime against peace, the point is clear. The difficulty in using domestic and international law and the laws of war was actually in getting the civilian and military courts to recognize them as applicable to draft and military resisters for refusing to participate in the Vietnam War.

The media responded with suspicion to this new wave of selective war objectors. The *New York Times* editorialized in April 1967 that if this notion were accepted by the courts and more generally in the United States, the idea “would chip away the foundation of universally shared obligation” to military service in the United States. “Citizens cannot pick and choose which wars they wish to fight any more than they can pick and choose which laws they wish to obey,” the editors opined. “However, if Cassius Clay [Muhammad Ali] and other draft-age objectors believe the war in Vietnam is unjust, they have the option of going to prison in behalf of their beliefs.”¹³ In September 1967, Vice President Hubert Humphrey answered a group of students who asked about selective objection that “I don’t think you can

¹² “The Meaning of the Nuremberg Issue in the Capt. Levy Court Martial,” *I.F. Stone’s Weekly*, 29 May 1967, 2.

¹³ “Clay vs. the Army,” *New York Times*, 29 April 1967, 34.

leave it up to individuals as to which wars they want to fight in” as this would “give a man God-like powers.”¹⁴ Humphrey’s answer underscores just how controversial and misunderstood this idea was in the 1960s.

While commentators and Johnson administration officials were opposed to the idea of selective objection to the war in Vietnam, so was the Congress and the president’s special commission tasked with studying the draft. The President Johnson’s National Advisory Commission on the Selective Service, headed by Burke Marshall, the former head of the Justice Department’s civil rights division, dealt specifically with the question of selective objection to war. The majority opinion in the final report was completely hostile to the idea calling it “essentially a political question of support or non-support of a war and cannot be judged in terms of special moral imperatives.” They argued that acceptance of selective objection or “selective pacifism” as a principle would lead to “a general theory of selective disobedience to law” and “could quickly tear down the fabric of government.” This principle would give the draftee or enlistee the power to decide if certain military tactics were war crimes and would force “upon the individual the necessity of making that distinction – which would be the practical effect of taking away the Government’s obligation of making it for him,” the opinion explained.¹⁵ Such foreboding language meant that selective conscientious objection would not be taken seriously in the halls of power in Washington.

Despite the best efforts of groups like CALCAV lobbying to get selective conscientious objection included into the Selective Service Act of 1967, legislators lead by Sen. Mendel Rivers and Rep. Edward Hebert rushed the bill through Congress in June 1967 without any provision for selective objectors. Walter Goodman concluded: “In pique against the young protesters who had been doing their disorderly things around the country, Congress ended the requirement that the Department of Justice hold a hearing in the case of objectors who appeal the decision of their local board – thereby assuring prompter

¹⁴ Hubert Humphrey quoted in James Finn, ed., *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (New York: Pegasus, 1968), x.

¹⁵ Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* Washington: United States Government Printing Office, 1967, pp. 50-51. See also: Walter Goodman, “Choose Your War; Or, the Case of the Selective C.O.,” *New York Times Magazine*, 23 March 1969, 131.

prosecution.”¹⁶ The new draft law also ended marriage and fatherhood deferments for those married after 1965 and included “language indicating that graduate [student] deferments (except for medical and dental school students) would be eliminated sometime in 1968 but set no timetable.” According to Michael Foley, despite the work of the Marshall Commission, the renewal of the draft law included the same “fundamental inequalities” as before.¹⁷

The majority opinion of the National Advisory Commission on the Selective Service, Vice President Hubert Humphrey, the editors of the *New York Times* and many others chronicled in the preceding pages all missed the fundamental point the military and draft resisters were making: international law and the laws of war should be applied to the war in Vietnam. Such a proposal was so threatening that critics from across the political spectrum in the United States all argued that this was an assault on the integrity of the U.S. government, the Selective Service and the military. The fact that this proposal brought forth cries of “anarchy” demonstrated that after World War II, political elites in the United States felt that the U.S. government was above international law and that, for some, the U.S. was simply incapable of committing war crimes, and if they were, they should not be held accountable. This was a central pillar of American exceptionalism and the Cold War consensus.

In the summer of 1967 as the movement against the draft was blooming and young men were taking great risks against the war in Vietnam, adult supporters who did not face conscription began issuing statements in support of the resisters. This action was itself a crime under the Selective Service Act. Arthur Waskow and Marcus Raskin, colleagues at the Institute for Policy Studies, with Bob Zevin of Columbia University, drafted one of the most famous statements of the war: “A Call To Resist Illegitimate Authority.” The “Call to Resist” was a legal and moral statement that called for “open resistance to the war and the draft.” The statement was broken up into nine paragraphs and argued “the war is unconstitutional and illegal” because it was an undeclared war under the Constitution, it violated the legitimate use of force provisions of the U.N. Charter, and the Geneva Accords of 1954 “which our

¹⁶ Walter Goodman, “Choose Your War; Or, the Case of the Selective C.O.,” *New York Times Magazine*, 23 March 1969, 128.

¹⁷ Michael Foley, *Confronting the War Machine*, 66;

government pledged to support but has since subverted.” The statement pointed to violations of the Geneva Conventions of 1949 and the U.S. government’s responsibility to uphold the Nuremberg judgment of 1946. The authors asked those who signed the statement to

believe on all these grounds that every free man has a legal right and a moral duty to exert every effort to end this war, to avoid collusion with it, and to encourage others to do the same. Young men in the armed forces or threatened with the draft face the most excruciating choices. For them various forms of resistance risk separation from their families and their country, destruction of their careers, loss of their freedom and loss of their lives. Each must choose the course of resistance dictated by his conscience and circumstances. Among those already in the armed forces some are refusing to obey specific illegal and immoral orders, some are attempting to educate their fellow servicemen on the murderous and barbarous nature of the war. Among those not in the armed forces some are applying for status as conscientious objectors to American aggression in Vietnam, some are refusing to be inducted. Among both groups some are resisting openly and paying a heavy penalty, some are organizing more resistance within the United States and some have sought sanctuary in other countries.¹⁸

Encapsulating the nature of the resistance to the draft and the military, the stark choices required paralleled risk taking among the adult supporters who were too old to be drafted. Waskow and Raskin distributed the statement widely and by July it received 100 signatures. In late-September it was published in *The New York Review of Books* and *The New Republic* in October with 128 signers. By 1968 it had 2000 and by the war’s end it had 20,000 endorsers. The “Call to Resist” was a key piece of evidence attempting to prove a conspiracy to aid and abet draft resisters in the landmark case of the Boston Five.¹⁹

Another statement released in September 1967, this time by Women Strike for Peace, supported draft-aged men refusing to participate with the Selective Service System on moral and legal grounds. Drafted in June by WSP’s National Consultative Committee, the statement read:

¹⁸ “A Call to Resist Illegitimate Authority,” *New York Review of Books*, 12 October 1967, 7.

¹⁹ Staughton Lynd and Michael Ferber, *The Resistance* (Boston: Beacon Press, 1967), 121-122; Tom Wells, *The War Within: America’s Battle Over Vietnam* (Lincoln: iUniverse, Inc., 2005), 192-193; and Michael S. Foley, *Confronting the War Machine: Draft Resistance during the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003), 94-96.

Increasing numbers of young Americans are finding that the Vietnam war so outrages their deepest moral and religious sense that they cannot serve in the Armed Forces while it continues

As Americans they have been taught respect for the rights of others and to stand up for their belief in justice.

They now refuse to violate these principles. They refuse to be sent to Vietnam to kill men, women and children who have never harmed them and who have never threatened our country.

As mothers, sisters, sweethearts, wives, we feel it is our moral responsibility to assist these brave young men who refuse to participate in the Vietnam war because they believe it to be immoral, unjust and brutal.

Too many men have died. Too many more will die, unless they have the courage to say "No!" We can help give them that courage by giving them our support.

We believe that support of those who resist the war and the draft is both moral and legal. We believe that it is not we, but those who send our sons to kill and be killed, who are committing crimes. We do, however, recognize that there may be legal risks involved, but because we believe that these young men are courageous and morally justified in rejecting the war regardless of consequences, we can do no less.²⁰

Always on the cutting edge of antiwar activity, Women Strike for Peace organized a dramatic series of demonstrations on September 20 to protest the continued escalation of the war in Vietnam. Organizing a day of activity in Washington, D.C., the group of 1000 women started with a rally before marching to the offices of the Selective Service System to deliver their statement. They continued marching to protest the war in front of the White House. Before the event was to take place, new rules were implemented which stipulated only 100 people at a time were allowed to protest at the gates of the White House. Undeterred by the new regulations, the women pushed up against the line of police at the entrance to the White House causing a scuffle to break out and the formation of a second line of police to act as

²⁰ Quoted in Amy Swerdlow, *Women Strike for Peace: Traditional Motherhood and Radical Politics in the 1960s* (Chicago: University of Chicago Press, 1993), 177.

reinforcements. Cooler heads prevailed and the event demonstrated the growing frustrations with the war and the escalation of confrontational tactics in the fall of 1967.²¹

In a final notable example, CALCAV released its own statement advocating for open defiance of the draft. Less militant than “A Call to Resist,” CALCAV issued a statement titled “Conscience and Conscription” expressing outrage over Congress’ continuation of the draft without adding new provisions for selective conscientious objectors. The appeals by the religious leaders in early 1967 fell on deaf ears on Capitol Hill and demonstrated that the blank cheque given to the Johnson administration to wage war in Vietnam was extended. “It is no longer enough to protest the injustice of the present military conscription system. The time has come to pledge active support to all who in conscience and through non-violent means decide to resist its injustice,” the statement read. Issued after Stop The Draft Week and the March on the Pentagon, CALCAV invoked the “long-standing Jewish and Christian tradition” of selective conscientious objection. They argued that “conscience is by definition a matter of personal moral code as a basis for ‘sincere and meaningful’ objection” to war and decried the government’s refusal to entertain “political, philosophical, or sociological views” in its conception of C.O. status. “Ethical decisions must be made in relation to particular events. Therefore the citizen whose conscience forbids him to participate in a particular war is as deserving of respect as a citizen whose conscience forbids him to participate in any war,” CALCAV reaffirmed.²² The statement was controversial among its membership and represented a turn to fierce moral arguments against the war and the adoption of civil disobedience as a necessary tactic to end the war.

²¹ Amy Swerdlow, “‘Not My Son, Not Your Son, Not Their Sons’: Mothers Against the Vietnam Draft,” in Melvin Small and William D. Hoover, eds., *Give Peace a Chance: Exploring the Vietnam Antiwar Movement* (Syracuse: Syracuse University Press, 1992), 166-169.

²²The statement concluded: “We hereby publicly counsel all who in conscience cannot today serve in the armed forces to refuse such service by non-violent means. We pledge ourselves to aid and abet them in any way we can. This means that if they are now arrested for failing to comply with a law that violates their consciences we too must be arrested, for in the sight of the law we are now as guilty as they.” Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 55. For the full text of the statement, see: Conscience and Conscription, A Statement by Clergy and Laymen Concerned About Vietnam, 25 October 1967, Folder 50, Box 12, Social Movements Collection, The Vietnam Center and Archive, Texas Tech University. Available Online: <http://www.vietnam.ttu.edu/virtualarchive/items.php?item=14511250011>.

By 1968, the national debate developing about selective war objection and selective conscientious objection was aided with the publication of Alice Lynd's edited collection *We Won't Go* and other excellent work such as James Finn's *A Conflict of Loyalties: The Case for Selective Conscientious Objection*. Moreover, CALCAV's advocacy on behalf of selective conscientious objectors was helping to break down barriers in the religious communities and organizations across the United States. Between 1967 and 1968 Vietnam spurred debates within most of the major religious organizations across the United States. In 1967, other than CALCAV, the National Council of Churches and the General Synod of the United Church of Christ issued statements in support selective conscientious objection. In 1968, after the Tet Offensive, to this list was added the United Presbyterian Church, the American Baptist Church, the Synagogue Council of America, and the World Council of Churches.²³

The work of the early pioneers not only turned the issue of selective objection into a national debate, they put the illegality of the war front and center as an issue to mobilize around and build new constituencies. The May 1968 edition of the Lawyers Committee on American Policy Towards Vietnam newsletter, *Report*, highlighted that "challenges to the legality of the Vietnam War have increased substantially in the past few months." For instance, drawing attention to the increased activity of the draft resistance movement and the elimination of deferments for graduate students, the Lawyers Committee announced it "has been recently deluged" with requests for advice and help for those seeking to resist the draft, the military, and the payment of taxes to support the war machine. The remainder of the newsletter listed all of the possible legal arguments one could make in refusing to cooperate with the draft, the military, and the IRS and initiated a call to create a "clearing house" for

²³ See James Finn, "Introduction," in James Finn, ed., *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (New York: Pegasus, 1968), iii-ix. See also: Mitchell K. Hall, *Because of Their Faith: CALCAV and religious opposition to the Vietnam War* (New York: Columbia University Press, 1990), 46, 51, 65. While most religious bodies were unwilling to lend their support to selective conscientious objection, in 1967 a number of organizations released statements questioning either the tactics or the entire war in Vietnam: the Methodist Board of Missions, the United Church of Christ, the American Baptists and United Presbyterians, the Disciples of Christ, and at the Episcopal triennial convention 24 bishops vowed to petition President Johnson to end the bombing of North Vietnam. By 1968, the list of religious bodies officially questions or opposing the war was expanded to include the Roman Catholic monthly *U.S. Catholic*, and the United Methodists.

lawyers and refusers. The Lawyers committee specifically highlighted the legal arguments and case of David Mitchell between 1965 and 1966 as well as lawyers willing to defend civil resisters.²⁴ By the end of the decade, one-tenth of all federal prosecutions involved draft resistance cases.²⁵

While the courts had deferred their power to intervene on crucial constitutional questions to the other two branches of government, the significant legal challenges launched by the draft and military resisters helped to crystallize resistance to the Vietnam War more broadly in the anti-draft, GI, and veterans movements. By the end of 1967 and the beginning of 1968, the U.S. was still escalating in Vietnam and the movement to end the war had been organizing for over two years. Since this time a myriad of press reports, antiwar activities, and draft call-ups had raised the level of consciousness about the illegality of the war. The publication of numerous movement materials such as petitions, flyers, articles in the movement presses, newspaper advertisements, and books became an essential tactic of the movement. The principled stands and the examples set by the early resisters who went to jail inspired others to resist. At the same time, a number of critical exposés were released such as Donald Duncan's February 1966 *Ramparts* article and subsequent disclosure of covert operations in North Vietnam Laos and Cambodia by the United States, in November David Dellinger had returned from Southeast Asia (after touring South and North Vietnam) and had publicized the fact that fragmentation bombs were being used in *Liberation* magazine. On Christmas Day 1966, *New York Times* correspondent Harrison Salisbury reported that the United States Air Force was indeed killing civilians and not bombing just "concrete and steel." The credibility gap between the Johnson administration, the media, and the public was widening.

Captain Howard Levy and the Fort Hood Three, while they were imprisoned, helped to shape resistance for other G.I.'s and they were consistently used as examples in articles in the

²⁴ "A Clearing House on Challenges to the Legality of U.S. Intervention in Vietnam," *Report*, No.3, May 1968.

²⁵ Melvin Small, *Anti-Warriors: The Vietnam War and the Battle for America's Hearts and Minds* (New York: SR Books, 2002), 64. See also: James W. Tollefson, *The Strength Not to Fight: An Oral History of Conscientious Objectors of the Vietnam War* (Boston: Little, Brown and Company, 1993), 6-7.

burgeoning G.I. underground press. For example, Howard Petrick wrote in the first issue of *Task Force* on 10 August 1968 that:

It is now becoming clear that if the American GI's don't want to fight this war, they are going to have to make it known to the American people that the best way to support them is to demand to bring them home and that all inductees be released so that they can go 'back to the block'. GI's who, more than any other – segment of American society are affected by this war, must understand the impact that their voices and actions can have on the American people. The antiwar movement among GI's has, up to this point, played a very important role in deepening the antiwar movement among the American people. Actions of the GI's such as the Fort Hood Three, who refused to go to Vietnam, have had a profound effect on orienting the antiwar movement toward working with GI's and also brought about the ideas of GI's working within the Army among' other GI's who are against the war.²⁶

The growing resistance was concerning to those who say this as an affront to American democracy and the ideals of national service in the military.

While interest in human rights, international law, and the laws of war became an important field of study in the 1990s and 2000s, it is important to point out that the debate about these subjects was in part sparked during the Vietnam War because of the efforts of the antiwar movement. If military and draft resisters did not bring the legality of the war as well as the use of the Nuremberg Principles as a basis of their resistance to civilian and military courts, the movement may have lost an important opportunity to educate the public about international law and the laws of war vis-à-vis American intervention in Vietnam. Moreover, international legal scholars would not have debated the issues at conferences, in resolutions at professional associations, in letters to the editor of national and international newspapers, and in law journals. The use of the Nuremberg Principles, international law, and the laws of war by these war resisters occurred at a time when legal experts were lamenting the fact that after the Nuremberg and Tokyo war crimes trials did not usher in the creation of a world court that had the powers to enforce the new international mechanisms governing the use of force and military tactics in war. These legal experts criticized the lack of international

²⁶ Howard Petrick, "GI's Fight Back," *Task Force* No.1, 10 August 1968. Available online: http://www.sirnosir.com/archives_and_resources/library/articles/task_force_04.html

mechanisms and the failure of the international community to agree on a definition of aggression at the same time the American and international antiwar movements were attempting to create a war crimes movement from below. Illuminating this history flips our understanding of the importance of the Nuremberg Principles and the ways in which they are enforced locally, nationally, and internationally. This also helps us understand the breadth, scope, and depth of the anti-Vietnam War movement what was established between 1965 and 1967.

Elizabeth Borgwardt argues the Nuremberg Principles are becoming “constitutionalized” as “they percolate through specific institutions in concrete, operational ways” when their language has been applied in the post-Cold War “international criminal tribunals” such as for the former Yugoslavia, Rwanda, and the International Criminal Court.²⁷ If we take the Vietnam War as an example, it is the opposite formulation: the Principles were adopted as a moral, political and legal code by peace activists, draft resisters, and military resisters. The power of the Nuremberg Principles was not “constitutionalized” in the United States beyond the U.S. Army Field Manual, despite the fact that they were part of the “Supreme Law of the Land” under the U.S. Constitution as the various civilian and military court cases demonstrate. In other words, at the level of international institutions, the Nuremberg Principles are being taken seriously only after they have been internalized by peace movements from below.

²⁷ Elizabeth Borgwardt, “‘Constitutionalizing’ Human Rights: The Rise and Rise of the Nuremberg Principles,” in Iriye, Goedde, and Hitchcock, *The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012), 83-85.

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