Discomfort and Unpleasantness: The Vietnam Antiwar Movement at the Supreme Court

On August 27, 1966, as part of an antiwar rally, the W.E.B. DuBois Club held a meeting on the grounds of the Washington Monument to discuss several topics related to the Vietnam War. In attendance was Robert Watts, an 18-year-old African American war protestor.[1] When those at the rally broke into small discussion groups, Watts joined a group set to discuss police brutality. In the course of conversation, Watts proclaimed:

> "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights in L.B.J. [President Lyndon B. Johnson]. [….] They are not going to make me kill my black brothers."[2]

Present at the rally was an investigator for the Army Counter Intelligence Corps who overheard Watts' remarks and reported him. As a result, Watts was arrested for violating a 1917 statute that prohibited any person from "knowingly and willfully… [making] any threat to take the life of or to inflict bodily harm upon the President of the United States."[3] Convicted by a federal jury, Watts appealed to the Court of Appeals for the D.C. Circuit in which a divided court upheld the conviction.[4]

On appeal, the Supreme Court issued a per curiam opinion without hearing oral argument and reversed the decision of the appellate court. The Court upheld the constitutionality of the

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[1] David L. Hudson Jr., "50 Years Ago, the Court Enters the True Threats Thicket in *Watts v. United States*," Freedom Forum Institute, May 7, 2019, https://www.freedomforuminstitute.org/2019/05/07/50-years-ago-the-court-enters-the-true-threats-thicket-in-watts-v-united-states/

[2] *Watts v. United States*, 394 U.S. 705 (1969).

[3] Ibid., at 705.

[4] Hudson, "50 Years Ago." The Court of Appeals for the DC Circuit was split 2-1. The majority opinion was written by Judge Warren Burger, the future Supreme Court Chief Justice. Burger emphasized, as did the judge in the trial court, that Watts did not need to actually intend to harm the President, simply "knowingly and willfully" making the threat was enough to be subject to prosecution under the 1917 statute.

1917 statute, writing that the country "undoubtedly has a valid, even an overwhelming, interest in protecting the safety" of the President.[5] Watts' statements, however, did not constitute a true "threat" to the safety of President Johnson. While the Court agreed that the statements were "a kind of very crude offensive method of stating a political opposition to the President," when taken in context, they could not reasonably be interpreted as a true threat. The Court concluded that "the language of the political arena […] is often vituperative, abusive, and inexact," and that Watts' statements were a kind of "political hyperbole" that is a form of constitutionally protected speech that must be distinguished from the type of language prohibited by the statute.[6]

While the Court's decision in *Watts* did not establish a clear legal test for determining when speech is a "true threat," it was the first time in which the Supreme Court attempted to define this type of speech. In its ruling, the Court established what became known as the Watts Factors, a framework used by future courts to discern "true threat" statements: (1) the context of the statement or statements in question, (2) whether the threatening statement was conditional, (3) the reaction of the listeners.[7] Throughout the rest of the twentieth century and into the twenty-first, courts have struggled to determine what speech constitutes a "true threat." Despite the confusion surrounding the topic, the Court's decision in *Watts* was a powerful case, particularly during the Vietnam era. It emphasized the importance of politically charged advocacy and ensured that such advocacies should not be misconstrued as true threats. For the bold and the impassioned, this case protected antiwar protestors' rights to express their opposition to the war and the government in hyperbolically threatening ways.

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[5] *Watts v. United States*, at 707.
[6] Ibid., at 708.
[7] David L. Hudson Jr., *Freedom of Speech: Documents Decoded* (Santa Barbara, CA: ABC-CLIO, 2017): 85.

Throughout the entirety of the Vietnam conflict, the only cases the Supreme Court agreed to hear were those that, like *Watts*, addressed First Amendment concerns. The Supreme Court – and really any court for that matter – refused to rule on the constitutionality of the war directly. Courts instead dismissed cases that raised the constitutionality question, claiming that it was a "political question" and thus nonjusticiable.[8] But as antiwar protest grew and put pressure on the judicial system, the Supreme Court had to grapple with at least some of the issues being brought to its bench by activists. First Amendment issues such as freedom of speech, freedom of religion, and freedom of the press became critical throughout the late 1960s and early 1970s due to their intimate relationship with the antiwar movement. Several activists, upon being convicted under different statutes, took to the courts to try to preserve their right to protest. Legal activism was necessary for the existence of the antiwar movement for it protected activists' rights to fight for an end to the war. Without this protest tactic, the movement would not have been able to flourish in different ways for these protests would have been suppressed by the government. Activism in the courts was a distinct tactic not only for its influence on the antiwar movement, but also for the ways in which it influenced the lives of Americans throughout the entire country and into the future in ways that other forms of activism did not.

Many of the cases that will be discussed in this chapter have been discussed by historians when examining First Amendment jurisprudence and the development of citizens' rights throughout American history. These studies tend to focus on the ways in which these landmark cases impacted the Supreme Court's understanding of the First Amendment's speech, press,

[8] For cases that discuss the non-justiciability of the war's constitutionality see *Mora v. McNamara*, 389 U.S. 934 (1968) cert. denied; *Luftig v. McNamara*, 252 F. Supp. 819 (D.C. Cir., 1966); *Morse v. Boswell*, 393 U.S. 1052 (1969) cert. denied; *Orlando v. Laird*, 443 F.2d 1039 (2nd Cir., 1971); *Berk v. Laird*, 317 F. Supp. 715 (EDNY, 1970); *Massachusetts v. Laird*, 400 U.S. 886 (1970).

assembly, and petition clauses.[9] Some historians have expanded upon this view by focusing on the ways in which these cases impacted other political events, including sparking the distrust and political divide that now characterizes American politics.[10] But few have discussed the ways in which these cases were a reflection of antiwar activists' realization that they would need a strong defense of First Amendment rights in order to use their activism to bring about an end to the war. This chapter will broaden the understanding of these cases as landmark events in American legal history by showcasing how activists' decision to compel the Supreme Court to protect their rights impacted the growth and development of Vietnam antiwar protests. It will show that it was because of activism in the courts that activism on the ground – marches, sit-ins, symbolic protests – was able to happen.

The United States has a long history of suppressing dissent during wartime. Patriotism and unquestioning confidence in the government was considered proper decorum of citizens during wartime, whereas public criticism of government activity was seen as anti-American. During every major war in American history, opposition to the government and the conduct of war has been seen as disloyal and treasonous. As early as the Revolutionary War, harassment, intimidation, and violence were used to dissuade citizens from sympathizing with the enemy.[11]

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[9] For more on the evolution of the Court's understanding of freedom of expression see Archibald Cox, *Freedom of Expression* (Cambridge, MA: Harvard University Press, 1981); Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992); David M. O'Brien and Ronald K. L Collins, *Congress Shall Make No Law: The First Amendment, Unprotected Expression, and the Supreme Court* (Lanham, MD: Rowman & Littlefield, 2010); James J. Magee, *Freedom of Expression* (Westport, CT: Greenwood Press, 2002); and Terry Eastland, *Freedom of Expression in the Supreme Court: The Defining Cases* (Lanham, MD: Rowman & Littlefield, 2000).

[10] For more on the ways in which law and the Supreme Court has impacted politics see Martin M. Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York: Free Press of Glencoe, 1964); Lief H. Carter, *Contemporary Constitutional Law Making: The Supreme Court and the Art of Politics* (New York: Permagon Press, 1985); Richard J. Reagan, *A Constitutional History of the U.S. Supreme Court* (Washington, DC: Catholic University of America Press, 2015); and Brandon L. Bartels, Christopher D. Johnston, and Alyx Mark, "Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a 'Political' Institution?", *Law and Society Review* 49, no. 3 (2015): 761-794.

[11] William B. Dickinson Jr., "Protest Movements in Time of War," *Editorial Research Reports 1966* 1 (1966): 141-160, http://library.cqpress.com/cqresearcher/cqresrre1966022400

Restrictions on free speech and free press existed throughout the war, and some colonies even went as far as to declare loyalty to King George III a treasonous act.[12] During the Civil War, President Lincoln suspended habeas corpus, giving the military the broad authority to arrest thousands of people who supported, or were thought to support, the Confederacy.[13] President Lincoln also censured telegraph dispatches to and from Washington, and newspapers nationally were suppressed.[14]

Opposition to the American government during war became a more serious offense during World War I with the passage of the Espionage and Sedition Acts. The Espionage Act of 1917 made it a crime for a person to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military […] or to promote the cause of its enemies." The Sedition Act of 1918 prohibited any individual "by word or act [to] support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein."[15] Essentially, these two acts made it criminal to oppose the American war effort by any means. In a series of three landmark cases, *Debs v. United States*, *Abrams v. United States*, and *Schenck v. United States*, the Supreme Court upheld these two acts.[16] In each case, the petitioners were convicted for advocating against the war and for socialist ideology. In *Schenck*, Justice Holmes wrote that "the character of every act depends on the circumstances in which it is done," concluding that "when a nation is at war, many things that might be said in time of peace are such a hinderance to its efforts that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any

[12] David L. Hudson Jr., "Free Speech During Wartime," The First Amendment Encyclopedia, 2009, https://mtsu.edu/first-amendment/article/1597/free-speech-during-wartime
[13] Dickinson, "Protest Movements in Time of War."
[14] Hudson, "Free Speech During Wartime."
[15] Dickinson, "Protest Movements in Time of War."
[16] *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

constitutional right."[17] The Supreme Court officially declared that First Amendment protections can constitutionally be suppressed in a time of war, a decision that has yet to be overturned.

Suppression of dissent continued throughout World War II and the Korean War, as well as the Vietnam War.[18] The most infamous example of the government's attempt to suppress opposition to American involvement in Vietnam was the clash between protestors and the police at the 1968 Democratic National Convention in Chicago, Illinois.[19] Events such as this were common around the nation throughout the entirety of the war and became more frequent as opposition continued to grow. What is unique about the Vietnam era, however, was that the courts, for the most part, appeared to be on the side of the protestors. The courts often upheld First Amendment rights that protected the actions of protestors and prevented the government from suppressing dissent to the same degree as it had in the past. The Supreme Court took on several important cases throughout the war that had an immediate impact on the work of antiwar activists by protecting their right to protest for an end to the war in Vietnam.

The majority of the key cases the Supreme Court reviewed during this time had to do with freedom of speech and the way in which expressive conduct relates to speech. Expressive conduct refers to behavior that is meant to convey an idea or a message; the conduct itself is the

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[17] *Schenck v. United States*, at 52. This case is essential to First Amendment jurisprudence for it established the "clear and present danger" test that has been used to determine when dangerous speech can be suppressed. It is in this case from which the famous analogy prohibiting the shouting of "Fire!" in a crowded theatre originated. For the purposes of this thesis, the only aspect of this case that is essential to our understanding is the quoted portion declaring that First Amendment free speech rights can constitutionally be suppressed during wartime.

[18] For more on the suppression of dissent during wartime, see Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Company, 2004); Robert Mann, *Wartime Dissent in America: A History and Anthology* (New York: Palgrave Macmillan, 2010); William H. Thomas, *Unsafe for Democracy: World War I and the U.S. Justice Department's Covert Campaign to Suppress Dissent* (Madison: University of Wisconsin Press, 2008); and Thomas I. Emerson, "Freedom of Expression in Wartime," *University of Pennsylvania Law Review* 116, no. 6 (1968): 975-1011.

[19] For more on the 1968 DNC protests, see Daniel R. Ferber, *Chicago '68* (Chicago: University of Chicago Press, 1988); Frank Kusch, *Battleground Chicago: The Police and the 1968 Democratic National Convention* (Westport, CT: Praeger, 2004); Tom Wells, *The War Within: America's Battle Over Vietnam* (Berkley, CA: University of California Press, 1994): 274-283; and Ron Sossi, Tom Hayden, and Frank Condon, *Voices of the Chicago Eight: A Generation on Trial* (San Francisco: City Lights Books, 2008).

behavioral equivalent of speech. By using expressive conduct, an individual can share his/her beliefs without needing to use the spoken or written word. Throughout the Vietnam War, activists often shared their beliefs through expressive actions and symbolic forms of protest. In three critical cases, the Supreme Court was asked to determine when expressive conduct used in protest can be constitutionally suppressed. The rulings varied, but many of the different tactics the antiwar movement employed throughout the Vietnam conflict to call for an end to the war were protected due to the decision of activists to use the courts to fight for their right to protest.

One of the major cases that protected symbolic speech used in protest was *Tinker v. Des Moines*. In December 1965, a group of teenagers in Des Moines, Iowa met to discuss a new way in which they could support the antiwar movement. They agreed to wear black armbands to school on December 16 to mourn the dead and support Senator Robert Kennedy's proposal for a Christmas truce that they all hoped would lead to an indefinite end to the bombing of North Vietnam.[20] One of the students in attendance at this meeting was thirteen-year-old Mary Beth Tinker – the eventual namesake of the famous case. Raised by very outspoken parents, Tinker participated in Civil Rights activism and became involved in the antiwar movement as military activity in Vietnam began to increase in 1965.[21] Other members of the student group who agreed to wear the black armbands to school included Tinker's older brother John and their friend Chris Eckhardt who was also raised by activist parents.[22]

School administrators caught word that Tinker and the other students were planning to wear the armbands to school a few days before the scheduled protest. In response, school

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[20] "Case 8: Tinker v. Des Moines" in *May It Please The Court: The Most Significant Oral Arguments Made Before the Supreme Court Since 1955*, ed. Peter Irons and Stephanie Guitton (The New Press: New York, 1993): 122.
[21] Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (Penguin Books: New York, 1990), 244-246.
[22] Irons, *The Courage of Their Convictions*, 246; "Case 8" in *May It Please The Court*, 129.

administrators enacted a policy that prohibited any student in the Des Moines public school system from wearing armbands to class. Should students wear an armband in school, the students would be asked to take it off and if they refused, the students would be suspended "until such a time as they are willing to return to school without the armbands."[23] Tinker and the other protestors knew about this new policy but still wore their armbands to school to express their views about the war. All three students were suspended the day of their protest and did not return to school until after New Year's Day – the end of the period for which they had planned to wear their armbands.[24]

Debates between students, parents, and school administrators quickly followed the suspensions. The Iowa Civil Liberties Union asked the schoolboard to rescind the suspensions as it saw the policy and punishment as a violation of students' rights to "freely express themselves on controversial issues."[25] The topic of the armbands became a major news story in Des Moines, but the publicity did not bode well for the Tinkers. Their house was vandalized, and they often received threatening phone calls.[26] As the anger the public had towards the Tinkers continued to grow and the school board refused to change its policy or the suspensions, the ACLU stepped in and helped the Tinkers take the issue to court. The family sued the school board on First Amendment grounds, arguing that the students' rights to freedom of speech and freedom of expression were violated by the armband policy and sought an injunction restraining the school from disciplining the students. When both the district court and the court of appeals upheld the

[23] "Case 8" in *May It Please The Court*, 123.
[24] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), at 504.
[25] Irons, *The Courage of Their Convictions*, 234.
[26] Ibid., 248.

policy as constitutional, the Tinkers petitioned for certiorari at the Supreme Court and were granted review.[27]

Fortunately for the students, the Supreme Court ruled in their favor. The Court found that wearing the armbands was expressive conduct "akin to 'pure speech.'" It was "a silent, passive expression of opinion" that did not interfere with the work of the school and therefore was entitled to comprehensive protection under the First Amendment.[28] The Court created a new standard to determine when schools can create policies or issue punishments that suppress First Amendment rights. It stated that expression can only be prohibited if it "materially and substantially interferes" with the operation of the school day and school activities.[29] As such, the Court upheld students' right to protest the war through nondisruptive, symbolic means in school, concluding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[30]

The *Tinker* case was one of the first times the Supreme Court gave power to students in schools. Prior to this decision, schools operated under the principle of *in loco parentis*, wherein school administrators and teachers were meant to act "in place of the parent," making any decision that could be justified as being in the "best interests of the students."[31] By minimizing the power of this principle and giving some degree of constitutional agency back to the students, student activism was able to flourish.[32] The first national student antiwar coalition in the United

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[27] *Tinker v. Des Moines*, at 504-505.
[28] Ibid.
[29] Ibid., at 509.
[30] Ibid., at 506.
[31] Jacob Hillesheim, "How Today's Laws Were Shaped by the Vietnam War," Rewire, Sept. 14, 2017, https://www.rewire.org/laws-shaped-vietnam-war/
[32] John W. Johnson, *The Struggle for Student Rights:* Tinker v. Des Moines *and the 1960s* (Lawrence: University of Kansas Press, 1997); Gael Graham, "Flaunting the Freak Flag: *Karr v. Schmidt* and the Great Hair Debate in American High Schools, 1965-1975," *Journal of American History* 91, no. 2 (Sept. 2004): 522-543; Penny Lewis, *Hardhats, Hippies, and Hawks: The Vietnam Antiwar Movement As Myth and Memory* (Ithaca: ILR Press, 2013).

States, the Student Mobilization Committee, was created in 1966 to coordinate opposition to the war among high school and college students.[33] Throughout the late 1960s and into the early 1970s, the Committee sought to teach students why the war in Vietnam ought to be stopped. The Committee held "Vietnam Commencements" to honor those who pledged to refuse service in the military and organized "Antiwar Basic Training Days" at schools to explain the G.I. antiwar movement to students who might soon be in the army.[34] Mary Beth Tinker started a chapter of the Student Mobilization Committee at her own school after the Supreme Court announced its decision in her case.[35] By 1969 – the year the *Tinker* decision was announced – the Committee had established regional centers in 15 cities throughout the country and explicitly relied on the *Tinker* decision to protect the antiwar actions it organized as well as other nondisruptive protests led by students in other schools.[36]

This type of protest in schools – direct action meant to influence others to join the fight against the war – would not have been possible without the *Tinker* decision. Students were one of the largest demographics of the antiwar movement and they actively advocated for an end to the war through campus protests coordinated by organizations such as the Student Mobilization Committee. Education of and discussion about the war at these campus protests certainly motivated many students to become involved in the antiwar movement in ways that they would not have been otherwise.[37] Had Tinker not fought in the courts for students' right to protest in

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[33] "Student Mobilization Committee," The Hall-Haog Collection, Brown University, March 4, 2015 https://blogs.brown.edu/hallhoag/2015/03/04/student-mobilization-committee/#_ftnref3

[34] Ron Wolin, "Student Mobilization," The New York Review of Books, June 5, 1969, https://www.nybooks.com/articles/1969/06/05/student-mobilization/

[35] Irons, *The Courage of their Convictions*, 249.

[36] Wolin, "Student Mobilization."

[37] For more about student protest specifically see Kenneth J. Heineman, *Campus Wars: The Peace Movement at American State Universities in the Vietnam Era* (New York: New York University Press, 1993); Eric Swank and Breanne Fahs, "Students for Peace: Contextual and Framing Motivations of Antiwar Activism," *The Journal of Sociology & Social Welfare* 38, no. 2 (2018); Lauren E. Duncan and Abigail J. Stewart, "Still Bringing the Vietnam War Home: Sources of Contemporary Student Activism," *Personality and Social Psychology Bulletin* 21 (9): 914-

schools, school administrators would have been free to create other armband-esque policies that restricted these protests. Therefore, constitutional protection of the right to protest in schools was essential for the existence of the antiwar movement because it allowed this significant sect of the movement to grow and develop. In this way, Tinker used legal activism to fight for an end to the war because as the movement grew larger, activists hoped, it would become more influential and have a greater chance at convincing government leadership to stop the war. By using the courts, Tinker ensured the growth of the student antiwar movement for students were constitutionally permitted to express their antiwar beliefs in the lace they spent most of their time – the space beyond the schoolhouse gates.

The *Tinker* decision was important not only for the way in which it protected student protests, but also for the way in which it developed the Court's understanding of disruption and conduct as they relate to constitutionally protected speech. Two years after the *Tinker* case, the Supreme Court was urged to further its analysis of the relationship between disruption, conduct, and speech by a young antiwar protestor named Paul Cohen. On April 26, 1968, then-19-year-old Cohen arrived at the Los Angeles County Courthouse to testify for a case unrelated to the Vietnam War or the draft. Inscribed on the back of the jacket Cohen wore to the courthouse were two phrases: "Stop the War" and "Fuck the Draft." Cohen was aware these phrases were on the back of his jacket and decided to wear the jacket as a means of informing the public of his feelings about the war and the draft.[38] After giving his testimony in the non-Vietnam related case

924; and Penny Lewis, *Hardhats, Hippies, and Hawks: The Vietnam Antiwar Movement As Myth and Memory* (Ithaca: ILR Press, 2013).

[38] *Cohen v. California,* 403 U.S. 15 (1971), at 16.

and walking back into the hallway of the courthouse, Cohen was arrested for disturbing the peace.[39]

The California statute that Cohen was arrested and subsequently convicted under prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person…by…*offensive conduct*" [emphasis added].[40] When he appealed his conviction, the Court of Appeals affirmed, concluding that the term "offensive conduct" in the statute meant "behavior which as a tendency to provoke *others* to acts of violence or to in turn disturb the peace" [emphasis original]. The court held that "it was reasonably foreseeable that" Cohen's conduct – wearing a jacket with an inappropriate phrase – might cause others to "rise up to commit a violent act against" him or "attempt to forceably [*sic*] remove his jacket."[41] In appealing to the Supreme Court, Cohen urged the Court to consider once again how conduct, disruption, and freedom of speech interact under the protections of the First Amendment.

As the Vietnam antiwar movement shifted from dissent to resistance toward the end of the 1960s, the rhetoric activists used shifted as well. A major aspect underlying protests that took place throughout the decade was the notion of "civility," outlined in Kenneth Cmiel's essay "The Politics of Civility."[42] Harsh language, such as the word "fuck" on Cohen's jacket, was often used by activists to express their belief that society "had its priorities backward." Activists believed that society's emphasis on decorum masked the inequalities of America, and that the "true obscenities […] were the Vietnam War and racial hatred."[43] These activists used language that directly offended "civil society" as a way to expose this hypocrisy and shock individuals

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[39] Daniel A. Farber, "Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of *Cohen v. California*," *Duke Law Journal* 1980, no. 2 (1980): 286.
[40] *Cohen v. California*, at 16.
[41] *Cohen v. California*, at 17.
[42] Kenneth Cmiel, "The Politics of Civility" in *The Sixties: From Memory to History* ed. David R. Farber (Chapel Hill: University of North Carolina Press, 1994): 263-284.
[43] Ibid., 274.

into understanding their point of view. For those in the antiwar movement, language such as Cohen's was used to inspire others to understand the perceived atrocities taking place in Vietnam and call for an end to the war.

Although the social mores of mainstream society were changing by the time Cohen wore his "Fuck the Draft" jacket[44], there was still great opposition to the use of this language. Police throughout the country at this time were "looking for grounds on which to curtail the activism unleased by the war" by any means possible.[45] Those in power were vehemently opposed to antiwar protest in general and were quick to use any law they could (including seemingly unrelated "disturbing the peace" statutes as was used in Cohen's case) to put a stop to these protests. Phrases such as Cohen's were hardly the most extreme, and yet phrases such as Cohen's were being prosecuted as a way to hinder activists' ability to protest for an end to the war. Therefore, getting confirmation from the Supreme Court that the use of this language in protest was constitutional was critical in order to allow the antiwar movement to fight for an end to the war in the language and conduct of its choosing.

The case created a strong divide between the justices of the Supreme Court. Many were personally very offended by the language written on Cohen's jacket, while others saw it simply as political discourse rightly protected under the First Amendment.[46] During oral argument, the justices avoided using the word "fuck" in their questioning and instead referred to it as "that word." When informing Cohen's attorney that the Court was ready to hear his argument, Chief Justice Burger stated that "it will not be necessary for you…to dwell on the facts [of the case]" in

[44] Cmiel, "The Politics of Civility," in *The Sixties*, 277. For example, in 1969, for the first time in history, a major dictionary of the English language included the words "fuck*"* and "cunt."
[45] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979): 129.
[46] Ibid., 131.

an attempt to instruct the lawyer to avoid using the inappropriate language. However, to follow this advice of the Chief Justice would be to concede that the word should in fact not be spoken and undermine Cohen's entire argument. As such, Cohen's attorney gave a brief recitation of the facts in which he did restate the critical phrase written on Cohen's jacket.[47] Even from the beginning of the case, it was clear that the type of language people used to express their beliefs caused a great deal of contention and discomfort for the justices of the Supreme Court.

Despite vehement opposition from a few justices, the Court ruled in Cohen's favor. The decision began by stating that "the only 'conduct' which [California] sought to punish is the fact of communication" and "thus, we deal here with a conviction resting solely upon 'speech.'"[48] The Court went on to explain that "it cannot plausibly be maintained that this vulgar allusion […] would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket."[49] Cohen's decision to wear the jacket could not be considered "conduct" for it had not inspired any real conduct in response. Rather, Cohen's jacket was a form of pure speech subject to protections under the First Amendment, as were the armbands in *Tinker*. More importantly, the Court reaffirmed the idea from *Tinker* that fear of disruption, or in this case disturbance of the peace, due to a reaction of those viewing a protest does not give the government authority to suppress the speech associated with such protest.[50]

In affirming Cohen's right to use the offensive language on his jacket, the Court effectively affirmed the right of all other protestors to use whichever abrasive and outrageous phrases they found most appropriate for expressing their beliefs so long as it did not inspire a violent reaction from onlookers. The *Cohen* decision reemphasized the importance of the right to

[47] Woodward and Armstrong, *The Brethren*, 129.
[48] *Cohen v. California*, at 18.
[49] Ibid., at 20.
[50] Ibid., at 23.

freedom of speech in a democracy, designed to "remove governmental restraints from the arena of public discussion."[51] The government was not allowed to suppress speech simply because it disagreed with the viewpoint being expressed. Cohen's decision to take his case all the way to the Supreme Court ultimately forced the Court to look antiwar protest language in the face and affirm the rights of protesters to use whichever speech best expressed their thoughts and emotions. No longer were the police or other government figures allowed to suppress speech because they disagreed with the language being used or as a cover for their disapproval of antiwar protest in general.[52] This allowed the antiwar movement to grow because activists would no longer be thrown in jail for the use of harsh language. Furthermore, those who only believed they could fight for an end to the war throughout abrasive language were now permitted to join the movement and help it develop as it turned towards resistance and militancy in the early 1970s.[53] The right of antiwar activists to fight for an end to the war in the language and manner of their choosing was protected due to Cohen's decision to take his activism into the courtroom.

Although the Supreme Court differentiated between disruptive conduct and speech in *Tinker* and *Cohen* in support of the antiwar protestors, the same was not true for the third speech case the Court reviewed during the war: *United States v. O'Brien*. On March 31, 1966, David O'Brien and three other antiwar activists arrived at the South Boston Courthouse to answer charges related to an earlier rally. While standing on the steps of the courthouse, the four men

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[51] *Cohen v. California*, at 24.
[52] Woodward and Armstrong, *The Brethren*, 129.
[53] Cmiel, "The Politics of Civility" in *The Sixties*, 273. For more on the militancy of the later years of the antiwar movement see Jeremy Varon, *Bringing the War Home: The Weather Underground, the Red Army Faction, and Revolutionary Violence in the Sixties and Seventies* (Berkley: University of California Press, 2004); and David L. Parsons, *Dangerous Grounds: Antiwar Coffeehouses and Military Dissent in the Vietnam Era* (Chapel Hill: University of North Carolina Press, 2017).

burned their draft cards in open defiance to federal law.[54] In August 1965, just a few months before O'Brien and his companions committed this act, Congress had passed an amendment to the draft law that made it a crime to "knowingly mutilate [or] knowingly destroy" draft certificates and classification documents.[55] Therefore, the actions of O'Brien and the three other men were illegal as their decision to burn their cards was done knowingly. Speaking with an FBI agent afterwards, O'Brien informed the agent that he burned his card because of his antiwar beliefs, fully aware that he was breaking federal law.[56] He wanted other people to "reevaluate their positions with the Selective Service, with the armed forces, and reevaluate their place in the culture of [the time], to hopefully consider [his] opinion."[57] O'Brien was convicted of violating the draft law and sentenced to six years in the custody of the Attorney General, up to four of which could be spent in prison.[58]

O'Brien appealed his conviction on constitutional grounds, arguing that his act of burning the draft card was a form of constitutionally protected symbolic speech and therefore the 1965 amendment was unconstitutional because it was enacted to abridge free speech.[59] His appeal did not seem all that promising because a year earlier, the Second Circuit Court of Appeals had upheld the conviction of David Miller under the 1965 amendment for burning his draft card.[60] The *Miller* decision was used by other circuit courts to uphold similar convictions throughout the country, and thus it did not seem likely that the First Circuit, where O'Brien's case was being

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[54] Dean Alfange, Jr., "Free Speech and Symbolic Conduct: The Draft-Card Burning Case (1968)" in *Free Speech and Association: The Supreme Court and the First Amendment*, ed. Philip B. Kurland (The University of Chicago Press: Chicago, 1975): 256.
[55] *Military Selective Service Act, 50 U.S.C. 3801* (2012) § 12 (b) 3. https://www.sss.gov/wp-content/uploads/2020/02/Military-Selective-Service-Act.pdf
[56] *United States v. O'Brien*, 391 U.S. 367 (1968), at 369.
[57] Ibid., at 370.
[58] Aflange, "Free Speech and Symbolic Conduct" in *Free Speech and Association*, 256.
[59] *United States v. O'Brien*, at 371.
[60] *United States v. Miller*, 367 F.2d 72 (2nd Cir. 1966).

decided, would rule any differently. Fortunately for O'Brien and the rest of the antiwar movement, the First Circuit came to a different conclusion. Although the appeals court upheld O'Brien's conviction on other statutory grounds, it concluded that the 1965 amendment was unconstitutional. It was directed at public destruction and thus ran afoul to the First Amendment by singling out persons engaged in protest. And for a variety of other statutory reasons, the amendment also served no valid purpose.[61]

Both the government and O'Brien appealed to the Supreme Court; the government seeking to overturn the First Circuit's decision that the 1965 amendment was unconstitutional, and O'Brien to overturn his conviction.[62] The Supreme Court granted certiorari to reconcile the conflict between the First and Second Circuits' decisions on the issue.[63] In its decision, the Court disaggregated O'Brien's conduct into the expressive and non-expressive elements. It recognized the expressive nature of burning a draft card as a sign of opposition to the war, but there were valid reasons, unrelated to expression, that justified the suppression of this conduct. The Court stated that when "speech" and "non-speech" elements are combined in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[64] In regard to the 1965 amendment, the government's interest in raising and supporting armies and ensuring a smooth operation of the Selective Service System did meet the "sufficiently important" standard.[65] As such, expressive conduct in the way of burning a draft card was not constitutionally protected under the First Amendment freedom of speech.

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[61] *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967).
[62] *United States v. O'Brien*, at 372.
[63] Alfange, "Free Speech and Symbolic Conduct" in *Free Speech and Association*, 259.
[64] *United States v. O'Brien*, at 376.
[65] Ibid., at 380-382.

While this decision did not protect the rights of antiwar protestors who voiced their dissent through the act of burning their draft cards, it did still have a powerful impact on the antiwar movement. Throughout the movement, one of the ways in which activists attempted to stop the war was by filling the jails. Some activists believed that if most draft eligible men ended up in jail, there would be nobody left to join the military and therefore the government would not be able to continue its activities in Southeast Asia.[66] Under the *O'Brien* ruling, it was evident that if they burned their draft cards, activists would be able to achieve this goal and thus the use of this tactic increased. O'Brien's decision to involve the court system in his activism by directly defying a law and then using his conviction to challenge that law allowed the antiwar movement's protest tactics to develop. Many activists began burning their draft cards as an act of defiance towards the war as well as the government and its inability to protect the rights of protestors. Draft card burning became an extremely important symbolic act that reflected activists' desire for the government to stop the war in Indochina.[67] Although he did not get the outcome he wanted, O'Brien still influenced the antiwar movement by giving other activists a new avenue through which they could try to stop the war. Implicating the court system in activist work gave the antiwar movement a new way to view the war in Vietnam and their protest tactics, even if their conduct was not upheld as protected speech the way other forms of protest were.

As seen in these free speech cases, activists' decisions to use the court system to fight for protection of their right to protest for an end to the war had great impact on the development of the antiwar movement. It gave the movement strength by permitting certain types of protest and

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[66] Michael Ferber and Staughton Lynd, *The Resistance* (Boston: Beacon Press, 1971): 278; George Q. Flynn, *The Draft, 1940-1973* (Lawrence: University Press of Kansas, 1993): 214.

[67] For more on draft card burning as a show of opposition see Michael S. Foley, *Confronting the War Machine: Draft Resistance During the Vietnam War* (Chapel Hill: University of North Carolina Press, 2003); Michael Ferber and Staughton Lynd, *The Resistance* (Boston: Beacon Press, 1971); Holly V. Scott, *Younger Than That Now: The Politics of Age in the 1960s* (Amherst: University of Massachusetts Press: 2016); and Mary Ellen Snodgrass, *Civil Disobedience: An Encyclopedic History of Dissidence in the United States* (Armonk, NY: Sharpe Reference, 2009).

permitting protest in certain spaces. These cases have become landmark decisions that have greatly affected First Amendment jurisprudence and have impacted the rights of citizens beyond the antiwar movement. All citizens have seen their free speech and protest rights change due to these cases whether they know it or not. Therefore, legal activism was distinct from other forms of activism because it impacted the lives of people not directly involved in antiwar protest.

The same can be said for the major press case the Supreme Court reviewed during the Vietnam War: *New York Times Co. v. United States*, otherwise known as the Pentagon Papers case. The publication of the Pentagon Papers helped verify the antiwar movement's call for an end to the war for it exposed decades of lies about the success and morality of American involvement in Southeast Asia. By fighting for the legal protection of the right to publish this information, the activists involved in the leaking and publication of the Pentagon Papers used the court system to fight for an end to the war for the release of this information inspired more people to join the antiwar movement and put pressure on the government to stop its military efforts. The right to freedom of the press under the First Amendment is just as critical to the existence of the open marketplace of ideas in a democracy as freedom of speech. Therefore, while this case is distinct from the three just discussed because it deals with a different clause in the First Amendment, it still played an important role in the antiwar movement as an example of successful legal activism that helped the movement grow as well as protected a critical constitutional right that has held importance in America far beyond the movement itself.

On June 13, 1971, the *New York Times* published its first installment of a new series under the headline "Vietnam Archive: Pentagon Study Traces Three Decades of Growing U.S. Involvement."[68] The series was based on a secret Pentagon study commissioned by Secretary of

[68] *Inside the Pentagon Papers*, ed. John Prados and Margaret Pratt Porter (Lawrence, KS: University Press of Kansas, 2004): 1.

Defense Robert McNamara prepared between June 1967 and January 1969 that covered American involvement in Indochina from 1945 to 1967. Its official title was "History of US Decision Making Process on Vietnam Policy," but colloquially became known as the Pentagon Papers.[69] The publication of this information immediately caused a great uproar throughout the country and citizens began calling for more installments of this series.

The documents were leaked by Daniel Ellsberg, one of the analysists who worked on the study, as a way to expose the lies the government had been telling the public for years and create the final push the antiwar movement needed to influence the government to stop the war. Although Ellsberg originally supported the war in the early 1960s, after spending a few years in Vietnam as a civilian studying military operations he became convinced that "the programs we were pursuing had no chance of succeeding" and that the United States "should get out of the war."[70] These antiwar beliefs were strengthened when Ellsberg read the final Pentagon Papers study a few years later which confirmed the fact that despite "all predictions point[ing] to a continued stalemate," administration after administration continued the American war effort and has thus prolonged the war indefinitely.[71] After attending a conference in which he listened to testimonies of draft resisters, Ellsberg felt compelled to turn his frustrations with the war and his desire for it to end into action. The conference "opened [his] eyes to the question, what can I do to help end this war, now that I'm ready to go to prison?"[72] Ellsberg believed that if the public were to learn of the information contained in the Pentagon Papers, they too would be convinced that the war needed to end for there was no chance of "success" (whatever that meant). This

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[69] David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (Berkley, CA: University of California Press, 1996): 2.
[70] Ibid., 37.
[71] Ibid., 40.
[72] David Smith, "'I've never regretted doing it': Daniel Ellsberg on 50 years since leaking the Pentagon Papers," *The Guardian*, June 13, 2021, https://www.theguardian.com/world/2021/jun/13/daniel-ellsberg-interview-pentagon-papers-50-years

increase in antiwar sentiment would hopefully put great political pressure onto President Nixon to listen to the antiwar constituency and end military operations in Southeast Asia.[73] In early 1971, Ellsberg made the decision to give the study to the *New York Times* for this purpose.[74]

Great debate transpired among journalists, editors, and publishers at the *Times* as to whether the newspaper should publish the Pentagon Papers study. The journalist whom Ellsberg directly gave the documents to, Neil Sheehan, was motivated to write and publish the series for he believed, like Ellsberg, that "the disclosure of the secret Pentagon history might well shorten the war and force a war crimes investigation."[75] Others were worried about the serious potential risks, particularly the legal risks, associated with the publication of a top-secret government report. The *Times*'s decision to publish the study, however, proves that those in charge of the paper believed they "had a constitutional right to publish" the truth and expose government corruption and considered the publication "an extraordinary event in the history of the press" that would raise profound questions of the press's obligations and legal rights.[76] Furthermore, the decision to publish reflected Sheehan and Ellsberg's ideas that these installments would be the final push the antiwar movement needed to urge the federal government to end the war.

A few days after the publication of the first installment, the government successfully obtained an order in federal court in New York to temporarily enjoin further publication of the Pentagon Papers, claiming that it would hurt the national security.[77] The *Times* was not dissuaded by this decision, however, and quickly became ready for a long legal battle. The paper reaffirmed its commitment to the fight to protect the rights of newspapers by claiming that "the

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[73] Rudenstine, *The Day the Presses Stopped*, 41-42.
[74] Ibid., 46.
[75] Ibid., 53.
[76] Ibid., 49.
[77] Woodward and Armstrong, *The Brethren*, 139.

case would be won or lost ultimately in the United State Supreme Court," not the district court in New York City.[78] From the beginning of the case it was evident that the *Times* was prepared to go as far as necessary to protect its right to publish this important study.

Around the same time that the *Times* was being enjoined in federal court, the *Washington Post* was debating whether to publish its own Pentagon Papers article. When Ellsberg gave the *Post* the study after the *Times* had already published, he requested its first story focus on the pre-Kennedy administration information. Ellsberg believed that "the public might realize that [then-President] Nixon's Vietnam policies were doomed to fail" if it understood that these policies were essentially no different that the failed policies of previous presidential administrations.[79] Some members of the *Post*'s leadership supported this idea and believed publishing was the right thing to do as a way to stand up against an administration that already disliked the press. Others were extremely fearful as the threat of legal consequences proved extremely high in the face of the new restraining order against the *Times*.[80]

The decision came down to the *Post*'s publisher Katherine Graham. She believed that it was critical to publish in the face of the *Times*' restraining order in order "to support the *Times* in its historic struggle against censorship." Graham knew that the government would win in a case against the *Post* and that "the cause of press freedom would be severely damaged."[81] But by giving the go ahead, Graham welcomed the legal battle that was about the ensue to protect the paper's right to publish the truth. In publishing the pre-Kennedy information Ellsberg requested be published, the *Post* essentially supported Ellsberg's belief that this information was a critical part of the fight to end the war in Vietnam. A major newspaper would not publish such a risky

[78] Rudenstine, *The Day the Presses Stopped*, 104.
[79] Ibid., 127.
[80] Ibid., 128-132.
[81] Ibid., 134.

story if it did not believe that it was truthful and necessary for the public to know. By accepting the challenge to legally protect the right of the paper to publish the Pentagon Papers, the *Post* was using the courts to defend Ellsberg's position that the publication of this information was crucial to American knowledge. While some of the editors were motivated to publish by the greater constitutional right that publishing represented, they were only able to fight for this constitutional protection because this information was brought to them in an attempt to end the war by educating the public. The way in which the *Post* viewed their legal activism may have been slightly different than the other activists discussed in this chapter, but it was still a crucial tactic that protected a unique form of antiwar protest: exposing government lies in the press.

Fortunately for the *Post*, both the district court and appeals court in Washington did not approve of the government's injunction.[82] The government appealed to the Supreme Court, as expected, and the was consolidated with the *Times*'s Supreme Court appeal after its restraining order was upheld in the New York appeals court.[83] Much like many of the cases that have been discussed in this chapter, the justices of the Supreme Court were very divided on the issue of whether to hear the two appeals. The Supreme Court's term was set to technically finish on Friday, June 25, the day both appeals officially reached the Court. Four justices favored restraining both the *Times* and the *Post* until the fall when the Court could review both cases at the beginning of its new term. Four other justices wanted to let the papers publish without further delay. The deciding justice, Justice Stewart, did not want the papers to be restrained until the fall,

[82] *United States v. Washington Post Co.*, 446 F.2d 1327 (D.C. Cir., 1971).
[83] *United States v. New York Times Co*., 444 F.2d 544 (2nd Cir., 1971).

but also did not want them to continue publishing without the Court reviewing the case. As a result, the Court agreed to grant an immediate hearing, scheduled for the very next morning.[84]

The Pentagon Papers case was the first time in which the federal government attempted to establish a prior restraint – that is censorship before publication. In 1931, in the case *Near v. Minnesota*, the Supreme Court firmly established that the chief purpose of the First Amendment guarantee of freedom of the press is to "prevent previous restraints upon publication." The Court did suggest, however, that a limitation exists in exceptional cases, such as if a newspaper were to publish "the sailing dates of transports or the number and location of troops" during war.[85] During oral argument, the government attempted to expand upon this limitation by arguing that the Pentagon Papers could not be published as the information contained in the study would "materially affect the security of the United States."[86] Both the *Times* and the *Post* instead argued for an "immediate harm" standard for prior restraint. The attorneys for both papers emphasized that in the eleven days since the publication of the first installment, no catastrophes had occurred; the government's national security concerns were therefore "nothing but speculation and surmise."[87] The Court ultimately ruled in favor of the newspapers, writing in its per curiam opinion that the government had failed to meet the "heavy burden" of showing proper justification for the imposition of prior restraint.[88]

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[84] Rudenstine, *The Day the Presses Stopped*, 263; Woodward and Armstrong, *The Brethren*, 140-143. Chief Justice Burger and Justices Harlan, White, and Black voted to restrain the papers until the fall. Justices Black, Douglas, Brennan, and Marshall voted to let the papers continue printing without delay.

[85] *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

[86] "Case 11: New York Times v. United States" in *May It Please The Court*, 170.

[87] Woodward and Armstrong, *The Brethren*, 144.

[88] *New York Times Co. v. United States*, 403 U.S. 713 (1971). The Court's divisiveness when deciding whether to hear the Pentagon Papers case influenced its decision greatly. The official 6-3 per curiam opinion was only approximately 200 words, and each justice wrote their own separate opinion. The inability of the Court to come to a consensus on how to decide whether the government had met the "heavy burden" or what the burden even was, has given future courts the ability to maneuver freely in this area.

The Supreme Court's decision to allow the *New York Times* and the *Washington Post* to continue to publish stories on the Pentagon Papers was a watershed moment for the antiwar movement. The Pentagon Papers exposed more than twenty years of government misinformation, misjudgment, and deception about the military activities in Southeast Asia. Finally, Americans had something with which to compare what they had been told about the war and discover the truth.[89] The organization Vietnam Veterans Against the War, for example, used the Pentagon Papers to confirm what they had been saying about war crimes and the inappropriate war policies created in Washington.[90] The information contained in the study detailing the questionable ways in which America became, and stayed, involved in Vietnam caused many citizens to reevaluate their position regarding the war. It finalized the growing consensus that the war was wrong and ought to be stopped, just as Ellsberg had hoped it would.[91] As such, Ellsberg's decision to leak the papers and the *Times* and *Post*'s decision to fight for their ability to publish them allowed the antiwar movement to grow as more people joined the movement as they became opposed to the war upon learning this information. In this way, legal activism on the part of the *Times* and the *Post* to fight for the protection of their right to publish such crucial information allowed the antiwar movement to flourish in its final years.

As seen throughout these cases, by taking antiwar activism to the courts, activism on the ground was able to grow in several different ways. Antiwar protestors were able to expand their activism onto school campuses, use vulgar language, and learn about the truth of the Vietnam conflict because a few activists decided it was necessary to urge the Supreme Court to protect their ability to fight for an end to the war. Legal activism was distinct in that it gave life to the

[89] *Inside The Pentagon Papers*, 3.
[90] Ibid., 184.
[91] Ibid., 183.

antiwar movement in critical ways. It also impacted Americans throughout the entire country and into the future as our understanding of First Amendment rights developed in tremendous ways because of these cases. The Vietnam War and the dissent it inspired is often considered one of the leading causes of the public distrust of and disillusionment with the government that exists today, particularly due to the publication of the Pentagon Papers and the lies they exposed. Therefore, perhaps in this way legal activism is also distinct in that the results of it radically changed understandings of government and politics for generations to come.