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## A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokley Carmichael

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**A TALE OF PROSECUTORIAL INDISCRETION:  
RAMSEY CLARK AND THE SELECTIVE NON-PROSECUTION  
OF STOKELY CARMICHAEL**

LONNIE T. BROWN, JR.\*

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I. INTRODUCTION

The war in Vietnam is illegal and immoral. The question is, What can we do to stop that war? What can we do to stop the people who, in the name of America, are killing babies, women, and children? We have to say to ourselves that there's a higher law than the law of a fool named [Dean] Rusk; there's a higher law than the law of a buffoon named [Lyndon] Johnson. It's the law of each of us. We will not murder anybody who they say kill, and if we decide to kill, *we're* going to decide who it shall be. This country will only stop the war in

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Vietnam when the young men who are made to fight it begin to say, “Hell, no, we ain’t going.”<sup>1</sup>

This quote is from a speech delivered in 1966 at the University of California, Berkeley by Black Power activist, and Chairman of the Student Nonviolent Coordinating Committee, Stokely Carmichael.<sup>2</sup> The Vietnam War was raging and Carmichael’s personal sentiments could not have been clearer—the war was wrong, as were the American leaders who advocated its continuance.<sup>3</sup> Most significantly, however, Carmichael openly called for draft-eligible young men (black men in particular) to refuse induction,<sup>4</sup> in direct contravention of the Military Selective Service Act (SSA).<sup>5</sup> Indeed, he expressed the view that such adherence to a “higher law” was the only way to stop the war.<sup>6</sup>

This was neither the first nor the last time that Stokely Carmichael would actively promote defiance of the draft as a means of combating what he (and many others) considered to have been an unjust war in Vietnam.<sup>7</sup> Notwithstanding this, he was never indicted on federal charges for his antiwar activities.<sup>8</sup> One might readily surmise that this made perfect sense, as Carmichael was simply exercising his First Amendment right to free speech.<sup>9</sup> The problem, though, is that not all speech-related activities are protected, and one could argue that a great deal of Carmichael’s antiwar rhetoric fell within this unprotected zone.<sup>10</sup> Moreover, the government prosecuted others for words and

1. Stokely Carmichael, Berkeley Speech (Oct. 1966), in *STOKELY SPEAKS: BLACK POWER BACK TO PAN-AFRICANISM* 45, 52–53 (Ethel N. Minor ed., 1971) [hereinafter Carmichael, Berkeley Speech].

2. *Id.* at 45; JOHN LEWIS WITH MICHAEL D’ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 368 (1998). In 1978, Carmichael changed his name to Kwame Ture in honor of two African socialist leaders. Michael T. Kaufman, *Stokely Carmichael, Rights Leader Who Coined ‘Black Power,’ Dies at 57*, N.Y. TIMES, Nov. 16, 1998, at B10. Throughout this Article, however, I will refer to him by his more familiar former name.

3. See Carmichael, Berkeley Speech, *supra* note 1, at 52–53.

4. See *id.*

5. See 50 U.S.C. app. § 462 (1990); *infra* text accompanying notes 142–43. The Act was also referred to as the Universal Military Training and Service Act. See Joseph O’Meara, “*No Man is Above the Law*,” 53 A.B.A. J. 1107, 1108 (1967).

6. Carmichael, Berkeley Speech, *supra* note 1, at 53.

7. See *infra* notes 80–88 and accompanying text.

8. See *infra* note 156 and accompanying text.

9. See, e.g., ROGER WILKINS, *A MAN’S LIFE: AN AUTOBIOGRAPHY* 231 (1982) (suggesting that Ramsey Clark’s refusal to prosecute Carmichael was likely appropriate because he “was constitutionally incapable of prosecuting somebody just for speech”); Letter from Fred M. Vinson, Jr., Assistant Att’y Gen., to James O. Eastland, U.S. Senator (Nov. 2, 1966) [hereinafter Eastland Letter] (on file with the Lyndon Baines Johnson Library, Personal Papers of Ramsey Clark, Box 61, “Anti-Riot Plans 1968”) (“Thus far, Carmichael’s statements appear to have been expressions of opinions directed to general groups, and therefore protected by the First Amendment.”).

10. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (observing that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic” and holding that the question to answer in determining the extent of First Amendment protection is “whether the words used are used in such circumstances and are of such a

actions that seemed less overt and provocative than his, most notably the Boston Five, which included well-known pediatrician Dr. Benjamin Spock and respected clergyman the Reverend William Sloane Coffin, Jr.,<sup>11</sup> who were charged with conspiracy to aid and abet draft evasion, among other things.<sup>12</sup>

On top of all this, President Lyndon B. Johnson and other prominent political leaders strongly advocated for the prosecution of Stokely Carmichael.<sup>13</sup> The target of these coercive efforts and the individual who principally held Carmichael's fate in his hands was Attorney General Ramsey Clark.<sup>14</sup> As the chief prosecutor for the United States, the decision of whether or not to prosecute was ultimately his, and he steadfastly refused to pursue an indictment—much to the dismay of President Johnson.<sup>15</sup>

Was Clark's refusal a courageous stand that exemplified the ideal of a truly independent public prosecutor? Was it weak capitulation to avoid being labeled as unsympathetic to the plight of blacks in America during a racially charged period in our history?<sup>16</sup> Or was it something else altogether, possibly some deeply personal, unarticulated motivation? And, perhaps most importantly, did the decision not to charge Stokely Carmichael, whatever its basis, constitute a proper exercise of Clark's discretion as a prosecutor?

It is well established that prosecutors have enormously broad discretion in making charging decisions, both in terms of the nature of the potential crime to be charged and whether a given charge should even be pursued.<sup>17</sup> The only

nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"); O'Meara, *supra* note 5, at 1108–10 (arguing that Carmichael's rhetoric was akin to the classic example of someone falsely yelling fire in a movie theater, which is plainly not constitutionally protected). *But see* WILKINS, *supra* note 9, at 231; Maurice Kelman, *On Prosecuting Sedition: A Reply to Dean O'Meara*, 54 A.B.A. J. 164, 165–66 (1968) (arguing that the First Amendment protected Carmichael's antiwar activities and thus did not run afoul of the Selective Service laws).

11. *See generally* JESSICA MITFORD, *THE TRIAL OF DR. SPOCK, THE REV. WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL GOODMAN, AND MARCUS RASKIN* (1969) (providing a thorough treatment of the trial).

12. *See* Indictment, U.S. v. Coffin, No. 68-1-F Crim. (D. Mass. Jan. 5, 1968), *reprinted in* MITFORD, *supra* note 11, app. 1, at 251–55 (1969) [hereinafter Boston Five Indictment].

13. *See infra* notes 96–98, 116–22 and accompanying text.

14. *See infra* notes 127–39 and accompany text.

15. *See* WILKINS, *supra* note 9, at 230 (observing that "Johnson despised us at Justice, because we wouldn't put Stokely Carmichael in jail"); *infra* notes 127–39 and accompanying text.

16. Interview by T.H. Baker with Harry McPherson, former special counsel to President Johnson, in Wash., D.C. (Apr. 9, 1969) [hereinafter McPherson Interview], available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/mcpherson/mcpher05.pdf> ("[McPherson] felt that Ramsey [Clark] had so intense a concern that he not be regarded as an anti-civil libertarian that he was letting go of one of the main reins of power that the public expects an Attorney General to exercise, which was the prosecuting function.").

17. *See* U.S. DEPT. OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-27.110 cmt. (1997) ("[T]he prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law."); R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 14 (2005) ("[T]he decisions of whether to charge, whom to charge, and what crimes to charge are an awesome source of power for the government lawyer."); JOSEPH F. LAWLESS, *PROSECUTORIAL*

tangible limitations on this power are the requirements that the alleged crime be supported by probable cause<sup>18</sup> and that the decision to prosecute not be motivated by unconstitutional considerations,<sup>19</sup> neither of which is generally regarded as a very significant check.<sup>20</sup>

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MISCONDUCT § 1.14 (3d ed. 2003) (“[T]he prosecutor exercises extremely broad discretion in the decision to indict or initiate criminal proceedings against a suspected wrongdoer and, to a large extent, that decision is unassailable.”); Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993) (“[T]he prosecutor’s decision to institute criminal charges is the broadest and least regulated power in American criminal law.”); Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 532 (1970) (“One of the most striking features of the American system of criminal justice is the broad range of largely uncontrolled discretion exercised by the prosecutor.”); *infra* notes 212–17 and accompanying text.

18. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” (alteration in original) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) (internal quotation marks omitted)); MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2009) (providing that a “prosecutor in the criminal case shall: . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”).

The guidelines for U.S. Attorneys, which do not have the force of law, contain a somewhat more exacting standard or aspirational measure with regard to charging decisions. The comment to section 9-27.220 of the U.S. Attorney’s Manual provides that “both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.” U.S. DEPT. OF JUSTICE, *supra* note 17, § 9-27.220 cmt. (1997). In a similar vein, the non-binding American Bar Association Standards Relating to the Administration of Criminal Justice maintain that:

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 3–3.9(a) (1992).

19. See *Wayte*, 470 U.S. at 608 (“[T]he decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification’ . . . .” (quoting *Bordenkircher*, 434 U.S. at 364)); U.S. DEPT. OF JUSTICE, *supra* note 17, § 9-27.260 (1997) (providing that prosecutors should not consider “race, religion, sex, national origin, or political association, activities or beliefs” in making charging decisions). A related limitation on prosecutors in making charging decisions is that they must not prosecute a defendant in order to penalize the defendant for exercising a constitutional or statutory right. Prosecuting for this reason would constitute “vindictive prosecution”—a violation of the defendant’s due process rights. See, e.g., *Bordenkircher*, 434 U.S. at 363 (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is ‘patently unconstitutional.’” (citation omitted) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 33 n.20 (1973))).

20. See CASSIDY, *supra* note 17, at 15 (expressing the view that “[p]robable cause is a very low evidentiary threshold” and “has been criticized as inadequate to meet the prosecutor’s overriding obligations as a minister of justice”); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:9 (2d ed. 2002) (observing that findings of discriminatory enforcement on the part of prosecutors are rare); Gershman, *supra* note 17, at 513 n.2 (“The doctrines of selective,

Indeed, there is a legitimate perception that prosecutors are prone to exploit the ephemeral “probable cause” constraint, at times charging or overcharging defendants founded on evidence admittedly too insubstantial to establish guilt.<sup>21</sup> And claims of selective prosecution based on race or some other protected status are nearly impossible to prove.<sup>22</sup> Outrage, accompanied by claims of abuse of discretion and prosecutorial misconduct, are not uncharacteristic responses to questionable charging decisions,<sup>23</sup> but almost always without consequence.<sup>24</sup>

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vindictive, and bad faith prosecutions provide modest constraints on the prosecutor’s charging power.”); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, CARDOZO L. REV. (forthcoming 2010) (manuscript at 2), available at <http://ssrn.com/abstract=1545937> (observing that the “probable cause” standard is “inherently quite minimal; it only requires enough evidence for the individual prosecutor subjectively to think it is more likely than not that the person committed the crime”).

21. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 31 (2007) (maintaining that “[p]rosecutors routinely engage in overcharging”); Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 284–85 (2007) (“The low charging standard of probable cause encourages abuse of the charging power, allowing prosecutors to charge an individual in order to intimidate, harass, or coerce a guilty plea in a case in which the government cannot meet its burden of proof at trial.”); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (maintaining that the probable cause standard is so minimal that “it would allow a prosecutor to charge two individuals in two separate cases with the same criminal conduct even when the prosecutor knows that only one of the two could possibly have engaged in the alleged conduct”).

22. See *infra* note 227 and accompanying text.

23. One fairly recent example is the racially divisive prosecution in 2007 of six black high school students in Jena, Louisiana for their attack on a white classmate. See generally Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1288–91 (2008) (describing the legal and political climate surrounding the prosecution of the defendants). In this case, the prosecutor charged the so-called “Jena Six” with, among other crimes, attempted second degree murder for an assault that resulted in serious, but far from life-threatening, injuries to the victim. Clarence Page, Op-Ed., *Injustice is Bigger than ‘Jena 6,’* GRAND RAPIDS PRESS (Michigan), Sept. 25, 2007, at A8; see also Alfieri, *supra* at 1290 (indicating that the district attorney amended the original indictment by adding attempted second-degree murder).

Following an avalanche of criticism, including demonstrations reminiscent of bygone days of the civil rights movement, the prosecutor reduced the charges to lesser crimes. *Boiling Point: Thousands March in Tiny Jena, La., to Protest the Arrest of 6 Black Teens*, CHI. TRIB., Sept. 21, 2007, at 8 (“[The district attorney] initially charged five of the black youths with attempted murder—charges he reduced to aggravated second-degree battery after black bloggers and civil rights leaders from across the country raised complaints that the charges were excessive.”); see also Alfieri, *supra* at 1290–91 (recounting the various protests associated with the prosecution of the Jena Six); Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 469 (2009) (“[T]he disparity between no criminal punishment for the white students and heavy charges for the black students led to community and national protests.”); Miguel Bustillo, *Nooses Stir a Year of Racial Unrest*, L.A. TIMES, Sept. 15, 2007, at A9 (“The case . . . elicited outrage around the world—not only because of the stiff charges brought against the black teenagers, but because of the stark contrast between the way black boys and white boys in the same town were treated.”).

Notwithstanding the lowering of the charges, the prosecutor still wrongfully insisted upon trying the first defendant—seventeen-year-old Mychal Bell—as an adult on charges of aggravated second degree battery and conspiracy to commit second degree battery. See Podgor, *supra* at 468 (observing that it was improper to try Bell as an adult on these charges as he was facing them for the

Refusals to initiate criminal proceedings, on the other hand, despite what may seem to be compelling evidence of guilt, do not typically elicit as strong of a public reaction<sup>25</sup> nor are such decisions normally called into question.<sup>26</sup> In fact, they are essentially impervious to any sort of meaningful scrutiny,<sup>27</sup> left wholly to a prosecutor's subjective assessment of the facts and evidence involved.<sup>28</sup>

Notwithstanding the Teflon nature of a prosecutor's charging decision, Attorney General Ramsey Clark's refusal to prosecute Stokely Carmichael and his contemporaneous prosecution of the all-white Boston Five raise a legitimate question with regard to his exercise of discretion. This Article examines the fascinating people, evidence, and sociopolitical influences that Clark faced while

first time); Miguel Bustillo, *'Jena Six' Teenager is Freed on Bail*, L.A. TIMES, Sept. 28, 2007, at A10 (noting that a Louisiana appeals court vacated the verdict convicting Bell of aggravated battery and conspiracy to commit aggravated battery on the ground that he was unlawfully tried as an adult). While certainly criticized for his charging decisions, the prosecutor was apparently never subjected to any sort of professional censure.

24. See CASSIDY, *supra* note 17, at 23–24 (citing *Wayte*, 470 U.S. at 607–08) (discussing the judicial deference accorded to prosecutors' charging decisions); GERSHMAN, *supra* note 20, § 4:3 (noting the “extraordinary deference” historically afforded to prosecutors with regard to charging and the rarity of a judicial challenge); Podgor, *supra* note 23, at 464 (“Although courts may mention improper conduct on the part of the prosecutor when dismissing charges, the prosecutorial conduct is seldom the exclusive basis for the dismissal of the charges.”).

25. See, e.g., LaFave, *supra* note 17, at 535 (observing the tendency to view prosecutors' exercise of discretion in this regard as not being a concern “on the ground that only acts of leniency are involved”).

26. See FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154 (1969) (noting that “[m]any persons who are in fact guilty of a crime and who could be convicted are . . . not charged at all” and that legislatures and courts rarely call these prosecutorial decisions into question).

27. See *Powell v. Katzenbach*, 359 F.2d 234, 234 (1965) (per curiam) (holding that the U.S. Attorney General's exercise of prosecutorial discretion may not be controlled through mandamus); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 410 (2001) (“[T]he decision to forego charges is entirely within the discretion of the prosecutor.”); LaFave, *supra* note 17, at 538 (“Although the American criminal justice system has reasonably effective controls to ensure that the prosecutor does not abuse his power by prosecuting upon less than sufficient evidence, there are—as a practical matter—no comparable checks upon his discretionary judgment of whether or not to prosecute one against whom sufficient evidence exists.”); *infra* note 222 and accompanying text.

28. See STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, *supra* note 18, at 3–3.9(b) (“The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”); Medwed, *supra* note 20, at 11 (noting that the prosecutorial charging standard in “almost every jurisdiction is entirely subjective”); Ronald Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. BOOKS, June 6, 1968, at 14 (“A prosecutor may properly decide not to press charges if the lawbreaker is young, or inexperienced, or the sole support of a family, or is repentant, or turns state's evidence, or if the law is unpopular or unworkable or generally disobeyed, or if the courts are clogged with more important cases, or for dozens of other reasons.”); *infra* note 223 and accompanying text.

navigating through a daunting prosecutorial minefield, and critically analyzes the legal propriety of the course he ultimately chose.

The Article first provides significant personal details about both Ramsey Clark and Stokely Carmichael, with an emphasis on Clark's impressive civil rights pedigree<sup>29</sup> and Carmichael's putatively unlawful anti-Vietnam War activities.<sup>30</sup> It then proceeds to explore Clark's refusal to prosecute Carmichael,<sup>31</sup> a decision that reportedly involved an exhaustive investigation into the underlying facts that might have supported federal charges.<sup>32</sup> While he maintained that the evidence was lacking and held that up as his explanation for not pursuing Carmichael,<sup>33</sup> this portion of the Article calls into question Clark's tidy rationale, given its narrow focus on the ambiguous crime of "conspiracy to incite a riot."<sup>34</sup> In particular, there seems to have been ample support for proceeding against Carmichael on separate and more easily provable charges related to "aiding and abetting draft evasion," the principal foundation for Clark's prosecution of the Boston Five.<sup>35</sup>

The Article concludes with a probing examination of the propriety of Ramsey Clark's non-prosecution of Stokely Carmichael, an exercise of prosecutorial discretion undoubtedly influenced by the substance of Carmichael's racially-themed antiwar message.<sup>36</sup> More precisely, Carmichael's rhetoric surely resonated with Clark in light of his well-documented commitment to securing equal rights for black Americans.<sup>37</sup> Was this, however, a valid ground on which to forego prosecution, especially considering its direct link to race?

In the end, when assessed against the backdrop of Clark's temporally related and factually weaker prosecution of the all-white Boston Five, his decision may aptly be described as an act of "prosecutorial indiscretion." This

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29. See discussion *infra* Part II.A.

30. See discussion *infra* Part II.B.

31. See discussion *infra* Part III.

32. See *infra* note 128 and accompanying text.

33. See *infra* notes 128–36 and accompanying text.

34. See discussion *infra* Part III.B.

35. It is important to note that the charges against the Boston Five were limited solely to counts for *conspiracy* to aid and abet violations of the draft laws. See *infra* text accompanying note 158. This narrow focus is difficult to explain in light of the fact that Ramsey Clark could have made a much stronger case against these defendants for individual acts of aiding and abetting. See *infra* notes 183–84 and accompanying text. Clark, however, has suggested that one reason for this type of charge was to narrow the field of prospective defendants to avoid having to prosecute large numbers of low level individuals who were less culpable than the alleged "conspirators." Telephone Interview with Ramsey Clark, former U.S. Att'y Gen. 4–5 (July 26, 2010). For a discussion of some other possible explanations for the government's approach to this case, see ALAN M. DERSHOWITZ, *AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION* 383–87 (2004). See also MITFORD, *supra* note 11, at 63–72 (recounting the possible strategic and procedural benefits to the prosecution associated with a "conspiracy" charge as opposed to a straightforward "aiding and abetting" charge).

36. See discussion *infra* Part IV.

37. See discussion *infra* Part II.A.



characterization, in my view, strikes the appropriate balance between denunciation and praise—it recognizes the facial impropriety of Clark’s disparate handling of the two matters but stops well short of outright condemnation. Such a measured appraisal justly acknowledges the ominous and unprecedented complexity of the circumstances, as well as Ramsey Clark’s admirable desire to calibrate the troubled and unequal existence of black Americans in the 1960s by, in effect, according them preferential treatment under federal law.

## II. THE PROTAGONISTS

### A. Ramsey Clark and His Civil Rights Pedigree

In 1961, Ramsey Clark left the private practice of law to join President John F. Kennedy’s Administration as the Assistant Attorney General for the Lands Division of the Department of Justice, serving under Attorney General Robert Kennedy.<sup>38</sup> Though Clark’s work on behalf of the Lands Division was certainly valuable, his tenure in that role is more noteworthy for the courageous leadership that he provided in securing and protecting the emerging civil rights of black citizens. In particular, Attorney General Robert Kennedy enlisted Clark to facilitate school integration in the South,<sup>39</sup> which was progressing quite slowly notwithstanding the landmark decision in *Brown v. Board of Education*<sup>40</sup> eight years earlier.

Throughout 1962 and 1963, Clark worked in Alabama, Georgia, and South Carolina to enforce the federal mandate of school desegregation.<sup>41</sup> Even more significantly, however, Clark was responsible for monitoring James Meredith’s historic, combative admission to the University of Mississippi from September of 1962 to the spring of 1963.<sup>42</sup> Profoundly affected by his Mississippi

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38. See C. DAVID HEYMANN, *RFK: A CANDID BIOGRAPHY OF ROBERT F. KENNEDY* 192 (1998); VICTOR S. NAVASKY, *KENNEDY JUSTICE* 29 (1971). For a more detailed account of the life of Ramsey Clark, see Lonnie T. Brown, Jr., *Representing Saddam Hussein: The Importance of Being Ramsey Clark*, 42 GA. L. REV. 47, 54–101 (2007).

39. See NAVASKY, *supra* note 38, at 29 (observing that Attorney General Kennedy “sent Ramsey Clark, . . . on tours of the South to anticipate and prevent violence and assess and promote the progress of school desegregation”); Mary C. Schneidau, *Former AG Defends Hussein Work: Revered for Principle, Reviled for Clients, Clark Says Fair Trial Is a Right*, DALLAS MORNING NEWS, Dec. 24, 2005, at 1A.

40. 347 U.S. 483 (1954); Charles Ogletree, *All Too Deliberate*, in *THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION* 45, 45–46 (Black Issues in High Educ. ed., 2004).

41. See Lizzy Ratner, *Ramsey Clark: Why I’m Taking Saddam’s Case*, N.Y. OBSERVER, Jan. 10, 2005, at 1, available at <http://www.observer.com/node/50299>; Interview by Harri Baker with Ramsey Clark, former U.S. Att’y Gen., in Wash., D.C. (Feb. 11, 1969) [hereinafter Clark Interview II], available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/ClarkR/Clark-r2.pdf>.

42. See Clark Interview II, *supra* note 41 (discussing Clark’s role in “creat[ing] a set of conditions that would ease the admission of Meredith”).

experience, Clark drafted a memorandum to Robert Kennedy on the plane trip back to Washington suggesting the pressing need for federal civil rights legislation.<sup>43</sup> This memo reportedly provided the impetus for what would become the Civil Rights Act of 1964.<sup>44</sup>

Following President Kennedy's assassination on November 22, 1963, Vice President Lyndon Johnson assumed the presidency and was elected to that office in 1964. He elevated Ramsey Clark to the position of Deputy Attorney General in 1965,<sup>45</sup> and in that capacity, Clark continued to exhibit a strong commitment to civil rights.

In the spring of 1965, he was the principal federal official in charge of the government's oversight of the historic third civil rights march from Selma to Montgomery, Alabama.<sup>46</sup> Later, in August of that year, Clark was instrumental in securing passage of the momentous Voting Rights Act of 1965.<sup>47</sup> Shortly thereafter, the Watts race riots erupted, and Clark was assigned the daunting role of orchestrating the federal government's response.<sup>48</sup> As chair of the President's Task Force on the Los Angeles Riots (Task Force), Clark conducted a thorough examination of the riots, including their causes and effects, and ultimately prepared and issued a lengthy report, graphically documenting the harsh social and economic realities that contributed to the urban unrest.<sup>49</sup> In conducting his investigation, Clark witnessed firsthand the social ills that African-American

43. See Josh Saunders, *Ramsey Clark's Prosecution Complex: How Did Lyndon Johnson's Attorney General Come to Defend Dictators, War Criminals, and Terrorists?*, LEGAL AFF., Nov.–Dec. 2003, at 43, 44; Clark Interview II, *supra* note 41.

44. See Saunders, *supra* note 43, at 44; Clark Interview II, *supra* note 41 (“[A]fter I got back from that trip, . . . we had the first meeting in the Attorney General's office on proposals for civil rights legislation that was introduced later that summer and it became the Civil Rights Act of 1964.”).

45. See Clark Interview II, *supra* note 41. For a brief period before Clark became Deputy Attorney General, he worked in the White House as some sort of assistant to the President; he had no official title and never relinquished his position as Assistant Attorney General until he was officially appointed Deputy Attorney General in February 1965. Interview by Harri Baker with Ramsey Clark, U.S. Att'y Gen., in Wash., D.C. (Oct. 30, 1968) [hereinafter Clark Interview I], available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/ClarkR/Clark-r1.pdf>; Victor S. Navasky, *Wrong Guy for the Wrong Post at the Wrong Time?*, SATURDAY EVENING POST, Dec. 2, 1967, at 74, 77 (discussing Clark's placement in the White House after President Johnson's 1964 election and Clark's appointment as Deputy Attorney General in 1965).

46. Clark Interview II, *supra* note 41; see also John H. Richardson, *How the Attorney General of the United States Became Saddam Hussein's Lawyer*, ESQUIRE, Feb. 2007, at 89, 92.

47. See Clark Interview II, *supra* note 41.

48. See REPORT OF THE PRESIDENT'S TASK FORCE ON THE LOS ANGELES RIOTS, AUGUST 11–15, 1965, at 14 (Sept. 17, 1965) [hereinafter TASK FORCE REPORT] (on file with the Lyndon Baines Johnson Library, Task Force Reports, Box 10) (noting that “between August 11 and August 15, South Central Los Angeles was swept by lawless and bloody rioting such as has not been seen in this country in recent years”); Interview by Harri Baker with Ramsey Clark, former U.S. Att'y Gen., in Falls Church, Va. (Mar. 21, 1969) [hereinafter Clark Interview III], available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/ClarkR/Clark-r3.pdf>.

49. See generally TASK FORCE REPORT, *supra* note 48 (discussing the Watts riots and recommending reforms).

citizens were enduring, most of which, to some degree, seemed to emanate from institutionalized racism.<sup>50</sup> Indeed, at one point, the report tellingly observed that “the strong feeling of alienation from society held by many of the minority poor, and the feeling that society’s rules, laws, and customs are designed to oppress them do little to encourage respect . . . for property.”<sup>51</sup>

President Johnson, however, never released the Task Force report, apparently because of its relatively unfiltered and uncompromising depiction of the social and economic situation in South Central Los Angeles.<sup>52</sup> Without a doubt, Ramsey Clark’s personal witnessing of the harsh and tragic realities associated with the Watts riots specifically, and the civil rights movement more generally, armed him with a perspective on race that few white Americans possessed.<sup>53</sup>

In September 1966, Attorney General Nicholas Katzenbach resigned to assume the position of Under Secretary of State.<sup>54</sup> Clark became the Acting Attorney General, and President Johnson subsequently named Clark as the Attorney General on March 10, 1967.<sup>55</sup> The urban racial unrest that the Watts riots manifested continued to smolder in the years that followed Clark’s promotion, with riots occurring in Cleveland, Newark, and Detroit, among other places.<sup>56</sup> In addition, further rioting took place in various cities, including Washington, D.C., in the aftermath of the assassination of Dr. Martin Luther King, Jr. in 1968.<sup>57</sup> As Attorney General, Ramsey Clark was extensively

50. See WILKINS, *supra* note 9, at 172–73 (discussing Clark’s meetings with black citizens of South Central Los Angeles); TASK FORCE REPORT, *supra* note 48, at 5–13.

51. TASK FORCE REPORT, *supra* note 48, at 47.

52. See Clark Interview III, *supra* note 48 (“I think the President made the decision [not to release the report]. . . . The report didn’t pull any punches; it demonstrated the existence of really immensely difficult problems in the fields of education, employment, housing, health, communications and public service; it was not tender in its treatment of many important interests.”).

53. See, e.g., WILKINS, *supra* note 9, at 172–73 (discussing Clark’s meetings with black citizens of South Central Los Angeles and observing that “I had never seen a powerful white man take poor black strangers seriously before. . . . He was more sensitive to the problems of poor blacks than I imagined any white man could be”); Peter Carlson, *The Crusader*, WASH. POST, Dec. 15, 2002, at F1 (“[W]atching poor, unarmed black people defy entrenched racism was a life-changing experience that gave [Clark] a lingering sympathy for dissidents.”).

54. Clark Interview I, *supra* note 45.

55. RICHARD L. SCHOTT & DAGMAR S. HAMILTON, PEOPLE, POSITIONS, AND POWER: THE POLITICAL APPOINTMENTS OF LYNDON JOHNSON 87 (1983); see also Clark Interview I, *supra* note 45.

56. See Interview by Harri Baker with Ramsey Clark, former U.S. Att’y Gen., in Falls Church, Va. (Apr. 16, 1969) [hereinafter Clark Interview IV], available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/ClarkR/Clark-r4.pdf>.

57. JOHN T. ELLIFF, CRIME, DISSENT, AND THE ATTORNEY GENERAL: THE JUSTICE DEPARTMENT IN THE 1960’S 112 (1971) (“Dr. King’s assassination triggered a wave of rioting in over a hundred cities, including serious disorders and widespread property destruction in Washington, D.C., as well as new charges of organized incitement.”); see also GEROLD FRANK, AN AMERICAN DEATH: THE TRUE STORY OF THE ASSASSINATION OF DR. MARTIN LUTHER KING, JR. AND THE GREATEST MANHUNT OF OUR TIME 119–20 (1972) (stating that Clark received reports of rioting in Memphis, Nashville, Raleigh, and Washington, D.C.).

involved in organizing the federal government's efforts to monitor and contain these volatile situations,<sup>58</sup> and he faced escalating social and political pressure to prosecute black radicals whom many viewed as responsible.<sup>59</sup> High on this list of militant targets was none other than Stokely Carmichael.<sup>60</sup>

*B. Stokely Carmichael: "Hell no, we won't go!"*

A native of Port-of-Spain, Trinidad, Stokely Standiford Churchill Carmichael<sup>61</sup> moved to the South Bronx in the summer of 1952.<sup>62</sup> Intellectually curious and gifted, Carmichael excelled academically throughout his youth, notably being one of the few black students chosen for admission to the elite Bronx High School of Science.<sup>63</sup> After graduating from high school, he chose to attend Howard University, principally because of his strong attraction to the sophisticated and politically active Nonviolent Action Group (NAG), an unofficial student organization at the university that was affiliated with the better known Student Nonviolent Coordinating Committee (SNCC).<sup>64</sup> SNCC had emerged on the civil rights scene in February 1960.<sup>65</sup> Comprised of a younger, more idealistic and confrontational generation of activists, SNCC focused its efforts on voter registration drives in the inhospitable South, notably in Lowndes County, Alabama.<sup>66</sup>

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58. See Clark Interview IV, *supra* note 56.

59. See *infra* notes 125–39 and accompanying text.

60. See *infra* notes 120–39 and accompanying text. In addition to Carmichael and H. Rap Brown, members of the Black Panther Party were also the subject of blame for the urban unrest during the late 1960s, and there were widespread calls for an intense government response to their reputedly subversive activities. See Brown, *supra* note 38, at 84. Though the Black Panthers advocated violence and spoke apocalyptically of the impending "revolution," Ramsey Clark refused to target them in the manner urged by many powerful figures at that time. *Id.* He was unwilling "to blame black militants for riots or to use them as a scapegoat to avoid confronting problems of poverty and racial discrimination." ELLIFF, *supra* note 57, at 149. Interestingly, following the election of President Nixon, Clark's successor as Attorney General, John Mitchell, took a decidedly more aggressive approach to the Black Panthers. See Brown, *supra* note 38, at 85.

61. For a discussion of the derivation of his somewhat ostentatious moniker, see STOKELY CARMICHAEL WITH EKWUEME MICHAEL THELWELL, *READY FOR REVOLUTION: THE LIFE AND STRUGGLES OF STOKELY CARMICHAEL (KWAME TURE)* 19–20 (2003).

62. See *id.* at 44, 48.

63. See *id.* at 73.

64. See *id.* at 112–13, 117. Although NAG was essentially a Howard-based group, there were also some members who were from other institutions or else not students at all. See *id.* at 136.

65. See PENIEL E. JOSEPH, *WAITING 'TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA* 123 (2006) (noting that SNCC was "founded in conjunction with the spontaneous sit-ins that originated in Greensboro, North Carolina, on February 1, 1960").

66. See *id.* at 123–24, 127–31. For an in-depth account of Carmichael's and SNCC's heroic struggles in Lowndes County, see CARMICHAEL WITH THELWELL, *supra* note 61, at 457–77.

Carmichael's committed involvement with NAG eventually led to a larger role within SNCC<sup>67</sup>—culminating in his election as the organization's chairman in 1966 through his defeat of future civil rights icon John Lewis.<sup>68</sup> Skeptical of and disenchanted with the traditional civil rights movement's strategy of nonviolent resistance,<sup>69</sup> Carmichael was prepared to take the organization in a decidedly more combative direction.<sup>70</sup> Once in charge, he quickly altered SNCC's image and course, calling for rebellion and violence, if necessary,<sup>71</sup> and popularizing the controversial "Black Power" mantra and correlative movement.<sup>72</sup>

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67. See JOSEPH, *supra* note 65, at 124 (noting that after Carmichael's graduation from Howard in 1964, he "became project director for [SNCC's] voter registration efforts in that year's Freedom Summer").

68. See generally CARMICHAEL WITH THELWELL, *supra* note 61, at 479–83 (discussing the events preceding the election of Carmichael); DAVID HALBERSTAM, *THE CHILDREN* 523–24 (1998) (same); LEWIS WITH D'ORSO, *supra* note 2, at 365–68 (1998) (discussing the election from Lewis's perspective).

69. For example, in an article Carmichael wrote for the *New York Times Review of Books*, he maintained:

For too many years, black Americans marched and had their heads broken and got shot. . . . After years of this, we are at almost the same point—because we demonstrated from a position of weakness. We cannot be expected any longer to march and have our heads broken in order to say to whites: Come on, you're nice guys. For you are not nice guys. We have found you out.

Stokely Carmichael, *What We Want*, N.Y. REV. BOOKS, Sept. 1966, *reprinted in* STOKELY SPEAKS: BLACK POWER BACK TO PAN-AFRICANISM 17, 18 (Ethel N. Minor ed., 1971) [hereinafter Carmichael, *What We Want*]; see also HALBERSTAM, *supra* note 68, at 529 ("Nonviolence, Carmichael said, had taken them as far as they could go.").

70. See HALBERSTAM, *supra* note 68, at 528 ("The new ideology was clearly that of black separatism."); JOSEPH, *supra* note 65, at 130 ("Carmichael's election over the more moderate John Lewis served as the capstone for SNCC's radical orientation."); LEWIS WITH D'ORSO, *supra* note 2, at 368 (maintaining that John Lewis did not consider his loss to Carmichael "so much a repudiation of [him] as a repudiation of [SNCC], of what we were, of what we stood for").

71. In a speech delivered in 1967 to the Congress on the Dialectics of Liberation in London, Carmichael proclaimed:

Our history demonstrates that the reward for trying to coexist in peace has been the physical and psychological murder of our peoples. We have been lynched, our houses have been bombed and our churches burned. Now we are being shot down like dogs in the streets by white racist policemen. We can no longer accept this oppression without retribution.

Stokely Carmichael, *The Dialectics of Liberation* (July 18, 1967), *in* STOKELY SPEAKS: BLACK POWER BACK TO PAN-AFRICANISM 77, 95 (Ethel N. Minor ed., 1971); see also Carmichael, *What We Want*, *supra* note 69, at 21 ("SNCC reaffirms the right of black men everywhere to defend themselves when threatened or attacked. As for initiating the use of violence, we hope that such programs as ours will make that unnecessary; but it is not for us to tell black communities whether they can or cannot use any particular form of action to resolve their problems."); HALBERSTAM, *supra* note 68, at 526 ("What fascinated Carmichael . . . was nothing less than the idea of revolution and the use of violence to achieve a revolution."). For a detailed discussion of "Black Power" as viewed by Carmichael, see STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 34–56 (1967).

72. See Kaufman, *supra* note 2 (noting that following Carmichael's release from his twenty-seventh arrest, he began to promote use of the phrase "Black Power": "We been saying 'Freedom'

In his seminal Black Power speech in Mississippi on June 16, 1966, following release from his twenty-seventh arrest, Carmichael vehemently maintained that he was not going to jail anymore and asserted:

We want black power! . . . That's right. That's what we want, black power. We don't have to be ashamed of it. We have stayed here. We have begged the president. We've begged the federal government—that's all we've been doing, begging and begging. It's time we stand up and take over. Every courthouse in Mississippi ought to be burned down tomorrow to get rid of the dirt and the mess. From now on, when they ask you what you want, you know what to tell 'em. What do you want?<sup>73</sup>

The crowd obediently responded with shouts of “Black [P]ower!”<sup>74</sup> Following this speech, which took place on the heels of the historic continuation of James Meredith’s “March Against Fear” (led by Martin Luther King, Jr., Carmichael, and other civil rights notables),<sup>75</sup> the *New York Times* reported that, with Stokely Carmichael as its leader, a “new philosophy” of Black Power was

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for six years . . . . What we are going to start saying now is ‘Black Power!’”); JOSEPH, *supra* note 65, at 141–42 (discussing the unveiling of SNCC’s “Black Power” slogan in Greenwood, Mississippi); LEWIS WITH D’ORSO, *supra* note 2, at 371 (explaining that Carmichael adopted the phrase “Black Power” after seeing SNCC staffer Willie Ricks excite crowds with the phrase).

73. TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965–68*, at 486 (2006). Carmichael’s twenty-seventh arrest was on a charge of trespassing. See Gene Roberts, *Mississippi Reduces Police Protection for Marchers*, N.Y. TIMES, June 17, 1966, at 1.

74. BRANCH, *supra* note 73, at 486 (quoting Paul Good, *The Meredith March*, NEW SOUTH, Summer 1966, at 2, 8).

75. Meredith made history in 1962 by becoming the first African American to enroll at the University of Mississippi. See JOSEPH, *supra* note 65, at 132 (citing TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 647–53 (1988)) (discussing the controversy associated with Meredith’s enrollment); Brown, *supra* note 38, at 60 (discussing Ramsey Clark’s monitoring of Meredith’s admission on behalf of the Department of Justice); *supra* note 42 and accompanying text. On June 5, 1966, Meredith embarked upon a solitary “March Against Fear” to symbolically inspire black citizens out of their fearful states of mind with regard to the exercise of constitutional rights. JOSEPH, *supra* note 65, at 132–33 (citing DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 475 (1986); Roy Reed, *Meredith is Shot in Back on Walk into Mississippi*, N.Y. TIMES, June 7, 1966, at 1; Roy Reed, *Meredith Regrets He Was Not Armed*, N.Y. TIMES, June 8, 1966, at 1). The march began in Memphis, Tennessee and was to conclude in Jackson, Mississippi; however, on the second day of his quest, Meredith was shot. JOSEPH, *supra* note 65, at 133. Although he would fully recover, he could not continue with his march at that time; therefore, Dr. King, Stokely Carmichael, and many others did so for him. *Id.* at 133–34 (citing *Civil Rights: The New Racism*, TIME, July 1, 1966, at 11). Meredith rejoined the march on June 25 and completed it on the following day at the Mississippi State Capitol Building. *Id.* at 144–45 (citing GARROW, *supra*, at 487; *Meredith Says F.B.I. Watched Shooting*, N.Y. TIMES, June 20, 1966, at 21; *Meredith Will Fly to South on Friday to Resume March*, N.Y. TIMES, June 22, 1966, at 24; Roberts, *supra* note 73, at 1; *Meredith Leads the March on Eve of Rally in Jackson*, N.Y. TIMES, June 26, 1966, at 1; *Tactics of March Disturb Meredith*, N.Y. TIMES, June 16, 1966, at 35).

“sweeping the civil rights movement.”<sup>76</sup> “Reporters and cameramen drawn to a demonstration by the magic of Dr. King’s name stay[ed] to write about and photograph Mr. Carmichael . . . .”<sup>77</sup> And this was only the beginning.

In the year and a half that followed, Stokely Carmichael became a force to be reckoned with in the civil rights movement<sup>78</sup> and more broadly within the expanding antiwar context.<sup>79</sup> He was resolute in his general opposition to the Vietnam War but was adamant that blacks should take no part whatsoever in what he considered to be a racist conflict.<sup>80</sup> During New York’s Spring Mobilization antiwar rally in 1967, which featured such distinguished personalities as Dr. King and Dr. Benjamin Spock, Carmichael stole the show with his caustic indictment of America’s involvement in Vietnam and unequivocal advocacy of black draft resistance:

We maintain that America’s cry of “preserve freedom in the world” is a hypocritical mask behind which it squashes liberation movements which are not bound, and refuse to be bound, by the United States’ cold war policies. We see no reason for black men, who are daily murdered physically and mentally in this country, to go and kill yellow people abroad, who have done nothing to us and are, in fact, victims of the same oppression. We will not support LBJ’s racist war in Vietnam.<sup>81</sup>

On a separate occasion, Carmichael pointedly highlighted the hypocrisy and audacity of the government’s enlisting of black men to fight in Vietnam—“Hell, no. We won’t go. They expect us to run in Harlem and fight in Hanoi? They must be crazy.”<sup>82</sup> On another occasion, Carmichael sharply observed that: “Even if I believed the lies of [President] Johnson, that we’re fighting to give

76. BRANCH, *supra* note 73, at 494 (quoting Gene Roberts, *Rights March Disunity: Campaign in Mississippi Emphasized a New ‘Black Consciousness’ Force*, N.Y. TIMES, June 28, 1966, at 23).

77. *Id.*

78. *See id.* at 495 (“Black power was hot, whether or not it would last. King was too Sunday School, and he no longer commanded attention at the White House.”); JOSEPH, *supra* note 65, at 146 (“Carmichael emerged from Mississippi as the spokesman for a generation of black radicals.”).

79. One commentator suggested that 1967 could aptly be described as the “Year of Stokely Carmichael” and observed that during this period, he became “one of the country’s most vocal antiwar activists.” Peniel E. Joseph, *Black Power’s Powerful Legacy*, CHRON. HIGHER EDUC. (D.C.), July 21, 2006, at B6; *see also* Carmichael, *Berkeley Speech*, *supra* note 1, at 53 (“It is sometimes ironic that many of the peace groups have begun to call SNCC violent and say they can no longer support us, when we are in fact the most militant organization for peace or civil rights or human rights against the war in Vietnam in this country today.”).

80. *See* JOSEPH, *supra* note 65, at 180–81 (quoting *Why SNCC Says ‘Hell No!’ to Viet War*, MUHAMMAD SPEAKS, Apr. 28, 1967, at 5).

81. *Id.* (quoting *Why SNCC says ‘Hell No!’ to Viet War*, *supra* note 80, at 5.)

82. Photograph of Carmichael speaking to students in Hampton, Virginia, in CARMICHAEL WITH THELWELL, *supra* note 61, following p. 500; *see also* BRANCH, *supra* note 73, at 608 (“At Tougaloo . . . Carmichael’s strong anti-Vietnam statements set off almost five minutes of chanting, ‘We ain’t going, hell no!’” (internal quotation marks omitted)).

democracy to the people in Vietnam, as a black man living in this country I wouldn't fight to give this to anybody.”<sup>83</sup> In the same speech, he also targeted his ire directly towards black men who acquiesced to the government's call to fight in Vietnam:

Any black man fighting in the war in Vietnam is nothing but a black mercenary. Any time a black man leaves the country where he can't vote to supposedly deliver the vote to somebody else, he's a black mercenary. Any time a black man leaves this country, gets shot in Vietnam on foreign ground, and returns home and you won't give him a burial place in his own homeland, he's a black mercenary.<sup>84</sup>

Contrary to the peaceful opposition language that many within the antiwar movement employed, Carmichael's rhetoric was ominously tinged with endorsements of violence in the aid of resistance.<sup>85</sup> For example, at the birthday benefit for imprisoned Black Panther Party co-founder and Minister of Defense Huey P. Newton,<sup>86</sup> Carmichael stated:

For us the question is not going to Vietnam any more, the question is how we can protect our brothers who do not go to Vietnam from going to jail so that when one brother says “Hell, no,” there're enough people in that community around him, so that if they dare come in, they are going to face maximum damage in their community.<sup>87</sup>

While noted for his oratorical skills, it is important to stress that Carmichael did not merely “talk the talk” in opposing the Vietnam War; he literally put his words into action. For example, on one occasion he personally escorted fellow

83. Carmichael, Berkeley Speech, *supra* note 1, at 53. In a similar vein, Dr. Martin Luther King, Jr. observed the irony of the government sending black men “eight thousand miles away to guarantee liberties in Southeast Asia which they had not found in Southwest Georgia and East Harlem.” Martin Luther King, Jr., *Why I Am Opposed to the War in Vietnam* (Apr. 30, 1967), available at <http://www.lib.berkeley.edu/MRC/pacificviet/riversidetranscript.html>.

84. Carmichael, Berkeley Speech, *supra* note 1, at 53.

85. See JOSEPH, *supra* note 65, at 181.

86. Stokely Carmichael, *Free Huey* (Feb. 17, 1968), in *STOKELY SPEAKS: BLACK POWER BACK TO PAN-AFRICANISM* 111, 111 (Ethel N. Minor ed., 1971) [hereinafter Carmichael, *Free Huey*]. Newton faced the death penalty in connection with the alleged first-degree murder of an Oakland, California police officer. See JOSEPH, *supra* note 65, at 206. He was also charged with assaulting another officer. See *id.* at 237–38. His perceived wrongful imprisonment inspired somewhat of a movement unto itself to “Free Huey.” For a discussion of the nature of and events associated with the “Free Huey” effort, see *id.* at 221–26, 229–32. The jury ultimately convicted Newton of voluntary manslaughter and acquitted him on the assault charge. *Id.* at 237–38.

87. Carmichael, *Free Huey*, *supra* note 86, at 126; see also JOSEPH, *supra* note 65, at 151 (“Declaring that Black Power meant the destruction of ‘Western Civilization,’ [Carmichael] urged black men to refuse to serve in Vietnam.”); cf. *id.* at 148 (recounting “Carmichael’s insistence that discussion of nonviolence in the movement be tabled as long as ‘the United States continues to commit violence in Vietnam.’”).



SNCC leader Cleveland Sellers to his Army induction ceremony, at which Sellers famously refused induction.<sup>88</sup>

Carmichael's hip, militant, and mesmerizing oratory, combined with his innate charisma and good looks, transformed him into a veritable rock star within the civil rights (Black Power) and antiwar movements.<sup>89</sup> His irreverent contempt for the white power structure and persistent calls for effecting change through the exertion of Black Power<sup>90</sup> inspired awestruck blacks but alarmed many whites,<sup>91</sup> including President Lyndon Johnson.<sup>92</sup>

In fact, President Johnson became somewhat fixated on Carmichael and viewed him as one of his principal antagonists on both the civil rights<sup>93</sup> and Vietnam War fronts.<sup>94</sup> He even went so far as to demand regular weekly reports from the FBI concerning Carmichael's conduct.<sup>95</sup> Moreover, Johnson's growing

88. See BRANCH, *supra* note 73, at 605 (discussing Sellers' refusal and noting Carmichael's whispered words of encouragement—"Don't let them get you."); CARMICHAEL WITH THELWELL, *supra* note 61, at 519 (recounting Sellers's reaction to Dr. Martin Luther King, Jr.'s famous anti-Vietnam speech at Riverside Church in New York and noting that "[b]efore the dust settled, Cleve [Sellers] would do time for refusing to go to Vietnam").

89. See JOSEPH, *supra* note 65, at 150 ("Television and print media found a fascinating persona in the handsome activist."); Joseph, *supra* note 79, at B6 ("Carmichael was tall, handsome, intellectually agile, and equal parts angry and gregarious, carrying himself . . . with an air of unadorned dignity and grace that helped turn him into an international icon: black power's rock star.").

90. See, e.g., JOSEPH, *supra* note 65, at 145 ("The movement, [Carmichael] said, had to build a political base so powerful that blacks would 'bring them [whites] to their knees every time they mess with us.'") (alteration in original) (quoting CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 211 (3d prtg. 2000))).

91. See, e.g., HALBERSTAM, *supra* note 68, at 529 ("Nothing. . . would alienate the white middle class, which the Movement needed for political and financial support, more quickly than a cry of black power. It might have [had] a certain legitimacy, . . . but the sound of it to ordinary whites after a decade in which the rhetoric had been based on Christian charity seemed ominous and threatening . . ."); JOSEPH, *supra* note 65, at 150 ("Carmichael began to inspire a mixture of admiration and revulsion that rivaled the memory of Malcolm X."); *id.* at 162 ("If scaring whites is an art," wrote one reporter, "Carmichael seems well on his way to becoming a master.") (quoting Gene Roberts, *The Story of Snick: From 'Freedom High' to 'Black Power'*, N.Y. TIMES MAG., Sept. 25, 1966, at 27, 128)); *id.* at 178 (citing '*Black Power*' in Nashville, N.Y. TIMES, Apr. 11, 1967, at 46) ("Critics charged that Carmichael was a one-man army, traveling around the country leaving insurrection and disorder in his wake.").

92. See JOSEPH, *supra* note 65, at 159 (citing Memorandum from J. Edgar Hoover, Dir. of the F.B.I., to Special Agents in Charge of the Atlanta, N.Y.C., and Wash. Field Offices (Aug. 18, 1966), available at [http://foia.fbi.gov/carmichael\\_stokely/carmichael\\_stokely\\_part02.pdf](http://foia.fbi.gov/carmichael_stokely/carmichael_stokely_part02.pdf)) (noting that Johnson's concerns about Carmichael led to enhanced FBI surveillance of Carmichael's activities).

93. See *id.* at 166 (observing that Johnson attributed his inability to secure the passage of new civil rights legislation to both Carmichael and Black Power).

94. See *id.* at 179 (indicating that Carmichael's outspoken opposition to U.S. involvement in Vietnam garnered "the attention of both the White House and the Justice Department").

95. See *id.* at 159 (quoting Memorandum from C. D. DeLoach, Deputy Dir. of the F.B.I., to Clyde Tolson (Aug. 10, 1966), available at [http://foia.fbi.gov/carmichael\\_stokely/carmichael\\_stokely\\_part01.pdf](http://foia.fbi.gov/carmichael_stokely/carmichael_stokely_part01.pdf)) (observing that Johnson's special assistant requested the provision of updates "at least several times a week" (internal quotation marks omitted)).

frustration over the escalating unpopularity of the Vietnam War and the increasing prevalence of rioting as an apparent mode of civil rights protest caused him to push for the prosecution of Stokely Carmichael, among others.<sup>96</sup> Interestingly, the proposed ground for prosecution that the President and his cabinet advocated was “conspiracy to incite riots” rather than antiwar-related charges.<sup>97</sup> Several members of Congress, however, openly pressed for an indictment based on violation of draft laws,<sup>98</sup> as did many citizens.<sup>99</sup>

In addition to, and perhaps in aid of, calls for the criminal prosecution of Stokely Carmichael, the FBI and even Vice President Hubert Humphrey sought to employ enhanced microphone surveillance of his activities.<sup>100</sup> After Assistant

96. See *id.* at 166 (“Johnson’s private solution [to his concern that he was losing the support of white Americans, was] to ‘do something to shake them up like convict that damn Carmichael and uphold it’ . . . .”); WILKINS, *supra* note 9, at 207 (“[I]t seemed clear that there was a good deal of pressure on the Department of Justice to find some way to put Rap Brown and Stokely Carmichael in jail.”); Interview by Harri Baker with Ramsey Clark, former U.S. Att’y Gen., in Falls Church, Va. (June 3, 1969) [hereinafter Clark Interview V], available at <http://www.lbjlib.utexas.edu/johnso n/archives.hom/oralhistory.hom/ClarkR/Clark-r5.pdf> (recalling that President Johnson “was outraged by Carmichael” and “thought it would be very good for the country if we could stop [him]”).

97. See Michael Flamm, *The “Long Hot Summer” and the Politics of Law and Order*, in LOOKING BACK AT LBJ 128, 136 (Mitchell B. Lerner ed., 2005) (“The 2 August meeting of the cabinet exposed other deep divisions within the White House. . . . The issue that generated the most heated exchanges, however, was whether black radicals like Stokely Carmichael and Rap Brown had incited the riots.”); *infra* notes 123–39 and accompanying text. While Ramsey Clark expressed the sentiment that there was insufficient evidence to pursue a case against Carmichael or Rap Brown, President Johnson was not prepared to concede the point yet. See Minutes of President Johnson’s Cabinet Meeting of August 2, 1967, at 3–4 (on file with author) [hereinafter Cabinet Minutes] (discussing the possible prosecution of “outside agitators,” such as Carmichael, for conspiracy to incite riots).

98. See JOSEPH, *supra* note 65, at 155 (observing that Democratic Congressman Mendel Rivers questioned whether Carmichael’s anti-Vietnam War diatribes violated the Universal Military Training and Service Act). An antiwar speech that Carmichael delivered in Cleveland, Ohio led its Democratic congressman to request prosecution for flouting the nation’s draft laws. *Id.* at 151–52. Senator James O. Eastland of Mississippi apparently raised the issue in a telegram to Ramsey Clark on October 31, 1966, in reference to certain comments made by Stokely Carmichael, see Eastland Letter, *supra* note 9, most likely in a speech delivered at the University of California, Berkeley. See Carmichael, Berkeley Speech, *supra* note 1, at 45–60. In response to the telegram, Assistant Attorney General Fred M. Vinson, Jr. essentially maintained that there was no evidence to suggest that Carmichael’s words had crossed into the area of speech unprotected by the First Amendment, and therefore, prosecution under the Universal Military Training and Service Act was not possible at that time. See Eastland Letter, *supra* note 9.

99. See, e.g., Letter from F.W. Ferguson to President Lyndon B. Johnson (May 17, 1967) (on file with the Lyndon Baines Johnson Library, White House Central Files, Box 79, “Carmichael, Stokely” (file 1 of 2)) (“If [Carmichael’s anti-Vietnam Rhetoric] is not interfering with the draft and is not giving aid and comfort to our enemies then I do not understand the English language.”); Letter from R.W. Hickman to President Lyndon B. Johnson (May 19, 1967) (on file with the Lyndon Baines Johnson Library, White House Central Files, Box 79, “Carmichael, Stokely” (file 1 of 2)) (“I heard Stokely Carmichael’s tirade Wednesday, degrading the President of these United States and advocating refusal to serve in the Armed Services. . . . If Carmichael is allowed to persist, you will certainly see a civil war here in our time.”).

100. See JOSEPH, *supra* note 65, at 164–65, 168–69.

FBI Director Deke DeLoach informed Humphrey of certain public remarks by Carmichael, which included insults of prominent White House officials and expressions of open opposition to the draft, Humphrey reacted sharply.<sup>101</sup> He was “‘sick and tired’ of hearing about Carmichael” and issued a directive, through DeLoach, to Ramsey Clark that he approve the wiretap.<sup>102</sup>

In general, Clark fervently opposed wiretapping and, throughout his tenure as Attorney General, consistently thwarted FBI Director J. Edgar Hoover’s efforts in this regard.<sup>103</sup> Thus, it was not surprising that Clark resisted permitting microphone surveillance of Stokely Carmichael.<sup>104</sup> He offered specific reasons for his reluctance. The first, ironically, was because of the potential for imminent criminal prosecution of Carmichael.<sup>105</sup> Perhaps more significantly, Clark expressed the view that Carmichael’s notoriety as a civil rights leader, as well as the possible recriminations that might flow from a leak regarding such surveillance, presented too great of a risk.<sup>106</sup>

As such, Clark held fast to his stance concerning surveillance of Carmichael, resisting the strong desires of other members of the Johnson Administration. He likewise rebuffed the potent calls for Carmichael’s criminal prosecution.

### III. RAMSEY CLARK’S REFUSAL TO PROSECUTE STOKELY CARMICHAEL

#### A. *Impetus Behind Calls for Prosecution*

Admittedly, Stokely Carmichael’s confrontational approach to securing civil rights for black citizens was distasteful to many white leaders, especially President Johnson.<sup>107</sup> He clearly preferred dealing with the more traditional civil rights leaders of the old guard, such as NAACP President Roy Wilkins and Urban League Chair Whitney Young, who were very supportive of and cooperative with his Administration.<sup>108</sup> Johnson was extraordinarily sympathetic

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101. *See id.* at 168–69.

102. *Id.* at 169.

103. *See* RICHARD HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA 38 (1970) (“Clark was deeply suspicious about both the usefulness of this kind of snooping and the motives of the people who wanted to use it.”); NAVASKY, *supra* note 38, at 83 (“Ramsey Clark . . . opposed wiretapping except in national-security cases.”); Brown, *supra* note 38, at 65 (discussing Clark’s opposition to Hoover’s electronic surveillance of Martin Luther King, Jr.).

104. *See* JOSEPH, *supra* note 65, at 165.

105. *See id.*

106. *See id.*

107. *See supra* notes 91–102 and accompanying text; Clark Interview V, *supra* note 96 (recalling that Johnson was “outraged by Carmichael”).

108. *See, e.g.,* Steven F. Lawson, *Civil Rights*, in EXPLORING THE JOHNSON YEARS 93, 108 (Robert A. Divine ed., 1981) (“Vietnam and the riots isolated the President from black radicals, but drew him closer to such moderates as Wilkins and Young.”).

to the plight of black citizens<sup>109</sup> and was concededly working with these leaders to enhance the status of blacks in America, albeit at a somewhat patient, measured pace.<sup>110</sup> Carmichael and other principals of the new guard, however, were convinced that the only way to achieve equal stature in American society was through the establishment and assertion of Black Power, which included resorting to violence, if necessary.<sup>111</sup>

Johnson viewed Carmichael's less palatable style as a significant impediment to Johnson's efforts to push his civil rights agenda.<sup>112</sup> Whites felt threatened and angry, and these emotions translated into reticence on the part of elected officials in Washington.<sup>113</sup> Furthermore, the urban racial unrest that seethed in major metropolitan areas in the years following the Watts riots<sup>114</sup> was popularly attributed to militant black leaders, such as Carmichael, H. Rap Brown, and others within the burgeoning Black Power movement.<sup>115</sup>

Equally disturbing, from the perspective of President Johnson, was Carmichael's blatant, vocal disdain for the Vietnam War.<sup>116</sup> By 1967, Johnson appeared more committed than ever to achieving victory in Vietnam.<sup>117</sup> The

109. See BRANCH, *supra* note 73, at 113 (recounting portions of Johnson's famous address on voting rights in which he stated, "There is no Negro problem, . . . there is only an American problem, and we are met here tonight as Americans . . . to solve that problem" (quoting Lyndon B. Johnson, U.S. President, Special Message to the Congress: The American Promise, in 1 PUB. PAPERS 281, 282 (March 15, 1965)) (internal quotation marks omitted)); HALBERSTAM, *supra* note 68, at 479 ("Johnson was becoming, unlike his cooler predecessor, something of a genuine activist for the black cause. . .").

110. See, e.g., WILKINS, *supra* note 9, at 205–07 (stating that Johnson told a gathering of black civil rights leaders, including Martin Luther King, Jr., Roy Wilkins, and Whitney Young, that "they had to be patient. All the things that had to be done couldn't be done at once.").

111. See *supra* notes 69–73 and accompanying text.

112. See JOSEPH, *supra* note 65, at 161–62 (quoting John Herbers, *Rights Backers Fear a Backlash*, N.Y. TIMES, Sept. 21, 1966, at 1) (discussing the undermining effects of Black Power on Johnson's social agenda). Johnson attributed his inability to secure the passage of new civil rights legislation to both Carmichael and the Black Power movement. *Id.* at 166.

113. See, e.g., *id.* at 162 ("If political fatigue over race relations threatened to hinder legislative breakthroughs, it also suggested 'at least the possibility that the nation [was] moving into a vicious cycle in which Negroes riot[ed] because whites [did] not do enough and whites [did] not do enough because Negroes riot[ed]'" (quoting Herbers, *supra* note 112, at 1)).

114. See Brown, *supra* note 38, at 61–64 (discussing Ramsey Clark's investigation into the Watts Riots and noting the subsequent racial unrest that emerged in other areas of the country in the riots' aftermath); *supra* notes 56–57 and accompanying text.

115. See O'Meara, *supra* note 5, at 1109 ("[Carmichael] seems to breed riots; they follow in his train."); Robert E. Baskin, *Tower Urges Removal of Ramsey Clark*, DALLAS MORNING NEWS, Apr. 27, 1968, at 1A ("The cities of our nation, . . . are being burned not by 12-year-olds but by bandits, looters and arsonists who are potential mass murderers, reacting to the agitation of the Stokely Carmichaels and H. Rap Browns of our society." (internal quotation marks omitted)).

116. See BRANCH, *supra* note 73, at 451 ("The dissenters unhinged Johnson. To him, they undermined the tenuous hopes for military success without offering an honest alternative, which made them disloyal, impractical, and unprincipled all at once.").

117. See, e.g., MICHAEL H. HUNT, LYNDON JOHNSON'S WAR 110 (1996) ("The tonnage of bombs dropped reflected the rising ferocity of the attack, increasing from 63,000 in 1965 to 226,000 in 1967."); ROBERT S. MCNAMARA WITH BRIAN VANDEMARK, IN RETROSPECT: THE TRAGEDY

War's rising unpopularity was having a devastating effect on his potential legacy, which fueled an almost maniacal obsession with the conflict.<sup>118</sup> Johnson came to view any opposition to the War as a personal affront,<sup>119</sup> and he had absolutely no tolerance for antiwar activists who promoted draft evasion.<sup>120</sup> Carmichael, therefore, represented a sharp thorn in the President's side—one that he desperately wanted removed.<sup>121</sup> An effective method for doing so seemed to be a successful federal criminal prosecution.<sup>122</sup>

While a potential charge against Carmichael under the SSA for knowingly aiding and abetting draft evasion would appear to have been a logical and viable basis for prosecution, this was not the crime for which Carmichael was investigated. Instead, President Johnson pushed for, and Ramsey Clark concentrated his investigation upon, a possible indictment for conspiracy to incite a riot.

### *B. Conspiracy to Incite a Riot*

The dramatic shift within the civil rights movement from peaceful nonviolence to militant, aggressive calls for Black Power was viewed by many as a major contributor to the disturbing race riots of the “long, hot summer” of 1967.<sup>123</sup> There were certainly other plausible explanations for the tumultuous events of that period. Specifically, the National Advisory Commission on Civil Disorders (better known as the “Kerner Commission”)—which the President charged with the task of investigating the causes of the riots—concluded (much

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AND LESSONS OF VIETNAM 321 (1995) (indicating that the number of U.S. troops in Vietnam increased from 184,300 in December 1965 to 485,600 in December 1967).

118. *See, e.g.*, GEORGE C. HERRING, *LBJ AND VIETNAM* 135–50 (1994) (discussing the Johnson Administration's efforts to “sell the war” to the public and highlighting Johnson's “[h]ypersensitiv[ity] to the political implications of anything that concerned the war,” which fueled an obsession with trying to control public opinion).

119. *See, e.g.*, DAVID MARANISS, *THEY MARCHED INTO SUNLIGHT: WAR AND PEACE, VIETNAM AND AMERICA, OCTOBER 1967*, at 314 (2003) (noting that Johnson “had become nearly as obsessed with the targets of protest as with the bombing targets around Hanoi”). Johnson was enraged over the October 20, 1967 anti-draft demonstration at the Department of Justice, during which almost 1,000 draft cards were delivered. *Id.* at 455–57.

120. *See, e.g., id.* at 455 (“Columnist Joseph Alsop, who supported the war and detested the protesters . . . was ushered in when Johnson wanted to leak raw intelligence reports detailing the ribald sexuality or political recklessness of antiwar partisans.”); Lawson, *supra* note 108, at 109 (“Public opposition to the Vietnam War soured King's relationship with Johnson.”).

121. *See, e.g.*, BRANCH, *supra* note 73, at 629 (noting that upon receiving a secret report that Martin Luther King, Jr. and Stokely Carmichael were opposing the Vietnam War for allegedly ulterior reasons, Johnson “urged [the FBI] to arrange leaks against Carmichael but not King”).

122. *See, e.g.*, JOSEPH, *supra* note 65, at 166 (noting that Johnson's private solution to the ills of his presidency was to convict Carmichael).

123. *See* Flamm, *supra* note 97, at 128; Baskin, *supra* note 115, at 1A (quoting Senator John Tower, who blamed the riots throughout the nation on “the agitation of the Stokely Carmichaels and H. Rap Browns of our society”).

to Johnson's chagrin) that the unrest had been fueled by "systemic racism, unemployment, and police brutality."<sup>124</sup>

Nevertheless, it was superficially difficult to dismiss the potential connection that existed between the rebellious oratory of Stokely Carmichael and H. Rap Brown, among others, and these volatile urban uprisings.<sup>125</sup> When combined with the reality that casting blame on such "rabble rousers" seemed like a much more satisfying and politically astute strategy, it is easy to understand why various leaders viewed prosecution of Carmichael and Brown as an efficacious solution.<sup>126</sup>

During a notably intense Cabinet meeting on August 2, 1967, the principal topic for discussion was the issue of whether Carmichael and Brown could be indicted on federal charges for conspiracy to incite riots.<sup>127</sup> In his report to the Cabinet regarding the recent riots in Detroit and elsewhere, Ramsey Clark concluded that there was "no hard evidence of a Negro conspiracy."<sup>128</sup> Though he conceded, "we know there are lots of leaders and roving trouble-makers[.]" he attributed much of the severity of the unrest to overreactions by "irresponsible officials"—"There is panic . . . fear . . . overreaction and deadly error."<sup>129</sup>

Secretary of State Dean Rusk retorted somewhat incredulously: "Don't we have any remedy for these people?"<sup>130</sup> Clark responded by noting that the Justice Department was closely following both Carmichael and Brown but reiterated that there was no basis for prosecuting either of them.<sup>131</sup> Despite the

124. JOSEPH, *supra* note 65, at 226; *see also id.* at 226–27 ("[T]he Kerner Commission's report was the last thing that Lyndon Johnson wanted to hear."); NICHOLAS DEB. KATZENBACH, *SOME OF IT WAS FUN: WORKING WITH RFK AND LBJ* 175 (2008) ("[The Watts Riots were] a spontaneous reaction to years of being second-class citizens, to not having jobs, [and] to living in de facto segregated ghettos.").

125. *See, e.g.,* BRANCH, *supra* note 73, at 633 ("Black power enthusiasts fed speculation with competitive rhetoric . . . Brown coined . . . an epigram that gripped the country as truism or demonic slander: 'Violence is necessary. It is as American as cherry pie.'" (quoting Ben A. Franklin, *S.N.C.C. Head Advises Negroes in Washington to Get Guns: Burning Capital Urged, If Needed*, N.Y. TIMES, July 28, 1967, at 14)); *id.* at 634 (observing that on the heels of the Detroit riots, Carmichael stated, "[w]e are preparing groups of urban guerillas for our defense in the cities." (quoting Memorandum from John Edgar Hoover, Dir. of the FBI, to Mildred Stegall, White House Staff (July 28, 1967) (on file with the Lyndon Baines Johnson Library, Office Files of Mildred Stegall, Box 73B))); JOSEPH, *supra* note 65, at 188 (quoting CARSON, *supra* note 90, at 255) (noting that during the height of the social unrest, Brown gave "a fiery speech, . . . call[ing] for an escalation of black liberation politics, [and] explicitly sanctioning guerilla warfare as a political tactic. 'If America don't come around,' he warned, 'we are going to burn it down!'" ).

126. *See* Cabinet Minutes, *supra* note 97, at 5–6.

127. *See* Flamm, *supra* note 97, at 136 (citing Cabinet Minutes, *supra* note 97, at 4).

128. Cabinet Minutes, *supra* note 97, at 3 (internal quotation marks omitted); *see also* McPherson Interview, *supra* note 16 ("[Clark had the entire Justice Department virtually, even guys down in the Land[s] Division, researching the record on Rap Brown and on Stokely Carmichael, trying to find definitive evidence that they had in fact incited to riot . . . And he couldn't find it.").

129. Cabinet Minutes, *supra* note 97, at 3 (internal quotation marks omitted).

130. *Id.* at 5 (internal quotation marks omitted).

131. *See id.* ("A poll of Justice Department lawyers showed agreement that there was no basis to prosecute." (internal quotation marks omitted)). *But see* HARRY MCPHERSON, *A POLITICAL*

fact that a conviction might have been possible at the trial level,<sup>132</sup> according to Clark, it would surely have been overturned on appeal, which would have only served to further elevate Carmichael's and Brown's statuses.<sup>133</sup> Various Cabinet members nevertheless persisted in their calls for prosecution. John Gardner, Secretary of Health, Education, and Welfare, rhetorically asked: "Surely there must be a limit to what a man can say?"<sup>134</sup> Secretary Rusk chimed in: "What about Carmichael's threat on the President's life—isn't that enough?"<sup>135</sup>

In the end, the bottom line seemed to be that as unsettling as Carmichael's and Brown's words and methods may have been to many, they simply did not rise to the level of conspiracy to incite a riot.<sup>136</sup> Indeed, the President's Cabinet, Clark included, ultimately acknowledged that local law may have presented the most viable option for pursuing Carmichael and Brown—"It isn't the end of the road to say that we can't prosecute Brown and Carmichael. . . . The local laws can catch them . . . ."<sup>137</sup>

President Johnson, however, remained hesitant to abandon completely the conspiracy theory at this point: "I don't want to foreclose the conspiracy theory now. . . . Keep that door open. . . . Even though some of you will not agree with me, I have a very deep feeling that there is more to that than we see at the moment."<sup>138</sup> Although he eventually acquiesced to Ramsey Clark's position concerning the prosecution of Carmichael, Johnson and others within his Administration never fully embraced that decision.<sup>139</sup>

EDUCATION 363 (1972) ("Given the public's animosity against Carmichael, an indictment for inciting to riot seemed assured.").

132. See Cabinet Minutes, *supra* note 97, at 5; Clark Interview V, *supra* note 96 ("[I]t would have been very easy to strike out at Carmichael without a case . . .").

133. See MCPHERSON, *supra* note 131, at 363 ("[T]he evidence for conviction was not there, and acquittal, Clark believed, would exalt Carmichael as nothing else."); McPherson Interview, *supra* note 16 ("[Clark] was afraid that he would haul them up in Court and any competent judge, or certainly a Court of Appeals, would reverse or acquit them.").

134. Cabinet Minutes, *supra* note 97, at 5 (internal quotation marks omitted).

135. *Id.* (internal quotations marks omitted).

136. See Clark Interview V, *supra* note 96 ("I think [President Johnson] was outraged by Carmichael . . . . I think he thought it would be very good for the country if we could stop that. My position was just a legal position. We didn't have the facts that as applied to the law demonstrate[d] guilt of any crime.").

137. Cabinet Minutes, *supra* note 97, at 6 (internal quotation marks omitted). Frustration over the inability to federally prosecute Stokely Carmichael for his alleged involvement with the riots helped inspire subsequent legislation specifically designed to cover "inciteful" activities, such as his and Brown's. Indeed, the Anti-Riot Act of 1968, *see* 18 U.S.C. § 2101 (2006), which was enacted as a part of the Civil Rights Act of 1968, was originally referred to interchangeably as the "Stokely Carmichael Act" or the "Rap Brown Act." *See* MARTY JEZER, ABBIE HOFFMAN: AMERICAN REBEL 198 (1992).

138. Cabinet Minutes, *supra* note 97, at 4 (internal quotation marks omitted).

139. See MCPHERSON, *supra* note 131, at 363 ("[McPherson] was worried that unless Carmichael were prosecuted the government, with its commitment to peaceful change, would be made a goat . . . . Johnson had the same concern, but he abided Clark's judgment."); WILKINS, *supra* note 9, at 204 (describing Ramsey Clark as "the guy Johnson was furious at because he wouldn't put Rap Brown and Stokely Carmichael in jail"); Flamm, *supra* note 97, at 136 (observing

Given this, it is difficult to understand why the focus of Carmichael's criminal investigation was limited to conspiracy to incite riots.<sup>140</sup> There seemed to have been more than ample evidence to support a charge for aiding and abetting "another to refuse or evade registration or service" in violation of Section 462 of the SSA.<sup>141</sup> Why did Clark not pursue Carmichael on this basis, particularly in light of Clark's contemporaneous prosecution of the Boston Five on a similar ground? An objective comparison of the evidence against the Boston Five and Carmichael suggests that a decision to prosecute him would have been equally, if not more, justified.

*C. Aiding and Abetting Draft Evasion: Stokely Carmichael v. The Boston Five*

Section 462 of the SSA is a comprehensive provision that, among other things, makes it unlawful for any person to evade or refuse "registration or service in the armed forces or any of the requirements of this [Act], or [to] knowingly *counsel[], aid[], or abet[] another to refuse or evade registration or service in the armed forces* or any of the requirements of this [Act] . . . ."<sup>142</sup> Violation of the Act subjects offenders to possible "imprisonment for not more than five years or a fine of not more than \$10,000, or . . . both."<sup>143</sup>

In a 1967 article in the *American Bar Association Journal*, University of Notre Dame Law School Dean Joseph O'Meara staunchly advocated for the prosecution of Stokely Carmichael for his anti-Vietnam War activities.<sup>144</sup> O'Meara drew comparisons to the earlier successful prosecutions in *Schenck v.*

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that Johnson privately expressed "his deep disappointment with Clark" to his senior domestic policy aide, Joseph Califano); McPherson Interview, *supra* note 16 (opining that Clark "made the wrong judgment" and "should have shown that he was really after [those] birds, but he conveyed exactly the opposite impression").

It should be noted that Rap Brown was eventually prosecuted and convicted for traveling across state lines with a firearm while the subject of a felony indictment in Maryland. He was sentenced to five years in prison. See Clark Interview IV, *supra* note 56. Brown, now known as Jamil Abdullah Al-Amin, is currently serving a life sentence for homicide. See David Firestone, *Ex-Black Militant Gets Life for Murdering Deputy*, N.Y. TIMES, Mar. 14, 2002, at A20.

140. There was apparently some discussion of prosecuting Carmichael for treason under the 1917 Sedition Act following controversial visits to Cuba and Hanoi, among other places, during which he was highly critical of the United States. See Drew Pearson & Jack Anderson, *LBJ-Clark Differ on Handling Stokely*, WASH. POST, Dec. 5, 1967, at B11. While President Johnson contended that Carmichael's "prosecution would put other militants on notice that there is a limit to treasonous activities against the United States," Ramsey Clark maintained that this would only serve to make Carmichael a martyr. *Id.*

141. 50 U.S.C. app. § 462 (1990); see also O'Meara, *supra* note 5, at 1107–10 (discussing the existence of a case for Carmichael's prosecution under § 462).

142. *Id.* (emphasis added).

143. *Id.*

144. See O'Meara, *supra* note 5, at 1109–10.



*United States*<sup>145</sup> and *United States v. Miller*<sup>146</sup> for conduct akin to Carmichael's, and maintained that if those defendants could be prosecuted for their actions, Carmichael's prosecution should have been a foregone conclusion.<sup>147</sup> In particular, according to O'Meara, "Carmichael's language [was] more violent, more provocative, more likely to inflame young men against conscription and to defy the draft than the statements made by Schenck and Miller."<sup>148</sup> Though the acerbic tone and overtly anti-Communist theme of the Dean's article undermined its credibility,<sup>149</sup> his substantive position was certainly not without some merit.

Stokely Carmichael unabashedly challenged young men to stand up to the American government and to refuse to participate in the Vietnam War.<sup>150</sup> He was the very embodiment of the anti-Vietnam and anti draft movement, the standard bearer for the war resisters' mantra—"Hell no, we won't go!"<sup>151</sup> His antiwar rhetoric was even stronger with respect to black men.<sup>152</sup> In Carmichael's view, no one should fight in "LBJ's racist war,"<sup>153</sup> but black men, especially, had no business taking up arms abroad for the sake of democracy when they were not afforded equal access to so-called democratic freedoms at home<sup>154</sup> and, indeed, were the subject of unequal treatment and overt racism within the military itself.<sup>155</sup>

Plainly, if anyone should have been prosecuted for aiding and abetting draft evasion or conspiracy to do so—a legitimately debatable proposition—it was Stokely Carmichael. Nevertheless, Ramsey Clark appears to have never

145. 249 U.S. 47, 48–49, 53 (1919) (convicting defendants of conspiracy to violate the Espionage Act by obstructing recruitment and enlistment efforts of the United States military during a time of war).

146. 233 F.2d 171, 172 (2d Cir. 1956) (per curiam) (convicting defendant of knowingly counseling others to violate the Universal Military Training and Service Act).

147. O'Meara, *supra* note 5, at 1109. *But see* Kelman, *supra* note 10, at 164–66 (offering a strong rebuttal to O'Meara's arguments for Carmichael's prosecution).

148. O'Meara, *supra* note 5, at 1109. Notably, though O'Meara discusses the substance of Schenck's printed commentary, he provides no details regarding Miller. *See id.* at 1108 (quoting *Miller*, 233 F.2d at 171); Kelman, *supra* note 10, at 165 (citing *Miller*, 233 F.2d at 171; O'Meara, *supra* note 5, at 1108) (noting the absence of any particulars concerning Miller's offense).

149. *See, e.g.*, Kelman, *supra* note 10, at 164 ("[T]he tone of Dean O'Meara's call for Stokely Carmichael's scalp . . . and the texture of his argument—a salmagundi of law, fact, innuendo, choplogic, and flagwaving—are uncomfortably evocative of the early 1950's."); O'Meara, *supra* note 5, at 1107–08 (maintaining that Carmichael and Martin Luther King, Jr. were Communists, or at least Communist sympathizers, that only "weep[ed] for the enemy").

150. *See supra* notes 78–80 and accompanying text.

151. *See* Joseph, *supra* note 79, at B7.

152. *See supra* notes 81–87 and accompanying text.

153. *See* JOSEPH, *supra* note 65, at 180–81 (quoting *Why SNCC Says 'Hell No!' to Viet War*, *supra* note 80, at 5).

154. *See supra* notes 82–83 and accompanying text.

155. *See, e.g.*, WALLACE TERRY, BLOODS: BLACK VETERANS OF THE VIETNAM WAR: AN ORAL HISTORY 186 (2006) (maintaining that "institutional racism" existed within the Navy during the Vietnam War); *id.* at 213 (observing that most blacks in Vietnam "were put in the jobs that were the most dangerous, the hardest, or just the most undesirable").

seriously considered pursuing him in this regard.<sup>156</sup> Instead, he opted to prosecute five far less volatile anti-Vietnam activists for their “aiding and abetting” activities.<sup>157</sup> The gist of the charges was that the defendants “did unlawfully, wilfully and knowingly combine, conspire, confederate, and agree together and with each other . . . to unlawfully, knowingly and wilfully counsel, aid and abet” various violations of the SSA by Selective Service registrants, including their evasion of service in the armed forces.<sup>158</sup> Nicknamed the Boston Five because of their Boston-based prosecution in the federal district court in Massachusetts,<sup>159</sup> the group consisted of five respected white men who had independently undertaken active, peaceful opposition to the Vietnam War.<sup>160</sup>

Defendant Mitchell Goodman was a novelist and professor<sup>161</sup> who was instrumental in organizing two of the most critical events that led to the charges brought against the Boston Five. The first event was a major press conference held on October 2, 1967 (Overt Act No. 2 of the indictment), orchestrated to publicize all of the anti-draft activities that were taking place.<sup>162</sup> In addition, Goodman was the principal force behind a demonstration on October 20, 1967 (Overt Act No. 11), during which a briefcase full of draft cards and other draft-related materials was delivered to the Department of Justice.<sup>163</sup>

156. Interview with Ramsey Clark, former U.S. Att’y Gen., in Atlanta, Ga. (Oct. 17, 2009) (“It never occurred to me to think of him in the draft case. I had to think of him in terms of his own activity. . . .”). Dean O’Meara suggests in his article that the Department of Justice considered prosecuting Carmichael on this charge but concluded that “no violation [had] occurred.” O’Meara, *supra* note 5, at 1109. However, the only support for this contention that the author could locate was a single, unsigned letter dated November 2, 1966, from Assistant Attorney General Fred M. Vinson, Jr. to Senator James O. Eastland, responding to an inquiry by Senator Eastland regarding the possible prosecution of Stokely Carmichael under the Universal Military Training and Service Act. See Eastland Letter, *supra* note 9. The letter rather summarily concludes that, at the particular time in question, Carmichael’s public anti-draft commentary fell within the realm of protected speech. See *id.*

Hence, it seems evident that Clark directed no meaningful attention towards the prospect of pursuing Carmichael on the basis of any charge related to aiding and abetting draft evasion. See O’Meara, *supra* note 5, at 1109.

157. See Boston Five Indictment, *supra* note 12, at 251–52. Interestingly, from a timing standpoint, the allegations against the Boston Five were based on activities that reportedly commenced on August 1, 1967, one day before the President’s heated cabinet meeting. *Id.* at 251; see also *supra* text accompanying note 127.

158. *Id.* at 251–52.

159. See Saunders, *supra* note 43, at 44 (“[T]he five, called the Boston Five because they were tried in federal court there, had never been in the same room together before the trial.”).

160. See MITFORD, *supra* note 11, at 4–5.

161. *Id.* at 30.

162. See *id.* at 33; Boston Five Indictment, *supra* note 12, at 254.

163. See MITFORD, *supra* note 11, at 107–08; Boston Five Indictment, *supra* note 12, at 255. Defendants Coffin, Ferber, Raskin, and Spock also participated, along with about 500 other members of the resistance movement. MICHAEL S. FOLEY, CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR 131–32 (2003) (citing WILLIAM SLOANE COFFIN, JR., ONCE TO EVERY MAN: A MEMOIR 247–48 (1977); NORMAN MAILER, THE ARMIES OF THE NIGHT 74–79 (1968)). For a more detailed description of the demonstration, see MITFORD, *supra*

The lead defendant in the indictment was the Reverend William Sloane Coffin, Jr., the highly respected Chaplain at Yale University and a noteworthy activist for individual rights.<sup>164</sup> He was particularly engaged in opposing the Vietnam War, delivering numerous fiery speeches that openly flouted the draft laws through blanket calls for resistance.<sup>165</sup> One such address was made in conjunction with the October 20 demonstration that Goodman coordinated. In that speech, Coffin proclaimed the following from the steps of the Justice Department:

We hereby publicly counsel these young men to continue in their refusal to serve in the armed forces as long as the war in Vietnam continues, and we pledge ourselves to aid and abet them in all the ways 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 that law we are now as guilty as they.<sup>166</sup>

Defendant Michael Ferber, a Harvard Ph.D. candidate at the time, was the youngest of the Boston Five and a dedicated member of the student-dominated “Resistance” movement.<sup>167</sup> His defining criminal act for the government’s case against him took the form of an address delivered on October 16, 1967, titled “A Time to Say No.”<sup>168</sup> In that speech, Ferber directed unequivocal appeals for draft avoidance to his listeners:

Let us make sure we are ready to work hard and long with each other in the months to come, working to make it difficult and politically dangerous for the government to prosecute us, working to help anyone and everyone to find ways of avoiding the draft, to help disrupt the workings of the draft and the armed forces until the war is over.<sup>169</sup>

The fourth defendant, Marcus Raskin, was perhaps the most low-key of the five, though equally strident in his opposition to the war.<sup>170</sup> He served in the Kennedy Administration and later co-directed the Institute for Policy Studies in

note 11, at 40–44. *See also* BRANCH, *supra* note 73, at 646–47 (recounting the scene of Coffin delivering the briefcase full of draft cards to Assistant Deputy Attorney General John McDonough).

164. *See* MITFORD, *supra* note 11, at 39–40 (discussing Coffin’s activism during the 1960s).

165. *See id.* at 37 (describing a post-indictment speech that Coffin delivered as “a good deal milder than any of his speeches subsequently offered in evidence at the trial”).

166. MITFORD, *supra* note 11, at 41 (internal quotation marks omitted). Coffin’s speech comprised Overt Act No. 6 of the indictment against the Boston Five. Boston Five Indictment, *supra* note 12, at 254.

167. *See* MITFORD, *supra* note 11, at 18–20. For a discussion of the origins and mission of the Resistance movement, *see id.* at 25–28.

168. *Id.* at 28; Boston Five Indictment, *supra* note 12, at 254.

169. MITFORD, *supra* note 11, at 28–29 (internal quotation marks omitted).

170. *See id.* at 45–50.

Washington, D.C.<sup>171</sup> In 1965, he co-authored *The Viet-Nam Reader*,<sup>172</sup> which presented a history of the conflict and sought to demonstrate why and how the U.S. should withdraw.<sup>173</sup> More significantly, Raskin and Arthur Waskow drafted and issued a document entitled “A Call to Resist Illegitimate Authority”<sup>174</sup>—Overt Act No. 1 in the indictment.<sup>175</sup> The “Call” was addressed to “the young men of America, to the whole of the American people, and to all men of good will everywhere,”<sup>176</sup> and sought to have them formally join in and pledge their support for the war resistance movement.<sup>177</sup> Among other things, it articulated and advocated the position that “every free man [had] a legal right and a moral duty to exert every effort to end [the] war, to avoid collusion with it, and to encourage others to do the same.”<sup>178</sup>

The last, but certainly not the least, of the defendants was renowned pediatrician Dr. Benjamin Spock, the author of *The Common Sense Book of Baby and Child Care*,<sup>179</sup> one of the bestselling books of all time.<sup>180</sup> Although his antiwar activities were quite visible and extensive,<sup>181</sup> the government concentrated on his involvement in three of the incidents already mentioned—the October 2, 1967 press conference that Mitchell Goodman organized; the October 20, 1967 demonstration at the Department of Justice; and the issuance of “A Call to Resist Illegitimate Authority.”<sup>182</sup>

Though the evidence against the Boston Five seemed to support an indictment for aiding and abetting violations of the SSA,<sup>183</sup> the government

171. See MITFORD, *supra* note 11, at 48; *The Fearsome Five*, THE NEW REPUBLIC, Jan. 20, 1968, at 7.

172. THE VIET-NAM READER (Marcus G. Raskin & Bernard B. Fall eds., 1965).

173. See MITFORD, *supra* note 11, at 48–49.

174. See *id.* at 49–50 (citing *A Call to Resist Illegitimate Authority*, N.Y. REV. BOOKS, Oct. 12, 1967, at 7) (noting that although there were other drafts of this document circulating around the country, theirs “was the final one that incorporated the others” and was published in *The New York Review of Books* and distributed to members of the antiwar movement). It should be noted that the indictment avers that defendants Coffin and Spock distributed the “Call.” Boston Five Indictment, *supra* note 12, at 254.

175. Boston Five Indictment, *supra* note 12, at 254–59.

176. *Id.* at 255.

177. *Id.* at 255–57.

178. *Id.* at 256.

179. BENJAMIN SPOCK, THE COMMON SENSE BOOK OF BABY AND CHILD CARE (1945).

180. See, e.g., RUSSELL ASH, THE TOP TEN OF EVERYTHING 124 (1994) (ranking Dr. Spock’s book seventh on the list of all-time bestselling books).

181. See MITFORD, *supra* note 11, at 13–17 (describing some of Dr. Spock’s many antiwar activities).

182. See *supra* notes 162–63, 166, 174–78 and accompanying text; Boston Five Indictment, *supra* note 12, at 254–55.

183. See DERSHOWITZ, *supra* note 35, at 383–84 (observing that the government’s “chances of ultimately prevailing would [have been] significantly higher if it [had] charged a substantive or accessory crime rather than a tenuous conspiracy among strangers”). But see HARRIS, *supra* note 103, at 63 (“Conspiracy charges are fairly common legal devices—to a degree, because they’re easier for the prosecution.” (internal quotation marks omitted)); MITFORD, *supra* note 11, at 63–67 (discussing various potential advantages associated with conspiracy charges).

instead chose to pursue a far more insubstantial conspiracy theory—one that ultimately did not carry the day in court.<sup>184</sup> It is not clear why the government did this or, more importantly, why it singled out these defendants to the exclusion of numerous other potential targets who were engaged in equally unlawful behavior.<sup>185</sup>

One theory is that the indictment was a response to an ill-advised memorandum and explanatory letter issued to all local draft boards by Selective Service Director Lieutenant General Lewis Hershey, in which he essentially decreed that draft eligible resisters should be declared delinquent, denied deferment, and reclassified for immediate induction.<sup>186</sup> Because of the outrage that ensued over these draconian directives,<sup>187</sup> Ramsey Clark and General Hershey released a joint statement announcing the formation of a special unit within the Justice Department devoted to investigating and prosecuting, on a much narrower scale, violations of the Selective Service laws, “with special attention to violations of the ‘counsel, aid, or abet’ provisions.”<sup>188</sup>

The head of this special unit, John Van de Kamp, acknowledged that the prosecution of the Boston Five represented an effort to save face after the Hershey debacle and that the government selected these defendants because of their notoriety and the large quantity of public evidence available against them.<sup>189</sup> In addition, one commentator has suggested that the indictments may have been an effort “to send a message that although criticism of the war and the

184. See *infra* notes 206, 209. Some have contended that the five defendants had little personal interaction with one another prior to the indictment and apparently had never come together as a group until that time. See FOLEY, *supra* note 163, at 228; MITFORD, *supra* note 11, at 5 (“When for the first time all five met together—after the indictment, in attorney Leonard Boudin’s living room, to discuss their common plight—Boudin says the first thing he felt he could do for these conspirators was to introduce them to each other.”); Saunders, *supra* note 43, at 44 (indicating that they “had never been in the same room together before the trial”).

185. See FOLEY, *supra* note 163, at 231 (listing other potential targets that the government could have indicted).

186. *Texts of Letter and Memo on the Draft*, N.Y. TIMES, Nov. 9, 1967, at 2; see also GEORGE Q. FLYNN, *THE DRAFT, 1940–1973*, at 215–16 (1993); GEORGE Q. FLYNN, LEWIS B. HERSHEY, MR. SELECTIVE SERVICE 259 (1985); FOLEY, *supra* note 163, at 149–50 (citing JOSEPH A. CALIFANO, JR., *THE TRIUMPH AND TRAGEDY OF LYNDON JOHNSON* 198–200 (1991); Memorandum from Lewis B. Hershey, Dir. of the Selective Serv. Sys., to Selective Serv. Local Bds. (Oct. 24, 1967) (on file with the Lyndon Baines Johnson Library, Califano Papers, Box 55)); MITFORD, *supra* note 11, at 53–54.

187. See FOLEY, *supra* note 163, at 150–51 (citing numerous letters exemplifying the “firestorm of protest” that followed Hershey’s issuance of directives, including calls for his removal).

188. MITFORD, *supra* note 11, at 55. See also FOLEY, *supra* note 163, at 154–55, 230 (quoting Joint Statement by Ramsey Clark, Att’y Gen., and Lewis B. Hershey, Dir. of the Selective Serv. Sys. (Dec. 9, 1967) (on file with the Lyndon Baines Johnson Library, Califano Papers, Box 55)) (citing CALIFANO, *supra* note 186, at 201–02; FLYNN, *supra* note 186, at 217–18).

189. See MITFORD, *supra* note 11, at 56 (“The reason they were singled out, said Mr. Van de Kamp, was that because of ‘their names and personalities’ the government managed to subpoena a large amount of television newsreel footage of [them].”).

draft would be tolerated, ‘inducing or procuring evasion’ would not.”<sup>190</sup> These explanations, of course, do not address the rationale for the conspiracy theory, nor do they adequately explain why the government selected the Boston Five over other well-known and possibly more notorious flouters of the aiding and abetting proscription, such as Stokely Carmichael.<sup>191</sup>

Besides the two foregoing hypotheses, Ramsey Clark has offered several alternative, but conflicting, rationales for the Boston Five’s prosecution.<sup>192</sup> One position is based on the notion that it is the obligation of the Department of Justice to prosecute violations of the law—“[I]f the law says that you cannot do this and you do it, then you’ve got an obligation to enforce the law.”<sup>193</sup> According to him, the Boston Five’s patent violation of the letter of the Selective Service laws necessitated prosecution—a failure to charge them would have effectively robbed the system of integrity.<sup>194</sup> Interestingly, Clark has also maintained that this prosecutorial argument supported his refusal to pursue Stokely Carmichael, ostensibly because, in his judgment, the factual basis for a violation was lacking.<sup>195</sup> In Clark’s words,

[T]he system has to have integrity. If you don’t prosecute violations of the law, you don’t have a government of laws. On the one hand, in my judgment, if we had prosecuted Carmichael without facts, we would be guilty of, you know, [the] most serious abuse. But if we didn’t prosecute Spock and Coffin where we did have the facts of violation in our judgment—this is a matter of judgment—we would be guilty of just the opposite abuse. It’s not a question of morality—who’s right. . . . It’s a question of whether the system has integrity.<sup>196</sup>

Clark has further justified his decision to prosecute the Boston Five on the ground that their conduct was particularly egregious insofar as they were

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190. FOLEY, *supra* note 163, at 230.

191. *See id.* at 231 (listing other potential targets that could have been indicted).

192. *See* Clark Interview V, *supra* note 96.

193. *Id.*

194. *Id.*; Saunders, *supra* note 43, at 44 (“Clark said that he felt obligated to file charges against the activists. . . . ‘The law either has to do what it says or change what it says, and there was no chance of changing the draft laws.’”).

195. Clark Interview V, *supra* note 96; *see also* Ward Just, *U.S. to Widen Draft Plot Prosecution*, WASH. POST, Jan. 7, 1968, at A1 (“According to one theory Black Power leaders Rap Brown and Stokely Carmichael were not included among those indicted because at no time (in the words of one official) did they move beyond advocacy to action. . . . ‘They have done a lot of talking, that’s all’ . . .”).

196. Clark Interview V, *supra* note 96; *see also* HARRIS, *supra* note 103, at 63 (“As the nation’s chief law-enforcement officer, I had the duty to prosecute Spock and the others when, in my judgment, the facts showed a violation of the law. If you don’t enforce the law, it becomes shapeless.” (internal quotation marks omitted)).

“deliberately endeavoring to destroy the Selective Service System.”<sup>197</sup> It seems difficult to maintain, however, that this characterization meaningfully distinguishes their efforts from those of other anti-Vietnam War activists. In Clark’s own words, if the facts support a violation of the law, the nature of the strategy that may have motivated the offense should be irrelevant.<sup>198</sup> Furthermore, even though Stokely Carmichael’s passionate exhortations for young black men to refuse military service were assuredly inspired more by impatience with the slow pace of racial progress in America than by a desire to bring down the Selective Service System, that did not alter the putatively unlawful nature of his behavior.

More recently, Clark has proffered another interesting take on his prosecution of the Boston Five, suggesting that his desire to provide a forum for debating the efficacy of the draft was the stimulus.<sup>199</sup> He purportedly “hoped to show Johnson that opposition to the war wasn’t limited to draft-dodging longhairs but included the most admired pediatrician in America, a prominent and revered patrician minister, and a respected former Kennedy Administration official . . . .”<sup>200</sup> The problem with this explanation, though, is that President Johnson was already well aware that Dr. Spock and other mainstream figures were involved in the antiwar movement<sup>201</sup> and could have possessed some knowledge about the potential for the case before the charges were brought.<sup>202</sup>

197. Clark Interview V, *supra* note 96; *see also The Fearsome Five*, *supra* note 171, at 7 (“Spock, Coffin and Company kept challenging the Justice Department to bring charges against them, and no prosecutor can very long stay his hand under such circumstances without tendering some public explanation. An indictment was politically preferable to an explanation, no doubt.”).

198. *See supra* text accompanying note 193.

199. *See* FOLEY, *supra* note 163, at 232 (citing TOM WELLS, *THE WAR WITHIN: AMERICA’S BATTLE OVER VIETNAM* 234–37 (1994)) (“A draft resistance test case, . . . would ‘ventilate the issues, escalate them where they can be seen, [and] provide vigorous defense’ for the defendants . . . .” (alteration in original)); Saunders, *supra* note 43, at 44 (“Clark said he believed their cases would take a long time and would ‘focus attention on the problems of the draft.’”). Inferential support for this rationale may be gleaned from Clark’s informing the trial judge in the case that in the event of conviction, the Justice Department would not recommend the imposition of any jail time. HARRIS, *supra* note 103, at 64; *see also* Ramsey Clark, “How Can You Represent That Man?": Ethics, the Rule of Law, and Defending the Indefensible, 44 GA. L. REV. 921, 925 (2010) (indicating that “[b]efore sentencing in the Spock case, [Clark] personally wrote the judge” and noting that Clark “thought any penalty would be improper”).

200. Saunders, *supra* note 43, at 45; *see also* FOLEY, *supra* note 163, at 232 (citing WELLS, *supra* note 199, at 234–37) (“Clark felt he had a duty to avoid injuring ‘innocent’ people like ordinary draft resisters who were not engaged in acts of moral turpitude but were acting on conscience.”).

201. *See, e.g.,* MITFORD, *supra* note 11, at 13 (noting Spock’s direct communications to Johnson expressing opposition to the war and advocating withdrawal).

202. *See id.* at 58 (recounting a “knowledgeable federal judge” as contending that “[i]n Johnson’s administration, . . . one would not indict Dr. Spock without first consulting the President.”). *But see* HARRIS, *supra* note 103, at 64 (“As with all the other cases that Clark filed as Attorney General, he did not discuss any aspect of this one beforehand with the President.”); Clark, *supra* note 199, at 923–24 (“I had a rule with President Johnson: I would not discuss criminal cases

One final view is that Clark targeted the Boston Five because he could not feasibly prosecute everyone who was violating the draft laws at that time.<sup>203</sup> According to him, the number of draft evaders was staggering, and he was far more interested in pursuing those who were “aiding and abetting” this evasion than the actual evaders themselves.<sup>204</sup> Clark now maintains that he wanted to test the efficacy and enforceability of the “counsel, aid and abet” provision and therefore deliberately selected a handful of people who had a high level of participation in major antiwar demonstrations.<sup>205</sup> Ostensibly, this winnowing process, combined with Clark’s perplexing choice of a conspiracy theory<sup>206</sup> and his preference for prosecuting individuals who could afford adequate representation,<sup>207</sup> ultimately led to the selection of the Boston Five.

The multiple, conflicting explanations for the case against the Boston Five certainly raise legitimate questions regarding the basis for, and propriety of, their prosecution.<sup>208</sup> All the same, it does not necessarily follow that pursuing charges against them constituted an inappropriate exercise of prosecutorial discretion on the part of Ramsey Clark. Probable cause clearly was present and the government initially obtained convictions with regard to four of the defendants,<sup>209</sup> which suggests that the decision to prosecute, taken in isolation, may have been entirely justified.<sup>210</sup>

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with anyone besides lawyers in the Department of Justice. He didn’t find out about the Spock case until it was announced in the press.”).

203. *Cf.* DAVIS, *supra* note 21, at 13 (“There are not enough resources in any local criminal justice system to prosecute every alleged criminal offense.”).

204. Telephone Interview with Ramsey Clark, *supra* note 35, at 4–5; *see also supra* note 194.

205. Telephone Interview with Ramsey Clark, *supra* note 35, at 4.

206. *See* DERSHOWITZ, *supra* note 35, at 384 (“[T]he government, . . . decided to pursue the conspiracy approach, even though it carried with it the highest likelihood of an eventual appellate reversal.”); Boston Five Indictment, *supra* note 12, at 251–54. Professor Alan Dershowitz has suggested that the conspiracy charge may have been an effort to more widely “discourag[e] organized opposition to the Vietnam War.” DERSHOWITZ, *supra* note 35, at 384. *See generally id.* at 384–87 (discussing possible theories for the government’s conspiracy charge).

207. *See* Saunders, *supra* note 43, at 45 (noting that long after the case was over, Clark reportedly told Coffin that he “had a choice to arrest a hundred students or select five people who could take financial care of themselves” (internal quotation marks omitted)); *see also* Clark, *supra* note 199, at 925 (“Dr. Spock and the other four defendants could present the best defense the law offered.”); *cf.* THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES 174–75 (1991) (discussing Ramsey Clark’s difficulty related to his decision to prosecute Muhammad Ali for draft evasion and noting that one positive aspect of the case was that “there was power on both sides to shape and test the issues”).

208. *See, e.g.,* WILKINS, *supra* note 9, at 231 (observing that although Wilkins was not involved in the decision to prosecute the Boston Five, he believes it to have been “one call that [Clark] would like to have back”).

209. Defendant Raskin was the only member of the Boston Five acquitted at trial. MITFORD, *supra* note 11, at 45. It should be noted, however, that on appeal, the convictions of Spock and Ferber were overturned, and the government declined to retry Coffin and Goodman. Saunders, *supra* note 43, at 45.

210. In a memorandum directed to Ramsey Clark concerning the sentencing of the four members of the Boston Five who were convicted, Solicitor General Erwin Griswold stated the



The problem is, however, that one cannot reasonably conduct a solitary assessment of the Boston Five prosecution. The unlawful actions at issue were not unique—there were other offenders whom the government could have prosecuted for the same alleged misconduct, even after taking into account the various prosecution-narrowing considerations that may have been utilized.<sup>211</sup> As a result, Ramsey Clark's decision did not merely boil down to whether or not to prosecute those particular men, it also involved an element of choice—as between multiple potential targets, whom should he pursue?

#### IV. SELECTIVE NON-PROSECUTION

Without question, prosecutors are enormously powerful.<sup>212</sup> As Attorney General Robert Jackson famously said in his 1940 speech to a gathering of U.S. attorneys: “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.”<sup>213</sup> Among the array of potent discretionary decisions that prosecutors are authorized to

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following: “It is clear that the defendants have broken the law. . . . What the government basically needed to do here was to establish the law. That it has done. That is a significant and useful achievement.” Memorandum from Erwin Griswold, Solicitor Gen., to Ramsey Clark, U.S. Att’y Gen. (July 2, 1968) (on file with the Lyndon Baines Johnson Library, Personal Papers of Ramsey Clark, Box 123, “Selective Service Cases Prosecuted 1967–1968”).

The point of Griswold's memo was to convey his view that the convictions alone were enough and that pursuing severe penalties would be a mistake. *See id.* Clark certainly agreed, *see* Clark, *supra* note 199, at 925, but the judge in the case did not. In sentencing the four defendants, the judge maintained that:

It is the view of this Court that it is reasonably inferable that the defendants here played some material part in inciting certain draft evaders to flout the law. It would be preposterous to sentence young men to jail for violation of the Selective Service Act and allow those who, as the jury found, conspired to incite Selective Service registrants to take action to violate the law and who, it is reasonable to conclude, were instrumental in inciting them to do so, to escape under the guise of free speech.

Copy of Judge Francis Ford's Remarks at Sentencing of Spock, et al. (on file with the Lyndon Baines Johnson Library, Personal Papers of Ramsey Clark, Box 123, “Selective Service Cases Prosecuted 1967–1968”).

211. *See, e.g., The Startling Indictment of Spock*, LEWISTON TRIB. (Idaho), Jan. 7, 1968 (on file with the Lyndon Baines Johnson Library, Personal Papers of Ramsey Clark, Box 123, “Selective Service Cases Prosecuted 1967–1968”) (“If there is reason for action against [the Boston Five], the grounds are equally sound against scores of others.”); *see also supra* text accompanying notes 204–07.

212. *See, e.g.,* DAVIS, *supra* note 21, at 5 (“Prosecutors are the most powerful officials in the criminal justice system.”).

213. Robert H. Jackson, U.S. Att’y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940–1941). President Franklin Delano Roosevelt later appointed Jackson as an Associate Justice of the U.S. Supreme Court, and he served in that capacity from 1941–1954. *See* James M. Marsh, *Robert H. Jackson*, in THE SUPREME COURT JUSTICES 406, 408 (Clare Cushman ed., 2d ed. 1995).

render,<sup>214</sup> none is more important or more insulated from review than the decision to charge.<sup>215</sup> Jackson referred to it as “the most dangerous power of the prosecutor”—the danger being “that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”<sup>216</sup> Along the same lines, another commentator has gone so far as to suggest that a “federal prosecutor is virtually free to charge anyone he chooses with any crime that strikes his fancy.”<sup>217</sup>

While these assessments may sound rather exaggerated, they are actually highly representative of the widely held perception that some prosecutors wield their awesome power in an arbitrary and unchecked manner.<sup>218</sup> Claims that prosecutors have abused their discretion by wrongfully charging or “overcharging”<sup>219</sup> particular defendants are not uncommon<sup>220</sup>—though disturbingly unlikely to result in professional discipline.<sup>221</sup>

214. A prosecutor’s discretionary authority includes: “decid[ing] whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution.” GERSHMAN, *supra* note 20, § 4:1.

215. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[Prosecutors’] broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.”); DAVIS, *supra* note 21, at 22 (“The charging decision is the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.”); GERSHMAN, *supra* note 20, § 4:1 (citing ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY* 4 (1981)) (“[T]he prosecutor enjoys considerable independence from the judiciary, his administrative superiors, and the public.”); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 374 (2000) (citing MILLER, *supra* note 26, at 151–350; Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 741 (1996); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 4 DUKE L.J. 651, 652, 678–81 (1976)) (“The prosecutor’s decision as to whether or not to charge a suspect is virtually unchecked by formal constraints [or] regulatory mechanisms, making it one of the broadest discretionary powers in criminal administration.”); *supra* note 17 and accompanying text.

216. Jackson, *supra* note 213, at 5.

217. LAWLESS, *supra* note 17, § 3.08. It has been colloquially stated that “[a] grand jury would indict a ham sandwich if the prosecutor asked it to.” 1 SUSAN W. BRENNER & LORI E. SHAW, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE* § 6.1, at 255 (2006).

218. See DAVIS, *supra* note 21, at 16 (“The lack of enforceable standards and effective accountability to the public has resulted in decision-making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process.”); *id.* at 286 (observing that the ethical rules do not prohibit overcharging and that because “the probable cause standard is so easy to achieve, an unethical prosecutor may bring an indictment against an individual even if she knows that she ultimately will not be able to prove that person’s guilt”).

219. “Overcharging” refers to “a practice that involves ‘tacking on’ additional charges that [prosecutors] know they cannot prove beyond a reasonable doubt or that they can technically prove but [that] are inconsistent with the legislative intent or otherwise inappropriate.” *Id.* at 31; *cf.* STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standard 3–3.9(f) (1992) (“The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.”).

Prosecutors who *decline* to initiate criminal proceedings, on the other hand, are typically not viewed as having arbitrarily exercised their discretion and, therefore, are even less likely to have such decisions meaningfully examined— “[i]f a prosecutor decides not to prosecute a case, there is no judicial recourse to compel prosecution.”<sup>222</sup> A host of reasons have traditionally been accepted as valid grounds for foregoing prosecution, including finite resources, the relatively minor nature of an offense, a willingness to cooperate, and the absence of a criminal record.<sup>223</sup>

Indeed, the only potential problem presented by a refusal to prosecute would be if other similarly culpable offenders were prosecuted on some unconstitutionally arbitrary basis, such as race.<sup>224</sup> Otherwise, “a prosecutor under his broad discretionary mandate generally is entitled to single out for prosecution one . . . suspect[] and decline to prosecute . . . others,”<sup>225</sup> so long as probable cause exists.<sup>226</sup> And this is concededly the norm, as successful challenges based on so-called “selective prosecution” are exceptionally rare in

220. See, e.g., Medwed, *supra* note 20 (manuscript at 6) (observing that “dubious charging decisions involving innocent suspects do not exist purely in the world of hypothetical cases” and proceeding to discuss the Duke Lacrosse prosecution).

221. See, e.g., *id.* (manuscript at 6–9) (citing N.C. REVISED RULES OF PROF’L CONDUCT R. 3.8(a) (2004); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 FORDHAM L. REV. 1337 (2007)) (discussing the infamous Duke Lacrosse case and noting that although Durham, North Carolina District Attorney Mike Nifong was disbarred on grounds related to his handling of the case, the “deferential ethical rule” likely explains why the state bar never pursued disciplinary charges for abuse of discretion in pursuing rape charges against the three Duke Lacrosse players). For a detailed account of the Duke Lacrosse case, see STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007).

222. GERSHMAN, *supra* note 20, § 4:5; see also LaFave, *supra* note 20, at 538 (citing *Moses v. Kennedy*, 219 F. Supp. 762, 764 (D.D.C. 1963)) (“If a specific instance of nonenforcement is challenged in the courts by way of a mandamus action, the usual response is that the matter rests with the executive rather than the judicial branch of government.”); *supra* note 27 and accompanying text.

223. See U.S. DEPT. OF JUSTICE, *supra* note 17, § 9–27.220 (1997) (“[P]rosecution should be declined [if]: (1) [n]o substantial Federal interest would be served by prosecution; (2) [t]he person is subject to effective prosecution in another jurisdiction; or (3) [t]here exists an adequate non-criminal alternative to prosecution.”); STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standard 3–3.9(b) (1992) (setting forth various illustrative factors that prosecutors “may properly consider in exercising [prosecutorial] discretion”); DAVIS, *supra* note 21, at 24 (“If the charge is very minor, and the arrestee has no criminal record, the prosecutor may decide to forgo charges altogether.”); *id.* at 41 (noting the necessity of weighing practical considerations, such as caseloads and resources, in making charging decisions); *supra* note 28.

224. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996); CASSIDY, *supra* note 17, at 22 (“The mere failure to prosecute other perpetrators is not, in and of itself, sufficient to raise a claim of arbitrary or discriminatory enforcement.”); GERSHMAN, *supra* note 20, § 4:9(a) (“Arbitrary selection of a defendant may violate principles of equal protection under the Fifth and Fourteenth Amendments and thus make out the defense of selective prosecution.” (citing *Armstrong*, 517 U.S. at 465; *Bolling v. Sharpe*, 347 U.S. 497, 500 (1994))); *supra* note 19 and accompanying text.

225. GERSHMAN, *supra* note 20, § 4:9.

226. See *supra* notes 18, 20 and accompanying text.

light of the demanding legal standard employed, which requires a showing of discrimination in both effect and purpose.<sup>227</sup>

Nevertheless, the facts and circumstances surrounding Ramsey Clark's prosecution of the all-white Boston Five, to the exclusion of Stokely Carmichael, supply a highly plausible basis for maintaining that Clark may have engaged in selective prosecution, albeit in a reverse discriminatory sense. Of course, the manner in which he evaded bringing charges against Carmichael has the aura of validity, but on closer examination, that perception blurs. Namely, by focusing on the crime of conspiracy to incite a riot, rather than aiding and abetting draft evasion (or "conspiracy" to do so), Clark was able to represent legitimately to President Johnson and other Carmichael condemners that the necessary evidence—evidence to establish a causal link between the "inciteful" oratory and the riots—was lacking.<sup>228</sup> Clark, however, likely would have viewed such a charge with a healthy dose of informed skepticism, even absent the alleged lack of evidence.

Specifically, Clark would have understood better than almost anyone that the root cause of the riots was far deeper than the mere words of any one activist, given his involvement with the investigation into the Watts riots and other similar instances of urban racial unrest.<sup>229</sup> As noted earlier, the Johnson Administration never released his graphic report on the Watts riots, perhaps because it contained a story that President Johnson and others would have preferred not be told.<sup>230</sup> As a result, it is not beyond reason to posit that Ramsey Clark may have been endeavoring to send a not-so-subtle message by demonstrating that the government could not successfully prosecute Carmichael

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227. See CASSIDY, *supra* note 17, at 20–21 (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)) ("As a practical matter, however, the Supreme Court has made it exceptionally difficult for a defendant to defeat a criminal prosecution on the grounds of invidious discrimination. To make out a selective prosecution claim, a defendant must show both discriminatory *effect* (that is, that persons of other races, religions or genders were equally subject to prosecution but were not charged) and discriminatory *purpose* (that is, the prosecutor made his charging decision on the basis of the defendant's race, sex, or religion)."); Moore, *supra* note 215, at 388 ("Having the right to file a motion claiming selective prosecution based on race or other impermissible grounds offers little protection to a defendant. Indeed, the trend of courts has been to increasingly limit the application of this remedy."); Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 GEO. J. LEGAL ETHICS 657, 661 (1990) (assessing unsuccessful selective prosecution claims in Indiana, maintaining that "the burden of proof placed upon the claimant to show current discriminatory intent results in an insurmountable burden that virtually emasculates the meritorious allegations"); Podgor, *supra* note 23, at 463 (citing Podgor & Weiner, *supra*, at 661) ("[F]ew cases successfully prove selective prosecution on the part of the prosecutor."). It is also significant to note that the defendant's onerous burden in proving selective prosecution is further compounded by the demanding standard imposed for obtaining discovery from the government in support of such a claim. See *Armstrong*, 517 U.S. at 468 ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.").

228. See MCPHERSON, *supra* note 131, at 363; Clark Interview V, *supra* note 96.

229. See *supra* notes 48–59 and accompanying text.

230. See *supra* note 52 and accompanying text; see also WILKINS, *supra* note 9, at 173.

for conspiracy to incite a riot. Conceivably, this was a clever subterfuge intended to force President Johnson and other members of the Administration to acknowledge the real problems at the core of the riots in Watts and other urban areas.<sup>231</sup> Whatever Clark's true motivation, it is hard to imagine that he took seriously the prospect of indicting Stokely Carmichael for conspiracy to incite a riot.<sup>232</sup>

Furthermore, the fact that Clark apparently gave no significant consideration to the possibility of charging Carmichael with the crime of aiding and abetting, or "conspiracy to aid and abet" SSA violations, suggests that Clark really did not want to prosecute Carmichael, period.<sup>233</sup> Clearly, had the desire been there, he could have done so because the existence of probable cause seemed irrefutable.<sup>234</sup> Hence, the question that still lingers is: Why would Clark fail to pursue Carmichael on this basis? Stokely Carmichael's very words may provide some insight regarding one possible answer.

In the same 1966 speech quoted at the beginning of this article, Carmichael noted that the philosophers Albert Camus and Jean-Paul Sartre posed the question of whether or not it is possible for a man to condemn himself.<sup>235</sup> Though they apparently failed to provide a response, black existentialist Frantz Fanon did—concluding that the answer was "no."<sup>236</sup> Carmichael agreed and proceeded to use as an example the infamous Philadelphia, Mississippi murders of civil rights workers James Chaney, Mickey Schwerner, and Andrew Goodman in 1964.<sup>237</sup> According to Carmichael, the local white community did not condemn those responsible for the murders because to condemn them would have been tantamount to condemning themselves—he maintained that they had elected the sheriff and his deputies to do precisely what they had done.<sup>238</sup>

Although I am not sure that I completely accept Fanon's theory as Carmichael employs it in this example, it does have some appeal and potential legitimacy when applied to Ramsey Clark's refusal to prosecute Carmichael. For Clark, charging Carmichael would have been akin to condemning himself, given his plain identification with the plight of black Americans,<sup>239</sup> as well as his openness to Carmichael's views on race and black resistance to the Vietnam

231. See *supra* notes 49–53, 124 and accompanying text.

232. Cf. Clark Interview V, *supra* note 96 (noting that President Johnson wanted Clark to be tougher on dissenters, but that Clark believed this was explained by the fact that Johnson was "outraged by Carmichael" and was not a lawyer).

233. See *supra* note 156 and accompanying text.

234. See *supra* notes 1, 80–88 and accompanying text.

235. See Carmichael, Berkeley Speech, *supra* note 1, at 46.

236. See *id.*

237. See *id.*; HALBERSTAM, *supra* note 68, at 479–80 (discussing the shocking murders and their impact on President Johnson and his push for civil rights reforms).

238. See Carmichael, Berkeley Speech, *supra* note 1, at 46.

239. See HARRIS, *supra* note 103, at 15 (during an appearance on the *Today Show*, Clark stated that as Attorney General "I have the responsibility for enforcement of the civil-rights laws—a responsibility, I might add, I cherish. I think it's essential to the future of this nation that we vigorously enforce those laws."); *supra* Part II.A.

War. In other words, Clark likely viewed Carmichael through a “civil rights,” rather than an “antidraft,” lens. From Clark’s perspective, Stokely Carmichael’s antiwar message was simply a vehicle for pushing his broader agenda of the necessity for “Black Power”—it was a convenient platform for the expression of his views on race, but it was not what he was all about.<sup>240</sup> As a result, it is reasonable to conclude that Clark probably never considered prosecuting Carmichael under the SSA because he viewed Carmichael as separate from the Boston Five and other outspoken white opponents of the draft.

Based on this assessment of Ramsey Clark’s charging decision, one could rationally maintain that he pursued the Boston Five, at least in part, because they were white (or at least, not black), a constitutionally impermissible consideration. However, it may be more accurate to contend that rather than overtly selecting the Boston Five because they were white, Clark opted to refrain from prosecuting Stokely Carmichael because he was black. Thus, this was really a case of “selective non-prosecution,” which, though still facially improper, has a less condemnable countenance under the circumstances, particularly given the likely motivation for Clark’s failure to charge.

Yet, his decision remains somewhat problematic from the perspective of Clark’s role as a prosecutor, especially when measured against his personal, stringent charging standards. As already noted, throughout his tenure as Attorney General, Clark consistently maintained that it was vital for our legal system to have integrity, and if he failed to prosecute someone when the facts clearly pointed to a violation, he would rob the system of that all-important attribute.<sup>241</sup>

Moreover, in defending his prosecution of the aiders and abettors of draft resistance, Clark has stated that “[t]he law either has to do what it says or change what it says, and there was no chance of changing the draft laws.”<sup>242</sup> By holding up this principle as a justification for pursuing the Boston Five, while simultaneously evading a similar course with regard to Stokely Carmichael, Clark seems to have done precisely what he firmly believed prosecutors should not do. His multiple prosecutorial explanations are suggestive of a private struggle to reconcile this incongruity.<sup>243</sup> Indeed, a sense of internal ambivalence about the case can be gleaned from Clark’s concession that “[o]ne could believe that Spock was morally right—as I may have, in fact—and still believe that the laws had to be enforced.”<sup>244</sup> But at what toll personally?

Some have argued that Ramsey Clark’s controversial post-Attorney General representations have been an effort to atone for the sin of prosecuting the Boston

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240. Telephone Interview with Ramsey Clark, *supra* note 35, at 4–5.

241. See *supra* notes 193–94, 196 and accompanying text.

242. Saunders, *supra* note 43, at 44.

243. See *supra* text accompanying notes 192–207.

244. HARRIS, *supra* note 103, at 63.

Five.<sup>245</sup> In other words, if someone as incorruptible as him could make a grave error in judgment, it is highly probable that other prosecutors may do the same<sup>246</sup>—possibly with far more dire consequences. Indeed, it is conceivable that Clark has devoted his entire post-government career to ferreting out such wrongs, trying to ensure that prosecutors seek justice in an independent and impartial manner.<sup>247</sup> While certainly a noble effort at atonement, if true, this theory fails to shed any light on the basis for Clark’s evasive refusal to prosecute Stokely Carmichael and its problematic inconsistency with the rigid decision to pursue the Boston Five.

I firmly believe that the most credible explanation, valid or not, was race. Ramsey Clark’s civil rights pedigree and profound understanding of the plight of black Americans in the 1960s<sup>248</sup> caused him to assess their putatively unlawful behavior on a scale of justice heavily weighted with a presumption in their favor. Blacks at that time clearly perceived the “law” as a tool of oppression, used to subjugate them to an unequal stature in virtually every aspect of society. Hence, to Ramsey Clark, it would have been perverse to place blacks on equal footing with whites when the question was one of criminal culpability. In his mind, to be sure, this would have served only to reinforce their view of the unjust and oppressive nature of the law.<sup>249</sup>

For Clark, the law must have integrity above all else.<sup>250</sup> His refusal to prosecute Stokely Carmichael, as curious as it may seem in retrospect, was entirely consistent with this sacred ideal.

## V. CONCLUSION

Broadly speaking, a prosecutor’s role is not to secure convictions but to act as a “minister of justice.”<sup>251</sup> On the one hand, in refraining from indicting

245. See Saunders, *supra* note 43, at 45 (“Both [David] McReynolds and Mel Wulf think Clark may have felt guilty enough about the prosecution [of the Boston Five] that he decided to spend his career doing penance.”). Among some of Clark’s more notorious clients are Saddam Hussein, reputed Nazi war criminal Karl Linnas, and former Yugoslavian leader Slobodan Milosevic. See Brown, *supra* note 38, at 49, 92–93. For a discussion of Clark’s representation of Saddam Hussein, see Brown, *supra* note 38, at 101–29.

246. See Saunders, *supra* note 43, at 46 (“[Clark] may have come to believe that anyone—even the most noble-seeming person with the best motives—could repeat his mistakes.”).

247. See *id.* (“[Clark has] defended the unpopular against prosecutions that have almost universal support, perhaps in part because he feels that he himself once naively, or unwittingly, represented the face of the persecutory state.”).

248. See *supra* Part II.A.

249. See Telephone Interview with Ramsey Clark, former U.S. Att’y Gen. 2 (July 27, 2010).

250. See *supra* note 196 and accompanying text.

251. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2010) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); STANDARDS RELATING TO THE

Stokely Carmichael, Ramsey Clark arguably epitomized this lofty standard, maintaining his independence and refusing to succumb to powerful political pressure. Yet, on the other hand, by concurrently prosecuting the Boston Five, arguably based on race, he seems to have been the very antithesis, undermining the revered concept of equal justice under the law.<sup>252</sup> All the more confounding, Clark's disparate and perhaps unconstitutional treatment of actors who were outwardly similarly situated remains paradoxically admirable and just, evincing his compassion and earnest commitment to the plight of African-Americans in the 1960s.

Ultimately, this perplexing discord makes it impossible to condemn outright what Ramsey Clark did, but it also makes it legally cumbersome to heap unqualified praise upon him. As a result, it seems most appropriate to attribute his actions to what I term as the exercise of "prosecutorial indiscretion," a studied characterization that fittingly acknowledges Clark's well-placed intentions in the midst of overwhelming sociopolitical circumstances. Whether or not this "prosecutorial indiscretion" in charging constituted a technical, merits-based error in the execution of his "most dangerous power"<sup>253</sup>—guided by his heartfelt devotion to civil rights and profound empathy for the legally oppressed—Ramsey Clark unquestionably sought to do what he felt was right. In the final analysis, what more could one legitimately ask of our nation's chief prosecutor?

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ADMIN. OF CRIMINAL JUSTICE Standard 3–1.2(c) (1992) ("The duty of the prosecutor is to seek justice, not merely to convict.").

252. See Podgor, *supra* note 23, at 469 ("The lopsided presentation to charge some individuals while not charging others when the activities are threaded together—even loosely—defeats the goal of fostering an equitable legal system.").

253. See *supra* note 216 and accompanying text.



