Confronting the Johnson Administration at War: The Trial of Dr. Spock and Use of the Courtroom to Effect Political Change

by Michael S. Foley

The Johnson administration's 1968 decision to indict Dr. Benjamin Spock and four others for conspiracy to aid and abet draft resisters thrilled the antiwar movement because it demonstrated that the government could no longer ignore the growing number of Americans opposed to the Vietnam War. In the months leading up to the trial, expectations ran high as the antiwar movement looked forward to a courtroom confrontation in which they hoped to see the government's policies put on trial. This article argues that the trial did not live up to its billing, however, because the defendants and their attorneys pursued both political and civil libertarian trial strategies that were, in practice, mutually exclusive. Although the trial disappointed the peace movement, its shortcomings warrant renewed attention for the lessons it offers those who again will seek a courtroom confrontation with their governments during wartime.

> "The only clear moral to be drawn from the trial is that the law has a mind of its own and can prove a frustrating tool to those interested in pressing certain issues."
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> *Harvard Summer News*, July 12, 1968[1]

On June 14, 1968, a federal jury in Boston found America's favorite pediatrician, Dr. Benjamin Spock, and three other men guilty of conspiring to undermine the nation's system of conscription. Four weeks later, when the judge sentenced them to two-year prison terms, he characterized the convicted men's crimes as "in the nature of treason."[2] The defendants and their supporters knew that political trials are almost impossible to win, so the verdicts and resulting sentences did not come unexpectedly. In fact, the accused in this case had worked openly and

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publicly as individuals and with others to end the war in Vietnam through active participation in a nationwide draft resistance movement. Although they may not have been guilty of conspiracy as a layperson might define it, the jury's verdict surprised few.

Even with the probability of defeat, the trial constituted a tremendous disappointment for the defendants and their supporters in the broader antiwar movement. When the indictments came down in early January, Americans saw it as the Johnson administration's first significant response to the war's opponents. The move galvanized the draft resistance movement to even greater defiance and prompted antiwar leaders and the media to predict that the trial would be one of the most important political trials in American history. For their part, the defendants pledged to turn the tables in court and to put the war—and the government—on trial. "This trial," Dr. Spock asserted the day after he was indicted, "will better dramatize the illegal and immoral war in Vietnam, and if this trial will further my efforts to stop it, so much the better."[3] At the same time, the draft resistance movement saw the indictments as validation that their strategy worked; confronting the administration by returning draft cards and by refusing to comply with the draft—initially hoping to flood the court system with draft cases—had at least brought about this high profile showdown. Elsewhere in the antiwar movement, activists welcomed the Spock trial as the first high-level forum for debating the war's legitimacy.

It turned out that Lyndon Johnson's own attorney general, Ramsey Clark, agreed with using the law for that purpose. Clark selected the defendants in the Spock case at least in part because he believed the judicial system could play an important role in airing debates over pressing public policy issues. He thus chose to prosecute articulate men who could marshal the necessary resources to wage an able defense and who would engage the government in a dialogue over the war and the draft that would serve the public good. Ultimately, however, this strategy, like that of the defendants, did not prevail when confronted with a judicial system that adapted easily to such challenges.

In spite of the monumental importance assigned to the case by the antiwar movement and the government at the time, the trial of Dr. Spock remains largely hidden from history. Not since Jessica Mitford's 1969 book on the subject and a flurry of law review articles in the two years following the trial has anyone paid serious attention to the place of this courtroom confrontation in the history of the Vietnam War era or in American political and peace history.[4] As a result, the

Spock trial lingers in the shadows of the more famous Chicago conspiracy trial (1969) and, consequently, receives no more than cursory treatment from only a handful of the period's historians.[5]

This lack of attention seems to stem from the widely held perception that the Spock trial was a dull, uneventful affair—true enough, especially when compared to the Chicago trial—dominated by too many lawyers seeking acquittal of their clients on technicalities. This interpretation began forming even before the trial ended, as criticism poured in from various quarters of the antiwar movement. In public statements during and after the trial, several of the defendants described their own disappointment with the way the trial unfolded and acknowledged that they knew of their colleagues' complaints of their failure to confront the government on the issues that mattered most: the legitimacy of the war and the draft.

In later years, despite some assertions that the Spock trial inspired thousands of others to stop being supporters "only to become resisters themselves," the characterization of the trial as a political failure has endured thanks mostly to its use by participants in the Chicago trial as a justification for their more confrontational approach.[6] David Dellinger, one of the Chicago defendants, has on several occasions described the Spock trial as dominated by lawyers, as tending "to skirt substance and concentrate on technicalities," and as resulting in an "individualistic scramble" instead of a collective defense. In contrast, Dellinger says, the Chicago defendants thought that the state of the war and domestic dissent "demanded a more forthright and aggressive" strategy: "*We wanted to put the government on trial, not win our freedom on a technicality*" [Dellinger's italics]. Their objective would be to press their message that "the times called for active resistance" to everyone watching the trial. Their court case, they believed, would be an exercise in political education. In his 1994 memoir, William Kunstler, attorney for the Chicago Eight, agreed with Dellinger. In light of the Spock convictions, which Kunstler described as the result of a "fairly conventional" trial in which the defendants and attorneys were "polite," the Chicago defense "used a new technique." Rather than simply defend their clients, Kunstler and his partner "decided to put the government on trial." He writes, "Len and I attacked, fought like dogs, ripping the government's witnesses apart, often with wit and ridicule. …"[7]

Obviously these memories of the Chicago trial are in many ways self-serving. Putting the government on trial was not a new technique. Just among draft protesters, not only had the Boston Five (as the

defendants in the Spock trial came to be known) tried to put the government on trial, but so had the Oakland Seven, Baltimore Four, and the Catonsville Nine, among others. Although the Chicago defendants exceeded their peers in these other trials in their courtroom defiance, they too ultimately found themselves convicted and without any real evidence that their approach had moved more Americans to active resistance.

By focusing on the Spock trial, this essay is not written to defend the approach of the defendants and lawyers in that case; instead it recovers the serendipitous nature of a political and legal confrontation between a social movement and the government. It argues that the shifting and sometimes conflicting strategies employed by the defense both raised expectations for a political victory and simultaneously guaranteeing that those expectations could not be met. Ultimately, for peace and social justice movements, it reveals the apparent promise and real perils of attempting to parlay acts of civil disobedience into successful legal challenges and political victories. Whether the Spock trial should be regarded as a success or failure is not particularly important. It should not be ignored, however, for its example shows that to invite criminal litigation, particularly in political trials at times of national crisis, is a risky undertaking. Like their Chicago counterparts, the Spock defendants embraced their indictments and fully intended to try to put the government and especially the war in Vietnam on trial. In this, they were aided unknowingly by an attorney general who possessed his own motives for prosecuting them. It seemed they had inherited optimal conditions in which to wage a serious attack on the administration's war policies, but once they stepped into the arena of Boston's federal courthouse, neither they nor the attorney general could foresee what lay ahead.

Although the indictments of the Boston Five came down on Friday, January 5, 1968, the defendants did not receive official notice from the government until Monday, January 8. Following a weekend of endless questions from reporters, the five men finally saw the government's charges. The indictments were handed down by a Boston grand jury to Judge W. Arthur Garrity, a former United States attorney for Massachusetts who later gained notoriety as the judge at the heart of Boston's busing crisis. In the indictment of each of the accused, the grand jury stated that "from on or about August 1, 1967, and continuously thereafter," Reverend William Sloane Coffin, 43-year-old chaplain at Yale; Michael Ferber, 23-year-old Harvard graduate student; Mitchell Goodman, 44-year-old novelist and teacher; Marcus Raskin, 33-year-old head of a Washington think tank; and Dr. Spock "did unlawfully, wilfully,

and knowingly combine, conspire, confederate, and agree together and with each other ... to commit offenses against the United States." Those offenses, the government contended, included the following: (1) counseling, aiding, and abetting "diverse" draft registrants to "fail, refuse, and evade" service in the armed forces; (2) counseling, aiding, and abetting registrants to "fail and refuse to have in their possession" their Selective Service registration certificates and their classification certificates; and (3) hindering and interfering "by any means" with the administration of the Selective Service.[8]

To support these charges the indictment listed several overt acts committed by the defendants that furthered the alleged conspiracy. These acts included the participation of the four older men in signing and circulating the Call to Resist Illegitimate Authority, a public petition urging Americans to support draft resisters and others who would break the law to stop the Vietnam War; the participation of Coffin and Ferber in an October 16, 1967, service at Boston's historic Arlington Street Church, where they presided over a mass draft card turn-in in which, the government charged, they "accepted possession" of 214 draft cards and the ashes of 67 others burned in a candle's flame; and the presence of all five in a demonstration at the Justice Department on October 20 and the abandonment there of a briefcase full of nearly 1,000 draft cards collected from across the country by Coffin, Goodman, Raskin, and Spock (Ferber remained outside) and several others. Taken together, the government asserted, these five men conspired to "sponsor and support a nationwide program of resistance to the functions and operations of the Selective Service System." The indictment acknowledged that they were not alone in taking part in these activities and repeatedly referred to "other co-conspirators, some known and others unknown to the Grand Jury," but by indicting only the five implied that they were the ringleaders.[9]

To a layperson unacquainted with the intricacies of conspiracy law, the government did not appear to have a strong case. Use of the word conspiracy conjured up dark images of criminals meeting in secret, plotting elaborate schemes over a long period of time. In fact, all of the draft resistance activities detailed as part of the indictment occurred publicly and rarely included all five defendants. Ferber, for instance, had been introduced to Coffin for the first time at Arlington Street and only met Goodman, briefly, at the Justice Department rally; he did not meet Spock and Raskin until after being indicted. As a result, some within the draft resistance movement saw the indictments as evidence that the

government had rushed to assemble its case. It was a reasonable supposition. Even John Wall, the assistant United States attorney in Boston who prosecuted the case, later admitted that when the case came to him from the Justice Department it looked like it was "a jerry-built thing ... put together at the last minute." At least one court observer speculated that the government brought the case as a concession to congressional pressure but had set itself up for failure by choosing five "staggeringly respectable defendants" instead of radicals or "anyone else calculated to embarrass." Conjecture on that point aside, the movement's reaction to the indictment determined the direction draft resistance would take in the coming months.[10]

At first the responses within the draft resistance community to the indictments ranged from wariness over what the government might do next to satisfaction that their movement had elicited such a strong response from Washington. Those who felt anxious were concerned that the indictments of these five might be just the first in a wave of repression aimed at squashing draft resistance and the antiwar movement. William Sloane Coffin cautioned, "There may be other indictments handed out and a move to repress a great many people." If that happened, he said, then "it gets pretty serious." Indeed, predictions circulated that more than 100 indictments soon would follow in San Francisco, New York, Chicago, and other cities where draft resistance was strongest. Moreover, some rumors suggested that the indictments were timed to coincide with an American ground invasion of North Vietnam, that refrigerator units had been sited 10 miles south of the demilitarized zone (DMZ), loaded with blood plasma to support such a mobilization. (By the end of the month, the world would learn that the opposite was true as North Vietnam launched attacks in dozens of offensives in the South during the Tet holiday.)[11]

The most persistent fear, however, stemmed from predictions that government repression had only just started. When the five defendants met in New York the week after being indicted—the first time ever that they got together in the same room to plot strategy on anything—Michael Ferber remembers Marc Raskin being particularly despondent. Raskin believed the indictments were the first move in a planned "decimation of the intelligentsia," soon to be followed by indictments of Noam Chomsky, Dwight McDonald, Ashley Montagu, Susan Sontag, Howard Zinn, Robert Lowell, Paul Goodman, and on down the line.[12]

Not everyone in the antiwar movement agreed with Raskin's dire predictions, but most were willing to grant that the government at least

intended to scare people away from draft resistance and maybe from criticizing the administration altogether. Howard Zinn later said that he saw the indictments as typical of a political trial in which the government goes after prominent opponents in order to send a message to everyone else. "Whenever the government has moved against radicals," he later commented, "it has usually taken the top leadership and used it as a kind of lesson for all the rest." Louis Kampf of Resist, the organization of older advisers (mostly academics) formed from the Call to Resist, agreed. The government went after a representative group as a way of "scaring the shit out of everybody," he said. An editorial in *Ramparts* called the indictments an "act of repression" representing a "fundamental break with previous handling of opposition to the Vietnam war." Such "heinous repression of freedom at home," they wrote, "forebodes a greater desperation" on the part of policymakers. John Fuerst of Students for a Democratic Society (SDS) described the indictments as a "trial balloon for the government, a test of the antiwar movement's strength and militancy." In a prescient observation, he suggested that the most important factor in how this drama would play out would be the kind of defense adopted by the indicted men: "... It is unclear whether that defense will also be a defense of the program they supported; and if the defense of the men is separated from an active defense of draft resistance as such, then the government will know that the way is open for an attack on the Resistance movement itself." Remaining defiant in the face of prosecution, Fuerst seemed to suggest, would demonstrate the movement's commitment and would give the government pause. In any event, all such analyses of the indictments assumed that the administration planned a crackdown—one that could be imminent or that might not occur until after the trial. As Hilde Hein, a philosopher at Tufts University and an active member of Resist, recalled, the notion that these five formed a conspiracy—the etymology of the word reduces to "breathing together"—was absurd. That said, if they still could be indicted for a conspiracy, she thought, "anybody could be indicted as a member of a conspiracy." Expectations of more indictments and more government repression became common. One *Harvard Crimson* reporter later reflected, "The prospect of mass conspiracy indictments against dissenters was chilling, to say the least."[13]

More than 30 years later, this view of the government's motives persists largely unchallenged. In the trial's immediate wake, pundits and other credible observers such as Jessica Mitford agreed with those who believed that the Johnson administration targeted the Boston Five primarily to

intimidate the larger antiwar movement. Not only did Mitford assert that in the Spock trial the prosecution twisted the concept of due process into "an elaborate sham to mask what is in reality a convenient device to silence opponents of governmental policies," but legal scholars such as Harvard Law professor Alan Dershowitz argued that the Spock prosecution "represented a deliberate effort to frighten away scores of opponents of the war who might consider signing statements like the "Call [to Resist Illegitimate Authority], attending demonstrations like the one at the Pentagon [October 21, 1967], or organizing efforts to help people who had decided not to serve." The proof of this, Dershowitz charged, lay in the accusation of a conspiracy. "Any knowledgeable lawyer," he argued, "would have advised the government that, on the facts of the Spock case, its chances of prevailing would be significantly higher if it charged a substantive or accessory crime rather than a tenuous conspiracy among strangers." The government must have known this, but according to Dershowitz, prosecutors were willing to risk losing the case at the appellate level because it was more important to charge a crime—conspiracy—that "would have the greatest impact on discouraging organized opposition to the Vietnam War."[14]

In ensuing years, historians and other chroniclers of the era, to the extent that they have paid any attention to the Spock trial, generally have accepted uncritically this view of it as the first stage of a broader crackdown on dissent. Historian Charles DeBenedetti, for example, called the trial "Washington's first overt attack upon prominent antiwar activists," while journalist Jules Witcover in his popular book about 1968, *The Year the Dream Died*, described the indictment as "part of a new Johnson administration get-tough policy" against the draft Resistance movement. Likewise, Dr. Spock's most recent biographer, Thomas Maier, characterized the trial as underlining the government's "commitment to prosecute anyone who would challenge the draft—in effect a legal rebuke to many months of protest...." It turns out, however, that this analysis is misleadingly simplistic.[15]

In reality the government did not have any additional repression planned, and if antiwar activists had been privy to the manner in which the Spock indictments originated, their concerns might have been eased.[16] Although the Federal Bureau of Investigations (FBI) moved quickly to canvass draft resisters whose names appeared on the draft cards left at the Justice Department, investigation of the men who became known as the Boston Five did not start until December, more than two months after most of the overt acts itemized in the indictment

had occurred. The indictments did originate, however, at least indirectly, with the president of the United States. On the same day that four of the would-be defendants (along with several others) left the satchel containing nearly 1,000 draft cards from across the country with Assistant Deputy Attorney General John McDonough, President Johnson sent a terse memo to Ramsey Clark ordering that "any violations of the law" associated with the incident "be dealt with firmly, promptly, and fairly."[17] In addition, the president approved a plan proposed by General Lewis Hershey, director of Selective Service, to reclassify and draft any registrant known to have turned in or burned his draft card.[18]

The two orders issued by the president to his attorney general and to the director of Selective Service resulted in a public squabble between Clark and Hershey over how best to handle the growing number of draft resisters. In particular, Hershey's instructions to the country's more than 4,000 draft boards to regard anyone who interfered with the operation of the draft (by turning in a draft card, refusing induction, or just by sitting-in at a draft board) as delinquent and subject to reclassification and as an accelerated induction caused considerable controversy.[19] In December the two men compromised and issued a joint public statement on the enforcement of Selective Service laws. Hershey agreed to leave lawful protesters alone. Clark, in turn, went along with Hershey's existing policy of reclassifying those who turned in their draft cards (a policy later ruled unconstitutional by the United States Supreme Court in *Oestereich v. Selective Service*), and pledged the department's cooperation in prosecuting those who refused an accelerated induction resulting from reclassification.[20] The Justice Department, meanwhile, would not prosecute a draft resister simply for failing to possess his draft card. In addition, the statement indicated that the department planned to form a special unit in the Criminal Division in Washington, D.C., to oversee the prosecution of draft law violators. United States attorneys across the country could expect to work closely with this new unit in bringing cases against draft resisters in their cities.[21]

Most lawyers within the Justice Department regarded the joint statement as a victory for the attorney general: It stopped Hershey from targeting demonstrators and made no commitment to prosecute men who returned their draft cards. Years later, however, as Ramsey Clark reflected upon his acquiescence to Hershey's reclassification and induction policy, he acknowledged the difficult situation in which he found himself during that period. Even though he saw draft card turn-ins as an issue of free speech and as an expression of conscience, he felt obligated to

uphold the Selective Service laws. Clark believed that if one accepted the idea of a conscription system like Selective Service (which he did because he thought it was "more compatible with civilian authority and government and less likely to lead to militarism"), then the Selective Service rules had to be upheld. "As much as I opposed the war," he said, "the law has to have integrity. It has to do what it says even if what it says is wrong. I thought, therefore, that I had to act to protect the Selective Service System."[22]

At the same time, however, Ramsey Clark sought to minimize the impact of the joint policy on individual draft resisters. He asked John Van de Kamp, a former United States attorney in Los Angeles, to head up the criminal division's new special unit on draft resistance, and rather than have him focus on individual draft law violators, Clark instructed Van de Kamp to look into the existence of a possible conspiracy aimed at inducing young men to resist the draft. Clark was concerned much more with the possibility that older advisers were soliciting draft-age men to resist the draft. Therefore, until the department could make a determination on the conspiracy, Clark directed all United States attorneys to suspend the prosecution of men who had refused induction when the call to report was based on a reclassification stemming from a prior protest against the Vietnam War or against the Selective Service System.[23] This effectively nullified one part of his agreement with General Hershey, who wanted to see resisters reclassified and inducted.

Van de Kamp quickly put together a small team of lawyers to "look at if there was any overall conspiracy ... any kind of national effort to persuade people, to *induce* them to evade the draft." Among the first activities they investigated were the counseling services offered by the American Friends Service Committee and other religious organizations, which the department found to be "very careful" about how they dispensed information "without getting into any kind of inducement that would bring them within any kind of criminal prosecution." At the same time, though, Van de Kamp's unit focused on the events of October 20 at the Justice Department. Eventually that investigation led to the preparation of an indictment of a long list of people found to be pushing for a national draft resistance movement. The attorney general rejected it; he wanted it whittled down to a group of the individuals who were most involved.[24]

What is most interesting is the government's final choice of ringleaders. Of the five men chosen for prosecution by the Justice Department, only Ferber was of draft age; the other four were older and, more

important, had joined the movement as supporters, not draft resisters. As Mitch Goodman remarked, "The kids invented the Resistance movement, [and] we came along behind." According to Justice Department officials, however, the government felt obligated to go after the older advisers who were "inducing," "soliciting," "inciting," or "encouraging" draft-age men to violate Selective Service laws. After all, these men invited it. The specific language used by Coffin on the Justice Department steps, for example, seemed to come right from the statute books. "We hereby publicly counsel these young men to continue in their refusal to serve in the armed forces," Coffin said. "And we pledge ourselves to aid and abet them in all the ways we can." Indeed, they were asking for it. In the same way that draft resisters combined their act of moral witness with a strategy aimed at swamping the courts with their draft cases, their older allies fashioned their own civil disobedience as an act of conscience aimed at luring the government into a courtroom confrontation.[25]

The department did not interpret the statements of these draft resistance supporters merely as attempts to assume some of the same level of risk as the resisters themselves. Instead, their interest in prosecuting these conspirators stemmed in large part from a concern that older, wiser men were urging younger, more impressionable men to break the law. That was not only illegal, but it also was offensive. Although John Van de Kamp, John McDonough, and especially John Wall, the man who would prosecute the Boston Five, doubted the wisdom of the administration's Vietnam policies, none of them felt that it justified what these older advisers were trying to do by urging younger men to resist the draft. The department, as Van de Kamp later noted, wanted to send a message that although speech would be tolerated, "inducing or procuring evasion" would not. To protect America's youth and the integrity of the draft laws, such individuals would have to be prosecuted.[26]

If Justice Department officials truly interpreted the draft resistance movement this way, then they clearly misjudged it—just as the movement misjudged them. The young men who founded the draft resistance movement, who worked in Resistance chapters across the country, who planned draft card turn-ins and sent the yield to Washington, did all of those things on their own, with and without the encouragement of older supporters. Only when the older men who circulated the Call to Resist Illegitimate Authority sought to raise their own personal stakes did they seek alliance with the younger men by suggesting that they be the ones to accept the returned draft cards and then to convey them to

the attorney general. By the time that idea had occurred to Coffin, the Resistance already had built considerable momentum in several cities across the nation. Of course, the younger men were happy to accept the support of the older partisans. Not only did they enjoy hearing Dr. Spock describe draft resisters as "patriotic and courageous" to reporters on *Meet the Press*, but also the support of older movement figures gave the entire movement an added air of credibility and their fundraising abilities proved invaluable too.[27] Ultimately, however, even a perfunctory review of the draft resistance movement should have made government investigators realize that the leaders of the movement were the resisters themselves. Although they could not be accused of counseling others to resist the draft (as at Arlington Street, Resistance organizers everywhere took careful steps to make sure every resister came to his position on his own) these younger men were certainly guilty of aiding and abetting the mass violation of Selective Service laws. In this context, indicting Michael Ferber made sense. They also might have indicted other Resistance leaders in San Francisco, Chicago, New York, Boston, Philadelphia, and several other cities. Instead, though, the government created the Trial of Dr. Spock.

The answer to this prosecutorial riddle lay at the top, with the attorney general, Ramsey Clark. It turned out that no one outside the department—and very few within it—understood the complicated motives behind Clark's approval of this indictment. Years after the trial of the Boston Five, Clark acknowledged that he intentionally sought a draft resistance control case or test case; significantly, he wanted "a case that would justify deterring other aggressive actions" by the department against individual draft resisters. (It is a singular irony that the draft resistance community believed the attorney general sought indictments of the Boston Five primarily to inhibit the movement's activities when, according to Clark, he did so to inhibit his own department's litigation against the movement.) Two motives led him to this particular case. First, as he later said, "The law always has to consider how you test an unpopular law" like the Selective Service Act. The law, he said, "has an obligation to protect governmental institutions, even when they're engaged in erroneous policy." Sounding almost utopian, Clark argued that in any society "that wants to be democratic and free," important issues like the war and the draft should be "vigorously debated" as early as possible. A draft resistance test case, therefore, would "ventilate the issues, escalate them where they can be seen, [and] provide vigorous defense" for the defendants—or so he hoped. Second, Clark felt he had a duty to avoid

injuring innocent people like ordinary draft resisters who were not engaged in an act of moral turpitude but were acting on conscience. Here, his own experience during World War II when some of his friends who chose to be conscientious objectors were "permanently hurt by the social ostracization" informed his decision. In his opinion, in the 1940s the nation had "needlessly damaged many of [its] best young people," and he wanted to avoid doing that again. As he later put it:

> The saddest thing to see is a youngster out in the boondocks who's a pacifist. There's no sympathy there for him, no support there for him, he's got no way to defend himself or protect himself, and it looks like the whole world is against him (perhaps his father feels he's a traitor, and his mother feels he's a coward, his buddies don't like him). He's got nothing, and you come down on him with a prosecution that's just devastating.

Clark wanted to avoid prosecuting men like this. As an alternative, the Spock defendants were mature and "had thought things through for a long period of time, and had firm—even passionate—understanding and commitment of what they were doing and why," he reasoned. They also had the resources to mount a more adequate defense than an isolated young resister might have. The department, Clark later commented, "could have ground up tens of thousands of youngsters"—as the movement hoped it would—"and nobody would ever [have] notice[d] it." But here, Clark remarked, "with a famous baby doctor and a prominent chaplain of a major university, attention had to be paid." As he reflected on it years later, Clark still liked the plan. "I think it was sound government, sound law, and sound morality," he said.[28]

As the department prepared the indictment, Clark brought in Solicitor General Erwin Griswold to look at the case. Clark especially wanted Griswold, whom he thought of as the "Grand Old Man of law school deans and legal scholarship," to vet the case for two reasons: "to be absolutely confident that it did not involve a violation of the First Amendment and that it was a proper use of the conspiracy statute." For one thing, he did not want the trial to become a free speech case. The central issues in the case, he believed, had nothing to do with free speech. Secondly, Clark believed that, inherently, the five men charged were engaged in a conspiracy—well intentioned or not. On many occasions Clark had had numerous older people, such as college professors, lawyers, and other draft counselors, appeal to him telling him that they

wished Clark would prosecute them instead of the draft-age men. The trouble with that, as Clark saw it, however, was that even if the government prosecuted these people, it could not ignore "the principal who commits the ultimate act." The one time that the government could ignore the individual resisters would be when a "major effort ... a continuing effort," involved "the same circulation of people," ringleaders who were more involved in trying to create opposition to draft registration and compliance. In this way the conspiracy statute actually might protect the mass of individual resisters while targeting only those responsible for inciting these violations of the law.[29]

Although some in the antiwar movement worried that the indictments represented the first act in a growing wave of repression, others speculated that the Justice Department had done them a favor by choosing five clean-cut, articulate defendants and by trying the case in Boston.[30] One week after being indicted, Michael Ferber told an audience, "Maybe we have a friend in high places." He saw Boston as one of the best communities for the trial due to the strong church and academic support. Similarly, the choice of defendants made one wonder about a benefactor. "Why else would they pick a healer of babies, the best known doctor in the country, a chaplain at Yale, a novelist, a research assistant who is in the National Security Council, and me?" Ferber asked. They could have gone after a group of bearded, long-haired draft resisters, but "none of us has so much as a moustache," he said.[31]

Indeed, rather than facing the trial with dread, many in the movement looked forward to it with great anticipation and also with high expectations for what it might accomplish to further their cause. *Ramparts* magazine declared, "The Spock case will undoubtedly be one of the most important political trials in American history." Echoing that sentiment, William Sloane Coffin told a reporter that he looked forward to "a really good confrontation with the government on the legality and morality of the war." Similarly, the Reverend Dick Mumma, Presbyterian chaplain at Harvard, told reporters that it pleased him that the issue had been joined, "that the legal confrontation" would at last take place. "A lot of the hope I have in the human race is pinned on these five indicted men," he explained. Ferber later reflected, "I felt really good for the Resistance. I felt *grateful* that we had Spock in trouble, and Coffin ... I thought this was the best thing for draft resistance that we could do." Though he knew the trial might draw some attention away from the resisters themselves, the idea of draft resistance would get much more attention, and it would be "a huge political problem for the government."

In fact, he thought the administration was "really stupid to have done it." The idea of putting Dr. Spock in prison, he reasoned, should have been the last thing the government wanted.[32]

The indictments thus produced a new sense of defiance and solidarity among draft resisters and the larger antiwar movement. In the days immediately following announcement of the indictments, Resist, the organization of older supporters that evolved out of the Call to Resist Illegitimate Authority, issued a complicity statement: "We stand beside the men who have been indicted for support of draft resistance. If they are sentenced, we, too, must be sentenced. If they are imprisoned, we will take their places and will continue to use what means we can to bring this war to an end." Among the signers were Martin Luther King, Jr., Noam Chomsky, Robert McAfee Brown, Dwight MacDonald, and Howard Zinn. In addition, Resist called for a nationwide academic strike during the trial and for another march on Washington. Teach-ins were scheduled at universities around the country, and the Resistance predicted that by spring another 10,000 men would turn in their draft cards. For many opponents to the war, their challenge had been met and now choices needed to be made. "If these five go to jail and thousands of others do not follow them, we can forget about serious opposition to the war and civil liberties in this country," a *Ramparts* editorial warned. "We are all on the spot. ... If these five men are conspirators, then we must become a nation of conspirators. If we do not stand with them, it is impossible to see where the repression at home, and the oppression abroad, will stop."[33]

Even two of the future defendants in the Chicago conspiracy trial, David Dellinger and Tom Hayden, saw the occasion of the indictments as a test for every individual in the antiwar movement. Dellinger told a rally at Northeastern University that it was time for those in attendance "to decide whether we're going to stand with them [the defendants] and take the kind of risks that they take...." Hayden followed, telling the crowd, "The question of draft resistance is a line that you must cross if you are to be a serious participant in opposition to the war," and noted that to do so takes "a very active political courage." The indictments, therefore, served as catalysts for a closing of ranks, a renewal of the spirit of defiance that launched the draft resistance movement.[34]

By the time the trial arrived in late May 1968, however, the world had changed. The Tet offensive shocked the American people in late January; Lyndon Johnson bowed out of the presidential race on March 31, and four days later a madman killed Martin Luther King, Jr.; a student

strike at Columbia University in May ended in a police riot; and students in France seemed on the verge of toppling the DeGaulle regime and waging a full-scale revolution as May gave way to June. The intensity of the times affected the movement deeply. Each day, it seemed, brought some new fantastic event, and many in the draft resistance movement sensed the arrival of an increasingly apocalyptic atmosphere. By May the New England Resistance no longer planned draft card turn-ins; to concentrate on the draft alone no longer seemed sufficient. Instead they targeted much broader problems such as American racism and imperialism and, like their French counterparts, began talking more openly of revolution.

As a result, although the trial of Dr. Spock, Coffin, Ferber, Goodman, and Raskin put draft resistance on the front pages of newspapers across the country for three and one-half weeks, in some ways it was largely irrelevant to Boston's local draft resistance effort. Certainly it provided several opportunities for demonstrations and for sustaining press attention to draft resistance—and led to dozens of speaking engagements across the country—but ultimately, for several reasons, the trial turned out to be a chore for the defendants and a bore for an antiwar movement that expected fireworks.

The most persistent criticism of the trial centered on the strategy adopted by the defense. At the start they considered three options. First, they could take a Gandhian approach. If they were not allowed to address the larger issues of the war and to make their own charges of American violation of the Geneva Accords and American war crimes or to raise constitutional issues regarding an undeclared war and the inequities of the draft, then they would stand mute and take their punishment. This idea resonated most with Coffin and Ferber, to whom further civil disobedience appealed on both a religious and practical basis. Not only did taking one's punishment follow more consistently the examples of Socrates, Thoreau, Gandhi, and King, but they believed that the sight of Dr. Spock entering prison—handcuffed and in overalls—would prove extremely embarrassing to the administration. As Michael Ferber later recounted, "The jury would be instructed to convict, the judge would sentence us, and we would march off to prison as heroes, with a huge antiwar movement making us into martyrs. Dr. Spock with his head held high marching into Danbury Prison—I thought it was great." Coffin eventually changed his mind when friends at the Yale Law School convinced him that to wage no defense would be delinquent. In particular, Alexander Bickel, an expert on constitutional law,

described the conspiracy charge as "a worn-out piece of tyranny that has to be resisted if the government is not to become repressive." He urged Coffin to fight it.[35]

The second option would have seen the five defendants plead not guilty and then act as their own lawyers. The press coverage of Coffin, veteran and ex-Central Intelligence Agency (CIA) operative, interrogating government officials about the nature of the war in Vietnam or of Dr. Spock questioning government witnesses in his Connecticut Yankee accent might have amounted to a stunning public relations victory. As Jessica Mitford pointed out, however, political trials often end with guilty verdicts and the best defendants can hope for is a solid appeal; letting the defendants defend themselves could only undermine the appeals process.

Finally, the third option—the one they chose—was to wage a full-scale civil libertarian defense. They embarked upon this course for several reasons. For one, if the government did indeed plan a decimation of the intelligentsia, then the mounting of a solid defense might delay further onslaughts. In addition, all five men strongly believed that they were not part of a conspiracy, at least in the ordinary sense of the word. They barely knew each other, after all, and had never stood in the same room together until they met for the first time at the New York apartment of Spock's lawyer, Leonard Boudin. The attorneys also argued that the case would give them the opportunity to challenge the use of conspiracy law against peace groups, something that appealed to all of the defendants. Moreover, although they admitted to giving moral and symbolic support to draft resisters, the Boston Five denied counseling or urging young men to resist the draft (as opposed to aiding and abetting).[36]

The very discussion of these three options, however, exposed mutually exclusive goals that were not recognized altogether at the time. On the one hand, the defendants wanted a political trial, one in which they would be able to present evidence of the illegal and immoral nature of the Vietnam War. Since the judge presumably would not allow such latitude, use of the trial to score a political victory would prove difficult. The first two court strategies—standing mute and accepting punishment or acting as their own attorneys—were probably the best available options in pursuing the larger political goal of discrediting the administration. On the other hand, the defendants, counseled by their lawyers, also recognized that there might be some value in winning a more civil libertarian victory in which they would hope to undermine the use of conspiracy laws and to protect free speech. Such a goal would require

a more technical defense, rooted in the law and more detached from the political context from which it sprang.

The Spock defendants and their lawyers did not clearly isolate the two objectives—political and civil libertarian—and consequently began to embark on the virtually impossible course of blending both goals. For example, the decision to abandon the strategy of defendants working as their own lawyers (because it would undermine their chances on appeal) was based on a more civil libertarian assumption that these dissenters should not, ultimately, be imprisoned and therefore lost sight of the larger objective of winning political points in the court of public opinion. The potential loss of an appeal should not have mattered when being sent to prison as martyrs would have hurt the administration politically.

Perhaps an examination of past political trials and the application of these strategies would have been helpful. For example, during World War I the government accused Socialist Party leader Eugene Debs of obstructing and attempting to obstruct the "recruiting and enlistment service of the United States" and for attempting to cause "insubordination, mutiny, disloyalty, and refusal of duty" within the military. Debs essentially adopted the first strategy considered by the Spock defendants: He instructed his lawyers not to contest the charges and relied only on his address to the jury at sentencing to make his case to the American people about his opposition to the war. The jury convicted him and sentenced him to 10 years in prison, but according to historian Nick Salvatore, Debs's words to the judge and jury "electrified Socialists throughout the country ... [and] gave a demoralized movement a new focus and rallying point." By the time Debs went to prison, however, that movement was, according to Salvatore, "in disarray," and Debs himself was disillusioned that American workers did not rise up and protest his incarceration. The victory was short-lived.[37]

In contrast, in the first Smith Act trial (1949), leaders of the Communist Party, charged with conspiring to overthrow the United States government, pursued a political labor defense that they hoped would speak to the American people and would result in demonstrations and petitions that would force the government to reconsider the prosecution. Dismissing a civil libertarian approach, the defendants used the trial to present the party line, arguing that under their interpretation of Marxist doctrine they sought only peaceful change within the United States. Maurice Isserman has described the result as "long, fruitless exchanges with the prosecution over the true meaning of passages in the works of Marx, Lenin, and Stalin—a strategy that brought about

neither legal nor political benefit." The 11 defendants were convicted, and most of them received five-year prison sentences. Ellen Schrecker has noted that in coming across as "wooden, doctrinaire ideologues," the defendants did not win over the public and only temporarily aroused the communist movement.[38]

Three years later in a subsequent Smith Act trial set in California, the accused presented a more strictly civil libertarian defense arguing for the defendants' right to interpret and express party policy. The trial still ended in convictions, but it exposed the judge as a bully for holding some of the witnesses in contempt of court for refusing to name other people in the party, and more important, led to a significant weakening of the Smith Act in the 1957 *Yates v. United States* decision. Justice John Marshall Harlan, writing for the 6–1 majority, declared that mere advocacy of an overthrow of the government was not punishable; only if the prosecution had proven that that advocacy had led someone to do something could it be punishable.[39]

Thus, in 1968, one could draw important lessons from such historical precedents. The Debs strategy had at least resulted in some short-term political gains, while the California civil libertarian defense ultimately had helped undermine the government's ability to crack down on dissenters. Applying these lessons in 1968 was a separate issue, however. In Boston, the defendants and their lawyers charted a new course that attempted to blend both political and civil libertarian strategies. In the months leading up to the trial, public statements raised public expectations for a political victory, particularly within the larger antiwar movement, while the steady preparations for a civil libertarian defense virtually ensured disappointment and disillusionment.

The Boston Five, acting individually, chose what turned out to be an eclectic mix of attorneys to represent them.[40] Some were high profile, nationally known lawyers such as Leonard Boudin, known for his sympathy for left-wing causes, and Telford Taylor, a Columbia University law professor best known as the chief American prosecutor at the Nuremberg War Crimes tribunal. Others, such as William Homans and Ed Barshak, practiced only in Boston and came to the case through the Civil Liberties Union of Massachusetts (CLUM). James St. Clair, a highly regarded Boston attorney who later represented Richard Nixon during the Watergate scandal, rounded out the group as Coffin's attorney.[41]

Despite, or because of, the formidable array of legal talent, the defense ceased to act in unified fashion once the lawyers were brought in. Of course, to avoid looking like a conspiracy it made sense to avoid

using one lawyer to defend the group, but the individual approach went further than that. Each lawyer filed his own motions for his client and generally kept his trial strategy to himself. This failure to conduct a coordinated—if not unified—defense put the defendants at a disadvantage when confronted with an efficient prosecution.[42]

Assistant United States Attorney Wall, whom one observer described as "a cross between a fox terrier and a young bloodhound," presented the government's case. Only one other person, Joseph Cella of the Justice Department, sat next to Wall at the prosecution's table. Wall grew up in a working-class family in nearby Lynn, Massachusetts, and put himself through Boston College while working nights at a Lynn tannery; he graduated from Columbia University law school. Following work in the organized crime division of the Justice Department in 1963 and completion of a master's degree in labor law at Georgetown, Wall found his way, through the department, back to Massachusetts working for United States Attorney Arthur Garrity.[43]

Beginning in 1966 Garrity assigned all Selective Service cases to Wall, who protested at first. Although he had served as a paratrooper in Korea between college and law school, he opposed American involvement in Vietnam and sympathized especially with religious objectors like Jehovah's Witnesses. Garrity responded that unless Wall could tell him that he was morally opposed and could not in good conscience prosecute draft cases, he would have to take the assignment. Wall could not go that far. He considered himself a "Lyndon Johnson liberal Democrat" and would have preferred that the nation's resources be marshaled to "doing good" at home rather than "supporting dictators and butchers all around the world [simply] because they say they're anticommunist," but "in those days," he later recalled, "it never occurred to me that 'hey, this [the draft] is *morally* wrong.'" He took the appointment to handle draft cases, and long before widespread draft resistance began Wall started putting draft violators behind bars with sentences ranging from two to five years. In December 1967 Clark called Wall and tapped him to prosecute the Spock case. Later, during the trial, Wall told a reporter that he considered himself "peace people," too. "Nobody *wants* this damn war," he said. This view of the war notwithstanding, Wall did not hesitate to try the Boston Five case to the best of his ability. "I'm the pick-and-shovel man," he said. "As the pick-and-shovel man, there are problems that don't concern me. I don't have any problem prosecuting people that break the law. If the law should be changed, change it...."[44]

The prosecution of the case was made easier for Wall because of, among other things, the shifting and conflicting goals pursued by the defense. In speech after speech in the months leading up to the trial, several of the defendants described their motives and the defense strategy as aiming for either a political or civil libertarian victory—or both. The day before they were arraigned, for example, Coffin told reporters on NBC's *Meet the Press* that they planned to raise the constitutional illegality of the war, but if the government wanted "to fight it along other lines," they would be prepared to do so, "lest the area of dissent be narrowed." Similarly, Ferber, in a January speech at Harvard, characterized the trial as a "large drama for the world to watch" and described a plan to prove that the war was illegal according to international law, the United States constitution, and the Nuremberg principles. At the same time, however, he relayed that the legal team believed that even if the judge did not allow them to "raise the fundamental questions" the defense "may, in fact, accomplish some good" in changing or "knocking down the conspiracy laws" or in "reforming the draft law." Dr. Spock, in an April speech at the University of Kansas, outlined a hierarchy of defense strategies in which the most ideal would be one based on the Nuremberg standards and then on the constitutional illegality of the war, and if those two approaches failed or were not allowed, the defense would accept victory on First Amendment grounds. Spock did not mention that they might lose on all three fronts.

The articulation of these multivalent strategies notwithstanding, the public and especially the draft resistance and broader antiwar movements expected a political trial, one in which the movement would directly confront the Johnson administration. Yet in April, at a hearing on pretrial motions before Judge Francis J.W. Ford, it became immediately clear that both the attorney general and the defendants had overestimated the chances of putting the war and the government on trial. At 85 years of age, Judge Ford's career spanned the entire century. He grew up in South Boston, graduating from Harvard with Franklin Delano Roosevelt in 1904, served on the Boston City Council under Mayor James Michael Curley during and after World War I, and in 1933 became a federal prosecutor; five years later Roosevelt appointed him to the judiciary. Throughout his tenure on the bench critics charged that Ford's experience as United States attorney "left him with at least some noticeable sympathy for the prosecution's point of view." Just as he religiously followed a daily lunchtime routine that included dining on a hard-boiled egg and an apple followed by a walk, he never wavered in

his belief in the sanctity of the law. As the Boston Five soon learned, when someone broke a law, no matter what the law, motive mattered not a whit to Judge Ford.[45]

Moments after taking his seat in the courtroom for the pretrial hearing, Judge Ford announced that he would not allow the defense to invoke the Nuremberg principles during the trial. Moreover, he said, debates over the legality of the war and the draft were irrelevant to the facts of the case and would not be permitted. The lawyers for each defendant had filed numerous motions with the court challenging the indictment on just these grounds.[46] Just like that, with stunning dispatch, Ford quashed the antiwar movement's—and Clark's—principal hopes for the case. Henceforth, the entire proceeding repeatedly would fall short of the antiwar movement's expectations as the defense moved from a political strategy to a civil libertarian one. Spock's lawyer, Leonard Boudin, made this clear when at the next pretrial hearing he summed up the case: "The question is whether it is a crime to take draft cards and to turn them in to the U.S. attorney general as a form of protest—that's what this case comes down to." A direct (or indirect) legal challenge to the administration's policies in Vietnam would not happen, at least not in this trial.[47]

When the first day of the trial arrived a few weeks later, though the defendants "radiated confidence in the justness of their cause" according to one writer, they quickly found themselves at an even greater disadvantage when they saw the prospective jurors. Of the 88 people milling about in venire room, only five were women. In a trial in which the most recognizable defendant was a world-renowned baby doctor, the almost complete absence of women, those most likely to have read *Baby and Child Care*, caused Boudin to protest vociferously. It made little difference. By the time the lawyers finished with their selections and had expended all of their challenges, the Boston Five sat across the courtroom from an all-male jury.[48]

The government presented its case first. In methodical fashion John Wall took the jury through the series of events that the prosecution saw as the framework for the conspiracy. He described the early October press conference announcing the Call to Resist Illegitimate Authority. (At one point in this discussion he mentioned Noam Chomsky but said that he was "not here today to my knowledge." When Boudin objected and pointed out that Chomsky indeed sat at that moment in the courtroom, Wall responded ominously: "At least he is not sitting in the bar as a defendant [pause] *today*.") He showed films of the October 16, 1964, draft

card turn-in and burning at the Arlington Street Church and entered into evidence enlarged photographs of draft cards collected there. Wall put John McDonough of the Justice Department on the witness stand to describe the conveyance of the draft cards to the attorney general. The assistant U.S. attorney also presented the briefcase, photostats of the cards, and the ashes from one of the cards (reconstructed by the FBI and secured between two pieces of glass) as government exhibits. In total, the prosecution scrupulously presented evidence detailing the overt acts for which the defendants were indicted. For their part, the defendants did not deny that they committed any of these acts; indeed, they had performed them publicly with hope of gaining the government's attention. "The government has bitten off less than it can chew," one court observer said.[49]

Nevertheless, the legal standards for proving the existence of a conspiracy made it easy to convince the jury in this case. As Wall eventually explained in his closing argument, members of a conspiracy do not have to know one another, nor does the conspiracy have to take place in secret. Each member of a conspiracy merely has to "have knowledge of the aims and purposes" of the conspiracy and to "agree to those aims and purposes," he said. At that point, each participant "becomes liable for all future and past acts" of the conspiracy. Furthermore, Wall argued, if the government proved that the Boston Five conspired to commit just one of the acts listed in the indictment, then that would be sufficient for a guilty verdict; the prosecution did not have to prove that the defendants conspired to commit all of the acts listed in the indictment. To better illustrate his points, Wall dissected the plot of a popular 1956 film. In director Stanley Kubrick's *The Killing*, actor Sterling Hayden's character, Johnny Clay, schemes to rob a racetrack. He recruits several others individually to assist him and, for the most part, tells them only of their own roles in the plan; they do not know about the others that Clay has enlisted. He hires someone who, posing as a disabled veteran, parks in the parking lot at the track and shoots the favorite horse in the race as a way of creating a diversion. Likewise, Clay employs a bartender at the track and another man to get into an argument with one another and to have it escalate into a fight as a second diversion. As the public and the police scramble to find out what is happening, Clay goes to the window of a teller he has hired to gain access to the money. He stuffs the cash into a duffle bag and throws it out a window to a policeman whom he recruited to make the getaway with the loot.[50]

Each of the characters in the film knew that they were involved in a plot to rob the racetrack and, by participating, approved of the plan. As John Wall explained to the Spock jury, even though few of these characters knew each other, all were part of a conspiracy. Therefore, Wall finally stressed, the jury should regard as irrelevant the persistent claims of the Boston Five's lawyers that most of them barely knew each other and, in some cases, did not meet until after they were indicted. From the government's perspective, the actions of the five defendants met the legal standards for establishing a conspiracy. All of them knew that they were involved in a national effort to undermine the Selective Service System (SSS) and affirmed it by taking part in the overt acts outlined in the indictment. Case closed.

When the government rested its case, then, it had established that the defendants indeed did take part in the series of events culminating in the draft card turn-in at the Justice Department. As the defense began to present its case, most notably by putting the defendants on the stand, the prosecution's objective—consciously or not—seemed to shift from trying to prove conspiracy to trying to prove that the defendants were guilty of urging, convincing, inducing, even pushing draft-age men into draft resistance. This development came unexpectedly, for the indictment did not charge the Boston Five with the actual acts of counseling, aiding, and abetting draft-age men to resist the draft; rather, it charged them with conspiracy to counsel, aid, and abet. The government's new emphasis presumably would prove more effective with the jury than focusing on the existence of a conspiracy, which the defendants would only deny and which the government believed it had already proved. As the testimony of several of the defendants soon demonstrated, the strategy worked.[51]

William Sloane Coffin, Jr., took the stand first and exposed the first hints that the court would not only forbid the defendants to address the larger issues important to the antiwar movement but that the defense's secondary civil libertarian stand would be disappointingly lawyerly and timid. James St. Clair, Coffin's attorney, took his client through the events described by the prosecution as making up the conspiracy and asked Coffin why he took part in the October 20 Justice Department demonstration and draft card turn-in. Coffin replied that first, he wanted to show moral support for the resisters; second, he hoped it would force the government to prosecute him and others for violation of the Selective Service Act, thus bringing about a trial in which the legality of the war and the draft could be challenged; and third, he hoped that his presence would

help the draft resistance movement to "win the hearts and minds of the American people." When St. Clair asked him if he believed the turning in of draft cards would undermine the Selective Service, he answered "Certainly not." "Why not?" asked St. Clair. "Because turning in a draft card speeded up induction and in no way impeded his induction." Defense supporters squirmed. Did he really believe that? First of all, no one knew that General Hershey would order punitive reclassifications and accelerated inductions for those who turned in their cards until a few weeks after October 20. Second, as Jessica Mitford pointed out, was the jury "really supposed to think that Mr. Coffin's purpose in handing over the draft cards was to clear the way for inducting the registrants into the armed forces," as St. Clair's line of questioning seemed to suggest?[52]

On the stand Coffin continued to equivocate and backtrack. He did not appear to be the same man who earlier suggested standing mute and defiantly marching off to prison. In the most dramatic example of this, John Wall zeroed in on the power of Coffin's oratory to move young men to commit crimes. Wall started by eliciting from Coffin that he had worn his clerical robe during the October 16 service at Arlington Street Church and that he had spoken from the pulpit there. Coffin admitted that he viewed the draft card turn-in as a "very religious act" but maintained that in spite of the presence of several moving speakers he did not believe that any of the resisters had been persuaded by the magnitude of the moment to give up their draft cards. He claimed that the decisions to resist the draft had been made in advance of the meeting. The jury, however, had seen film of Coffin's speech as well as his address at the Justice Department, and Wall again reminded them of Coffin's words:

> The National Selective Service Act declares that anyone "who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces ... shall be liable to imprisonment for not more than five years or a fine of ten thousand dollars or both."
>
> 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.

Whether or not Coffin intended it, a reasonable person could easily envision a young man being inspired to turn in his draft card after hearing such language from a man of his stature. Coffin's response that he never considered the power of his speeches to move people to resist the draft seemed disingenuous.[53]

In later years Coffin acknowledged that he walked a fine line between counseling and aiding or abetting. "I felt very strongly that I personally had never counseled," he reflected, "because I didn't think it was my role as chaplain at Yale University to counsel people to turn their draft cards in. ... For me as a pastor, that would have been wrong." Instead, he sought to limit his participation to aiding and abetting those who had already made up their minds—though he admitted that "aiding and abetting is an indirect form of counseling." When others saw someone of Coffin's standing aiding and abetting others, "the implication is that these guys are the really conscientious ones" and anyone wanting to be thought of in that way would follow suit.[54]

John Wall thought Coffin made a terrible witness. "He did an awful lot to win my case for me," the prosecutor said. Indeed, Wall believed that Coffin could have swung the case and at least secured a hung jury if only he had maintained his defiance and pleaded the rightness of his cause. Wall previously witnessed Coffin at his oratorical best and admired the "musicality and poetry of his words," but to his "dismay and disappointment," Coffin waged a "lawyer's defense" and that, Wall pointed out, "was not what the movement needed at the time." If instead Coffin had "preached to that jury and acknowledged legal responsibility ... he'd have been magnificent," Wall later commented. He probably would not have been acquitted "but to get up there and try to weasel ... he guaranteed at least his own conviction."[55]

Coffin's testimony showed the pitfalls of shifting from a political trial strategy to a civil libertarian strategy, and soon the entire defense came to seem too lawyerly to their supporters and even to the defendants themselves. As the government relentlessly asserted that the defendants through their speeches and actions were inducing and inciting draft resistance among young men, the defense responded that they were only stating their opinions, exercising their First Amendment right of free speech, and offering their support to any man who had already decided to resist. In his closing arguments Boudin told the jury that the case raised questions of "freedom of speech, of association, of assembly and even of the freedom of the press." Thus, the defendants, all of whom passionately opposed the war, and all of whom a reasonable person

would expect to be actively working to stop the war (rather than just talking about it), seemed now to be saying that they were only speaking—that they really were not doing anything of consequence. It rang hollow to most everyone in the courtroom. During the trial Coffin told Daniel Lang of *The New Yorker*, "I wanted a trial of stature. I wanted to test the legality of the war and the constitutionality of the Selective Service Act. I wanted a trial that might be of help to selective conscientious objectors. But this—what is it?"[56]

Ultimately the trial could only disappoint. Not only did Judge Ford completely prohibit the defense from putting the war and the administration on trial, but also the defendants' intention of taking their message to a wider public likewise fell flat. Although the judge allowed the defendants to testify as to their state of mind at the time they took part in their draft resistance activities (as distinct from their motives), very little of it filtered through the media to the general public; only those who carefully combed their daily newspaper for such details could get beyond the government-fostered image of older men manipulating younger ones to break the law. Here the mainstream media did little to help the defendants. As several studies have shown, the media, even as late as June 1968, remained largely unpersuaded by the antiwar movement. Dr. Spock, exasperated after the trial, complained that *Pravda* reported the trial better than "any of the American papers."[57]

In response to the thin coverage of the trial, Michael Ferber and others suggested running a counter-trial each day after the official court's sessions ended. At one point they suggested inviting Bertrand Russell and Jean Paul-Sartre, both of whom had conducted an unofficial war crimes tribunal on the Vietnam War in 1967. This kind of approach certainly would have attracted sustained media attention and may have succeeded in providing the political forum they had been precluded from having in Judge Ford's court. For reasons that no one can seem to recall clearly, however, the counter-trial idea never got off the ground, and the public consequently heard little from the defendants outside the courtroom.[58]

In the end, for much of the antiwar movement a defense predicated on claiming First Amendment freedoms seemed to minimize the importance of civil disobedience and of increasing the coefficient of friction until the war ended. The jury seemed to sense it too. In spite of Ferber's and especially Dr. Spock's unequivocal testimony, the defense strategy created a lasting impression that the defendants were putting aside their principles just to get off.

Wall highlighted this contradiction in his summation. On the one hand, he seemed to hold Spock in high esteem because, unlike Coffin, Spock had never equivocated. He disagreed that he had conspired with others, but he did not deny having done everything he could to stop the war. He did not backtrack from his well-documented statements to both the public and the FBI that he had broken laws and had invited prosecution out of patriotism. Wall consequently told the jury that "the defendant Spock on the stand was a man who appeared to be telling the truth, appeared to be hiding nothing ... I submit on the evidence that the man convicted himself on the stand—that's for you to decide." Wall later added, "If Dr. Spock goes down in this case, he goes down like a man, with dignity, worthy of respect." At the same time, however, the prosecutor argued, "That cannot be said about all the defendants in this case when you consider their testimony from the witness stand. ..." He reminded the jury that in December 1967 Coffin appeared on the television news show *Contact* and told the anchor that if a prosecutor asked him if he aided and abetted these people in turning in their cards, Coffin said, "Yes, I did." This differed sharply from the response to a similar question during the trial.[59]

In closing arguments, the defense attorneys remained generally satisfied to press the free speech line, though the two CLUM lawyers attempted to make larger points. Barshak reminded the jury of the ongoing war in Vietnam, noting that its existence had been present in the "atmosphere of this courtroom" throughout the trial. Although the judge would not allow discussion of the legality or morality of the war and the draft, Barshak asked the jurors to judge the conduct of the defendants against the context of the war and the divisions it created in American society. Bill Homans, after attempting to portray his client, Michael Ferber, as unacquainted with his co-defendants and absent from many of the events described by the prosecution, finished his closing argument by raising the issue of individual morality and its place in a civil society. "Few are willing to brave the disapproval of their fellows, the censure of their colleagues, the wrath of their society," he said. "Moral courage is a rarer commodity than bravery in battle or great intelligence. Yet it is the one essential vital quality of those who seek to change a world that yields most painfully to change." He urged the jury to find Ferber not guilty.[60]

For the defendants, the final indignity came even before deliberations began when Judge Ford delivered his charge to the jury. Throughout the trial Ford provided numerous hints of how he viewed the trial;

he frequently cut off defense attorneys, urging them to "go forward" and to "get on" with it, or dismissing their objections with "no further colloquy." One day late in the trial he said to counsel for both sides, "There will be one verdict and that will be guilty on the conspiracy count;" he later changed the record to read guilty or not guilty, but the original statement seemed to betray his true beliefs. Now, in charging the jury, Ford, on his own, submitted a questionnaire to the jurors to help them reach their verdicts. The 10 questions (or, as the lawyers call them, "interrogatories") broke down the different segments of the alleged conspiracy and asked the jury to decide if the defendants were guilty beyond a reasonable doubt of each charge. If they were guilty of any one of the 10 charges, they would be guilty overall. The defense lawyers protested the introduction of these questions, arguing (as they would later in the appeal) that the jury should be free to render its verdict without the undue influence of the judge's questions. Ford ignored their pleas.[61]

On June 14, 1968, the jury returned its verdict. After seven hours of deliberation the 12 male jurors found Coffin, Spock, Goodman, and Ferber guilty of all charges except conspiracy to counsel draft-age men to turn in their draft cards. At the same time, they acquitted Raskin, whom they suggested had been only minimally involved in the events outlined in the indictment. Judge Ford scheduled the four convicted men for sentencing on July 10.[62]

The postmortem began immediately. Two days after the trial ended, Sidney Zion of the *New York Times* reported, "There is broad sentiment that the defendants 'copped out,'" choosing a "legalistic position" instead of the "long-desired moral confrontation" with the administration. "Obviously the peace flock expected more from men who had been among the first to raise the moral flag against the war," he wrote. "They wanted a front-page trial and they didn't get it." Others described the trial as a disappointing, "limited drama" and also blamed the defense for assuming a "narrow legalistic stance." A *Harvard Summer News* reporter titled his article "Spock Trial Was a Timid Affair in which the Lawyers Took over" and lamented that the "promised confrontation fizzled into anticlimax and disappointment for the peace community." Critics within the movement made similar comments: As he prepared for his own trial in Chicago, Jerry Rubin chided Mitch Goodman in a public exchange of letters, saying the Spock trial "became just another court case and trial, buried in legalisms." Phillip Berrigan, who confronted the government by destroying draft

files and went to prison for it, labeled the Boston Five "as being people who sort of reacted to the government, instead of initiating action." Others were more understanding but suggested that the defendants could have turned the trial into a circus. To this idea, Dr. Spock responded, "I don't think I or any of the others is the sort of person who would want to turn the trial into a circus. You don't convince the American people you are right that way."[63]

The defendants accepted the criticism graciously but in expressing their own misgivings deflected responsibility for the trial's failures to the lawyers. Coffin told one reporter that his lawyers thought he did beautifully, but he did not agree. "I was racked all the way along on the matter of trying to win the case versus making a point," he said. "The frustration of the thing was enormous. I'm worried about trimming the moral sails too much to fight the legal winds." Mitch Goodman agreed. "We made a mess of it," he sighed. "We let the lawyers take it away from us." Dr. Spock, too, lamented that they did not make their political points "more emphatically" and said that he regretted not having a daily press conference to explain the views they did not get to stress in court. Although Michael Ferber believed that the trial succeeded at least in getting some of their opinions on the draft and the war into the press, years later he too agreed that the lawyers "did dominate too much." In retrospect, he believes it "would have made the imagery clearer" if they had chosen to mount no defense and accept their punishment. "It would have caused more public outrage," he concluded, "to have Ben Spock in prison."[64]

According to political scientist Beverly Woodward, the Boston Five may not have appreciated the difference between civil disobedience and what she called "civil challenge." Civil disobedience aims to achieve political objectives through an "appeal to the conscience of the entire body politic or some segment of it" and aims to secure political change through legislative and executive action. Civil challenge, on the other hand, is an attempt to achieve political change by appealing to and putting pressure on the courts. Civil challengers, therefore, seek confrontation and want a hearing, ultimately, with the Supreme Court. Draft resistance and the other activities in which the Spock trial defendants engaged began as civil disobedience but blurred into a civil challenge after they were indicted. Although Woodward applauded the Boston Five for attempting to contest the conspiracy law and conceded that the multiplicity of the defenses (and the confusion it provoked among the public) were "probably unavoidable," she implied that acts

of civil disobedience do not make a good basis for a subsequent civil challenge. Draft resistance was, by its nature, an act of mass civil disobedience that lent itself more readily to a political defense than a civil one.[65]

On July 10, 1968, Judge Ford sentenced each of the four men to two-year prison terms and fined each of them $5,000 (except Ferber who was fined $1,000—"the student discount," he joked).[66] When given the opportunity to make a final statement before sentencing, only Goodman and Ferber did so. Ferber remained defiant. "Your Honor, I have nothing to say that might mitigate my punishment," he said. "I only wish to point out that I have been part of no conspiracy, but rather I have been part of a movement, a movement led by my generation." The movement, Ferber explained, originated in his generation's "horror and disgust" at some of the things carried out by their government at home and abroad. He further criticized those in the government who decided that the movement, which was "created out of love for what our country might be," now could be characterized as criminal. "I cannot leave the movement," he declared as he finished. "I will remain working in it. I have no regrets."[67]

Almost exactly one year later the convictions were overturned on appeal. A three-judge panel ruled that the prosecution lacked sufficient evidence to prove that Spock and Ferber had actually taken part in a conspiracy and that in any event, the interrogatories given to the jury during the judge's charge were prejudicial and could have led the jurors only to a guilty verdict. Thus, the court acquitted Spock and Ferber and ordered new trials (which never took place) for Coffin and Goodman.[68]

This victory came much too late for the antiwar movement. In July 1969 the war raged on despite promises of peace from a new president, and the August 1968 police riot on demonstrators at the Democratic National Convention in Chicago endured as the lasting image of the movement's confrontation with the government; soon another political trial resulting from the Chicago conflict would take place with the same expectations of putting the war on trial.

The trial of Spock, Coffin, Goodman, Ferber, and Raskin offers valuable lessons to the peace movement and other campaigns for social justice. Although the defendants approached the trial as an opportunity to effect political change and though they unknowingly had the indirect aid of the highest law enforcement official in the land, their trial turned out to be, as Coffin said, "dismal, dreary, and above all demeaning to all concerned." A combination of factors, including a complicated

conspiracy charge (which led the defendants to adopt a legalistic, defensive defense), a judge who summarily ruled out any discussion of the illegality or morality of the war in Vietnam, an all-male jury, and the judge's use of special interrogatories in his charge to the jury, guaranteed an anticlimactic trial—almost completely useless to a movement attempting to stop a war. Most important, however, the defendants did not agree on one trial strategy with which they could, like Debs, "electrify" the antiwar movement. Certainly the very occasion of the trial helped sustain the movement for a time, but when the trial fell so far short of becoming the political event anticipated by the war's opponents it became a lost opportunity. In this respect the Spock trial is perhaps the most significant of the numerous political trials of the 1960s; for despite its example, dozens of other defendants charged with similar crimes failed to see the futility of trying to put the war on trial and, in the end, found themselves convicted, too. Meanwhile, the war continued unabated.

NOTES

1. A. Douglas Matthews, "Spock Trial Was a Timid Affair in which the Lawyers Took Over," *Harvard Summer News*, July 12, 1968, 4.

2. Transcripts, *U.S. v. Coffin et al.*, CR-68-1, Vol. 20, p. 24, National Archives, Waltham, MA.

3. "U.S. Indicts Dr. Spock, 4 Others," *Boston Globe*, January 6, 1968, 1.

4. Jessica Mitford, *The Trial of Dr. Spock* (New York: Knopf, 1969). Mitford's book is a very sympathetic chronicle of the trial. For law review articles, see William E. Brown, "Criminal Conspiracy and Political Dissent," *Tulane Law Review* 44 (April 1970): 587–594; Nathaniel L. Nathanson, "Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Spock," *Northwestern University Law Review* 65 (May–June, 1970): 153–192; Michael A. Wiener, "Freedom of Speech—*United States v. Spock*," *Suffolk University Law Review* 4 (Fall 1969): 175–183; Wiley Y. Daniel, "The Impropriety of Submitting Special Interrogatories to Juries in Criminal Cases," *Howard Law Journal* 15 (Summer 1969): 708–714; "The Logic of Conspiracy," *Wisconsin Law Review* (1970): 191–201; Alexander Morgan Capron and David N. Rosen, "Counseling Draft Resistance: The Case for a Good Faith Belief Defense," *Yale Law Journal* 78 (1969): 1008–1045. See also Joseph L. Sax, "Conscience and Anarchy: The Prosecution of Draft Resisters," *Yale Review* 57 (Summer 1968): 481–494.

5. The few things that have been written about the trial are contradictory. Tom Wells argues that the trial was good for the movement because media

coverage gave "wide and sympathetic play to the defendants' views." Tom Wells, *The War Within: America's Battle Over Vietnam* (Berkeley: University of California Press, 1994), 233. Charles DeBenedetti, on the other hand, argues, "Neither the trial nor the conviction of Spock, Coffin, Ferber, and Goodman aroused much interest." Charles DeBenedetti, *An American Ordeal: The Antiwar Movement of the Vietnam Era* (Syracuse, NY: Syracuse University Press, 1990), 222. Both of Spock's biographers give an entire chapter to the trial but largely recapitulate Mitford's view of the event. Lynn Z. Bloom, *Dr. Spock: Biography of a Conservative Radical* (Indianapolis: Bobbs-Merrill, 1972), and Thomas Maier, *Dr. Spock: An American Life* (New York: Harcourt Brace, 1998). The trial receives very brief mention in Nancy Zaroulis and Gerald Sullivan, *Who Spoke Up? American Protest Against the War in Vietnam* (Garden City, NY: Doubleday, 1984), 173; and briefer mention in Irwin Unger, *The Movement: A History of the American New Left* (New York: Dodd, Mead & Co., 1974), 192.

6. Though they note that the trial ended "inconclusively" and that some of the defendants regretted the "technically complicated trial," Michael Ferber and Staughton Lynd argue that the case "served as the focus for older activists for a number of months" [presumably this refers to the months between the handing down of the indictments and the end of the trial, January to July 1968]. Thousands of professors and clergy continued to aid and abet draft resistance; 28,000 people signed a complicity statement confessing " 'guilt' equal to that of the defendants." They conclude by arguing, "If the government hoped to cool off the antidraft movement by indicting its best-known members, their hope failed." This interpretation has been carried on by Wells, *The War Within*; Michael Ferber and Staughton Lynd, *The Resistance* (Boston: Beacon Press, 1971), 124.

7. David Dellinger, *From Yale to Jail: The Life Story of a Moral Dissenter* (New York: Pantheon, 1993), 342–343; David Dellinger, *More Power Than We Know: The People's Movement Toward Democracy* (Garden City, NY: Anchor Press, 1975), 106, 230–231; William Kunstler, *My Life as a Radical Lawyer* (New York: Birch Lane Press, 1994), 22.

8. Indictment, *U.S. v. Coffin et al.*, CR-68-1, case files, National Archives, Waltham, MA. Note: Complete text of the indictment also appears in the appendix of Mitford, *The Trial of Dr. Spock*, 253–257. The actual law violated, the government alleged, was Title 50, US Code Appendix, section 462(a), part of the Universal Military Training and Service Act.

9. Indictment, *U.S. v. Coffin et al.*

10. John Wall, interview with author, June 26, 1998; G. T. Hunt, "Bringing up Spock: A Lackadaisical Case," *Village Voice*, April 25, 1968, 28–29, 55.

11. Ferber speech at Town Hall, NY, January 14, 1968, transcribed in FBI memorandum, Exhibit 33a, *U.S. v. Coffin et al.*, CR 68-1, National Archives, Waltham, MA; "Indictments Protest Planned in Capital," *Boston Globe*, January 8, 1968, 1.

12. Michael Ferber, interview with author, June 16, 1998.

13. Howard Zinn, interview with author, July 6, 1998; Louis Kampf, interview with author, September 10, 1998; "The Repression at Home," editorial, *Ramparts*, February 1968, 2; John Fuerst, "Resistance and Repression," *New Left Notes*, January 15, 1968, 1; Robert Pardun, "The Political Defense of Resistance," *New Left Notes*, January 15, 1968, 1; Hilde Hein, interview with author, September 18, 1998; Matthews, "Spock Trial Was a Timid Affair," 4.

14. Mitford, *The Trial of Dr. Spock*, 240; Alan Dershowitz, "The Trial of Dr. Spock," review of Mitford, *New York Times Book Review*, September 14, 1969, 3.

15. DeBenedetti, *The Peace Reform in American History* (Bloomington: Indiana University Press, 1980), 181; Jules Witcover, *The Year the Dream Died: Revisiting 1968 in America* (New York: Warner Books, 1997), 51–52; Maier, *Dr. Spock*, 308.

16. Recently released FBI files on Dr. Spock include an FBI memo summarizing the department's approach in the Spock case. They indicate not only that the attorney general personally approved the indictment of the five Boston defendants but that, according to departmental lawyer Joseph Cella, "Additional indictments will be sought in other parts of the country in the very near future according to departments [sic] plans at this time." Years later, however, neither Ramsey Clark, John Van de Kamp, nor John McDonough recall any plans to cast the indictment net any wider; FBI memo, January 5, 1968, Spock FBI files, currently in author's possession but to be deposited with Spock Papers at Syracuse University.

17. Memo to Ramsey Clark from Lyndon B. Johnson, October 20, 1967, White House Central Files (WHCF), Lyndon B. Johnson Presidential Library (JL), Box 26, Lyndon B. Johnson Library (LBJL).

18. George Q. Flynn, *Lewis B. Hershey: Mr. Selective Service* (Chapel Hill: University of North Carolina Press, 1985), 259; George Q. Flynn, *The Draft, 1940–1973* (Lawrence: University Press of Kansas, 1993), 215–216; Joseph Califano, *The Triumph and Tragedy of Lyndon Johnson* (New York: Simon & Schuster, 1991), 198–200. Hershey based the reclassification and accelerated induction proposal on the premise that registrants who turned in or burned their draft cards were delinquent (because the draft law called for registrants to have their registration and classification certificates in their possession at all times) and therefore were not acting in the national interest. According to Flynn, Johnson

"immediately approved the idea." Flynn has confirmed this through various sources including Hershey and Califano. Primary source evidence linking the president to this issue has not yet been uncovered; however, it is possible that the phone conversation between Hershey and Johnson will be among those being released by the LBJL.

19. Hershey's letter declared that "any action" that violated Selective Service "processes" could be considered illegal and not in the nation's interest. This sweeping wording had critics envisioning thousands of youths being reclassified simply because they participated in a sit-in at a local board; Hershey letter to Members of SSS, October 26, 1967, National Security Defense files, ND 9-4, box 148, LBJL.

20. The exact language of the joint communiqué said, "A registrant who violates any duty affecting his own status (for example, giving false information, failing to appear for an examination, or failing to have a draft card) may be declared a 'delinquent' registrant by his local draft board. ... When a person is declared to be a delinquent registrant by his local board, he may be reclassified and becomes subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the enactment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts." Joint Statement by Attorney General Ramsey Clark and Director of Selective Service Lewis B. Hershey, December 9, 1967, Califano papers, Box 55, LBJL.

21. "Joint Statement by Attorney General Ramsey Clark and Director of Selective Service Lewis B. Hershey," December 9, 1967, Califano papers, Box 55, LBJL; Flynn, *The Draft*, 217–218; Califano, 201–202.

22. John Van de Kamp describes the joint statement as a victory for the Department of Justice (DOJ): John Van de Kamp, interview with author, June 9, 1998; Ramsey Clark, interview with author, April 29, 1998.

23. Clark interview, April 29, 1998; Van de Kamp interview, June 9, 1998; John McDonough, interview with author, June 3, 1998.

24. Van de Kamp interview, June 9, 1998; Ramsey Clark, interview with author, January 6, 1998.

25. Mitford, *The Trial of Dr. Spock*, 31, 42.

26. Van de Kamp interview, June 9, 1998; McDonough interview, June 3, 1998; John Wall, interview with author, June 26, 1998; Mitford, *The Trial of Dr. Spock*, 31, 271.

27. Transcript, *Meet the Press*, January 28, 1968, 3.

28. Clark interview, January 6, 1998; Clark interview, April 29, 1998. See also Wells, *The War Within*, 233–237. By this time, Clark himself had

turned against the war. He claims that within the administration his well-known opposition to Johnson's Vietnam policies rankled colleagues. Clark believed that the president left him off the National Security Council because of it and later admitted that his relationship with Johnson and others became "very strained." He remembered that the Foreign Intelligence Advisory Board claimed his resolute refusal to grant wiretaps of antiwar groups undermined "not only the war effort then but generally the national security of the country." By the time the administration left office he had become a virtual outcast, a cabinet official not invited to any of the many going-away parties held in the final weeks. So, in early January 1968, when the grand jury handed down indictments of the Boston Five, Clark recalls, the president and Joe Califano in particular were "genuinely and actually surprised." They did not think Clark would do it, especially on his own. The antiwar movement would have found this hard to believe since they were certain that Dr. Spock could have been indicted only with the president's consent. Wells, *The War Within*, 236; Clark interview, January 6, 1998. Dean Rusk counters this claim, however, by writing in his memoirs that Clark never said anything about his opposition to the war to Rusk or anyone else in the cabinet. Dean Rusk, *As I Saw It* (New York: Norton, 1990), 473–474.

29. Clark interview, January 6, 1998.

30. The reasons for trying the case in Boston remain unclear more than 30 years later. John Van de Kamp saw Boston as "more neutral grounds" than Washington, where the press would seize on the political showdown between Spock and President Johnson. John Wall, however, believed it was because the government would be more likely to impanel a conservative Irish Catholic jury than in Washington or New York and thus would get a conviction more easily. Many people in the movement interpreted it as Wall did. Van de Kamp interview, June 9, 1998; Wall interview, June 26, 1998; Ferber interview, June 16, 1998; Mitford, *The Trial of Dr. Spock*, 220.

31. Michael Ferber, speech at Town Hall, New York, January 14, 1968, Exhibit 33a, *U.S. v. Coffin et al.*, CR-68-1, National Archives, Waltham, MA.

32. "The Repression at Home," editorial, *Ramparts*, (February 1968): 2; "Draft Indictments Spur Calls for Strikes, Sit-Ins," *Boston Globe*, January 7, 1968, 1; "Indictments Protest Planned in Capital," *Boston Globe*, January 8, 1968, 1; Ferber interview, June 16, 1998; Coffin, *Once to Every Man*, 263; Mitford, *The Trial of Dr. Spock*, 4.

33. "Draft Indictments;" Michael Ferber, speech at Town Hall, New York, January 14, 1968, Exhibit 33a, *U.S. v. Coffin et al.*; "The Repression at Home."

34. Transcript of FBI tapes of David Dellinger and Tom Hayden at the Northeastern University rally, January 28, 1968, Spock FBI files.

35. Mitford, *The Trial of Dr. Spock*, 76–77; Wells, *The War Within*, 232–233; Coffin's discussion with his law school colleagues is recounted in several places: Coffin, *Once To Every Man*, 260–262; Matthews, "Spock Trial a Timid Affair," 4; Joan Morrison and Robert K. Morrison, *From Camelot to Kent State: The Sixties Experience in the Words of Those Who Lived It* (New York: Times Books, 1987), 104–105.

36. Joseph Sax, "The Trial," *Michigan Daily*, June 4, 1968, reprinted in Resist Newsletter #13 (July 1968), 4, Box 28, BSP; Mitford, *The Trial of Dr. Spock*, 76–77; Ferber interview, June 16, 1998.

37. Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* (Urbana: University of Illinois Press, 1982), 294–296, 304, 324.

38. Maurice Isserman, *Which Side Were You on? The American Communist Party during the Second World War* (Middletown, CT: Wesleyan University Press, 1982), 247; Isserman, *If I Had a Hammer: The Death of the Old Left and the Birth of the New Left* (Urbana: University of Illinois Press, 1993), 7–9; Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Princeton, NJ: Princeton University Press, 1998), 196–200.

39. Peter L. Steinberg, *The Great "Red Menace": United States Prosecution of American Communists, 1947–1952* (Westport, CT: Greenwood Press, 1984), 235–248, 279.

40. The selection of attorneys occurred somewhat haphazardly. When the indictments first came down in January, the American Civil Liberties Union (ACLU) jumped at the chance to represent the Boston Five. Melvin Wulf, the national legal director for the ACLU, described the Spock indictments as "a major escalation in the administration's war against dissent" and announced that the ACLU would assemble a team of lawyers to handle the case on a *pro bono* basis. The organization quickly developed cold feet, however, and the national board quashed Wulf's plans to help the five indicted men. An official statement claimed that the case went beyond civil liberties largely because the organization had hitherto "assumed the draft laws were constitutional." The Civil Liberties Union of Massachusetts (CLUM), the state affiliate of the ACLU, broke ranks and offered its services to the defendants anyway. When affiliates in New York, California, and New Jersey also protested, the ACLU held another board meeting on March 2 and voted to support the defense of the Boston Five with legal and financial help. In later years this crisis came to be seen as a critical test for the ACLU—one that it ultimately passed—but at the time it hardly mattered to the defense. Lawyers for each of the defendants had been on the job for weeks, and the ACLU's final resolution of the matter made little impact. See Mitford, "The Role of the American Civil Liberties Union in the Case of the Boston Five," Appendix 6 in *The Trial of Dr. Spock*, 272–274;

remarks of Marcus Raskin at CLUM dinner in honor of the 25th anniversary of the Spock Trial, October 2, 1993, Park Plaza Hotel, Boston (see "Conspiracy! Bill of Rights Dinner," 1993 videotape made of the meeting, copyright Roger Leisner, Radio Free Maine).

41. Mitford, *The Trial of Dr. Spock*, 78–84; Ferber interview, June 16, 1998; William Sloane Coffin, interview with author, August 28, 1997.

42. See records of *U.S. v. Coffin et al.*; Ferber interview, June 16, 1998; Mitford, *The Trial of Dr. Spock*, 82.

43. Wall interview, June 26, 1998.

44. Croce, "The Boston Happening," *National Review*, June 18, 1968, 602; Wall interview, June 26, 1998.

45. Mitford, *The Trial of Dr. Spock*, 169; "Courthouse's Squeaky Wheels of Justice Recalled," *Boston Globe*, August 23, 1998, B4.

46. For example, one motion filed by William Homans, attorney for Michael Ferber, sought dismissal of the indictment: Ferber's speech at the Arlington Street Church "demonstrates in good faith and with innocent motives the defendant considers the operation of the Selective Service System to be in aid of and for the purpose of conduct of a war undeclared by Congress as required by Article I, Section 8 of the Constitution and to be in aid of and for the purpose of conduct of a war in violation of international law, treaties, and agreements having the force of law, namely, Article II, Paragraph 3 of the Charter of the United Nations, the Geneva Accords of 1954, and the principles of law arising from the so-called Nuremberg Trials, incorporated in the Geneva Convention of 1949. ..." In addition, Homans argued, "The failure and refusal of diverse selective service registrants to have in their personal possession at all times their registration certificates and their notices of classification ... is a form of discussion of a matter of vital public concern, namely the legality and morality of the war in Vietnam...." William Homans, "Defendant Michael Ferber's Motion to Dismiss Indictment," case files, *U.S. v. Coffin et al.*; see also similar motions filed by Leonard Boudin on behalf of defendant Spock.

47. Mitford, *The Trial of Dr. Spock*, 91; "Spock Trial Tests Protesters' Rights," *Boston Record American*, May 19, 1968, 33.

48. Mitford, *The Trial of Dr. Spock*, 97–99.

49. See transcripts of *U.S. v. Coffin et al.*, CR-68-1, vol. 2, 36, National Archives, Waltham, MA; Mitford, *The Trial of Dr. Spock*, 96–134; Daniel Lang, "The Trial of Dr. Spock," *The New Yorker*, September 7, 1968, 48.

50. "Closing Argument to the Jury by Mr. Wall," *U.S. v. Coffin et al.*, CR-68-1, transcript of trial, vol. 18, 93, 96, 98–100.

51. To be fair, it should be noted that all of the defendants in the Spock trial took the stand to testify about their actions and their "state of mind"

(against the advice of some of the lawyers); by contrast, the Chicago defendants chose not to testify.

52. *U.S. v. Coffin et al.*, CR-68-1, transcript of trial, vol. 9, 37; "Coffin Outlines Protest Goals," *Boston Globe* (Evening edition), May 31, 1968, 6; Mitford, *The Trial of Dr. Spock*, 139.

53. "Overt Act #6, Statement before the Department of Justice by the Rev. William Sloane Coffin, Jr." in Jessica Mitford, *Trial of Dr. Spock*, 269–272.

54. Coffin interview, August 28, 1997.

55. Wall interview, June 26, 1998.

56. Lang, "The Trial of Dr. Spock," 53.

57. Zaroulis and Sullivan, *Who Spoke Up?*, 173; see also Matthews, "Spock Trial Was a Timid Affair," 1, 4: "The proceedings were slowly paced and made little splash in the news after the first few days;" see also Mitford, *The Trial of Dr. Spock*, 204: "Nationwide, newspaper coverage of the trial had been slim." On the press and the Vietnam War, see Clarence Wyatt, *Paper Soldiers: The American Press and the Vietnam War* (New York: Norton, 1993). On the press and the antiwar movement, see Melvin Small, *Covering Dissent: The Media and the Anti-Vietnam War Movement* (New Brunswick, NJ: Rutgers University Press, 1994); and Todd Gitlin, *The Whole World Is Watching: Mass Media in the Making and Unmaking of the New Left* (Berkeley: University of California Press, 1980).

58. Michael Ferber, e-mail to author, June 12, 2001.

59. *U.S. v. Coffin et al.*, CR-68-1, transcript of trial, vol. 18, 108–109, 113, 118.

60. *U.S. v. Coffin et al.*, CR-68-1, transcript of trial, vol. 17, 84, 89, 116–118; Mitford, *The Trial of Dr. Spock*, 182–184.

61. *U.S. v. Coffin et al.*, CR-68-1, transcript of trial, vol. 17A, 56–58; Mitford, *The Trial of Dr. Spock*, 196–200.

62. "Spock, 3 Others Guilty; 1 Acquitted," *Boston Globe*, June 15, 1968, 1; "Mistaken Identity for Raskin?" *Boston Globe*, June 15, 1968, 3; Mitford, *The Trial of Dr. Spock*, 196–206. Certainly the propensity of Justice Department officials and the prosecution to confuse Raskin with Arthur Waskow, his partner at the Institute for Policy Studies, helped Raskin's case.

63. Sidney Zion, "Spock's Conviction Sharpens the Issue of Dissent," *New York Times*, June 16, 1968, E10; Gordon Haskell, "The Spock Conviction: What Happens Next?," *Dissent* 15 (September–October 1968): 382–383; Matthews, "Spock Trial Was a Timid Affair," 1, 4; Jerry Rubin letter to Mitch Goodman, *New York Review of Books*, April 10, 1969, 41–42; Berrigan quoted in Michael Friedland, *Lift Up Your Voice Like a Trumpet: White Clergy and*

the Civil Rights and Antiwar Movements, 1954–1973 (Chapel Hill: University of North Carolina Press, 1998), 206; Spock quoted in Matthews, "Spock Trial Was a Timid Affair," 4.

64. Matthews, "Spock Trial Was a Timid Affair," 4; Maier, *Dr. Spock*, 314; Zaroulis and Sullivan, *Who Spoke Up?*, 173; Ferber interview, June 16, 1998.

65. Beverly Woodward, "Vietnam and the Law: The Theory and Practice of Civil Challenge," *Commentary* 46 (November 1968), 75–86.

66. Soon after the trial ended, Judge Ford called John Wall and Paul Markham to his chambers to discuss sentencing. Ford told the two prosecutors that he wanted to be sure that the Justice Department intended to recommend prison sentences for the convicted men. He did not say why but made it clear that suspended sentences would not be acceptable in this case. Wall informed the judge that he planned to meet with Ramsey Clark on the matter. Wall and Markham (the United States Attorney) agreed that the defendants should get some prison time.

Not everyone agreed, however. Solicitor General Erwin Griswold, for one, encouraged Clark to act with restraint. Clark himself believed (in spite of his own doubts about the war and the draft) that Selective Service laws had to be upheld, and the Spock trial did that. Punishment, though, stood as a separate issue, and Clark maintained that the government and the law "should act with extreme sensitivity" in deciding it, "not with vengeance or harshness." He felt strongly about this, particularly in cases in which the defendants "acted from moral conviction." In a 1998 interview, Clark compared the Spock trial to the hearings then being held by the Truth and Reconciliation Commission in South Africa. "Whether right or wrong, [the Spock defendants] acted from concern for others," he said. "A just or decent law doesn't punish people for that." Instead, Clark explained, like South Africa's Truth and Reconciliation Commission, the courts should "insist on accountability" and should reveal the truth. After that, he said, "You don't seek vindictive punishment, you seek reconciliation." In the Spock trial, Clark explained, "The conviction vindicated the law ... [but] this country ought to be greater and stronger than to feel you send somebody like that to prison. They not only weren't a threat to us in any way, they were our hope."

In a two and one-half hour meeting in Washington before the sentencing, Clark explained his philosophy on punishment in the Spock case to Wall and Markham. He asked Wall to recommend suspended sentences to Ford and even offered to talk to the judge himself if Wall preferred. But Wall accepted the assignment, and when he returned to Boston he delivered the news to the judge. Before Wall could even finish telling Ford that the department would recommend suspended sentences, the judge bellowed, "I don't want to hear anything

from anybody!" Clark also sent a letter to Ford asking him to hand down suspended sentences, but when the sentencing date arrived, Ford would not accept, and the government did not make a formal sentencing recommendation. Wall interview, June 26, 1998; Memo to Ramsey Clark from Solicitor General Erwin Griswold, July 2, 1968, Personal Papers of Ramsey Clark, Box 123, LBJL; Clark interview, January 6, 1998; Clark interview, April 29, 1998 (South Africa reference occurred in April 29 interview). Ford's insistence that the government not ask for leniency is corroborated in an FBI memo that quotes Joseph Cella saying that Ford "let it be known that he did not want to have the government ask for probation, suspended sentence, or any other leniency;" DeLoach to Gale, July 8, 1968, Spock FBI files.

67. "Spock, 3 Others Sentenced to 2 Years," *Boston Globe* (Evening Edition), 1, 3; Mitford, *The Trial of Dr. Spock*, 208–209.

68. *U.S. v. Coffin et al.*, 416 F.2d 165 (1st Cir. 1969); or see "Excerpts from the Two Opinions in the Spock Case," *New York Times*, July 12, 1969, 12.