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Selective Service or Prosecution for the Vocal Nonregistrants--First Amendment and Equal Protection: Wayte v. United States, 105 S. Ct. 1524 (1985)

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CASENOTES

FIRST AMENDMENT AND EQUAL PROTECTION—SELECTIVE SERVICE OR PROSECUTION FOR THE "VOCAL" NONREGISTRANTS?

Wayte v. United States, 105 S. Ct. 1524 (1985).

I. INTRODUCTION

In *Wayte v. United States*,[1] the Supreme Court[2] held that the United States government's passive enforcement policy, under which the Department of Justice prosecuted only those young men who reported themselves, or who were reported by others, as violators of the law requiring them to register with the Selective Service System, constituted neither selective prosecution nor violated the defendant's right to free speech. The Supreme Court concluded that the defendant had failed to show that the passive enforcement policy had the discriminatory effect and the discriminatory purpose required for a successful selective prosecution claim.[3] The Court also concluded that the defendant, who had publicly stated his opposition to registration with the Selective Service, could not demonstrate that the policy created an unjustified limitation upon his first amendment right to free speech.[4]

II. FACTUAL SUMMARY

On July 2, 1980, President Carter issued a Presidential Proclamation[5] requiring male citizens born during 1960 to register with

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[1] 105 S. Ct. 1524 (1985).

[2] Justice Powell delivered the Court's opinion. Justice Marshall, joined by Justice Brennan, dissented.

[3] 105 S. Ct. at 1532.

[4] *Id.* at 1534.

[5] Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980) (hereinafter cited as Proclamation No. 4771), *reprinted in* 50 U.S.C. App. § 453 at 233-34 (1982). President Carter issued the proclamation pursuant to his statutory authority, the Military Selective Ser-

the Selective Service System.[6] Although required to register, David Alan Wayte did not do so. Instead, on August 4, 1980, Wayte wrote letters to the President and the Selective Service declaring that he did not intend to register.[7]

The Selective Service adopted a passive enforcement policy whereby it would investigate and prosecute only those nonregistrants brought to its attention.[8] This pool of reported violators included those men who reported themselves to the government, like Wayte, and those men who were reported by third parties.[9] On June 17, 1981, the Selective Service sent letters to suspected violators.[10] This letter explained the duty to register, requested that the addressee comply by filling out an enclosed registration form, and warned of criminal prosecution for continued non-compliance.[11] Wayte received the letter, but did not respond.[12]

In July 1981, the Selective Service turned over to the Department of Justice the files of 134 men, including Wayte, identified through the passive enforcement system.[13] The Department of Justice referred the names of those nonregistrants still required to reg-

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vice Act, ch. 625, 62 Stat. 605 (1948) (codified as amended at 50 U.S.C. App. § 453(a) (1982)). Section 453(a) provides in pertinent part:

> [I]t shall be the duty of every male citizen of the United States, . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. App. § 453(a).

6 Males born in 1961 were to register during the week of July 28, 1980. Those born in 1962 were to register during the week of January 5, 1981. Males born after January 1, 1963 are to register within 30 days before or after their eighteenth birthday. Proclamation No. 4771, *reprinted in* 50 U.S.C. App. § 453, at 233.

Although one registering under the Military Selective Service Act might say he is "registering for the draft," no one currently is being drafted in the United States. "The United States requires only that young men *register* for military service while most other major countries of the world require actual service." 105 S. Ct. at 1527 n.1 (emphasis in original).

7 In his first letter to the Selective Service, Wayte wrote, "I have not registered for the draft. I plan never to register. I realize the possible consequences of my action, and I accept them." 105 S. Ct. at 137, n.2. Wayte's second letter to the Selective Service stated in part: "Well, I did not register, and still plan never to do so, but thus far I have received no reply to my letter, much less any news about your much-threatened prosecutions." *Id.*

8 *Id.* at 1528.

9 *Id.*

10 *Id.*

11 *Id.* Punishment for failure to register is "imprisonment for not more than five years or a fine of not more than $10,000," or both. 50 U.S.C. App. § 462(a), *amended by* 50 U.S.C.A. App. § 462(a) (West Supp. 1985).

12 105 S. Ct. at 1528.

13 *Id.*

ister to the F.B.I. for additional investigation.[14] The United States Attorney for the district in which each nonregistrant in this group resided was notified of these investigations.[15]

The Justice Department did not immediately begin prosecutions.[16] Instead, the Department established what became known as the "beg" policy.[17] Under this policy, United States Attorneys were first required to notify the suspected nonregistrants that unless they registered within a specified time, the Department would begin prosecution procedures.[18] The Department's policy was to notify each nonregistrant that criminal investigation had actually begun but would be terminated if the nonregistrant would register prior to indictment.[19] The United States Attorney for the Central District of California sent such a letter to Wayte on October 15, 1981.[20] Wayte again failed to respond.[21]

In December 1981, the Justice Department imposed a moratorium on efforts to indict nonregistrants.[22] In January 1982, President Reagan established a grace period, allowing nonregistrants to register without penalty until February 28, 1982.[23] Wayte did not register during the grace period.[24]

The Justice Department recognized that the passive enforcement system would lead to prosecutions of "a large sample of persons who object on religious and moral grounds and persons who publicly refuse to register."[25] The Department also recognized that each nonregistrant prosecuted under the passive system would probably allege that his prosecution was "in retribution for the nonregistrant's exercise of his first amendment rights."[26] Because

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14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 Memorandum of July 16, 1981 from David J. Kline, Senior Legal Advisor, Protection of Government Operations, General Litigation and Advice Section, to Lawrence Lippe, Chief, Department of Justice, Criminal Division, General Litigation and Advice Section, *reprinted in* Joint Appendix to Briefs at 248, Wayte v. United States, 105 S. Ct. 1524 (1985).

20 105 S. Ct. at 1528.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 Memorandum of June 30, 1982 from Assistant Attorney General, Criminal Division, D. Lowell Jensen, to F. Henry Habight II, Special Assistant to Attorney General William French Smith, *reprinted in* Brief for Appellee at 5-6, United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983).

26 Memorandum of March 17, 1982 from Lawrence Lippe, Chief, Department of Justice, Criminal Division, General Litigation and Legal Advice Section, to D. Lowell Jen-

Social Security records could not provide current addresses for the thousands of nonregistrants, the Selective Service informed the Justice Department that it could not develop an accurate identification system for some time.[27] Until that time, the Justice Department would have to continue under the passive enforcement system.[28]

The Justice Department resumed prosecution procedures under the passive enforcement system in June 1982.[29] On June 28, Wayte declined requests to register during an interview with F.B.I.

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sen, Assistant Attorney General, Criminal Division, *reprinted in* Joint Appendix to Briefs at 301, Wayte v. United States, 105 S. Ct. 1524 (1985).

In a July 9, 1982 memorandum to United States Attorneys, Assistant Attorney General D. Lowell Jensen acknowledged that because the initial prosecutions would be of men publicly refusing to register, the passive enforcement system would raise "thorny selective enforcement claims." United States v. Wayte, 549 F. Supp. 1376, 1381-82 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *aff'd*, 105 S. Ct. 1524 (1985).

27 105 S. Ct. at 1529, 1534.

28 *Id.* at 1529. On December 1, 1981, Congress amended 50 U.S.C. App. § 462, adding subsection(e), which states:

> The President may require the Secretary of Health and Human Services to furnish to the Director [of Selective Service], from records available to the Secretary, the following information with respect to individuals who are members of any group of individuals required by a proclamation of the President under § 3 [§ 453] to present themselves for and submit to registration under such section: name, date of birth, social security account number, and address. Information furnished to the Director by the Secretary under this subsection shall be used only for the purpose of the enforcement of this Act.

50 U.S.C. App. § 462(e) (1982).

The district court, which dismissed the indictment against Wayte, believed that the Selective Service had the ability to identify nonregistrants shortly after Wayte's indictment on July 22, 1982. The district court, Judge Hatter, quoted from a statement prepared by Thomas K. Turnage, Director of the Selective Service System, for presentation on July 28, 1982 to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee. "General Turnage stated that '[i]n August, we start realizing the results of a more active compliance program with the ultimate goal of identification of all non-registrants. This program involves matching our Selective Service registrant files with files of the Social Security Administration.'" United States v. Wayte, 549 F. Supp. 1376, 1381 (C.D. Cal. 1982).

The United States' brief on the petition for writ of certiorari refuted the district court's statement.

> Although arrangements were made with the Department of Health and Human Services for use of Social Security data by June 1982, it turned out that current addresses of nonregistrants could be obtained only from the Internal Revenue Service. The IRS declined to divulge that information, believing that disclosure would violate 26 U.S.C. 6103 . . . .
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> Once it became clear that "active" enforcement of the registration law could not depend on the use of social security data, Selective Service began negotiations with state departments of motor vehicles for the names and addresses of eligible men in driver license files. The first referrals of non-registrants by Selective Service to the Department of Justice arising from that system occurred in February 1983.

Brief for the United States on Petition for Writ of Certiorari at 7-8 n.4, Wayte v. United States, 105 S. Ct. 1524 (1985).

29 Brief for the United States at 7, Wayte v. United States, 105 S. Ct. 1524 (1985).

agents.[30] A grand jury indicted Wayte on July 22, 1982 for knowingly and willfully failing to register with the Selective Service, in violation of the Military Selective Service Act.[31]

III. Procedural History

David Wayte moved the district court to dismiss his indictment on grounds of selective prosecution.[32] Wayte argued that because all of the nonregistrants indicted to date were "vocal" opponents of registration,[33] the Justice Department had selected Wayte and the others for prosecution based on the exercise of their first amendment rights.[34] Wayte "sought to subpoena Presidential Counsellor Edwin Meese III, Secretary of Defense Caspar Weinberger, Selective Service Director Thomas Turnage, and Assistant Attorney General D. Lowell Jensen."[35] Wayte also sought to discover internal documents of the Selective Service, the Justice Department, the Presidential Military Manpower Task Force, and the White House Staff.[36]

After a hearing, District Judge Hatter granted Wayte's discovery request.[37] The government complied in part with the discovery order, but refused to comply with the remainder, asserting execu-

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30 105 S. Ct. at 1529.

31 *Id.* Wayte's indictment was for violation of sections 3 and 12(a) which correspond, as amended, to 50 U.S.C. App. § 453 and 50 U.S.C. app. § 462(a), *amended by* 50 U.S.C.A. App. § 462(a) (West Supp. 1985). *See supra* note 5 for pertinent text of § 453(a). Section 462(a) provides in part that "[any person] who . . . evades or refuses registration or service in the armed forces or any of the requirements of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished . . . ." For a description of the punishment provided in § 462(a) for failure to register, see *supra* note 11.

32 Wayte also urged the district court to dismiss the indictment because the government had refused to comply with the court's discovery order. In addition, Wayte argued that the Selective Service's registration regulations and Presidential Proclamation No. 4771 "were illegally promulgated and, therefore, invalid." 549 F. Supp. at 1378.

33 The district court used 500,000 as a "conservative figure" for the total number of nonregistrants. *Id.* at 1379. The Director of Selective Service, Thomas K. Turnage, stated during a congressional hearing on July 28, 1982 that there were 674,000 total nonregistrants. *Oversight Hearing on Selective Service Prosecutions before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 97th Cong., 2d Sess. 10 (1982). Only sixteen men, all self-reported nonregistrants opposed to registration, were indicted under the passive enforcement system before that system was replaced with an active one. *See* 105 S. Ct. at 1529 n.3.

34 *See* 549 F. Supp. at 137-80.

35 Brief for the United States at 10, Wayte v. United States, 105 S. Ct. 1524 (1985).

36 *Id.*

37 Judge Hatter conducted this first hearing on September 30, 1982 in order "to determine whether the defendant was entitled to an evidentiary hearing on his claim of selective prosecution." 549 F. Supp. at 1379.

tive privilege.[38] After an evidentiary hearing on the selective prosecution claim,[39] the court ordered the government to produce certain documents and Mr. Meese. The government declined to do so and requested that the district judge dismiss the indictment in order to allow an appeal.[40]

On November 15, 1982, the district court dismissed the indictment.[41] The court held that Wayte had established a prima facie case of selective prosecution which the government had failed to rebut.[42] The court concluded that a defendant's selective prosecution claim must pass a two-pronged test in order to establish a prima facie case.[43] A defendant must prove that "others similarly situated generally have not been prosecuted for conduct similar to that for which the defendant was prosecuted" and that "the Government's discriminatory selection of defendant for prosecution was based on impermissible grounds such as race, religion or exercise of the defendant's first amendment right of free speech."[44]

The court held that Wayte had met the first requirement by showing that of the thousands of nonregistrants, all those prosecuted were vocal opponents of registration.[45] The court reasoned

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38 *Id.* at 1383.

39 The pretrial evidentiary hearing on the selective prosecution claim took place on October 7, 1982. At the hearing, David J. Kline, Senior Legal Advisor in the General Litigation and Legal Advice Section, Criminal Division, Department of Justice, and Richard Romero, the Assistant U.S Attorney prosecuting Wayte, testified for the government. The government submitted the affidavits of Jensen, Turnage and Edward Frankle, former Associate Director of Selective Service. *Id.* at 1382.

40 *Id.* at 1379. "The government respectfully declined to comply [with the district court's production order] and suggested that the court dismiss the indictment in order to allow an appeal to be pursued with respect to the validity of the sweeping discovery ordered by the court." Brief for the United States at 13, Wayte v. United States, 105 S. Ct. 1524 (1985).

41 549 F. Supp. at 1391. The district court granted the defendant's motion to dismiss with prejudice based on its finding of selective prosecution. *Id.*

42 In the October 29th order directing the government to produce Mr. Meese to testify, the court also found that the defendant had established a prima facie case of selective prosecution. 549 F. Supp. at 1378 n.1.

Because the government refused to comply with the order, it could not rebut that finding. According to the court, the refusal "raise[d] serious questions as to whether the Government ha[d] pursued this case in good faith." *Id.* at 1383.

43 549 F. Supp. at 1380 (citing United States v. Scott, 521 F.2d 1188 (9th Cir.), *cert. denied*, 424 U.S. 955 (1975) and United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974)). *See also* Annot., 45 A.L.R. FED. 732 (1979).

44 549 F. Supp. at 1380 (citing *Scott*, 521 F.2d at 1188, and *Berrios*, 501 F.2d at 1207).

45 549 F. Supp. at 1381. The court stated: The court finds it hard to believe that the prosecutive arm of the Government, with access to Social Security records, could not locate any nonregistrants other than those who were vocal in their opposition to draft registration." *Id.* The district court and Supreme Court may have ultimately reached opposite results in the case because the former believed the government could have implemented an active enforcement system much earlier, while the latter believed that

that Wayte had satisfied the second requirement for three reasons. The court first noted that "an enforcement procedure that focuses upon the vocal offender is inherently suspect . . . ."[46] Second, the court pointed out that the government knew that the passive enforcement system would raise "thorny selective prosecution claims."[47] Finally, "[t]he involvement of Mr. Meese and the Presidential Military Manpower Task Force in prosecutorial decisions creates . . . a strong inference of impropriety with regard to the Government's motive in seeking the prosecution of this defendant . . . ."[48] Once the defendant had established a prima facie case, the court held that the burden of proof shifted to the government.[49] The court dismissed the case because the government failed to bear that burden.[50]

The Court of Appeals for the Ninth Circuit reversed.[51] The court of appeals applied the same two-pronged test used by the district court, but concluded that Wayte had not satisfied the second requirement.[52] Wayte met the first requirement by showing that all nonregistrants indicted to date, out of thousands of nonregistrants, were vocal opponents of registration.[53] The court of appeals, however, held that Wayte had failed to establish a case of selective prosecution because "Wayte ha[d] not shown that he was selected from the larger group [of all nonregistrants] *because of* his exercise of his constitutional rights."[54] The court admitted that Wayte's evidence and internal government documents did show that the government was aware that the passive enforcement system would result in prosecutions of vocal nonregistrants, who would then probably make selective prosecution claims.[55] Nevertheless, the court of appeals

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the Selective Service had made honest efforts to bring on line the active system as early as possible. *See* 105 S. Ct. at 1534; *supra* note 28.

46 549 F. Supp. at 1381 (quoting United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972)).

47 549 F. Supp. at 1382 (quoting Memorandum of July 9, 1982 from D. Lowell Jensen, Assistant Attorney General, Criminal Division, to United States Attorneys).

48 549 F. Supp. at 1382.

49 *Id.*

50 *Id.* at 1391. The court also dismissed the indictment on the separate grounds that Presidential Proclamation No. 4771 was invalidly promulgated. *Id.*

51 710 F.2d 1385 (9th Cir. 1983).

52 *Id.* at 1387.

53 *Id.*

54 *Id.* (emphasis added). Judge Schroeder dissented. She believed that the passive enforcement policy "was designed to punish only those who had communicated their violation of the law to others." 710 F.2d at 1389 (Schroeder, J., dissenting). In her view there was no "doubt that Wayte [had] established that [his] prosecution was impermissibly based upon his exercise of first amendment rights." *Id.*

55 710 F.2d at 1387.

concluded that "the district court's finding of selective prosecution was clearly erroneous."[56]

IV. The Supreme Court Opinion

After the court of appeals reversed the district court's finding of selective prosecution, the Supreme Court granted certiorari on the selective prosecution issue.[57] The Supreme Court affirmed the deci-

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56 *Id.* at 1388. The court of appeals approved of two justifications for the passive enforcement policy that the government offered. First, the government pointed out that the identities of other nonregistrants were not known. *Id.* The district court had said that "[t]he inference is strong that the Government could have located non-vocal non-registrants, but chose not to." 549 F. Supp. at 1381. The court of appeals declined to draw the district court's inference and accepted the government's first explanation. 710 F.2d at 1388.

The government's second explanation was that vocal nonregistrants had expressed their willful violation of the law. The court of appeals accepted this as a permissible motive "in making prosecutorial decisions." *Id.* Judge Schroeder, in her dissent, rejected this explanation. She pointed out that a nonregistrant's refusal to register when offered the opportunity during the government's "beg" procedures established the nonregistrant's willful violation of the law. *Id.* at 1390 (Schroeder, J., dissenting).

The court of appeals accepted the government's explanations for the passive enforcement policy and thus held that the government had not based the policy on impermissible grounds. The Supreme Court would later also accept these two explanations while upholding the policy against Wayte's first amendment challenge. *See* text accompanying *infra* notes 79-83.

57 Wayte v. United States, 104 S. Ct. 2655 (1985)(granting certiorari limited to the first question in the petition). The petitioner's first question was: "May the United States validly investigate and prosecute for refusal to register with the Selective Service only those individuals who are selected pursuant to an enforcement program designed to identify vocal opponents to draft registration?" Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit at i, Wayte v. United States, 105 S. Ct. 1524 (1985).

The majority was thus correct when it refused to decide whether Wayte was entitled to discover government documents regarding his selective prosecution claim, an issue discussed by the dissent, because that issue "was neither raised in the petition for certiorari, briefed on the merits, nor raised at oral argument." 105 S. Ct. at 1530 n.5.

The Court granted certiorari because of the importance of the selective prosecution issue and because of a conflict between the circuits on that issue. In United States v. Eklund, 733 F.2d 1287 (8th Cir. 1984)(en banc), the court of appeals held that the nonregistrant had failed to show that the government had based its prosecution of him on an impermissible ground—his right of free speech. 733 F.2d at 1295. Although the court assumed that Eklund had shown he was singled out for prosecution from the thousands of non-vocal nonregistrants, because the second requirement for a selective prosecution claim was not met, the court upheld Eklund's conviction. In United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983), the court of appeals reversed the defendant's conviction for failure to register. *Id.* at 1048. The court concluded that the defendant was entitled to an evidentiary hearing on his claim of selective prosecution.

After the Court's decision in *Wayte*, the Court resolved the conflict by granting certiorari in *Schmucker*. The Court vacated the judgment of the Court of Appeals for the Sixth Circuit and remanded for consideration in light of *Wayte*. United States v. Schmucker, 105 S. Ct. 1860 (1985).

sion of the court of appeals.[58]

The Court first noted that a prosecutor in our criminal justice system "retains 'broad discretion' as to whom to prosecute."[59] The Court stated that there are "substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute."[60] The court wrote, however, that constitutional constraints prevent a prosecutor from basing his decision on race, religion, or the exercise of constitutional rights.[61]

The Court, applying "ordinary equal protection standards,"[62] first addressed Wayte's selective prosecution claim. In order to establish selective prosecution, the Court stated that Wayte must "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."[63] Thus, the Court applied the same two-pronged test applied by the district court and the court of appeals. The Court concluded that Wayte had failed to show that the passive prosecution system had had a discriminatory effect upon vocal nonregistrants.[64] The Court examined "the pool of potential prosecutees"[65] and the pool of defendants and concluded that those nonregistrants "similarly situated" to Wayte were only those who were known to the government, not nonregistrants whom the government could not identify at the

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58 *Wayte*, 105 S. Ct. at 1535.

59 *Id.* at 1531.

60 *Id.*

61 *Id.* (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))). The *Oyler* decision was the first and only previous Supreme Court decision concerning the selective prosecution defense. In *Oyler*, the defendant was prosecuted after his third felony conviction under West Virginia's habitual criminal statute. The defendent alleged that he had been selectively prosecuted, and thus denied the equal protection of law guaranteed by the Constitution. *Oyler*, 368 U.S. at 454. The defendant demonstrated that of the six men in his county potentially subject to prosecution as habitual offenders, only he was sentenced under the statute. *Id.* at 454-55. The Court rejected the selective prosecution claim, stating that "[e]ven though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 456.

The various circuits used this language while developing the two-pronged test later applied to Wayte's claim by the district court, the court of appeals, and used here by the Supreme Court.

62 105 S. Ct. at 1531 (citing *Oyler*). The Court noted that "[a]lthough the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component." *Id.* at 1531 n.9. The Court cited Bolling v. Sharpe, 347 U.S. 497 (1954), the District of Columbia companion case to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

63 105 S. Ct. at 1531.

64 *Id.* at 1532.

65 Justice Marshall used this term in his dissent. The majority adopted the term while examining the dissent's arguments and reasoning in footnote 10 at 1532.

time.[66]

The Court cited the effects of the Justice Department's "beg" policy as evidence of the lack of discriminatory effect upon the indictees as members of the pool of potential prosecutees:

> The Government did not prosecute those who reported themselves but later registered. Nor did it prosecute those who protested registration but did not report themselves or were not reported by others .... The Government, on the other hand, did prosecute people who reported themselves or were reported by others but who did not publicly protest. These facts demonstrate that the Government treated all *reported* nonregistrants similarly.[67]

Thus, although both the district court and the court of appeals had concluded that Wayte had met the first requirement of the two-pronged test, the Supreme Court ruled that Wayte had failed to show a discriminatory effect.

The Court then examined Wayte's evidence of discriminatory purpose.[68] The Court concluded that Wayte had also failed to demonstrate that the government had intended a discriminatory result.[69] The Court admitted, as the court of appeals had, that Wayte's evidence revealed that the government was aware that the passive enforcement system would result in prosecutions of vocal nonregistrants who would likely make selective prosecution claims.[70] The Court wrote that " 'discriminatory purpose' implies more than intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[71]

The Court next addressed Wayte's argument that the passive enforcement policy violated his first amendment right to free speech.[72] The Court noted that Wayte's conduct included speech

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66 *Compare* 105 S. Ct. at 1542-43 (Marshall, J., dissenting) *with* 105 S. Ct. at 1532 n.10.

67 105 S. Ct. at 1532 (emphasis added).

68 105 S. Ct. at 1532. Because Wayte's selective prosecution claim had not met the first requirement of the test, the Court's discussion of the second requirement was unnecessary.

69 *Id.*

70 *Id. See supra* note 76 and accompanying text.

71 *Id.* (quoting Personnel Admin. of Massachusetts v. Fenney, 442 U.S. 256, 279 (1979)). The Court's quotation omitted footnotes, citations and several words in the original text. The Court indicated these omissions with ellipses.

72 105 S. Ct. at 1532-34. Although Wayte had not challenged the selective enforcement policy directly on first amendment grounds before the lower courts, his brief to the Supreme Court contained arguments almost wholly based on first amendment analysis. *See generally* Brief for the Petitioner, Wayte v. United States, 105 S. Ct. 1524 (1985). *Cf.* 105 S. Ct. at 1539 n.1 (Marshall, J., dissenting).

and non-speech elements[73] and applied a four-part test.

First, the regulation must be "within the constitutional power of the Government."[74] Second, it must further "an important or substantial governmental interest."[75] Third, "the governmental interest . . . [must be] unrelated to the suppression of free expression."[76] Finally, "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[77] The Court dismissed the first and third requirements without discussion because Wayte did not claim that the passive enforcement system failed to satisfy them.[78]

The Court examined the three reasons offered by the government to show that the passive enforcement policy furthered a "substantial governmental interest" and thus satisfied the second requirement. The Court accepted the government's argument that the passive policy allowed the government "to identify and prosecute violators without further delay."[79] The Court agreed that the "passive enforcement program thus promoted prosecutorial efficiency."[80] The Court also agreed with the government's argument

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[73] *Id.* at 1533 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)). In *O'Brien*, the Court upheld a congressional amendment to the Military Selective Service Act making it a crime to knowingly destroy or mutilate a draft card. O'Brien had burned his draft card in protest of the government's policies in Vietnam. 391 U.S. at 370. The Court upheld the law, now 50 U.S.C. App. § 462(b)(3), under first amendment challenge. The Court stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

Because the passive enforcement policy was a regulation with incidental limitations on first amendment freedoms, the policy would be justified only if it met each of four requirements originally set out in *O'Brien*. The Court has used this test on several occasions. *See, e.g.*, United States v. Albertini, 105 S. Ct. 2897 (1985)(defendant's conviction for re-entering a military base to make a protest, after being barred from the base, upheld because his exclusion did not violate the first amendment); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)(protective order preventing newspaper from publishing information about the plaintiffs obtained through pretrial discovery in a defamation action against the newspaper did not offend the first amendment); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S 789 (1984)(city ordinance prohibiting the posting of signs on public property did not violate the first amendment rights of group supporting a candidate for city council); Procunier v. Martinez, 416 U.S. 396 (1974)(the California Department of Corrections' regulations regarding censorship of prisoner mail unconstitutionally restricted the free speech of the prisoners and their correspondents and could not be justified).

[74] 105 S. Ct. at 1533 (quoting *O'Brien*, 391 U.S. at 377).

[75] *Id.* (quoting *O'Brien*).

[76] *Id.* (quoting *O'Brien*).

[77] *Id.* (quoting *O'Brien*).

[78] 105 S. Ct. at 1533.

[79] *Id.* at 1534.

[80] *Id.*

that Wayte's letters were helpful in establishing his intentional violation.[81] Finally, the Court accepted the argument that prosecuting visible nonregistrants promotes general deterrence.[82] Thus, the Court concluded that the passive enforcement policy did further a substantial governmental interest.[83]

The passive enforcement policy also met the fourth requirement that a regulation be no broader than necessary. Noting the difficulties that the Selective Service had in acquiring names and current addresses for an active enforcement system, the Court wrote that "[p]assive enforcement was the only effective interim solution available . . . ."[84] Because the passive enforcement policy had met all four requirements, the Court held that the policy withstood Wayte's first amendment challenge.[85]

Justice Marshall, joined by Justice Brennan, dissented. Justice Marshall argued that the issue before the Court was "whether Wayte ha[d] earned the right to discover Government documents relevant to his claim of selective prosecution."[86] The Court could not properly decide the substantive issues, Marshall argued, until Wayte had the opportunity to support his arguments with the testimony and documents that Marshall concluded Wayte was entitled to discover.[87] Justice Marshall believed Wayte was entitled to discovery because he had established a prima facie case of selective prosecution.[88] The court of appeals had erred in reversing the district court, Marshall wrote, because the district court had not abused its

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81 *Id.*

82 *Id.*

83 *Id.* at 1533-34.

84 *Id.* at 1534.

85 *Id.* at 1534-33. Before concluding the opinion, the Court made an observation about the implications of Wayte's first amendment argument. The Court wrote that Wayte's argument concerned self-reporting rather than passive enforcement. The Court pointed out that if a court should accept such an argument, a criminal could use the first amendment as a shield against prosecution. A criminal could commit a crime, report himself as a protesting violator of the law in question, and thus obtain immunity. The Court wrote that "[t]he First Amendment confers no such immunity from prosecution." *Id.* at 1534.

86 *Id.* at 1535 (Marshall, J., dissenting).

87 *Id.* (Marshall, J., dissenting).

88 Justice Marshall adopted his three-part test for a prima facie case of selective prosecution from Castaneda v. Partida, 430 U.S. 482 (1977), a case involving an equal protection challenge to grand jury selection procedures. Wayte would establish a prima facie case, Marshall wrote, by showing: 1) "that he is a member of a recognizable, distinct class;" 2) "that a disproportionate number of this class was selected for investigation and possible prosecution;" and 3) "that this selection procedure was subject to abuse or otherwise not neutral." 105 S. Ct. at 1541 (citing *Castaneda*, 430 U.S. at 494). Marshall concluded that Wayte had shown sufficient evidence of each requirement. *Id.* at 1542.

discretion by finding that Wayte had made out a prima facie case.[89] Marshall thus focused on the elements of the prima facie case and the appropriate standard of appellate review.[90]

Finally, Justice Marshall argued that the Court had erred in analyzing the merits of the selective prosecution claim. The majority had focused on the government's treatment of known nonregistrants in holding that the government had not discriminated against the indicted nonregistrants as members of the known group of nonregistrants.[91] Justice Marshall reasoned that the Court should have focused upon the fact that the passive system identified for prosecution only those nonregistrants who had exercised their first amendment rights.[92] Marshall agreed, however, that Wayte would need to show discriminatory intent in order to invalidate the passive enforcement system on equal protection grounds.[93]

V. ANALYSIS

The Supreme Court's decision establishes no new test, having adopted the traditional two-pronged equal protection test for analyzing the selective prosecution claim and the *United States v. O'Brien* test[94] for analyzing the first amendment challenge. Nevertheless, the decision does break some new ground.

THE EQUAL PROTECTION CHALLENGE

First, applying the traditional two-pronged test, the Court held that Wayte had failed to show that the passive enforcement system had a discriminatory effect on vocal nonregistrants.[95] Both lower courts held that Wayte had shown discriminatory effect,[96] but the Supreme Court disagreed.[97]

The Court reached this result because it refused to accept Wayte's contention that he and 674,000[98] other nonregistrants were similarly situated.[99] The lower courts had concluded that the pas-

89 105 S. Ct. at 1540 (Marshall, J., dissenting).

90 Justice Marshall believed the court of appeals had conducted de novo review of Wayte's claim, rather than looking solely at whether or not the district court had abused its discretion. 105 S. Ct. at 1540 (Marshall, J., dissenting).

91 *See supra* text accompanying notes 64-66.

92 105 S. Ct. at 1542-43 (Marshall, J., dissenting).

93 *Id.* at 1543.

94 391 U.S. 367, 377 (1968); *see supra* text accompanying notes 74-77.

95 105 S. Ct. at 1532.

96 549 F. Supp. at 1381; 710 F.2d at 1387.

97 105 S. Ct. at 1532.

98 *See supra* note 33.

99 *See supra* notes 64-67 and accompanying text.

sive enforcement system had a discriminatory effect based on the fact that all of the indicted nonregistrants were vocally opposed to the draft, while thousands of silent nonregistrants went unprosecuted.[100] The Court, however, preferred to characterize them not as "silent,"[101] but rather as "unreported," "unknown" or "temporarily unidentifiable" nonregistrants.[102] Wayte was not similarly situated to the thousands of nonregistrants, the Court reasoned, because he was a reported and known violator.[103]

The Court's statement of facts details the government's unsuccessful efforts to establish an active enforcement system prior to Wayte's indictment.[104] The Court, unlike the district court judge,[105] apparently viewed the government's efforts as reasonable and in good faith.[106] Had the Court believed, for example, the district court judge's statement that "[t]he inference is strong that the Government could have located non-vocal non-registrants, but chose not to,"[107] the Court might have decided in Wayte's favor.

Thus, the Court apparently assumed that when a law enforcement agency makes reasonable and good faith efforts to identify all violators of a particular law, the proper focus for the discriminatory-effect prong of the two-pronged test is upon the prosecutor's treatment of the known violators. A court need not take unknown violators into account in resolving a defendant's selective prosecution claim when the prosecuting authority's good faith efforts to identify all violators have failed. Because Wayte could not show that he had

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100 549 F. Supp. at 1391. *See also* 710 F.2d at 1387.

101 The Court stated that the term "vocal non-registrant" was "misleading insofar as it suggests that all those indicted had made public statements opposing registration. In some cases, the only statement made by the nonregistrant prior to indictment was his letter to the Government declaring his refusal to register." 105 S. Ct. at 1530, n.6. *Cf.* Brief for the United States at 25 n.18, Wayte v. United States, 105 S. Ct. 1524 (1985).

102 Although the Court never explicitly used any of these terms to refer to the so-called "silent" nonregistrants, the Court repeatedly used the word "reported" to refer to the nonregistrants identified by the passive enforcement system. *See* 105 S. Ct. at 1532.

103 *See supra* notes 64-67 and accompanying text.

104 *See supra* note 28 and accompanying text.

105 *See supra* note 45.

106 The Court implied this when it wrote:

> Although Selective Service was engaged in developing an active enforcement program when it investigated petitioner, it had by then found no practicable way of obtaining the names and current addresses of likely nonregistrants. Eventually, it obtained them by matching state driver's license records with Social Security files. It took some time, however, to obtain the necessary authorizations and to set up this system. Passive enforcement was the only effective interim solution available to carry out the Government's compelling interest.

105 S. Ct. at 1534 (footnote omitted).

107 549 F. Supp. at 1381.

been treated differently from other known nonregistrants, the existence of unknown nonregistrants could not establish discriminatory effect.

The Court, after finding that Wayte had failed to show discriminatory effect, nevertheless applied the second part of the traditional test for selective prosecution. The Court inquired whether the government's use of the passive enforcement system had a discriminatory purpose and concluded that it did not because Wayte had "not shown that the Government prosecuted him *because of* his protest activities."[108] The Court admitted that the government was aware of the probability that vocal nonregistrants would be prosecuted under the passive system.[109] The Court, however, distinguished the government's decision to knowingly proceed on a course of action "in spite of" adverse effects on a particular group from knowingly proceeding "because of" those adverse effects.[110]

Had the Court not made this distinction, it would have confused "discriminatory purpose" with mere knowledge of discriminatory effects. When a person acts with a purpose,[111] he deliberately acts to achieve a goal or objective. On the other hand, when one acts with knowledge of his action's effects, he may or may not be acting with those effects as his objectives. In the former instance he acts because of the action's effects; in the latter instance he acts, perhaps, in spite of those effects.

Confusion over the Court's definition of "discriminatory purpose" in the equal protection context results from the criminal and tort laws' presumption that a defendant *intended* his voluntary act.[112] The defendant's tortious or criminal intent is presumed when he knew the consequences of his act.[113] While defining "discriminatory purpose," the Court has explicitly rejected the common law's conceptions regarding intent. " 'Discriminatory purpose'. . . implies more that intent as volition or intent as awareness of

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108 105 S. Ct. at 1532.

109 *Id.* at 1530.

110 *Id.* The Court originally drew this distinction in Personnel Admin. of Massachusetts v. Feeney, 442 U.S 256, 279 (1979), cited by the Court. The Court of Appeals for the Ninth Circuit had already used the "because of" rationale when it rejected Wayte's claim that the government had employed the passive enforcement system for a discriminatory purpose. 710 F.2d at 1387 (citing United States v. Ness, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981)). *See supra* text accompanying note 34.

111 *See* BLACK'S LAW DICTIONARY 1112 (5th ed. 1979); WEBSTER'S THIRD NEW INTERNATIONAL DICTINARY 1847 (1966); 35A WORDS AND PHRASES "Purpose" (1963 & Supp. 1985).

112 *See Feeney*, 442 U.S. at 278.

113 RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 28 (1972).

consequences."[114]

The Court's "because of" definition for discriminatory purpose is especially appropriate when the Court subjects a prosecutor's decision-making to an equal protection analysis. If the Court were to hold that a prosecutor's knowledge of a prosecutorial policy's discriminatory effects constituted an impermissible discriminatory purpose, a perverse incentive would be created. Prosecutors would in effect be encouraged to avoid knowing or researching the effects of their own prosecutorial policies.[115] Ignorance of a policy's effects would be the simplest means of defending the policy against an equal protection challenge.

THE FIRST AMENDMENT CHALLENGE

Wayte first challenged the passive enforcement system on first amendment grounds in his brief to the Supreme Court.[116] Wayte argued that a showing of the government's discriminatory purpose was irrelevant to a proper "First Amendment analysis of the passive enforcement system's impact on protected expression."[117] Thus, Wayte was asking the Court to develop a new one-pronged test for selective prosecution claims based on the exercise of First Amendment rights.[118] Under the test Wayte proposed, once a court deter-

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114 *Feeney*, 442 U.S. at 279. Justice Marshall, joined by Justice Brennan, dissented in *Feeney* because of the Court's definition of discriminatory purpose. *Id.* at 281-86 (Marshall, J., dissenting). Justice Stewart, the writer of the majority opinion in *Feeney*, had earlier written that "awareness [of racial effects] is not, however, the equivalent of discriminatory intent." United Jewish Orgs. v. Carey, 430 U.S. 144, 180 (1977)(Stewart, J., concurring). Justice Powell joined Stewart's concurrence in *Carey* and the majority opinion in *Feeney*.

115 *But cf.* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS Standards 6.1 and 6.3 (1977)(imposing duties to develop a statement of "general policies to guide the exercise of prosecutorial discretion" and to "maintain sufficient [statistical] data to evaluate and monitor the performance of the [prosecutor's] office.")

Before the Court's decision in *Wayte*, one author wrote that "when the prosecutor has such knowledge [that other violators are not being prosecuted], or when such knowledge can be inferred, purposeful discrimination is more likely to be found." B. GERSHMAN, PROSECUTORIAL MISCONDUCT, § 4.3(c)(2) (1985)(footnotes omitted). After *Wayte*, this statement is apparently true only when the prosecutor knows, or should know through good faith efforts, who those other violators actually are.

116 *See generally* Brief for Petitioner, Wayte v. United States, 105 S. Ct. 1524 (1985).

117 Brief for Petitioner at 26, Wayte v. United States, 105 S. Ct. 1524 (1985).

118 Others have also suggested removing the discriminatory puropose (or motive) requirement from the test for selective prosecution. Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. (1984) Comment, *United States v. Wayte: The Big Chill on Vocal Draft Nonregistrants*, 69 NOTRE DAME L. REV. 102 (1984).

Defendants in the federal courts have brought hundreds of claims of selective prosecution based on their First Amendment rights. *See* Annot., 45 A.L.R. FED. 732 (1979) (cases far too numerous to cite here). The federal courts, however, have only upheld these claims in three cases, and in each case the court required the defendant to show

mined that a prosecutorial policy or system adversely affected those violators exercising their first amendment rights compared to those who remained silent, the court would strike down the policy without inquiring into the prosecutor's motive or intent.[119]

The Court never directly rejected Wayte's argument, but did so indirectly by refusing to adopt or formulate such a new test. The Court addressed the selective prosecution claim by applying the traditional two-pronged test.[120] The Court then applied the traditional *O'Brien*[121] balancing test to the first amendment challenge. Because the Court did not directly address the issue, all that the decision states on its face is that, under the circumstances before it, the Court was unwilling to remove the discriminatory purpose requirement from its equal protection analysis simply because the first amendment was involved. It is not clear how the Court would have held if the Court had found, as the lower lower courts had, that the passive system had a discriminatory effect on first amendment rights, but had then found no discriminatory purpose on the government's part.

Although the dissent discussed the standard used to decide when a defendant has established a prima facie case of selective prosecution and thus shifted the burden to the government, the majority refused to address the matter. The majority thus declined to lay down a rule as to when a defendant is entitled to discovery on his claim of selective prosecution. The majority's silence may be deemed tacit approval of the standards used by lower courts.[122]

The Court's opinion resolved the immediate dispute between the parties. The Court also resolved the conflict between the circuits regarding the use of the selective prosecution defense against indictments and convictions under the passive enforcement system

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discriminatory purpose in order to succeed with the claim. United States v. Falk, 479 F.2d 616 (7th Cir. 1973)(en banc); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

119 Brief for Petitioner at 26-31, Wayte v. United States, 105 S. Ct. 1524 (1985).

120 105 S. Ct. at 1531-32.

121 *See supra* text accompanying notes 74-77. This test balances the defendant's right to free speech with the government's interest in the regulation of the non-speech elements of that speech. The government's interest must be "important or substantial." United States v. O'Brien, 391 U.S. 367, 377 (1968).

122 The district court judge, applying the standard of United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978), required Wayte to "allege enough facts to take the question [of selective prosecution] beyond the frivolous stage." 549 F. Supp. at 1379. In order to shift the burden to the government, the district court judge required Wayte to further establish by evidence a prima facie case—discriminatory effect and purpose—of selective prosecution. *Id.* at 1382.

employed by the Selective Service and the Department of Justice.[123] Because the Selective Service now uses an active system to identify nonregistrants,[124] the Court did not need to make a broad decision concerning selective prosecution. With the handful of indictees identified through the passive system already in court, the Court could tailor its decision to the facts before it. Those indicted under the active system will not have available the selective prosecution defense thus, the Court had no reason to decide more than was necessary to resolve the case before it and the conflict between the circuits.

VI. CONCLUSION

The Court held that Wayte had not satisfied the first requirement of the selective prosecution test because Wayte was only similarly situated to nonregistrants whom the government had in fact identified. The Court thus correctly concluded that a court deciding a selective prosecution claim need not consider unknown violators when the prosecutor has made reasonable, good faith efforts to identify those violators. The Court also held that Wayte had not met the "discriminatory purpose" requirement of the selective prosecution test. Wayte had been unable to show that the government had developed or employed the passive enforcement system *because of* its adverse effects upon "vocal" nonregistrants. This decision is also correct, because to hold otherwise would confuse knowledge with purpose and encourage prosecutors to be ignorant of the effects of their prosecutorial policies.

The Court separately decided the first amendment issue. The Court refused to remove the "discriminatory purpose" requirement from its equal protection analysis merely because first amendment activity was involved. The Court thus avoided the absurd situation

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123 *See supra* note 57. The Court denied certiorari in *Eklund v. United States, Martin v. United States*, and *Sasway v. United States*, all reported at 105 S. Ct. 1864 (1985), immediately after its decision in *Wayte*. Eklund, Martin, and Sasway all raised selective prosecution claims.

124 Since early 1983 Selective Service has employed an "active enforcement" system to identify and locate non-registrants. This system utilizes Social Security records and state driver's license lists, as well as information from other federal and state sources. A suspected non-registrant is notified at least twice by letter of his duty to register; if he refuses to comply, Selective Service refers his name to the Department of Justice for investigation and possible prosecution. We are advised that, as of June 1984, a total of more than 160,000 names have been transmitted to the Department under the "active" system, and that 599 of these people have been selected at random for further investigation; to date, all such people who were subject to the registration requirement have elected to comply pursuant to the "beg" policy, and thus no prosecutions have been instituted.

Brief for the United States at 10, Wayte v. United States, 105 S. Ct. 1524 (1985).

where a criminal, by reporting his own crime, could use the first amendment as a shield against prosecution.

By the time of the Court's decision, the Selective Service System had abandoned the passive enforcement system and had adopted an active system for identifying nonregistrants. Because those indicted under the active system will be unable to make selective prosecution claims, Justice Powell wisely wrote a narrow opinion that decided the case before the Court, resolved the conflict between the circuits, and avoided unnecessarily broad pronouncements on selective prosecution.

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