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## First Amendment-Protection Expression-Selective Prosecution (Wayne v. United States)

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FIRST AMENDMENT—PROTECTED EXPRESSION—SELECTIVE PROSECUTION—*Wayte v. United States*

I. INTRODUCTION

In *Wayte v. United States*,<sup>1</sup> the Supreme Court held that the passive enforcement policy, whereby the Government prosecutes only those persons who report themselves or who are reported to the Selective Service as violators of the law, is constitutionally sound and does not constitute impermissible selective prosecution.<sup>2</sup>

The Supreme Court's decision in *Wayte* was its first pronouncement on the selective prosecution defense since in 1962 *Oyler v. Boles*.<sup>3</sup> The passive enforcement policy under scrutiny in *Wayte*, however, brought to the Court, for the first time ever, a claim of selective prosecution based on individual constitutional rights and selection by federal officials.

*Certiorari* was granted to *Wayte* by the Supreme Court because of differences among the Circuit Courts of Appeal in their assessment of selective prosecution claims brought in the context of the first amendment.<sup>4</sup> A majority of the circuits have applied a two part test under which the defendant must show disproportionate selection as well as a prosecutorial motive to punish or deter the exercise of first amendment rights.<sup>5</sup> Since these circuits have accepted a broad range of justifications for prosecutorial policies on nonspeech grounds, the motive test has

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1. *Wayte v. United States*, 470 U.S. 598 (1985).

2. Powell, J., delivered the opinion of the Court in which Burger, C.J., and White, Blackmun, Rehnquist, Stevens and O'Connor, JJ., joined. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined.

3. 368 U.S. 448 (1962). In *Oyler*, West Virginia's habitual criminal statute which mandated a life sentence upon the third conviction "of a crime punishable by confinement in a penitentiary" was at issue. Some repeat offenders did not receive the harsh sentence due to a lack of knowledge of their conviction history. *Oyler* argued that this lack of uniformity in treatment violated his right to equal protection under the laws.

4. *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir. 1983); *United States v. Wilson*, 693 F.2d 500, 503-4 (9th Cir. 1981); *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973); *United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974).

5. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

proved virtually impossible to meet.

This paper will attempt to show how under this approach, first amendment values have been superseded by the motive requirement. A brief historical analysis will demonstrate that the motive requirement is rooted in equal protection review of administrative action and has generally not been applied to first amendment claims. A minority of the circuits, however, have resolved the tension between the first amendment and the requirement to show motive by renouncing such a requirement.<sup>6</sup>

The Supreme Court majority required of Wayte a showing of impermissible governmental motivation in order to make a *prima facie* case of selective prosecution. The Court held that the case had properly been dismissed because this criterion had not been met. The procedural posture of the case, however, also merits attention. The proceeding had been halted at the discovery stage. The decision to dismiss, therefore, precluded the defendant from going forward in his attempt to establish a *prima facie* case. The dissent, on the other hand, determined that the defendant had made a showing sufficient to enable him to proceed with discovery in an effort to establish a *prima facie* case of selective prosecution.

## II. BACKGROUND

### A. *The Facts of the Case*

David Wayte, a nineteen year old philosophy student at Yale University,<sup>7</sup> fell within the class of young men required to register for military service.<sup>8</sup> Instead of registering, however, Wayte, in August of 1980, wrote to the Selective Service and to President Carter voicing his intent not to register.<sup>9</sup> This letter

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6. *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (selective prosecution defense made out without showing of motive); *United States v. Cammisano*, 546 F.2d 238 (8th Cir. 1976).

7. *N.Y. Times*, Sept. 11, 1985, at A18, col. 3.

8. Pursuant to his authority under sec. 3 of the Military Selective Service Act, 50 U.S.C. App. § 453, President Carter issued Presidential Proclamation no. 4771, 3 C.F.R. 82 (1981). This proclamation directed male citizens and certain male residents born in 1960 to register with the Selective Service System during the week of July 21, 1980.

9. *Wayte*, 470 U.S. at 601 n.2. Wayte's letter of Aug. 4, 1980 to President Carter stated, "I decided to obey my conscience rather than your law. I did not register for your draft. I will never register for your draft. . . . I realize the possible consequences of my action, and I accept them." *Id.* Wayte's second letter to the Selective Service stated:

was then placed in a Selective Service file of letters sent to the Service by men who either advised that they had not registered or were reported by others as having failed to register.<sup>10</sup> Due to the passive enforcement policy adopted by the Selective Service, this file constituted the only cases marked for investigation and potential prosecution.<sup>11</sup> In June of 1981, the Selective Service sent a letter to each of the men whose name appeared in the file apprising them of their duty to register and of the potential for prosecution. During the summer of 1981, a total of 285 names of men who did not register pursuant to this June letter were forwarded to the Department of Justice for investigation and potential prosecution.<sup>12</sup>

After screening the names of these nonregistrants, the Department of Justice forwarded them to the Federal Bureau of Investigation and to the appropriate United States Attorneys.<sup>13</sup> The Department of Justice then instituted a "beg" policy, encouraging these late registrants to register and assuring them that there would be no prosecution if they registered at that time.<sup>14</sup> The "beg" policy consisted of letters to the nonregistrants by the United States Attorneys and interviews with agents of the Federal Bureau of Investigation before prosecution began.

The Selective Service estimates that of the 9,039,000 men

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Last August I wrote to inform you of my intention not to register for the draft. . . thus far I have received no reply to my letter, much less any news about your much threatened prosecutions. I must interpret your silence as meaning that you are too busy or disorganized to respond to letters or keep track of us draft-age youth. So I will keep you posted of my whereabouts.

*Id.* Wayte also stated that he would be "travelling the nation . . . encouraging resistance and spreading the word about peace and disarmament" and could be reached at his home in Pasadena, California. *Id.*

10. *Id.* at 601.

11. *Id.*

12. Brief for the United States at 5, *Wayte*, 470 U.S. 598. The primary goal of the prosecution policy according to the Department of Justice was to encourage and facilitate registration, to conduct an initial round of well publicized prosecutions, and to implement a policy of leniency under which it would obtain voluntary compliance.

13. *Id.*

14. "The 'beg' policy was intended to afford nonregistrants a last opportunity to register in order to prevent prosecution and it neglected the fact that the Department was 'trying to do everything we can to avoid prosecution unless we're forced into it.'" *Id.* One Selective Service official stated that it was called the "beg" policy because the Department decided "to beg people to register before [it] prosecuted them." *Id.*

required to register, 674,000 did not.<sup>15</sup> On May 21, 1982, prosecution of nonregistrants began. When Wayte's case came before the district court, of the 674,000 men who had not registered, 13 men had been indicted.<sup>16</sup> All thirteen were vocal nonregistrants of the draft.

Petitioner asked the Supreme Court to dismiss his indictment, to be allowed to proceed with the evidentiary hearing on the selective prosecution claim, and for a ruling that the passive enforcement system constituted an impermissible content-based regulatory policy.<sup>17</sup> The issue, according to the petitioner, was whether the Selective Service may create a system whereby protected expression is the sole basis for investigation and prosecution of suspected nonregistrants.<sup>18</sup> Petitioner did not contend that not registering was itself protected under the first amendment.

The Government, wanting an indictment, asked the Court

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15. Brief for Petitioner at 5, *Wayte*, 470 U.S. 598. By design and in practice, the passive enforcement system selected for investigation only those who expressed opposition to the draft either publicly or by letter to government officials. As such, it was a content-based regulatory system focusing exclusively on protected political expression, thereby burdening the exercise of first amendment rights.

In response, the Government argued that the defendant was referred to the file merely because he brought himself to the attention of the Selective Service. Brief for United States at 12, *Wayte*, 470 U.S. 598.

16. *Wayte*, 470 U.S. at 604 n.3. "It is undisputed that the first 12 young men indicted for nonregistration were identified as a result of letters they had written to government officials." Brief for Petitioner at 31 n.19, *Wayte*, 470 U.S. 598.

By the fall of 1985, 18 active draft protesters had been prosecuted after making public their status as nonregistrants. At that time, about half of those draft resisters were put on probation, and six had been incarcerated for up to two and one-half years. All 18 of these indictments were obtained under the passive enforcement system, before the Government began to use drivers' licenses to locate nonregistrants. Galante, *Draft Protester is Sentenced to Six Months House Arrest*, Nat'l L.J., Sept. 23, 1985, at 4.

17. Brief for Petitioner at 17-20, *Wayte*, 470 U.S. 598. The petitioner argues that the content of his letters represents core political speech on public issues that "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Though the petitioner's proclamation of dissent from the law identifies him as a violator, his speech is not stripped of its fundamental character as constitutionally protected speech. Brief for Petitioner at 21, *Wayte*, 470 U.S. 598 (citing *Cohen v. California*, 403 U.S. 15, 26 (1971)).

18. "The question is not if the registration law is to be enforced, but how: Does exclusive use of a First Amendment trip-wire for investigation and prosecution impermissibly burden the exercise of protected rights?" Brief for Petitioner at 22, *Wayte*, 470 U.S. 598.

for a ruling that the selection of Wayte was not impermissible discrimination, that the selection did not violate the first amendment and that the Government properly used an executive privilege claim to withhold documents found by the district court to be discoverable.<sup>19</sup>

### B. Procedural History

In July of 1982, David Wayte was charged with knowingly and willfully not registering for the draft.<sup>20</sup> His case underwent a stormy trial proceeding. On September 27, the district court determined that Wayte had alleged facts, sufficient at this stage of the trial, to establish a "non-frivolous" showing of selective prosecution and was therefore entitled to an evidentiary hearing.<sup>21</sup>

In evaluating the defendant's showing of selective prosecution, the trial court used a two-prong test that was first designed to evaluate whether a *prima facie* case was established.<sup>22</sup> Hence, this standard was more stringent than the "non-frivolous" showing normally needed at this point in the proceedings. Nevertheless, the defendant was required first to show that others similarly situated generally had not been prosecuted for conduct similar to that for which the defendant was prosecuted.<sup>23</sup> The

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19. Brief for United States at 26-29, *Wayte*, 470 U.S. 598. The government asserted that petitioner was not impermissibly selected from among others similarly situated based on his first amendment rights. Those indicted shared a legitimate characteristic for distinguishing them: their violation was known to the government. The Government went on to say that a confession of a violation is not protected by the first amendment.

20. *United States v. Wayte*, 549 F. Supp. 1376, 1378 (1982).

21. *Id.* at 1379. The district court stated that in order to be granted an evidentiary hearing, the defendant must allege enough facts to take the question beyond the frivolous stage. See also *United States v. Erne*, 576 F.2d 212, 216 (9th Cir. 1978).

22. *Wayte*, 549 F. Supp. at 1380 (citing *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir.), *reh'g denied*, *cert. denied*, 424 U.S. 955 (1975); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)).

23. *Wayte*, 549 F. Supp. at 1380. The finding of this first prong depends upon how one defines "similarly situated vocal nonregistrants." The petitioner contends that the 13 individuals indicted were selected from among the 900,000 other nonregistrants on the basis of their letters to government officials and that these letters represent protected political speech. Brief for Petitioner at 13, *Wayte*, 470 U.S. 598. The Government asserted that the petitioner misconstrued the relevant universe for evaluating the selectivity of the "passive enforcement" system. The Government determined that 1000 men were reported to the selective service. Brief for Respondent at 14-15, *Wayte*, 470 U.S. 598.

court held that this first prong was met.<sup>24</sup> The second prong of the test required a showing that the Government's discriminatory selection of the defendant for prosecution was based on impermissible grounds, such as race, religion, or the exercise of the first amendment right to free speech.<sup>25</sup> This prong also was deemed to have been met. The court stated that, "[t]he inference is manifest that the defendant has been singled out for prosecution because he exercised his first amendment right to free speech."<sup>26</sup> The trial court also pointed out that in evaluating a selective prosecution claim, equal protection of the laws extends to the application of those laws, not merely their enactment.<sup>27</sup>

The day after the court's determination that Wayte's motion to dismiss the indictment on the ground of selective prosecution was "non-frivolous," a hearing was held as to Wayte's discovery requests.<sup>28</sup> A total of six hearings were held on the

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24. After discussing various memos sent by D. Lowell Jensen, Assistant Attorney General, Criminal Division, and General Thomas K. Turnage, Director of the Selective Service System, the district court said that "[t]he inference is strong that the Government could have located non-vocal nonregistrants, but chose not to. For example, nonregistrants could be located by using motor vehicle registration records in many states." 549 F. Supp. at 1381. In a letter to William French Smith on June 29, 1982, the Assistant Attorney General stated that the defendants identified only by way of the passive enforcement system "are liable to raise thorny selective prosecution claims." Brief for Petitioner at 5 n.9, *Wayte*, 470 U.S. 598.

25. *Wayte*, 549 F. Supp. at 1381 (citing *Steele*, 461 F.2d at 1152). *Steele* succeeded in showing selective prosecution of four individuals based upon their vocal opposition to census requirements. "[A]n enforcement procedure that focuses upon the vocal offender is inherently suspect since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right." *Steele* showed that there were six others who had not complied with the census and that the system would have revealed their names.

26. *Wayte*, 549 F. Supp. at 1382.

27. *Id.* at 1380 (citing *United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973)); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). In *Yick Wo*, the City of San Francisco made it illegal to operate a laundry without the permission of the board of supervisors unless the laundry was located in a brick or stone building. The law appeared fair on its face; the facts, however, showed that principally Chinese laundry operators were denied permission to continue using wooden facilities. Criminal enforcement of the law was, therefore, held illegal by the Supreme Court.

The court in *Falk* pointed out that though *Yick Wo* dealt with an abuse of discretion in the administration of a public ordinance by a city licensing board, "[t]he underlying principle has nevertheless been properly held to apply to the actions of prosecutors and police officials." 479 F.2d at 618.

28. *Wayte*, 470 U.S. at 616-19 (Marshall, J., dissenting).

discovery issue. Subsequent to these hearings, the court issued an order rejecting the Government's assertion of executive privilege and directing the Government to provide defendant with certain documents and testimonies requested by him.<sup>29</sup> The Government refused to comply with this October 29 order. On November 15, the district court filed an order and opinion dismissing Wayte's indictment.<sup>30</sup>

The court of appeals, in its review of the district court decision, required Wayte to show that others similarly situated had not been prosecuted and that the prosecution was based on an impermissible motive.<sup>31</sup> The appellate court found the first prong of the test to have been met. The court noted that of the more than 600,000 men who had not registered, twelve were indicted for failure to register, and all twelve were vocal nonregistrants.<sup>32</sup> Wayte, however, did not demonstrate the impermissible motivation needed to satisfy the second prong.<sup>33</sup> Selectivity in prosecution alone is not impermissible.<sup>34</sup> Petitioner, according to the court of appeals, must show that the selection was based deliberately on an unjustifiable prosecutorial motivation.<sup>35</sup> Given the fact that the identities of other violators were not known, the appellate court found that the Government had imposed a logical enforcement policy.<sup>36</sup> Nonregistrants like Wayte who had

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29. *Wayte*, 549 F. Supp. at 1378-79. In determining whether a claim of executive privilege was valid, the court used the standard announced in *United States v. Nixon*, 418 U.S. 683 (1974).

Applying the balancing test from *Nixon* to the facts, this court finds that the scales of justice tip decidedly in the favor of the defendant's right to review several of the documents which the court has inspected *in camera*. The Government's generalized assertion of a 'deliberative process' executive privilege must yield to the defendant's specific need for documents which this court has determined must be released to Mr. Wayte.

*Wayte*, 549 F. Supp. at 1378 n.1.

30. *Wayte*, 549 F. Supp. at 1391.

31. *United States v. Wayte*, 710 F.2d 1385, 1387 (citing *United States v. Ness*, 652 F.2d 890, 892 (9th Cir. 1980), *cert. denied*, 454 U.S. 1126 (1981)).

32. 710 F.2d at 1387.

33. *Id.*

34. *Id.* (citing *Oyler*, 368 U.S. 448, 456 (1962)). "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler*, 368 U.S. at 456. It should be pointed out that in *Oyler*, no intentional discrimination against the petitioner was alleged. In that case, *Oyler* attempted, by means of statistical evidence, to demonstrate that not all repeat offenders were given the harsher sentences.

35. 710 F.2d at 1387.

36. *Id.* at 1388. The court of appeals noted that the passive enforcement system was

expressed their intent not to register had made clear their willful violation of the law. Thus, no impermissible motives were implicated.<sup>37</sup>

The Supreme Court, acknowledging the importance of the issue and a division among the circuits, granted certiorari on the question of selective prosecution.<sup>38</sup> In a 7 to 2 decision, the Supreme Court upheld the court of appeals.

### III. PRECEDENTS

#### A. *The Roots of Selective Prosecution Analysis in Equal Protection Analysis*

The origins of the current approach to selective prosecution claims are to be found in *Yick Wo v. Hopkins*.<sup>39</sup> This case involved class discrimination based on race. Under a San Francisco ordinance, laundry businesses in wooden buildings were banned unless a permit was obtained from the Board of Supervisors. All but one of the white applicants received a permit; none of the 200 Chinese who applied received a permit. The ordinance, though valid on its face as a fire prevention regulation,

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intended as merely a temporary plan to be used until the Government could develop a more "active" enforcement system. The Government also claimed that the passive enforcement system was the only policy for which the Selective Service has authority and resources. Brief for United States at 7, *Wayte*, 470 U.S. 598. The Selective Service stated that they had problems obtaining current addresses through Social Security records and that efforts to obtain current addresses from the Internal Revenue Service failed because the Internal Revenue Service concluded that it was barred from disclosing such information by 26 U.S.C. § 6103. Brief for United States at 9, *Wayte*, 470 U.S. 598.

A law student working with the defense, however, demonstrated easy access to state driving license lists by calling four states at random and simply asking for them. 549 F. Supp at 1381 n.6. These lists could have been compared with the Selective Service's registration lists. In December of 1982, the Government implemented a new more "active" policy relying on state driving licenses, which had always been available for enforcement purposes. Brief for Petitioner at 10, *Wayte*, 470 U.S. 598.

37. The district court also dismissed *Wayte's* indictment on the ground that Presidential Proclamation 4771 had not complied with the requisite notice and publication requirements, and had therefore been improperly promulgated. The court of appeals reversed this finding, and the issue is now on appeal to the Supreme Court.

38. 470 U.S. at 607. Compare *United States v. Eklund*, 733 F.2d 1287 (8th Cir. 1984) (upholding criminal conviction under passive enforcement scheme), *cert. denied*, 471 U.S. 1003 (1985) with *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (ordering hearing on selective prosecution claim), *cert. granted and vacated*, 471 U.S. 1001 (1985); and *Wayte*, 710 F.2d 1385.

39. 118 U.S. 356 (1886).

was struck down as a denial of equal protection. The Court found that it was "applied and administered by public authorities with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . ."40

In *Snowden v. Hughes*, the Court applied the reasoning of *Yick Wo* to the administrative selection of individuals.<sup>41</sup> Since a decision to prosecute involves an executive action infused with broad discretion, the selective prosecution defense engenders judicial review of administrative action.<sup>42</sup> In *Snowden*, a Republican primary runner-up was not certified by the state election board, contrary to a state statute. Though stating that an individual could maintain an equal protection action, the Court rejected this particular claim because the plaintiff had not proven that the state proceeded with a hostile motive. Thus, there was no federal cause of action asserted since there had not been an "allegation of intentional or purposeful discrimination between persons or classes."<sup>43</sup>

In the case of *Oyler v. Boles*, the Court first considered a defense of selective prosecution in the context of criminal enforcement.<sup>44</sup> Oyler was prosecuted under the harsher of two recidivists statutes in West Virginia. He claimed that his prosecution was a denial of equal protection since not every repeat offender was prosecuted under the more severe habitual offender statute. The Court rejected Oyler's selective prosecution claim because he had not proven the nonprosecution of others similarly situated, and because he had not shown a hostile motive. The Court found that "[i]t was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>45</sup> Though the Court rejected the defense in *Oyler* and has never sustained such a defense, important dictum appearing in *Oyler* suggested that in a proper case the defense would be available.<sup>46</sup> Before *Wayte*,

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40. *Id.* at 373-74.

41. 321 U.S. 1 (1944).

42. Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144, 151 (1984)(hereinafter *Rethinking Selective Enforcement*).

43. 321 U.S. at 7.

44. 368 U.S. 448 (1962).

45. *Id.* at 456.

46. *Id.*

*Oyler* was the Court's last pronouncement on the selective prosecution defense.

*Oyler* dealt with an alleged selective prosecution by a state. Over the last two decades, it has been left to the lower courts to develop an analytical approach to those claims of selective prosecution which do not involve a racial or arbitrary classification. Courts of appeals have extended the selective prosecution defense to encompass prosecutions by federal officials as well as violations of individual constitutional rights.<sup>47</sup> The circuit courts' expansion of the selective prosecution defense, however, has remained within the structure of an equal protection approach. Though these cases do deal with federal violations of federal rights, "few courts have been able to see beyond the equal protection origins of the defense to apply the constitutional guarantee directly."<sup>48</sup>

An often cited and recent articulation of the need to show motive in an equal protection claim occurred in *Personnel Administrator of Mass. v. Feeney*.<sup>49</sup> The Court assessed a claim of denial of equal protection of the laws to women, based on a state Veterans Preference Statute granting lifetime preference to veterans for civil service positions. The plaintiff asserted that the law operated much to the advantage of men, given the proportion of women to men within the class of veterans. The Court upheld the state law because it was not shown that it reflected a state purpose to discriminate on the basis of sex.<sup>50</sup> The Court reaffirmed that for purposes of equal protection, though disproportionate impact on a group due to a state statute may reflect an invidious discrimination, "purposeful discrimination is the condition that offends the United States Constitution."<sup>51</sup>

### B. *The Traditional First Amendment Analysis*

Thus far, in order to sustain an action for selective prosecution, a defendant must prove that there was selection and that

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47. See, e.g., *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

48. *Rethinking Selective Enforcement*, *supra* note 42, at 153.

49. 442 U.S. 256 (1979).

50. *Id.* at 277.

51. *Id.* at 274 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

the selection was intentional and stemmed from hostility to the defendant or his exercise of constitutional rights. This hostile motive requirement has been applied to the defense of selective prosecution in the context of the first amendment.<sup>52</sup> Motive, however, is not a requirement for a successful challenge to Government action in any other first amendment context.<sup>53</sup> In fact, the Court has often stated that good motives will not save legislation that impinges on first amendment rights.<sup>54</sup> Thus, the tension between the two-pronged selective prosecution test and first amendment doctrine is evident.

The Supreme Court held that an improper intent is not required when governmental action impinges on first amendment liberties. In *NAACP v. Alabama*,<sup>55</sup> the NAACP had refused to comply with a court ordered disclosure of membership lists. The objective of the court order was to ascertain the extent of NAACP activity within Alabama in order to assess the organization's compliance with the Alabama foreign corporation law.<sup>56</sup> On appeal, the order was struck down by the Supreme Court. The Court noted that the stated purpose of the government's action appeared to be unrelated to first amendment rights. Nevertheless, as Justice Harlan wrote in the majority opinion, "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."<sup>57</sup> In the 1983 case of *Minneapolis Star & Tribune*,<sup>58</sup> the Court reaffirmed the *NAACP v. Alabama* rule when it struck down a use tax on large users of paper and ink. The Court stated:

We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit

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52. *United States v. Wilson*, 630 F.2d 500 (9th Cir. 1981); *Steele*, 461 F.2d 1148; *Falk*, 479 F.2d 616.

53. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (the Court struck down a use tax on large users of paper and ink); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *United States v. O'Brien*, 391 U.S. 367 (1968).

54. *Minneapolis Star*, 460 U.S. at 585; *NAACP*, 357 U.S. at 555.

55. 357 U.S. 449.

56. *Id.* at 451.

57. *Id.* at 463.

58. 460 U.S. 575.

legislative intent is not the *sine qua non* of a violation of the First Amendment. . . . We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.<sup>59</sup>

In *NAACP v. Claiborne Hardware Co.*,<sup>60</sup> 17 white merchants filed suit in a Mississippi state court for losses arising from a seven year boycott of their businesses by blacks seeking racial equality and integration. It is important to note that even in a civil lawsuit between private parties, the application of state law, as determined by the courts, constitutes state action under the fourteenth amendment. In *Claiborne*, therefore, a complete prohibition of a nonviolent boycott designed to effectuate rights guaranteed by the Constitution itself was held not to be justified by a state's power to regulate economic activity.<sup>61</sup> The Court held that the participants of the boycott were precluded from being held liable for losses incurred for the boycott was politically motivated and designed to effectuate rights guaranteed by the Constitution itself.<sup>62</sup> Hence, the existence of an activity protected by the first amendment imposes restraints on the states' regulatory power.

### C. Prosecutorial Discretion

In the context of selective prosecution, judicial deference to prosecutorial discretion must also be considered. In *Marshall v. Jerrico, Inc.*,<sup>63</sup> the Court compared the due process requirements applicable to a regional administrator, whose functions resemble those of a prosecutor, and those applicable to a judge. The Court stated in its discussion of criminal prosecutors:

Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement pro-

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59. *Id.* at 592-93.

60. 458 U.S. 886 (1982).

61. *Id.* at 914.

62. *Id.* at 920.

63. 446 U.S. 238 (1980). In *Marshall*, an assistant regional administrator in the Department of Labor's Employment Standards Administration assessed a total fine of \$103,000 in civil penalties for various violations of the child labor provisions of the Fair Labor Standards Act, and concluded that such violations were willful.

cess. . . . Prosecutors need not be entirely "neutral and detached." In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law.<sup>64</sup>

Thus, prosecutorial discretion may afford the segue between first amendment analysis in which motive is irrelevant when infringement of constitutional rights is at stake, and an equal protection analysis in which motive plays a more significant role.

#### IV. DEVELOPMENTS AMONG THE CIRCUITS

Pursuant to the *Oyler* dictum,<sup>65</sup> nearly every judicial circuit makes a selective prosecution defense available, and uses a two-part test to assess the claim. In *United States v. Berrios*, the Second Circuit articulated a test often referred to by those circuits requiring that the defendant demonstrate a hostile motive on the part of the prosecutor.<sup>66</sup>

To support a defense of selective or discriminatory prosecution, the defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he had been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.<sup>67</sup>

Part one of the *Berrios* formulation contains the threshold requirement that selection has taken place. Even this part of the test, however, is not uniformly applied. There are essentially three standards that are applied. Some courts require proof only that other violators were not prosecuted.<sup>68</sup> Other circuits require proof that other violators were not prosecuted, and that the government know at least generally that there were other viola-

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64. *Id.* at 248 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972)).

65. See *supra* notes 44-48.

66. 501 F.2d 1207 (2d Cir. 1974).

67. *Id.* at 1211.

68. *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1983).

tors.<sup>69</sup> In reference to the *Wayte* decision, the government knew, based on studies of the Selective Service itself, that there were many other nonregistrants. The most liberal articulation of this prong of the analysis of unconstitutional selection criteria states: "based upon impermissible grounds such as . . . the exercise of constitutional rights."<sup>70</sup> This formulation at least suggests the possibility that the defense may rest on good faith yet constitutionally unsound distinctions. At the other end of the spectrum, there are circuits which require a showing of personal hostility on the part of the prosecutorial decisionmaker. For instance, a court may require that "reprisal"<sup>71</sup> or a "desire to penalize"<sup>72</sup> be shown.

There are, however, two procedural requirements that have become part of the selective prosecution law which soften the impact of the severe motive requirement. First, a defendant may establish a *prima facie* case by alleging improper motive and then introducing evidence raising doubt as to the prosecutor's good faith.<sup>73</sup> This entitles the defendant to shift the burden of proof to the prosecutor. Second, the defendant may be aided if he is able to allege facts sufficient to take the selective prosecution defense "past the frivolous stage."<sup>74</sup> In this instance, the defendant is entitled to court ordered discovery of documents related to prosecutorial policy in order to prepare for an evidentiary hearing on the claim.

The Government may rebut the defendant's showing of either a *prima facie* case or an allegation of a nonfrivolous claim by putting forth justifications for prosecuting the vocal offender. Prosecutors may suggest that prosecuting vocal offenders has a strong deterrent effect since these offenders are more likely to command the public's attention.<sup>75</sup> Another rationale defers to

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69. *Wayte*, 710 F.2d at 1387-88.

70. *Rethinking Selective Enforcement*, *supra* note 42, at 147 (citing *United States v. Wilson*, 639 F.2d 500, 503 (9th Cir. 1981)); *United States v. Murdock*, 548 F.2d 599, 699 (5th Cir. 1977). A defendant has never been reported to have succeeded under this test.

71. *United States v. Ojala*, 544 F.2d 940, 944 (8th Cir. 1975).

72. *United States v. Peskin*, 527 F.2d 71, 86 (7th Cir. 1975).

73. *See, e.g., Falk*, 479 F.2d 616.

74. *See, e.g., Wilson*, 630 F.2d at 503; *Berrios*, 501 F.2d at 1212.

75. *See, e.g., United States v. Hazel*, 696 F.2d 473 (6th Cir. 1983); *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978). One may ask, however, whether this justification betrays an attitude that willingly overlooks the right to express one's views and the value to society derived therefrom.

the need to allocate scarce funds, the lower cost of finding vocal offenders thereby justifying the prosecutor's policy.<sup>76</sup> The third justification is based on the *mens rea* requirement of our criminal jurisprudence; if a defendant has made his dissident views known,<sup>77</sup> it is easier to establish a knowing violation.<sup>78</sup> These three justifications can dispose of a selective prosecution defense.

Many circuits have been faced with cases in which the claim of impermissible prosecution was based on an exercise of first amendment rights. One commentator has stated, "a court faced with the juxtaposition of the values served by these justifications . . . and the values invoked by the first amendment . . . might understandably pause before rejecting the selective prosecution defense."<sup>79</sup>

In *United States v. Falk*, the Seventh Circuit determined that petitioner's allegations of selective and discriminatory treatment, based on his exercise of first amendment rights, entitled him to discovery of certain Government documents in preparation for the defense of his charge of improper governmental purpose in prosecution.<sup>80</sup> Falk was indicted on two counts of failing to possess either a draft registration or a draft classification card. During the period of 1967-70, the Government did not prosecute those nonregistrants who turned their draft cards over to various officials in the Justice Department, the Selective Service, or the local draft boards. Those protesters, however, who participated in public demonstrations, for example, by burning their cards, were prosecuted. The Court stated that "[t]here can be no doubt but that the expression of views opposing this country's foreign policy with regard to Vietnam is protected by the First Amendment."<sup>81</sup>

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76. See, e.g., *Wayte*, 549 F. Supp. at 1384.

77. 50 U.S.C. §462 (1982 & Supp. III 1985).

78. See, e.g., *Wilson*, 639 F.2d 500 (the court deemed a tax protestor to have met the willful requirement); see also *United States v. Eklund*, 551 F. Supp. 964 (S.D. Iowa 1982)(because the purpose of a passive enforcement policy was to distinguish the willful from the innocent nonregistrants, the selective prosecution defense was rejected).

79. *Rethinking Selective Enforcement*, *supra* note 42, at 148-49; see also *Wayte*, 549 F. Supp. at 1385, *rev'd*, 710 F.2d 1385.

80. 479 F.2d 616. Falk was also indicted for failing to submit to induction into the Armed Forces, but this count was not an issue on this appeal.

81. *Id.* at 620 (citing *Schacht v. United States*, 398 U.S. 58 (1970)).

The circumstances of *Falk* overcame the presumption of good faith in prosecutorial conduct.<sup>82</sup> The Court responded to the threat posed by selective prosecution on the part of the government, and asserted that a decision to punish Falk due to his draft counseling activities and his choice to assert his right as a conscientious objector would corrode the prosecutorial system and the necessary trust in such a system. The Court stated,

The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances. Moreover, a prosecution under such circumstances would be barred by the equal protection clause, since the Government employs an impermissible classification when it punishes those who complain against police misconduct and excuses those who do not.<sup>83</sup>

Falk's previous judgment was vacated and the cause was remanded; the court of appeals determined that Falk was entitled to a hearing on the offer of proof.

In *United States v. Steele*, the Ninth Circuit, the circuit that first convicted Wayne, reversed a conviction and allowed a defendant to proceed with proof of his discriminatory prosecution claim when selection stemmed from first amendment activities.<sup>84</sup> The defendant, Steele, had publicly protested the census as an unconstitutional invasion of privacy. Steele was later prosecuted for not answering the census under 13 U.S.C. § 221(a), whereas at least six others known to the appropriate government officials to have not completed the census form but who did not protest were not indicted. The Court found a "questionable emphasis" on public protesters, and stated that "[a]n enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a

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82. *Falk*, 479 F.2d at 621-23. For instance, Falk's status as a conscientious objector was rejected; few indictments came from refusal to carry draft cards; various high officials were involved with Falk's prosecution; the U.S. Attorney was aware of Falk's draft counseling activities and had stated that such activities caused trouble for him.

83. *Id.* at 623 (quoting *Dixon v. District of Columbia*, 394 F.2d 966, 968 (1968)).

84. *Steele*, 461 F.2d 1148 (9th Cir. 1972).

constitutionally protected right.”<sup>85</sup> The Court concluded that Steele had demonstrated a purposeful discrimination on the part of the census officials. Having made a prima facie case of selective prosecution, Steele had thus shifted the burden to the Government to justify its prosecutorial scheme.

A Sixth Circuit case, decided shortly after the circuit court opinion in *Wayte*, allowed the selective prosecution defense. This case, *United States v. Schmucker*, created great uncertainty among the circuits, thereby prompting the Supreme Court to grant certiorari to *Wayte* to settle the dispute.<sup>86</sup> The *Schmucker* Court articulated its test as follows:

[A]n indictment must be dismissed if (1) the defendant has been “singled out” while other similarly situated violators are left untouched, and (2) the defendant’s selection for prosecution was “based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights.” A defendant is entitled to an evidentiary hearing if he makes a preliminary showing that there is a legitimate issue concerning the government’s conduct under this standard.<sup>87</sup>

The *Schmucker* Court characterized the issues presented by the selective prosecution claim based on the passive enforcement system differently than the Ninth Circuit did in *Wayte*. The Sixth Circuit, in assessing the group selected for prosecution, looked to the total group—all 674,000—of nonregistrants.<sup>88</sup> In this perspective, the question presented became, “whether a prosecutorial policy violates the first amendment if it is directed solely at the ‘vocal nonregistrant’ who openly objects to the law on religious, moral or political grounds.”<sup>89</sup> The Court answered this question in the affirmative, thereby entitling *Schmucker* to an evidentiary hearing.

In *Schmucker*, the Court accepted the Government’s char-

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85. *Id.* at 1152.

86. *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983). Like *Wayte*, *Schmucker* was a draft nonregistrant who wrote to his congressman and the Department of Justice asserting his intention not to register for the draft pursuant to President Carter’s proclamation.

87. *Id.* at 1048-49 (citing *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983)).

88. *Schmucker*, 721 F.2d at 1049.

89. *Id.*

acterization of the defendant's letter to public officials as a confession, thereby condoning criminal prosecution. The Court, however, went on to compare the prosecutorial selection policy and the justification given to the Alien and Sedition Acts of the 1790's. "[A] law punishing only draft nonregistrants who publicly confess by vocalizing their disagreement with the government's policies would violate the principle that 'Congress shall pass no law abridging free speech.'"<sup>90</sup> The Court then asserted that merely because criticism of governmental policy is accompanied by or perceived as a confession does not strip such criticism of its first amendment protections. Hence, *Schmucker* was deemed entitled to a full evidentiary hearing on his selective prosecution claim.

#### IV. THE DECISION

A majority of the Supreme Court in *Wayte* affirmed the court of appeals holding that petitioner put forth neither a selective prosecution claim nor violation of his first amendment rights.<sup>91</sup> The Court relied first on the principle that the Government has broad discretion as to whom to prosecute.<sup>92</sup> As long as the prosecutor has probable cause to believe that the accused violated a statute, the decision to prosecute rests within the prosecutor's discretion.<sup>93</sup> The Court explained that the judiciary is ill suited to review the prosecutor's decision to prosecute. Justice Powell, writing for the majority, expressed concern that a chilling effect on law enforcement would result if the Court were to conduct an examination of the basis of a prosecution. For instance, such examination would delay and increase the cost of a criminal proceeding. Further, the effect of an inquiry into prosecutorial motive would undermine prosecutorial efficiency

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90. *Id.* at 1050.

91. *Wayte v. United States*, 470 U.S. 598, 606-07 (1985).

92. *Id.* at 607.

93. *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). The broad discretion is exercised by prosecutors pursuant to article II of the Constitution in which it is stated that the executive power encompasses the power to see that laws are faithfully executed. Brief for United States at 19, *Wayte*, 470 U.S. 598. The role of the judiciary within this perspective is composed of "the very limited role of secondarily measuring the primary decision of the prosecutor against constitutional standards." *Id.* at 24 (quoting *United States v. Johnson*, 577 F.2d 1304, 1307-08 (5th Cir. 1978)).

and effectiveness.<sup>94</sup>

There are, however, constitutional constraints on executive discretion and selectivity in the enforcement of criminal laws.<sup>95</sup> Specifically, the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification;"<sup>96</sup> including the exercise of statutory and constitutional rights.<sup>97</sup> There must, however, "be a showing of clear and intentional discrimination."<sup>98</sup>

The district court acknowledged that there is a presumption that prosecution for violation of criminal laws is undertaken in good faith.<sup>99</sup> If the defendant, however, alleges intentional discrimination and presents sufficient facts as to place the prosecutor's motive in question, the presumption is defeated and the burden shifts to the Government to establish good faith.<sup>100</sup> The trial court found the Government's argument that the "passive enforcement" policy was the sole means of locating known violators of the draft registration law disingenuous.<sup>101</sup> The court referred to the fact that the Government could have used, as at least one alternative method, motor vehicle registration records and stated that "the inference was strong that the Government could have located non-vocal nonregistrants, but chose not to."<sup>102</sup> The Supreme Court, however, found that the breadth of prosecutorial discretion properly encompassed David Wayte's circumstances.<sup>103</sup>

The Court deemed it appropriate to judge selective prosecu-

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94. *Wayte*, 470 U.S. at 607-08.

95. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

96. *Id.*, quoted in *Wayte*, 470 U.S. at 608.

97. *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

98. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)(quoting *Gundling v. Chicago*, 177 U.S. 183, 186 (1900)).

99. 549 F. Supp. at 1383.

100. *Id.* (citing *United States v. Falk*, 479 F.2d 616, 620-21 (1973)). Jeffrey Falk was found guilty of failing to possess a selective service registration card and a draft classification card. On appeal, the circuit judge held that particular circumstances of prosecution for failing to possess either a registration or classification card placed a burden on the Government of proving nondiscriminatory enforcement of the law. Falk was, therefore, entitled to be heard on his claim that the prosecution was actually for the purpose of chilling his exercise of first amendment rights, and to punish him for participation in a draft-counseling organization.

101. 549 F. Supp. at 1381.

102. *Id.*

103. *Wayte v. United States*, 470 U.S. at 607.

tion claims according to ordinary equal protection standards.<sup>104</sup> These standards require the petitioner to show that the passive enforcement policy had not only a discriminatory effect, but was motivated by a discriminatory purpose.<sup>105</sup>

According to the Supreme Court majority, Wayte had not shown that the enforcement policy selected people based on any impermissible grounds, such as their speech.<sup>106</sup> "The facts demonstrate that the Government treated all reported nonregistrants similarly."<sup>107</sup> Thus, the Court did not find the "passive enforcement" policy to engender a discriminatory effect. Wayte would have had to have shown that the "passive enforcement" policy deliberately selected nonregistrants for prosecution on the basis of their speech. The "beg" policy instituted by the Department of Justice, however, precluded such a showing.<sup>108</sup> What the petitioner did show, according to the majority, was that those eventually prosecuted reported themselves to the Selective Service as having violated the law; those who protested the registration, but did not report themselves as violators were not even investigated.<sup>109</sup> "Indeed, those prosecuted, in effect, selected themselves for prosecution by refusing to register after being reported and warned by the Government."<sup>110</sup>

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104. The fifth amendment does not contain an equal protection component. The approach to fifth amendment equal protection claims, however, has been "precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* at 608 n.9 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

105. Equal protection of laws has come to mean that a policy involving discriminatory impact was pursued because of that effect, not merely in spite of it. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

106. *Wayte*, 470 U.S. at 609.

107. *Id.* at 610. The dissent takes issue with the majority's position on this point, and will be discussed later. *See infra* text accompanying notes 140-62.

108. *Id.*

109. *Id.* Petitioner pointed out, however, that even vocal protesters who were not within the class required to register were referred for investigation; for example, an 80 year old minister, and several women. This evidence seems to contradict the majority's assertion that only those who reported themselves as having violated the law were prosecuted, and supports petitioner's claim that the inevitable effect of the system was to prosecute those who objected to the registration on religious and moral grounds, and those who publicly refused to register. Brief for Petitioner at 23, *Wayte*, 470 U.S. 598.

110. *Wayte*, 470 U.S. at 610.

By simply registering after they had reported themselves to the Selective Service, nonregistrants satisfied their obligation and could thereafter continue to protest registration. No matter how strong their protest, registration immunized them from prosecution. Strictly speaking, then, the passive enforcement system

In the dissenting opinion, Justice Marshall, with whom Justice Brennan joined, asserted that petitioner's claim did not involve discrimination among known violators.<sup>111</sup> The claim asserted, according to Marshall, was that the system by which the Department of Justice defined the class of possible prosecutees was designed to discriminate against those who exercised their first amendment rights.<sup>112</sup>

The Government's position, however, with which the majority agreed, is that to focus on the 13 indicted as the group selected for prosecution, instead of all of the reported nonregistrants, misconceives the relevant context for evaluating the selectivity of the passive enforcement program.<sup>113</sup> Of the 1000 reported nonregistrants,<sup>114</sup> only 13 did not avail themselves of the opportunity to bring themselves within the law. The 13 indicted shared a characteristic that separated them from the other nonregistrants: they were known to the Selective Service as probable violators of the registration law. They were, therefore, not similarly situated to those not chosen for indictment, and this quality afforded a proper basis of selection for prosecution. From this perspective, the defendant must prove that the Government failed to prosecute persons it knew had violated the laws. Equal protection of the laws, therefore, would not be violated where the failure to proceed against another was due to lack of knowledge of their offenses.<sup>115</sup>

According to the majority, Wayte had not met his burden of proof with regard to either prong of the two-part test which the

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penalized continued violation of the Military Selective Service Act, not speech.  
*Id.* at 611 n.12.

111. *Id.* at 630 (emphasis in original).

112. *Id.* "If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool." *Id.*

113. Brief for United States at 26, *Wayte*, 470 U.S. 598.

114. *Id.* at 10, Oversight Hearing.

115. *Id.* at 27 (quoting *Oyler v. Boles*, 368 U.S. 448, 456):

It is not sufficient to allege nothing more than a failure to prosecute others because of a lack of knowledge of their . . . offenses. . . . Under this standard, in order to prove that others similarly situated generally had not been prosecuted . . . the defendant must show that the government knew of a number of violations of the statutes involved and chose to prosecute only those who spoke out against the laws.

Court applied. He had shown neither discriminatory effect, nor Government intent to produce such a result.<sup>116</sup> Petitioner would have to show that the Government prosecuted him because of his protest activities, in order to prove discriminatory purpose.<sup>117</sup> The Court acknowledged that petitioner had shown that the Government was aware that its enforcement policy would result in prosecution primarily of vocal objectors who would bring selective prosecution claims. The Court noted, however, "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."<sup>118</sup>

Thus, petitioner had not stated a cause of action for selective prosecution under the equal protection standards used by the Court to assess such a claim. He had shown neither discriminatory effect on those reported as nonregistrants, which is required under the Court's definition of those "similarly situated" to the petitioner, nor had he shown the requisite intent on the part of the Government to prosecute on the impermissible basis of first amendment rights. The majority never addressed the possibility that "similarly situated" could be defined as nonregistrants in general, though the definition given clearly impacts the inferences drawn from the Government's policy.

The petitioner also challenged the "passive enforcement" system directly on first amendment grounds, contending that it

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116. *Wayte*, 470 U.S. at 608-10.

117. *Id.* at 610.

118. *Id.* (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1970)). There is little doubt that the Selective Service as well as the Department of Justice were aware of the impact this system would have on vocal nonregistrants and the potential for first amendment problems. The majority, however, appears to neglect the potential danger recognized even by the Government. For instance, David Kline, the Justice Department official responsible for the overall enforcement of the draft registration law, stated that the decision whether or not to make referrals rested entirely with the Selective Service. The "passive enforcement" policy provided the only lists of suspected nonregistrants. A letter drafted by Kline for Assistant Attorney General D. Lowell Jensen to send to Herbert Puscheck, the Associate Director of Plans and Operations for Selective Service, stated that "indeed, with the present universe of hundreds of thousands of nonregistrants, the chances that a nonregistrant will be prosecuted is probably about the same as the chances that he will be struck by lightning." Brief for Petitioner at 6, *Wayte*, 470 U.S. 598.

created a "content-based regulatory system with a concomitantly disparate, content-based impact on nonregistrants."<sup>119</sup> Wayte did not claim that not registering was entitled to protection by the first amendment.<sup>120</sup> He claimed, however, that the enforcement policy was activated by defendant's first amendment activity conveying a particular political message, and not by any violation of the draft registration law itself.<sup>121</sup> From the petitioner's perspective, the issue revolved around how the registration policy was to be enforced, and whether "a First Amendment trip-wire for investigation and prosecution impermissibly burden[ed] the exercise of protected rights."<sup>122</sup>

The Supreme Court, in *United States v. O'Brien*, held that when, as here, speech and nonspeech elements are combined, a sufficiently important governmental interest in regulating the nonspeech conduct could justify any incidental impact on speech.<sup>123</sup> Thus, the government regulation charged here with being a content-based regulatory system with disparate impact on nonregistrants would be justified if, according to the *O'Brien* standard,

it is within the constitutional power of the Government; if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>124</sup>

*O'Brien* articulated a first amendment standard that had been applied by the courts for many years previous.

Wayte asserted that the fundamental character of vocal protest as constitutionally protected speech is not disturbed even though the proclamation may also identify the protestor as a vi-

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119. Brief for Petitioner at 23, *Wayte*, 470 U.S. 598.

120. *Id.* at 21. This distinguishes Wayte from *O'Brien*, who claimed that destroying a draft certificate was not a criminal activity under 50 U.S.C. §462(b)(5).

121. Since quiet nonregistrants were effectively immune from prosecution, it was argued that the passive enforcement system essentially made registration voluntary, but criticism of registration tantamount to a crime. *Rethinking Selective Enforcement*, *supra* note 42.

122. Brief for Petitioner at 22, *Wayte*, 470 U.S. 598.

123. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

124. *Id.* at 377.

olator of that law.<sup>125</sup> Though Wayte's stated intention "to obey his conscience rather than the law" and to not register could be used as evidence in a prosecution against him, the message's opposition to the draft is still politically expressive speech and entitled to constitutional protection.<sup>126</sup>

The Court applied the *O'Brien* test for assessing the burden on the speech and nonspeech elements of Wayte's conduct. It concluded, as to the first requirement, that the issuance of the President's draft registration proclamation was within the constitutional power of the Government.<sup>127</sup> The Court then proceeded to consider the third requirement, stating that the Government's interest in registering young men into the draft is unrelated to the suppression of free expression.<sup>128</sup> The Court then stated, in response to the second criteria, that the Government's conduct furthered an "important or substantial governmental interest", and that the Nation's need to provide for its own security was compelling.<sup>129</sup> The Court reiterated the principles that the power to "classify and conscript manpower for mil-

125. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

126. "Wayte's message is no less politically expressive than the armbands held to be a constitutionally protected 'silent symbol of opposition to this Nation's part in the conflagration in Vietnam.'" Brief for Petitioner at 21, *Wayte*, 470 U.S. 598 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 510 (1969)). In *Cohen v. California*, 403 U.S. 15, 18 (1971), the first amendment was held to forbid a conviction for disturbing the peace based on the defendant's wearing a jacket with the words "Fuck the Draft" on the back. Justice Harlan stated in his opinion:

Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

*Cohen*, 403 U.S. at 26. Wayte asserts that both cognitive and emotive significance are manifest in his expression of noncompliance with the draft registration law. Brief for Petitioner at 22, *Wayte*, 470 U.S. 598.

127. *Wayte v. United States*, 470 U.S. at 607.

128. *Id.*

129. *Id.* In his dissent in *O'Brien*, Justice Douglas agreed that

the constitutional power of Congress to raise and support armies is "broad and sweeping" and the Congress' power "to classify and conscript manpower for military service is beyond question." This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.

*O'Brien*, 391 U.S. at 389.

itary service is 'beyond question,' and is "broad and sweeping."<sup>130</sup>

With this strong Government interest at stake, the Government's justifications for the passive enforcement policy were accepted by the Court. Firstly, the Court accepted that, as alleged by the Government, the passive enforcement system promoted prosecutorial efficiency. By relying on reports of nonregistration, the Government could identify and prosecute violators immediately, while a search for likely violators would have been costly and difficult.<sup>131</sup> Secondly, the defendants' letters provided strong evidence of intent not to comply with the draft registration proclamation.<sup>132</sup> The third rationale put forth was that prosecuting those nonregistrants who made their views public would further deterrence.<sup>133</sup>

With this groundwork in principles of both constitutional interpretation and policy, the Court held that the Government satisfied the last criteria of the *O'Brien* test as well: the restrictions on first amendment freedom were no more than that essential to the furtherance of the Government's interest in ensuring registration for the nation's defense.<sup>134</sup> The Court found that the enforcement policy did not place any special burden on vocal nonregistrants, and was intended only as an interim enforcement system.<sup>135</sup>

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130. *Wayte*, 470 U.S. at 612 (quoting *O'Brien*, 391 U.S. at 377); accord *Lichter v. United States*, 344 U.S. 742, 755 (1948).

If . . . it should be resolved to extend the prohibition to the raising of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen—that of a nation incapacitated by its Constitution to prepare for defense before it was actually invaded.

THE FEDERALIST No. 25, at 165 (A. Hamilton) (C. Rossiter ed. 1961).

131. *Wayte*, 470 U.S. at 612.

132. *Id.* at 612-13. "Section 12(a) of the Military Selective Service Act, 62 Stat. 622, as amended, 50 U.S.C. § 462(a), provides that a criminal nonregistrant must 'evad[e] or refus[e]' to register." For conviction, courts have uniformly held that the Government must prove that a defendant's failure to register was intentional. See, e.g., *United States v. Boucher*, 509 F.2d 991 (8th Cir. 1975); *United States v. Rabb*, 394 F.2d 230 (3d Cir. 1968).

133. *Wayte*, 470 U.S. at 613. One may ask, however, how the Government's policy furthers any general deterrent interest since it is not a general enforcement policy. As the defendant's brief points out, the policy encourages silence, not compliance. Brief for Petitioner at 15, *Wayte*, 470 U.S. 598.

134. *Wayte*, 470 U.S. at 613.

135. *Id.* It is interesting to note that the passive enforcement policy remained the only policy for over three years. Finally, the Government began to use state driver's li-

Finally, the Court stated that the defendant had not successfully proved that the passive enforcement policy implicated a first amendment right.<sup>136</sup> Rather, the majority held, the petitioner's argument applied to self-reporting, not to the Government's policy. A confession is not protected by the first amendment, therefore, petitioner had no first amendment claim.<sup>137</sup> Given the "beg" policy instituted by the Justice Department, the nonregistrant's only obligation was to register, thereafter he could have protested unfettered.<sup>138</sup> It is significant that the majority considered the appropriate class to be reported nonregistrants, not all registrants. Since the Government investigated all reported nonregistrants, the Court found no discrimination among the class on first amendment grounds.<sup>139</sup> Thus, any influence from first amendment analysis was rejected and the traditional equal protection standard was reaffirmed as the proper test for selective prosecution claims in the context of violations of constitutional rights.

## V. THE DISSENT

In their dissent, Justices Marshall and Brennan construed the issue to be whether the petitioner had earned the right to

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cense records. *Id.*

136. *Id.* at 613-14. In the courts below, Wayte argued that he had been prosecuted based on an impermissible motive under the traditional equal protection standard which governs the selective prosecution defense. Before the Supreme Court, however, petitioner argued that his prosecution violated the first amendment. This claim of selective prosecution based on the exercise of first amendment rights is the first such case before the Supreme Court.

137. *Id.* at 614.

138.

By simply registering after they had reported themselves to the Selective Service, nonregistrants satisfied their obligation and could thereafter continue to protest registration. No matter how strong their protest, registration immunized them from prosecution. Strictly speaking, then, the passive enforcement system penalized continued violation of the Military Selective Service Act, not speech.

*Id.* at 611 n.12.

139. *But see id.* at 629-30 (Marshall, J., dissenting). As the dissent elucidates, the lens through which the majority views the issue takes in all reported nonregistrants. When the Court says, therefore, that the first amendment is not implicated and that the only consideration is that the person had been reported to the Government, the Court is cutting off its analysis before looking at how these men got on the list in the first instance. Though given the opportunity to avoid prosecution by registering under the "beg" policy, the only way of achieving the status of a nonregistrant on the list was by making public one's dismay with the President's proclamation.

have granted to him the discovery requests ordered by the district court.<sup>140</sup> The dissent argued that in order for Wayte to have prevailed at this stage, he needed only to show that the district court applied the proper legal standard, without abusing its discretion, in finding that Wayte had made a nonfrivolous showing of selective prosecution thereby earning him the right to discover relevant Government documents.<sup>141</sup> The grant of certiorari, the dissent contended, was properly limited to the issue of conflict among the circuits as to the standard used to determine whether a petitioner has made out a selective prosecution claim.<sup>142</sup> The threshold question, therefore, was whether Wayte had presented evidence of constitutional violation sufficient to entitle him to discovery of government documents and to subpoena the requested Government officials. If Wayte had presented sufficient evidence, then the merits of the case ought not to have been addressed until the record was complete.<sup>143</sup>

Marshall and Brennan outlined a two-part inquiry in order to resolve whether Wayte was entitled to the discovery requests. First, there must be a determination as to the showing a defendant must make in order to obtain discovery on an affirmative defense of selective prosecution.<sup>144</sup> Second, there must be a determination of the standard under which a court of appeals may review a district court's finding that the required showing was

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140. *Wayte*, 470 U.S. at 614-15 (Marshall, J., dissenting). In response to this discovery order, the Government stated: "It is obvious that the Court's appetite for more and more irrelevant disclosures of sensitive information has become insatiable. It is also apparent that with each new disclosure, made pursuant to near-impossible deadlines, the Court feels compelled to impugn the motives of the Government." Record at 3 (Doc. No. 95).

141. 470 U.S. at 615-16. In order to sustain his claim, Wayte presented internal Justice Department memoranda which discussed the prosecution process for prosecuting men who had not registered for the draft; a report discussing alternatives to the registration program by the U.S. General Accounting Office; a transcript of a Department of Defense Military Manpower Task Force; and a statement by the Director of the Selective Service before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee.

142. "The direct conflict between the Sixth and Ninth Circuits on an issue concerning the exercise of first amendment rights particularly in view of the pending prosecutions in other circuits raising the identical question justifies the grant of certiorari to review the judgment below." *Id.* at 622 n.1.(quoting Pet. for Cert.).

143. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 624 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

144. *Id.* at 623.

made.<sup>145</sup>

The circuit courts, according to the dissent, have adopted a standard under which a defendant has established his right to discovery if he has put forth "a colorable basis" for a selective prosecution claim.<sup>146</sup> In other words, if a defendant has alleged facts sufficient "to take [his selective prosecution claim] past the frivolous stage," he has made the necessary showing.<sup>147</sup> In general, the dissent assessed that a defendant must present "some evidence tending to show the existence of the essential elements of the defense."<sup>148</sup> The dissent concluded that the standard applied by the district court was well-founded and "consistent with our exhortation that '[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive.'<sup>149</sup>

As to the determination of the proper scope of review, the dissent stated that the district court ought to be afforded great deference in discovery matters and be subject to review under an abuse of discretion standard.<sup>150</sup> Marshall and Brennan were troubled by the fact that the court of appeals did not mention the proper standard for review of the district court's finding that petitioner had made a nonfrivolous showing of selective prosecution. According to the dissent, the appellate court undertook its own inquiry, based on the record, thereby shunning the district court's careful supervision of the discovery process and its "narrowly tailored" rulings.<sup>151</sup>

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145. *Id.*

146. *Id.* (citing *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977); *United States v. Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973)).

147. *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir. 1983); *United States v. Erne*, 576 F.2d 212, 216 (9th Cir. 1978).

148. *Wayte v. United States*, 470 U.S. at 624 (Marshall, J., dissenting) (quoting *Berrios*, 501 F.2d at 1211).

149. *Id.* (quoting *Nixon*, 418 U.S. at 709).

150. *Wayte*, 470 U.S. at 624.

Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with the [Federal Rule of Criminal Procedure] 17(c).

*Id.* (quoting *Nixon*, 418 U.S. at 702).

151. *Wayte*, 470 U.S. at 624 (dissenting opinion).

A proper departure point for the appellate court would have been to determine whether the district court had abused its discretion in holding that Wayte had made a nonfrivolous showing of selective prosecution. Although conscious that the defendant's burden in order to get discovery would be only to make a nonfrivolous showing,<sup>152</sup> the dissent considered the elements necessary to establish a prima facie case in order to evaluate the merit of Wayte's claim and to thereby assess the district court's finding.

The dissent agreed with the majority that Wayte's selective prosecution claim presented an equal protection challenge to the passive enforcement system.<sup>153</sup> There are three elements necessary to make a prima facie showing. First, Wayte would have to have shown that he was a member of a recognizable, distinct class. The district court found this criteria to be clearly met. Wayte was a member of a class of vocal nonregistrants who exercised their first amendment right to speak freely and to petition the Government for a redress of grievances.<sup>154</sup>

As to the second element, Wayte would have to have shown that under the enforcement policy through which the Selective Service referred names to the Justice Department for investigation, only the names of those men who were either reported by others as not having registered or who wrote to the Selective Service explaining their refusal to register subjected the class to disproportionate selection for investigation and potential prosecution. The record does not reveal how many of the approximately 300 men whose names were referred to the Justice Department were "vocal." Officials in the Department of Justice, however, knew that vocal opponents to the draft would comprise the majority of those selected.<sup>155</sup> The defendant put forth at

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152. *Id.* at 625. See also *United States v. Hazel*, 696 F.2d at 475; *United States v. Erne*, 576 F.2d at 216.

153. *Wayte v. United States*, 470 U.S. at 626 (citing *Oyler*, 368 U.S. at 456; *Yick Wo v. Hopkins*, 118 U.S. at 373).

154. *Id.* at 626-627 (dissenting opinion).

155. *Id.* at 627. Assistant Attorney General Jensen stated in a memorandum: Selective Service's enforcement program is presently "passive." Nonregistrants are brought to the Service's attention either when they report themselves or when others report them. Consequently, the first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds, and (2) persons who publicly refuse to register.

*Id.* at 628 (memorandum from Jensen to various United States Attorneys).

least a "colorable" claim, according to the dissent, as to this branch of the standard.

The final element that must be shown in order to make out a prima facie claim is that the selection procedure was not neutral, or somehow subject to abuse. Since the enforcement scheme was implemented with the full knowledge of the effect on vocal opponents, the third element of the standard for alleging a prima facie case was also met.<sup>156</sup> Given this knowledge, the choice to implement the passive enforcement system was one susceptible to abuse, thereby making the whole scheme vulnerable to charges of first amendment violations.<sup>157</sup> The dissent noted the correlation here between vocal opposition and violating the law, which would thereby make it quite easy to punish speech under the guise of enforcing the laws.<sup>158</sup>

The defendant, therefore, had put forth a colorable claim as to the second element and had established the first and third elements. There could be no doubt, under the dissent's approach, that the district court had not abused its discretion in finding that Wayte's equal protection claim was not frivolous.

The majority, however, did not set out to determine whether Wayte was entitled to discover relevant information from the Government. Instead, the Court immediately assessed the merits of Wayte's selective prosecution claim according to an equal protection standard. The dissent found this assessment premature.<sup>159</sup>

Marshall and Brennan also found that the majority erred in its focus on reported nonregistrants.<sup>160</sup> The Court addressed the claim as one of discrimination among known violators of the draft registration law. Hence, the "beg" policy, which gave those known violators the option of registering and escaping prosecu-

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156. *Id.* at 628 (dissenting opinion).

157. *Id.* In *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 (1979), the Court stated that "[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence . . . is one factor among others which may be considered by a court in determining whether a decision was based on an impermissible ground." The dissent also quoted *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1973): "[T]o discern the purposes underlying facially neutral policies, this Court has . . . considered the . . . foreseeability of any disproportionate impact."

158. *Wayte*, 470 U.S. at 628 (dissenting opinion).

159. *Id.* at 629.

160. *Id.*

tion, removed the shadow of an equal protection violation from the passive enforcement system. The dissent, however, focused on the system used to define the potential prosecutees.<sup>161</sup> "If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool."<sup>162</sup> Thus, the Court ought to have concentrated on the referrals made by the Selective Service to the Justice Department leading to prosecution.

## VI. CONCLUSION

This opinion determines that in order to set forth a first amendment selective prosecution defense, a defendant must establish a prosecutorial motive to deter or punish the defendant's protected first amendment expression. In spite of the potential danger of infringing constitutionally protected political speech, the Court refused to include in its equal protection analysis a test appropriate for content-based regulations or to apply the balancing test that would usually be applied whenever a general regulation incidentally infringed first amendment rights. Furthermore, the Court required that it be proved that the Government failed to prosecute individuals it knew to be violators. The Court, therefore, applied the strictest test used by the circuits. By requiring a defendant to show impermissible selection and motive, and by demanding that such a *prima facie* showing be made in order to obtain discovery, the Court has made it virtually impossible for a defendant to gather the evidence required to make such a showing.

It ought to be noted that the Court addressed and summarily dismissed the claim that the prosecution scheme placed a direct burden on Wayte's first amendment rights. Such a scheme was neither presented nor ruled upon at either the district court or the court of appeals, nor was it raised in the petition for certiorari. In other words, why did the majority not adhere to the discovery issues raised pursuant to the procedural posture of the case? This impatience to dispose of all the constitutional issues,

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161. *Id.* at 628-29.

162. *Id.* at 630.

even those not directly raised by the selective prosecution defense, suggest that the Court was carrying out its own agenda. Unfortunately, this appears to be one that shies away from and perhaps subverts this country's tradition of free speech, even when such behavior carries dissent and grievances.

It is revealing and troubling that the majority's decision compares a conscientious objector to "any criminal"<sup>163</sup> in its analysis of the first amendment issues. David Wayte, and the seventeen other men indicted under the passive enforcement policy were acting out of deeply held religious and social convictions that compliance with the military build up in this country is morally wrong. The courage to obey one's conscience, to dissent and to speak freely in the face of the perpetually escalating armament programs reveals a resource and strength available to this country that is greater than weapons could ever be.

The Court's characterization of the group from which the defendant is selected, as well as the characterization of Wayte's criticism as confession rather than protest made inevitable the Court's dismissal of Wayte's defense. As Justice Harlan warned in *Cohen v. California*, however, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."<sup>164</sup> *Wayte* may expose the sorry development that the Court is allowing the Government to prohibit criticism of itself, while stating that it is prosecuting confessional words.

The great majority of claims of illegal discrimination in the enforcement of criminal laws is dismissed with a reference to *Oyler v. Boles* and a statement that some selectivity in prosecution is necessary and not violative of the Constitution. Few, if any, would argue for chilling a prosecutor's flexibility and efficiency. Such a result would run counter to the public welfare. However, "[t]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional inva-

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163. See *Wayte*, 470 U.S. at 624 (dissenting opinion).

164. 403 U.S. 15, 26 (1971).

sions of their rights by all branches of Government.”<sup>165</sup> Such a statement articulates a crucial role of the courts in this country, and one that was not conscientiously carried out in *Wayte*.

*Donnaldson K. Brown*

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165. *United States v. Falk*, 479 F.2d 616, 624 (1975) (quoting *Stamler v. Willis*, 415 F.2d 1365, 1369-70 (7th Cir. 1969), *cert. den'd*, 399 U.S. 929 (1970)).

