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The Government's Enforcement of Draft Registration: Prosecution or Persecution?

by Joel M. Gora

David Alan Wayte

v.

United States

(Docket No. 83-1292)

Argued November 6, 1984

It is fitting that this case, *Wayte v. United States*, will be argued before the Supreme Court on Election Day, 1984, when Americans will go to the polls to choose a President. For the issues in this case ultimately trace back to the last Presidential election. In July, 1980, President Jimmy Carter, smarting from the continued American hostage situation in Iran, deeply concerned about the invasion of Afghanistan by Soviet troops and sure to face an indignant Ronald Reagan in the fall elections, took the first initial steps to reactivate the military draft registration system. Acting under a congressional statute, he authorized the Selective Service System to begin registering all young men aged eighteen, nineteen or twenty. Although Congress would have to act to reinstitute the draft itself, the registration requirement was viewed as a way to expedite any draft that might thereafter be authorized.

In the months that followed, millions of young men dutifully trooped to their local post offices, city halls and government buildings to fill out Selective Service registration forms. But hundreds of thousands did not. By mid-1982, Selective Service officials estimated that while approximately 8,365,000 young men had registered, 674,000 had failed to do so. Federal law makes it a criminal offense to willfully fail to register for the draft and carries a penalty of up to five years in jail and a \$10,000 fine. With more than a half million possible law violators walking around, how was the government going to find out who these young men were, let alone decide what to do about them?

A few young men made the first problem easy: they stepped forward and identified themselves as nonregistrants. They did so in letters to the Selective Service System, top government officials and even the President. Such letters typically objected to the draft on political, religious or moral grounds. Usually, the letters were

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unfilingly polite and respectful; occasionally, they were more harsh and strident. Uniformly, the statements contained classic criticisms of national policy concerning fundamental issues of war and peace, conscription and freedom. Many of these self-admitted nonregistrants repeated their views at public rallies and meetings opposing draft registration.

Starting in early 1981, the government, confronted with extensive noncompliance, began to formulate its enforcement response. The initial approach agreed upon was a so-called "passive enforcement" system, whereby the government would investigate for possible prosecution only those nonregistrants whose identities had come to its attention either through self-admission, reports by third parties (e.g., neighbors reporting that the boy next door hadn't registered) or otherwise. For obvious reasons, the government kept this policy secret for two years for fear that the hundreds of thousands of nonregistrants would realize that all they had to do to escape detection was keep quiet, not tell anyone they hadn't registered and certainly not tell the government.

By mid-1982, as a result of the "passive" enforcement system, approximately one dozen young men—.003% of the more than half-million estimated nonregistrants—were indicted for failing to register for the draft. It came as no surprise to anyone—including the government—that each one of these defendants had been "vocal" in admitting their noncompliance either to the government, the public, or both.

ISSUES

David Wayte's case is the first case questioning the "passive enforcement" system to reach the Supreme Court. It raises the issue of whether that "passive enforcement" system impermissibly focused only on those individuals who had been identified through their vocal opposition to draft registration, thereby stifling criticism of government and violating the right to freedom of speech and protest protected by the First Amendment.

In addressing that issue, the government concedes that Wayte, or anyone else, is free to criticize the draft as vociferously and passionately as one might choose, and further, that it would be impermissible for government to prosecute someone for the purpose of penalizing or deterring the exercise of First Amendment rights. For this part, Wayte concedes that the act of nonregistration itself is not protected as "symbolic speech" under the First Amendment, and that the government may validly

punish nonregistration—whether or not accompanied by protest or evidenced by dissent.

But that is where consensus ends. In the government's view, this is basically not a First Amendment case. Rather, the government characterizes the matter as a "selective prosecution" problem—that is, whether Wayte was singled out for prosecution from among other similarly-situated people because he protested draft registration, or for any other impermissible reason. The government contends he was not, reasoning that he was selected by virtue of the passive enforcement system, which was designed to be the least costly and cumbersome way to identify and prosecute violators, not punish dissenters. In this view, Wayte's letter of protest was not so much an expression of views as a confession of guilt. The government says it simply pursued suspected law violators who came to its attention.

Wayte counters that this is basically a First Amendment case, rather than a selective prosecution problem. In his view, whether the government intended to single him out is irrelevant, as is the *motive* for adopting the "passive enforcement" system itself. Instead, Wayte argues, the focus must be on the *effects* of the adoption of the passive enforcement system on punishing dissent. Since the very nature of the system guaranteed that only those few young men who were vocal about their non-compliance would be pursued—whether or not that was what the government intended—the system itself was "a First Amendment trip wire," stacked against free speech and dissent.

FACTS

In August of 1980, shortly after President Carter initiated draft registration, David Wayte, a twenty-year-old Yale University student from Pasadena, California, wrote to the Selective Service advising that he had not registered, planned never to do so and accepted the consequences of his action. That same day, he wrote to President Carter explaining his decision and criticizing the President's actions. In that letter Wayte stated:

I love my country. I believe that its Constitution is close to perfect, its laws the most just in the world. That is why it pains me deeply when a law is enacted which contradicts the basic tenets of freedom and democracy upon which my country was founded. You enacted such a law when you signed the draft registration bill ...

I decided to obey my conscience rather than your law. I did not register for your draft.

Several months later, in February of 1981, Wayte wrote again to the Selective Service, reminding them of his August letter, reaffirming his intention never to register and wondering why he had not heard from them:

I must interpret your silence as meaning that you are too busy or disorganized to respond to letters or to keep track of us draft-age youth. So I will keep you posted of my

whereabouts. For the foreseeable future, I will be traveling the nation by foot, encouraging resistance and spreading the word about peace and disarmament.

The government indeed was rather busy—trying to figure out what to do about the problem. The solution was the "passive enforcement" system. Under that system, the government would not actively seek to identify the hundreds of thousands of young men who had not registered, but would concentrate on investigating the hundred or so names that had come in one way or another to Selective Service attention. Some individuals, like David Wayte, had self-reported their nonregistration. Most others had been reported by neighbors, relatives or acquaintances. Presumably, almost all of the people reported by others had stated to someone that they had not registered. According to a Justice Department memorandum, government officials anticipated that: "The first wave of referrals will consist of names of young men who fall into two categories: 1) those who wrote to the Selective Service and said they refused to register, and 2) those whose neighbors and others reported them as persons who refused to register."

In July, 1981, the Selective Service referred a list of 134 names to the Department of Justice for further investigation, looking toward prosecution. Following referral to local federal prosecutors, this list was considerably winnowed down through a so-called "beg policy" whereby the prosecutor wrote each individual and offered a last opportunity to register and thereby avoid prosecution. Most on the list availed themselves of the chance. Others were eliminated when it turned out they were inappropriate for registration; for example, eleven were women, one was an eighty-year-old man, and a few names were fictitious.

In March, 1982, following a three-month grace period announced by President Reagan to encourage registration, officials in the Department of Justice decided to authorize local federal prosecutors to begin indicting the few people remaining on the list. Government officials recognized that: "The first prosecutions were 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." And these officials candidly worried that launching indictments against such few and vocal individuals identified through the passive enforcement system would "undoubtedly" lead to claims of selective prosecution brought in retribution for exercising First Amendment rights. This was particularly true since, as one official noted: "The chances that a quiet nonregistrant will be prosecuted is probably about the same as the chances that he will be struck by lightning."

Despite these concerns, the officials claimed they had no alternative but to proceed. Attempts to develop an "active" enforcement system to identify the half million nonregistrants had been difficult. Access to Social Secu-

rity records had been blocked by a court ruling that required an Act of Congress to change. Even after gaining access to Social Security information for computer matching purposes, Selective Service officials were still stymied by lack of addresses of suspected violators. Moreover, using state drivers license information was also claimed to be inadequate and irregular; although a law student researcher for Wayte was able, in a day, to identify several states that would easily make drivers lists available at a modest cost.

In addition to claiming that implementing an active enforcement system was difficult, the government also insisted that it had valid reasons for proceeding against Wayte and his dozen fellow nonregistrants. Those individuals had adamantly persisted in their refusal to register, their self-admitted refusals would help prove the willfulness of their actions at trial, and their prosecution would help encourage the hundreds of thousands of other nonregistrants to comply with the law. Wayte contended, however, that the prosecutions of vocal objectors would encourage silence, not compliance. The message would not be that violators would be punished, but that protestors would be. Wayte further contended that this could have been avoided had the government initially developed an active enforcement policy that would have identified large number of nonregistrants and then investigated a portion of them at random—the kind of system that the government finally put in place by the end of 1982. In the meantime, however, proceeding with prosecutions of those identified under the “passive” system guaranteed, according to Wayte, that the handful of young men prosecuted would all be vocal protestors. And that was what resulted. Of thirteen men indicted in 1982, all were self-admitted, vocal dissenters. Only three other individuals were to be indicted in the next two years.

Wayte was indicted in federal court in Los Angeles in July of 1982, two years after President Carter’s draft registration proclamation. The district court granted Wayte a hearing on his claim of selective prosecution. In November, 1982, the district court ruled that Wayte had been impermissibly selected for investigation and prosecution because of his exercise of First Amendment rights. The court also ruled that the Carter Proclamation was invalid because of administrative irregularities surrounding its promulgation. On both grounds, the court dismissed Wayte’s indictment. On appeal to the United States Court of Appeals for the Ninth Circuit, this decision was overturned by a three-judge appellate panel, with one dissent. The Supreme Court agreed to review that ruling, but limited the hearing to the question of selective prosecution for the exercise of First Amendment rights, not the validity of the Carter Proclamation.

BACKGROUND AND SIGNIFICANCE

The power to prepare for war is the federal government’s most awesome authority. For that reason, not surprisingly, the war power has been subject to frequent constitutional objections. The Civil War generated challenges to the President’s power to subject civilians to military rule. During World War I, the Supreme Court upheld the validity of conscription as against a claim that the draft constituted “involuntary servitude” prohibited by the Constitution. Even more pertinently, that war, which produced prosecutions of dissenters who advocated resistance to the draft and the military, afforded the Supreme Court its first opportunity to probe the meaning of the First Amendment’s guarantee of freedom of speech. Those cases fashioned the famous “clear and present danger” formula for assessing the line between valid protest and impermissible incitement of law violation. World War II led to a number of Court rulings exploring the extent to which the government could regulate almost the entire fabric of the national life in the cause of mobilizing for war.

During the Viet Nam war, the Court was kept busy addressing the claims of religious and moral objectors to military service. The Viet Nam conflict also resulted in an important Court ruling that bears on David Wayte’s case—namely that whatever rights of free speech are implicated in the public and symbolic burning of a draft card are outweighed by the government’s neutral purpose, not involving the suppression of dissent, of requiring those eligible to possess such cards in order to administer the selective service system.

Although the nation is not at war now, the 1980 draft registration proclamation has spawned its own round of constitutional challenges. In 1981, the Court upheld the registration system against the claim that it violated equal protection of the law because only young men, not young women, were compelled to register. The Court ruled that male only registration was valid because only men were eligible for combat duty and the purpose of draft registration was to provide a ready pool of combat personnel. Earlier this year, the Court upheld the Solomon Amendment—an Act of Congress requiring that male college students applying for federal financing state whether they had registered with Selective Service and suffer a loss of aid if they had not. The Court rejected arguments that the arrangement constituted an impermissible kind of legislative punishment and violated the privilege against self-incrimination, reasoning that no one was forced to apply for the funds.

In this, the Court’s third encounter with President Carter’s Proclamation, Wayte seems to be swimming against the tide of adjudication. But since he invokes the unique protections of the First Amendment, which occupies a preferred position in our constitutional system, his chance of success should not be discounted. The Court has long been sensitive to government suppres-

sion of dissent, not just when the law specifically makes it a crime to say certain things, but also when the enforcement of a seemingly neutral law seems to pose an undue risk of targeting on or "chilling" freedom of speech or press. Accordingly, Wayte argues that the passive enforcement scheme, whether or not devised with a motive to punish dissenters, would necessarily have that effect, as the government officials were well aware. Since the system was targeted only on dissenters the scheme violated the First Amendment. Because the government had alternatives readily available to pursue its valid enforcement objectives—most notably the active enforcement system it has since implemented—there was no compelling justification for having adopted the scheme which resulted in the prosecution of Wayte and other protestors.

While Wayte stresses these First Amendment attacks on the passive enforcement scheme, the government contends that such points are of secondary significance; the primary question is whether the system embodied an impermissible exercise of prosecutorial discretion. Accordingly, the government emphasizes the long settled rule that: "The decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the government's] discretion." Because of this rule, broadly deferential to prosecutorial decisionmaking, the Court rarely hears cases involving a claim of impermissible prosecutorial discretion. But the Court has not suggested that prosecutors have wholly unfettered discretion in selecting whom to prosecute, and the Justices have left the door slightly ajar, by noting that prosecutorial selectivity is subject to some constitutional constraints.

Because of this, the lower courts have developed a two-part formula to judge a selective prosecution claim: 1) Was the defendant singled out for prosecution from among others similarly situated, and 2) Was such discrimination based on impermissible factors such as race or the exercise of free speech rights. Pursuant to this approach, lower courts have occasionally thrown out convictions. Indeed, the appellate court that ruled against Wayte had previously accepted a similar claim of vocal protestors against compliance with the census who charged that they were impermissibly singled out for prosecution for refusing to cooperate and supply census information. The Wayte case is the first Supreme Court encounter with such a claim of selectivity to punish dissenters.

The government concedes the validity of the two-part formula for measuring selective prosecution claims, but insists that the standards have not been met. The government argues that Wayte and the others prosecuted were treated no differently than any other nonregistrants whose identities and whereabouts were known, who admitted noncompliance and who rejected the "beg policy" last opportunity to register and avoid prosecu-

tion. Similarly, even assuming for the sake of argument that these young men were treated differently, the needs of a developing enforcement policy justified the government's decision to proceed with their cases while a more comprehensive enforcement system was being implemented. Thus, the government concludes, there was no impermissible selection of the defendant.

In terms of the potential significance of the Court's decision in this case, there is an interesting juxtaposition of consequences. Although Wayte stresses the First Amendment features of this case, neither a victory nor a defeat will have farreaching free speech consequences. This is not a case involving broad and recurring questions such as the First Amendment limits on libel law, the measure of protection for commercial speech or obscenity and the use of the streets or other public places for picketing and demonstrating. No one disputes that Wayte was free to criticize the draft registration, while, conversely, the government was entitled to prosecute men who failed to register for the draft. The question is whether the decision to prosecute the latter was inevitably likely to punish only the former. Since this type of First Amendment problem arises only in occasional and unusual situations, the Court's ruling, whichever way it goes, is not likely to have much impact on First Amendment law.

A ruling in Wayte's favor, however, is likely to have a significant impact, not on the First Amendment law that Wayte now stresses, but on the selective prosecution doctrine that he won on in a lower court and that the government claims has not been breached. The Court has rarely considered, let alone upheld, a selective prosecution contention. If the Court agrees with the government, the ruling will probably not close the door to all selective prosecution claims, but will probably only conclude that impermissible selectivity has not been proven in this case. If the Court rules against the government, however, even though in the context of claimed discrimination against free speech, the practical consequences will be widespread, because the Court will have validated a selective prosecution claim, thereby inviting defendants to raise such objections far more often than is presently done. Thus, in terms of the development of the law, the government has far more to lose from an unfavorable decision than it stands to gain from a favorable ruling.

ARGUMENTS

For David Alan Wayte (Counsel of Record, Mark D. Rosenbaum, 633 S. Shatto Place, Los Angeles, CA 90005; telephone (213) 437-1720)

1. The passive enforcement system was an impermissible, content-based regulatory policy that targeted and burdened protected political speech opposing draft registration.
2. The question of governmental motive is irrelevant to

a First Amendment analysis of the passive system's impact on protected expression.

3. Since the government's enforcement policy burdens political speech, the burden was on the United States to show that the policy furthered compelling interests, without unnecessarily limiting protected speech. The government has not met that burden because it could have achieved its objectives in ways that would not have resulted in prosecuting only vocal nonregistrants.

For the United States (Counsel, John F. DePue, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

1. Selecting David Wayte for prosecution did not impermissibly discriminate against him.
 - A. Prosecutors have broad discretion in initiating cases and, unless deliberately based on impermissible considerations, the exercise of discretion is not subject to judicial scrutiny.
 - B. Wayte was selected for prosecution because the government knew of his nonregistration through his

own admissions. The passive enforcement system that resulted in prosecuting people like Wayte was a valid initial phase of a more comprehensive enforcement program being developed and did not base prosecutions on the exercise of First Amendment rights.

2. For similar reasons, the selection of Wayte for prosecution did not violate the First Amendment because the government did not seek to punish him for his protest and had valid reasons, unrelated to punishing dissent, for employing the enforcement system that resulted in his prosecution.

AMICUS ARGUMENTS

In Support of Wayte

The Central Committee for Conscientious Objectors, joined by various religious and antiwar groups, filed a brief on behalf of Wayte. These groups argued that the prosecution violated the historic right to petition government officials for redress of grievances, recognized by the First Amendment, as well as the rules against unequal enforcement of the law.

ARGUMENTS: DECEMBER SESSION

Monday, November 26

1. United States v. Maine et al. (35 Orig.)
2. United States v. Louisiana et al. (9 Orig.)
3. Town of Hallie v. City of Eau Claire (82-1832)
4. Southern Motor Carriers Rate Conference v. United States (82-1922)

Tuesday, November 27

5. United States v. Sharpe (83-529)
6. Bd. of License Commissioners of Town of Tiverton v. Pastore (83-963)
7. Atkins v. Parker (83-1660), Parker v. Block (83-6381)
8. Central States, SE and SW Areas Pension Fund v. Central Transport, Inc. (82-2157)

Wednesday, November 28

9. Francis v. Franklin (83-1590)
10. United States v. Johns (83-1625)
11. Federal Election Comm'n v. National Conservative Political Action Committee (83-1032), Democratic Party of the U.S. v. National Conservative Political Action Committee (83-1122)
12. NAACP v. Hampton County Election Comm'n (83-1015)

Monday, December 3

1. Cleveland Bd. of Education v. Loudermill (83-1362), Parma Bd. of Education v. Donnelly (83-1363), Loudermill v. Cleveland Bd. of Education (83-6392)
2. Heckler v. Chaney (83-1878)
3. Anderson v. City of Bessemer (83-1623)
4. Lindahl v. Office of Personnel Management (83-5954)

Tuesday, December 4

5. Wallace v. Jaffree (83-812), Smith v. Jaffree (83-929)
6. CIA v. Sims (83-1075), Sims v. CIA (83-1249)
7. Dean Witter Reynolds Inc. v. Byrd (83-1708)
8. Marrese v. American Academy of Orthopaedic Surgeons (83-1452)

Wednesday, December 5

9. School Dist. of City of Grand Rapids v. Ball (83-990)
10. Aguilar v. Felton (84-237), Secretary, U. S. Dept. of Education v. Felton (84-238), Chancellor of Bd. of Education of City of New York v. Felton (84-239)
11. Marek v. Chesny (83-1437)