Equal Protection and the Passive Enforcement System of Draft Registration: Selective Service or Selective Prosecution—*United States v. Wayte*

*By Rennika H. Thoon**

Introduction

The law works in mysterious ways. Perhaps nowhere is this more apparent than in judicial interpretation of the open-ended Equal Protection Clause of the Constitution.[1] Standard methodology in equal protection cases[2] often seems to be mere window dressing for what goes on behind the scenes[3]—the kind of intuitive decisionmaking[4] expected by many on the outside,[5] but rarely acknowledged on the inside.[6]

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* B.A., 1980, Drew University; member, third year class.

1. *See* Torke, *The Judicial Process in Equal Protection Cases*, 9 HASTINGS CONST. L.Q. 279, 342 (1982). "There is, in the equal protection clause, the potential for more thoroughgoing social changes than in any of the other great protective clauses of the Constitution." *Id.*

2. *See infra* text accompanying notes 103-09.

3. "[T]he emphasis on the mechanics of equal protection has resulted in insufficient attention to and articulation of values, leaving these critical, value laden premises of equal protection decisions not only unexplored but also unmentioned." Torke, *supra* note 1, at 285.

4. "The elaborate system of shifting levels of review, of vacillating presumptions, and of reasonableness . . . seems to move the decisionmaker logically along. . . . [H]owever, equal protection is about moral theory, and the fusion between the two ought to be made plain." *Id.* at 348 (footnote omitted) (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977)).

5. Most commentators accept the proposition that values, in addition to strict textual interpretation, are somehow necessary for constitutional decisionmaking. *See* Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). "Right through to the present day, the prevailing academic line has been that the Court should give content to the Constitution's open-ended provisions by identifying and enforcing . . . America's fundamental values." *Id.* at 15. *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH 109 (1962); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 738 (1975). Some commentators, however, argue that since there is no proper value source, the areas of judicial review should be limited. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 43-72 (1980) (suggesting that only "process-oriented" matters, and not substantive values, are the proper business of the Court).

6. "If the Court's decisions are often unconvincing, it is because the Court is not always straight with us." Torke, *supra* note 1, at 348.

One recent comment supporting the unspoken rule is the frank admission of Judge J. Skelly Wright of the United States District Court for the District of Columbia. He stated:

The standard methodology, however, is important. As a set of legal rules evolves from precedent, it provides consistency and predictability. It is the robe of reason that covers the underlying values of the individual judges. Without it, the court stands naked. It is thus that the Ninth Circuit Court of Appeals stands after its decision in *United States v. Wayte*.[7]

In its decision, the Ninth Circuit reversed the district court's finding of selective prosecution based on the exercise of First Amendment rights, and reinstated an indictment against Wayte for failure to register for the draft.[8] Wayte claimed that out of 500,000 men who had also failed to register, only he and twelve other men were selected for prosecution through a "passive enforcement system"; this system targeted only those nonregistrants who had spoken out against the draft. Despite this fact, the circuit court held that Wayte failed to establish selective prosecution

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> "[T]he key in all of this is doing justice within the law. . . . When I get a case I look at it, and the first thing I think of automatically is what is right, what should be done—and then you [sic] look at the law to see whether or not you can do it. That might invert the process of how you should arrive at a decision—of whether you should look at the law first—but with me it developed through making decisions which involve resolving problems, and I'm less patient than other judges with law that won't permit what I believe to be fair. But if you don't take it to extremes, I think it's good to come out with a fair and just result and then look for law to support it."

Chief Judge Robert F. Peckham, United States District Court for the Northern District of California (quoting Judge J. Skelly Wright, in Introductory Remarks at Address by Judge Wright, Inaugural Lecture, Matthew O. Tobriner Lecture Series, Hastings College of the Law (Oct. 4, 1983)).

7. 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3856 (U.S. May 29, 1984), *argued*, 53 U.S.L.W. 3359 (U.S. Nov. 6, 1984) (No. 83-1292). While this Comment was at the printer, the Supreme Court decided this case, holding that the passive policy of enforcing Selective Service registration requirements did not violate either First Amendment free speech or right to petition, or the Fifth Amendment equal protection componant. United States v. Wayte, 53 U.S.L.W. 4319 (March 19, 1985).

8. Wayte was charged under 50 U.S.C. §§ 453, 462(a) (1981 & 1984 Supp.).

Section 453 provides in part:

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

Section 462(a) provides in part:

> Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title . . . , or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . , or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction . . . , be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . .

based on the exercise of a constitutional right.[9] It also ruled that Wayte had presented no evidence that would entitle him to an evidentiary hearing on the matter.[10]

This Comment suggests that the Ninth Circuit erred in both holdings. Part I presents the factual background of the case and the circumstances surrounding the establishment of the passive enforcement system. Part II provides a brief summary of selective prosecution case law, including select cases that illustrate the developmental trend. Part III focuses on the holdings, reasoning and analysis by both the district and circuit court with respect to two issues: (1) whether a prima facie case of selective prosecution was established; and (2) whether the requisite showing was made for an evidentiary hearing on the matter. Finally, part IV suggests some unstated reasons for the Ninth Circuit's decision, and considers its real and potential impact.

I. The Prosecution

A. Factual Background

On July 2, 1980, a proclamation issued by President Carter reinstated the draft.[11] David Alan Wayte, although eligible, did not register. Instead he wrote letters to the Selective Service Administration and President Carter stating that he had no intention of registering because he had decided that he had to obey his conscience rather than the law.[12] In February 1981, Wayte sent another letter to the Selective Service restating that he had not registered, and indicating that he would be "traveling the nation . . . encouraging resistance and spreading the word about peace and disarmament."[13] A subsequent Selective Service letter sent to nonregistrants met with no response from Wayte.[14] In October of 1981,

9. *Wayte*, 710 F.2d at 1387. The circuit court also reversed a separate and independent basis for the district court's dismissal of Wayte's indictment. The district court had determined that Presidential Proclamation 4771, which reinstated the draft, was invalid under 50 U.S.C. § 463(b) (requiring 30 days before a regulation takes effect). 710 F.2d at 1388-89. The higher court reasoned that since Presidential Proclamations are not mentioned in § 463(b), but *are* referred to elsewhere in the Selective Service Act, they are exempt from its 30-day requirement. *Id.* The only district court finding left intact was the inapplicability of a 60-day notice and comment period imposed pursuant to Executive Order 12044 issued in October, 1978. 32 C.F.R. § 1615 (1984). 710 F.2d at 1389.

10. 710 F.2d at 1388.

11. Presidential Proclamation 4771 reinstated the draft and directed male citizens and residents born in 1960 to register with the Selective Service System during the week of July 21, 1980. 3 C.F.R. 82 (1980).

12. Brief for the United States at 3, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

13. 710 F.2d at 1386. Wayte had also appeared at public demonstrations across the country and on radio and television programs to state his dissent. Brief for the Appellee at 7, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

14. On June 17, 1981, the Selective Service sent warning letters by certified mail to all nonregistrants who had expressed opposition to the draft in the media or in letters to the

the United States Attorney for Wayte's district[15] sent a letter warning Wayte of possible prosecution.[16] Wayte did not respond.

In December, 1981 the government imposed a moratorium on efforts to prosecute nonregistrants because an overwhelming number of men had failed to register.[17] A grace period, effective until February 28, 1982, was instituted.[18] An impressive array of government officials and departments continued to meet during this period to consider a plan of action that would best enforce registration.[19] The plan ultimately adopted was the passive enforcement system.

B. The Passive Enforcement System

According to a July 9, 1982 memorandum written by Assistant Attorney General D. Lowell Jensen,[20] the Justice Department's policy was "designed to insure that only persons who are the most adamant in their refusal to register [would] be prosecuted."[21] Only those who had "reported" themselves by writing to the government in opposition ("self-reported" nonregistrants) or those who had publicly refused to register would form the prosecutive pool. A dossier had been kept on each vocal nonregistrant as part of the Selective Service's recordkeeping system known as the "Suspected Violator Inventory System."[22] This system provided the government with easy access to the names of vocal violators.

In that same memo, however, Jensen acknowledged that the Selective Service had the ability to identify *silent* nonregistrants for prosecu-

government. Brief for the United States at 5, *Wayte*, 710 F.2d 1385 (9th Cir. 1983). The letter apprised the recipient of the registration law, and requested that he fill out an enclosed registration card and mail it to the Selective Service in a self-addressed envelope. *Id.* The letter warned that unless the recipient responded within 15 days, his name would be forwarded to the Department of Justice. *Id.* at 5-6.

Presumably, the letter was to be government evidence that the nonregistration had been willful; § 462(a) of chapter 50 of the United States Code permits conviction only of those who "knowingly fail or neglect to perform such duty." 50 U.S.C. § 462(a) (1984). Receipt of the letter showed conclusively that the recipient had knowledge of the duty to register.

15. David Alan Wayte was a resident of the Central District of California. Brief for the United States at 2, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

16. The letter advised Wayte that he was subject to prosecution and urged him to complete and return a registration card. It stated that if Wayte did not register within three weeks, he would be prosecuted. *Id.* at 7.

17. 710 F.2d at 1387.

18. *Id.*

19. *See infra* text accompanying note 40.

20. D. Lowell Jensen, Prosecution of Selective Service Non-Registrants (July 9, 1982) (Department of Justice Memorandum), *quoted in* United States v. Wayte, 549 F. Supp. 1376, 1381-82 (C.D. Cal. 1982) [hereinafter cited as Jensen Memo].

21. *Id.*; Brief for the United States at 14-15, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

22. Brief for the United States at 5, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

tion through Social Security records.[23] In fact, he stated that the Selective Service had "nearly implemented an 'active' enforcement" policy using those records.[24] Jensen predicted that a combined "active" and "passive" enforcement system would result in random selection of both vocal and nonvocal nonregistrants for prosecution.[25] Random selection is constitutionally permissible.[26]

In an earlier letter dated March 2, 1982,[27] Jensen recognized that the passive system had "potentially serious first amendment problems that would lead to selective prosecution claims."[28] This detailed letter counseled that lest the government lose its first few important cases (and thereby discourage further registration), the Selective Service would have to start prosecuting nonvocal violators by the time of the first vocal violator prosecution.[29]

Similarly, in a June 29, 1982 memorandum to Attorney General William French Smith, Jensen acknowledged that defendants singled out

23. Jensen Memo, *supra* note 20. The government's ability to identify silent nonregistrants also was emphasized by General Thomas K. Turnage, Director of the Selective Service. His July 28, 1982 statement to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee provides: "In August, we start realizing the results of a more active compliance program with the ultimate goal of identification of all non-registrants. This program involves matching our Selective Service registrant files with files of the Social Security Administration." *Id.* The statement was made on July 28, 1982, six days after Wayte was indicted.

24. United States v. Wayte, 549 F. Supp. 1376, 1381-82 (C.D. Cal. 1982).

25. Jensen believed that random selection was constitutionally permissible. He "predicted that development of an 'active' enforcement program utilizing Social Security records would finally allow the government 'to create an *appropriate* selection criterion, most probably one based on randomness.' " Brief for the Appellee at 6, *Wayte*, 710 F.2d 1385 (9th Cir. 1983) (emphasis original).

26. *See infra* notes 89-91 and accompanying text.

27. Letter from D. Lowell Jensen, Assistant Attorney General, Criminal Division, to Herbert C. Puscheck, Associate Director, Plan and Operations, Selective Service System (March 2, 1982), *reprinted in part in* United States v. Wayte, 549 F. Supp. at 1384 [hereinafter cited as Jensen Letter]. The letter was apparently prepared by Senior Legal Advisor David J. Kline. *See infra* notes 33, 37-38 and accompanying text.

28. 549 F. Supp. at 1384.

29. Jensen Letter, *supra* note 27. The letter stated in pertinent part:

> [T]here is an even more important objection to the present scheme than that it wastes investigative resources. The present passive identification program is liable to result in adverse judicial decisions based on defendant claims of selective prosecution.
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> . . .
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> Unfortunately, we believe that if the government initiates prosecutions with only the passive identification scheme in place, there exists a real risk that the United States will lose at least a few of the initial cases. . . . Since a passive identification system necessarily means that there will be enormous numbers of non-registrants who are neither identified nor prosecuted, a prosecution of a vocal non-registrant will undoubtedly lead to claims that the prosecution is brought in retribution for the non-registrant's exercise of his first amendment rights. *See* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc).

Brief for the Appellee at 6-7, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

by the passive enforcement system "are liable to raise thorny selective prosecution claims."[30] A June 30, 1982 memorandum[31] from Jensen marked "BACKGROUND INFORMATION NOT FOR PUBLIC RELEASE" recognized that the passive system created a prosecutive pool comprised of "a large sample of persons who object on religious and moral grounds and persons who publicly refuse to register."[32]

The selectivity of the passive enforcement system also disturbed David J. Kline,[33] a United States Department of Justice advisor on the draft law. Kline testified at the *Wayte* hearing that he had become "very concerned"[34] about the system, as early as his assignment in July 1980.[35] He tried to convince the Selective Service to adopt an active enforcement system to identify nonregistrants instead of "simply waiting for them to come to their [sic] attention."[36] Ultimately, Kline drafted the March 2, 1982 "Jensen Letter"[37] to encourage "the decision makers . . . to push for the Active Enforcement System."[38] Clearly, the equal protection problem raised by the passive enforcement system, and its solution—random selection—did not escape the government.

In spite of these inherent and foreseeable problems, the government went forward with the passive enforcement system for selectively prosecuting only vocal nonregistrants. Ordinarily, the decision to prosecute nonregistrants for the draft originates in the Department of Justice, which provides names to the appropriate United States Attorney. Then the Attorney ultimately decides whom to prosecute.[39] Among those involved in *this* prosecutive policy determination, however, were: Presidential Counselor Edwin Meese III and other White House Staff; the Selective Service; the Justice Department in Washington, D.C.; and the Presidential Military Manpower Task Force whose membership includes the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Director of Selective Service, and others.[40] Documents disclosed by the government imply that if the first wave of prosecutions made examples of

30. Brief for the Appellee at 6, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

31. *Id.* at 5. The memorandum was sent to F. Henry Habight II, Special Assistant to Attorney General William French Smith.

32. *Id.* at 5-6.

33. David J. Kline is Senior Legal Advisor in the General Litigation and Legal Advice Section in the Criminal Division of the United States Department of Justice. It was his function to render advice on the draft law and supervise its administration. 549 F. Supp. at 1382.

34. Brief for the Appellee at 9, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

35. Brief for the United States at 15, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

36. *Id.*

37. Portions of the letter were drafted by Kline, but Jensen signed it. 549 F. Supp. at 1384.

38. Brief for the Appellee at 10, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

39. 549 F. Supp. at 1382.

40. Brief for the United States at 46, *Wayte*, 710 F.2d 1385 (9th Cir. 1983); *Wayte*, 549 F. Supp. at 1382. Membership also includes the Secretaries of the Army, Navy, and Air Force, and Presidential Advisors on National Security Affairs.

the most vocal resisters, great numbers of men would be induced to register.[41]

The intent and effect of the policy were inescapable; as Kline observed, "the chance that a quiet non-registrant will be prosecuted is probably about the same as the chance that he will be struck by lightning."[42]

On July 22, 1982, Wayte was indicted for failure to register for the draft.[43]

II. Selective Prosecution in Equal Protection Cases

A. Case Law Development

The landmark case of *Yick Wo v. Hopkins*[44] established the principle that equal protection of the law is denied when otherwise valid laws are discriminatorily enforced by state officials. Yick Wo, a Chinese laundry operator, was convicted of violating an ordinance that banned the operation of laundries in all but brick or stone buildings unless prior consent was obtained from the city licensing board. He had sought consent, but it was refused, despite the safe condition of his wooden facility. The facts showed that Chinese laundry operators were uniformly denied the required consent, while non-Chinese operators were granted consent in all but one instance.[45] The Supreme Court held that criminal enforcement of the law in this case was, therefore, illegal.[46]

While discriminatory *state* action is the subject of the Fourteenth Amendment Equal Protection guarantee,[47] the Due Process Clause of the Fifth Amendment[48] accords a defendant the same protection from

41. 549 F. Supp. at 1384; *see infra* note 172 and accompanying text.

42. Jensen Letter, *supra* note 20; Brief for the United States at 3, *Wayte*, 710 F.2d 1385 (9th Cir. 1983). This statement was drafted by Kline and signed by Jensen. *See supra* notes 33-37 and accompanying text.

43. 549 F. Supp. at 1378. *See supra* note 8.

44. 118 U.S. 356 (1886).

45. *Id.* Often, discrimination must be inferred from statistical data when prosecutorial discretion on a case-by-case basis forms a discriminatory pattern. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1026 (1978). This inference is more compelling when the prosecutive procedure itself systematically works the pattern. See *infra* notes 98-99 and accompanying text for consideration of the role of statistical data in establishing a prima facie case.

46. 118 U.S. at 373-74. Specifically, the Court stated:

> Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id.

47. U.S. CONST. amend. XIV, § 1: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

48. U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property without due process of law."

discriminatory *federal* enforcement or prosecution.[49] Selective prosecution claims may arise in a variety of contexts. This Comment analyzes cases in which the federal government was charged with selectively prosecuting those who exercised their First Amendment rights. The numerous cases that do not discuss selective prosecution on this ground or that deal with the issue only fleetingly, are beyond the scope of this Comment. The common denominator in the selective prosecution cases that follow is the defendant's expression of unpopular views and dissemination of ideas that run counter to federal government policy.

Although many claims of selective prosecution have been made in tax offense cases, it is clear that the government prosecutes both vocal and nonvocal tax offenders.[50] While the legal standard for selective prosecution is not different for tax offenders, the practical impact is that tax offenders must show a more individual-specific discrimination, as opposed to a systematic discrimination.[51]

Courts have developed a two-prong test for establishing a prima facie case of selective prosecution. First, the defendant must show that others similarly situated have not been prosecuted for the same conduct. Second, he must show that his selection was based on an improper ground.[52] Four cases[53] illustrate the development and gradual recognition[54] of selective prosecution claims and set the stage for the district court decision in *United States v. Wayte*.[55]

In *United States v. Crowthers*,[56] a law requiring a permit to assemble at the Pentagon was enforced against individuals assembled for a prayer service to pray for peace in Vietnam, but was not enforced against members of several progovernment demonstrations, assembled to welcome

49. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

50. *See infra* notes 89-94 and accompanying text.

51. Since no government enforcement procedure focuses solely on vocal tax offenders, a defendant will have to show that the government focused its investigation efforts *on him*. *See infra* text accompanying notes 94, 132 and 143-46.

52. *See infra* note 96 and accompanying text. A court also may grant an evidentiary hearing on the issue of selective prosecution when the defendant proffers evidence probative of selective prosecution. *See infra* note 82 and accompanying text. For example, the Ninth Circuit grants an evidentiary hearing on selective prosecution when a defendant has alleged facts sufficient to take the question beyond the frivolous stage. United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978) (citing United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976)). For a discussion of the Ninth Circuit standard for obtaining an evidentiary hearing, see *infra* note 125.

53. United States v. Scott, 521 F.2d 1188 (9th Cir.), *cert. denied*, 424 U.S. 955 (1976); United States v. Falk, 479 F.2d 616 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

54. *See* Comment, *The Ramifications of* United States v. Falk *on Equal Protection from Prosecutorial Discrimination*, 65 J. CRIM. L. & CRIMINOLOGY 62, 63-64 n.32 (1974).

55. 549 F. Supp. 1376 (C.D. Cal. 1982).

56. 456 F.2d 1074 (4th Cir. 1972).

Vice President Agnew and attend loud military band recitals.[57] On these facts, the Fourth Circuit inferred discrimination and shifted the burden to the government to rebut the inference of selective prosecution.[58] It stated, "It is neither novel nor unfair to require the party in possession of the facts to disclose them."[59] After government disclosure, the court concluded that the defendants had been selectively prosecuted.

Later that same year, the Ninth Circuit decided *United States v. Steele*.[60] In *Steele*, census-resisters who actively promoted the resistence movement were prosecuted for failing to complete their census forms. Only four individuals were prosecuted and all had encouraged resistance publicly, through press conferences or protest marches.[61]

Steele attempted to show that his selection was deliberately based on an "unjustifiable standard"; he relied on one of the first selective prosecution cases to set a standard, *Oyler v. Boles*.[62] *Oyler* held that selection for prosecution cannot be based on an "unjustifiable standard such as race, religion, or other arbitrary classification."[63] Steele would be entitled to an acquittal if evidence proved that the government "*purposefully* discriminated against those who chose to exercise their first amendment rights."[64] Some earlier cases had interpreted "purposeful" or "intentional" in a way suggestive of bad faith.[65] The *Steele* case is important

57. *Id.* at 1077. The defendants were also charged with creating a disturbance by conducting several "Masses for Peace." The defendants included the clerics Bishop Crowthers and Father Pierce who administered the religious services. *Id.* at 1076.

58. The court declared:

> [W]e think when the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint, and where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence as to what extent loud and unusual noise and obstruction of the concourse may have occurred on other approved occasions.

Id. at 1078.

59. *Id.*

60. 461 F.2d 1148 (9th Cir. 1972). It should be noted that the *Steele* opinion was written by Judge Eugene A. Wright, who also wrote the circuit court majority opinion in *Wayte*.

61. *Id.* at 1150-51.

62. 368 U.S. 448 (1962). In *Oyler* a prisoner filed a habeas corpus petition after being convicted under a state recidivist statute. He argued that 904 other prisoners had not received penalties as severe as his. *See infra* note 65.

63. 368 U.S. at 456.

64. 461 F.2d at 1151 (emphasis added).

65. The two sources for the "purposeful" interpretation were Oyler v. Boles, 368 U.S. 448 (1962) and Snowden v. Hughes, 321 U.S. 1 (1944); both had language limiting the availability of the claim of selective prosecution.

The *Oyler* court determined that while a habitual criminal statute had been applied unequally, the defendant's allegations set out no more than a failure to prosecute others because the prosecutors lacked knowledge of other defendants' prior offenses. 368 U.S. at 456. Although only a minority of prior offenders were prosecuted under the statute, their selection was not "the result of a deliberate policy of proceeding only in a certain class of cases or

because it stresses the *systematic* impermissible standard approach.[66]

Steele was able to demonstrate that at least six others had failed to fill out their census forms, but had not been prosecuted. None had taken a public stand on census resistance. When confronted with this evidence, the United States Attorney's Office indicated initially that information about the identity of those who failed to complete census forms was unavailable.[67] The Regional Technician for the census testified that he had never heard of the six.[68] However, the government clearly had all the names of those who failed to fill out the form completely—it only had to look at the forms.

Subsequent evidence indicated that government officials had been very concerned about the census resistance movement and in fact had compiled background dossiers on the vocal resisters.[69] The court determined that the mere fact that the government should have had all the names through the system alone "strongly suggest[ed] a questionable emphasis upon the [vocal] census resisters."[70] The government offered no

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against specific persons." *Id.* The Court concluded that the selection for prosecution was not based on "an unjustifiable standard, such as race, religion or other arbitrary classification." *Id.*

The *Oyler* court cited *Snowden* for support; *Snowden* used the "intentional" or "purposeful" standard in a way implying bad faith. 321 U.S. at 8. However, this support was misplaced. *Snowden* was a civil action in which the plaintiff charged that two election board members refused to certify him as a nominee for impermissible reasons. *Id.* at 4. Therefore, it was more appropriate to require a showing of some sort of ill will. It is also revealing to note that even *Snowden* recognized that "purposeful" discrimination may be evidenced by *systematic* discrimination. *Id.* at 9.

The *Oyler* case is best known for its chilling dicta that the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. 368 U.S. at 456. Although the United States was not a party in the case, it has doubtless benefitted from this powerful and often criticized statement. *See, e.g.,* United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973).

66. It has been argued that the *Snowden* interpretation (discussed *supra* note 65) is more appropriate in cases involving a lone plaintiff or defendant, rather than when the selective prosecution is systematic, or is of an identifiable class (such as classifications based on race or religion). Note, United States v. Falk: *Developments in the Defense of Discriminatory Prosecution*, 72 MICH. L. REV. 1113, 1119 (1974). "Where the existence of an impermissible standard can be shown by objective criteria, there should be no need to prove that the standard was applied with malice." *Id.*

Under this analysis, the passive enforcement system used in *Wayte* to select exclusively vocal offenders for prosecution would constitute objective criteria of impermissible selection based solely on the exercise of First Amendment rights. Evidence that the government had a "good" motive for selecting vocal violators, such as bolstering the national security, would not remedy the constitutional infirmity of the selection procedure. The Supreme Court is aware of the objective/subjective distinction as evidenced by its reference to the "necessity of showing systematic *or* intentional discrimination." Edelman v. California, 344 U.S. 357, 359 (1973) (dictum) (emphasis added); *see also Snowden*, 321 U.S. at 8-9.

67. 461 F.2d at 1151.

68. *Id.* at 1151-52.

69. *Id.* at 1151.

70. *Id.* at 1152.

explanation or justification for its actions other than prosecutorial discretion.

The court concluded that Steele had been selected for prosecution on the basis of his exercise of First Amendment rights. It stated, "An 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."[71]

The next, and perhaps most important case with respect to *Wayte* is *United States v. Falk*.[72] The facts in *Falk* are similar to those in *Wayte*. Falk was a vocal antidraft activist who participated in draft-resisters organizations and protested American actions in Vietnam. Falk was indicted on four counts, including refusal to submit for induction and failure to have a draft card.[73] Over 25,000 Selective Service registrants also failed to possess their draft cards. Although the government was aware of the violations, other violators were not being prosecuted.

The Seventh Circuit looked to *Steele* and *Crowthers* for guidance, and saw in *Steele* "[s]imilar circumstances, in which a vocal dissenter appeared to have been singled out for prosecution."[74] In addition, the list of officials involved in approving the decision to prosecute Falk was suspicious. The court found it "difficult to believe that the usual course of proceedings in a draft case requires such careful consideration by such a distinguished succession of officials prior to a formal decision to prosecute."[75]

The *Falk* trial court had rejected the claim of selective prosecution, and a Seventh Circuit panel had affirmed.[76] However, on rehearing en banc, the court reversed in a four to three decision. The dissenting judge on the panel now wrote for the majority:[77] "[J]ust as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government."[78] The majority applied the *Steele* holding that an enforcement procedure that focuses upon the vocal offender is inherently suspect and found (1) that Falk had established a

71. *Id.* (emphasis added).

72. 479 F.2d 616 (7th Cir. 1973) (en banc).

73. *Id.* at 617-18.

74. *Id.* at 621.

75. *Id.* at 622. As noted in *Wayte*, 549 F. Supp. at 1383, the list of officials who approved Falk's prosecution included the Assistant United States Attorney, the Chief of the Criminal Division of the United States Attorney's Office, the First Assistant United States Attorney, the United States Attorney, and officials with the Department of Justice in Washington.

76. 472 F.2d 1101 (7th Cir. 1973), *rev'd*, 479 F.2d 616 (en banc).

77. Judge Sprecher wrote for the majority in *Falk*.

78. 479 F.2d at 620.

prima facie case;[79] and (2) that it was incumbent upon the government to come forward with evidence rebutting the inferential evidence.[80] The *Falk* court remanded the case for an evidentiary hearing and thus allowed Falk to question the Assistant United States Attorney, engage in discovery, and present additional evidence that the government had not prosecuted other violators.[81]

Falk's treatment of the evidentiary hearing question is important. A request for an evidentiary hearing in selective prosecution cases usually arises when the defendant moves to dismiss the indictment against him on selective prosecution grounds. A hearing is granted when the defendant proffers evidence probative of the issue of selective prosecution.[82]

The *Falk* court established that if a defendant could raise a "reasonable doubt" that he was selectively prosecuted, then he should be granted an evidentiary hearing on that issue.[83] The court also implied that upon the "reasonable doubt" showing, the burden of going forward would shift to the government to prove nondiscrimination.[84]

The *Falk* dissent criticized this result and argued that the "reasonable doubt" standard opened the floodgates for evidentiary hearings that pry into the motives of prosecutors.[85] The dissent worried that *Falk*

79. *Id.* at 623. For a description of the prima facie case, see *supra* text accompanying note 52 and *infra* notes 96-101 and accompanying text.

80. 479 F.2d at 624. To meet its burden, the government had to show "compelling evidence." *Id.*

81. *Id.* at 623-24.

82. The amount of evidence required may vary. *Compare Falk*, 479 F.2d at 620-21 (facts sufficient to raise a reasonable doubt about the prosecutor's purpose) *with* United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1976) (enough facts alleged to take the question past the frivolous stage), *and* United States v. Schmucker, 721 F.2d 1046, 1049 (6th Cir. 1983) (preliminary showing that there is a legitimate issue concerning the government conduct).

83. 479 F.2d at 624.

84. *Recent Decisions*, 62 ILL. B.J. 472-74 (1974) (suggesting that the Seventh Circuit intended the burden to shift without establishment of the prima facie case, on the raising of reasonable doubt alone).

85. The *Falk* dissenters argued that Falk had "failed to show that a line had been drawn" between those who exercised their First Amendment rights and those who did not. 479 F.2d at 626 & n.2 (Cummings, Hastings, & Pell, J.J., dissenting). The dissent also quoted the panel opinion which reasoned that "select enforcement of a law against someone in a position to influence others is unquestionably a legitimate prosecutorial scheme to secure general compliance with the law." 472 F.2d at 1108 (panel opinion).

This reasoning is appropriate when the defendant gains his position of influence through general notoriety. For example, it is constitutionally acceptable to punish an organized crime figure for tax evasion when the figure's prominence and influence on the public stems from reputation in the community. However, this rationale is unacceptable when the government exclusively and selectively prosecutes offenders who gain prominence through their exercise of constitutionally protected rights. *See* Note, *supra* note 66, at 1128.

Moreover, even the *Falk* dissenters suggested that the decision would have been tolerable if Falk had established that the effect of the government's prosecutive policy was to prosecute only those who vocally opposed government policy. 479 F.2d at 627. Thus, *Wayte* established what even the *Falk* dissenters would have regarded as a case of impermissible selective prose-

could be used to investigate and curb a prosecutor's every discretion. While this concern is certainly valid, the real impact of the standard depends upon how a particular court defines "reasonable doubt." Requiring a strong showing to raise a reasonable doubt may still effectively insulate prosecutorial discretion; however, *Falk* permits greater scrutiny of executive agencies and officials in determinations of prosecutive policy than previous cases. While *Falk* may not be widely used for this purpose, it may well be the only available deterrent to prosecutorial discrimination.[86]

It seems that the *Falk* majority had just this deterrent effect in mind; it strongly disapproved the use of *Oyler* dicta to validate all methods of enforcement and shield procedures and decisionmakers from judicial scrutiny. Quoting Judge Cummings, it declared that "[t]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of government."[87] The minority's reliance on separation of powers as a reason for looking the other way was thus unconvincing. As one commentator notes, "If separation of powers prevents review of discretion of executive officers, then more than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the Constitution."[88]

The final case setting the stage is *United States v. Scott*.[89] Scott was convicted for failure to file an income tax return, and claimed selective prosecution on the basis of his exercise of First Amendment rights as a vocal opponent of the system. Scott failed to establish a prima facie case because he failed to satisfy the first prong of the test; he did not show that other violators, who were silent, were not prosecuted. The court distinguished *Scott* from *Steele* in which the government had knowledge and proof of other violators, but had prosecuted only those violators who had taken a public stand against compliance with the census law. The *Scott* court clarified that the government could properly prosecute vocal violators, as long as nonvocal violators were also being prosecuted.[90] Scott

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cution: that the effect of the government's prosecutive policy was to prosecute only nonregistrants who vocally opposed the draft. *See infra* note 115 and accompanying text.

86. Comment, *supra* note 54, at 67. The concurring opinion in *Falk*, 479 F.2d 616, 624 (1973) (Fairchild, J., concurring), suggests that judicial inquiry into the motives of the government prosecution was not only warranted, but necessary to the fair and equal administration of the law under the Constitution. "This is indeed an exceptional area of national life where conscientious opposition to government policy has been intertwined with violations of the laws which implement the policy." *Id.* at 625.

87. 479 F.2d at 624 (quoting Stamler v. Willis, 415 F.2d 1365, 1369-70 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970)).

88. K. DAVIS, DISCRETIONARY JUSTICE 210 (1969).

89. 521 F.2d 1188 (9th Cir.), *cert. denied*, 424 U.S. 955 (1975).

90. *Scott* has been consistently followed. *See, e.g.*, United States v. Oaks, 527 F.2d 937, 940 n.2 (9th Cir. 1975), *cert. denied*, 426 U.S. 952 (1976) (prosecution permissible because no

presented no evidence that the government failed to prosecute nonvocal violators, and therefore Scott was not impermissibly singled out.[91]

Tax cases like *Scott*[92] form a line of precedent inapplicable to political First Amendment cases, such as *Falk* or *Steele*. The government prosecutes tax offenders continuously, and while it doubtless believes that prosecuting vocal tax protesters has a beneficial deterrent effect, it has no policy or practice of prosecuting *only* vocal tax offenders.[93] Since no implicit or explicit enforcement procedure focuses *solely* on vocal tax offenders, a vocal tax offender claiming selective prosecution must make a more particularized showing of impermissible motive or ground for selection. He will have to show that the government focused its investigation *on him*.[94]

In contrast, the evidence presented to the district court in *Wayte* proved that the government had implemented an enforcement procedure which both in *policy* and *practice* selected only vocal offenders. The constitutional concern is greater when the selection is *systemic* than when a single individual defendant is targeted for investigation and prosecution.[95]

B. The Prima Facie Case

A defendant claiming selective prosecution must satisfy a two-prong test for establishing a prima facie case. The defendant must show: (1) that others similarly situated have not been prosecuted; and (2) that his selection was based on an impermissible ground such as race, religion, or his exercise of First Amendment rights to free speech.[96] The first prong

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evidence presented that government did not prosecute nonvocal tax offenders); United States v. Stout, 601 F.2d 325, 328 (7th Cir.), *cert. denied*, 444 U.S. 979 (1979) (prosecution of a vocal violator permissible so long as other nonvocal violators were prosecuted as well).

91. 521 F.2d at 1195.

92. *See, e.g.*, United States v. Catlett, 584 F.2d 864 (8th Cir. 1978); United States v. Ness, 652 F.2d 890 (9th Cir. 1981).

93. *See Scott*, 521 F.2d at 1195 (no evidence that government fails to prosecute those who fail to file tax returns but do not take a vocal stand on the issue). Presumably, government tax audits based on random selection warn the average citizen that he, too, will be prosecuted for tax offenses. Investigating and prosecuting both vocal and nonvocal tax offenders is not only a sound constitutional scheme based on random selection, it is also an effective tool for securing general compliance with the law. It is more than puzzling that the government did not adopt such a scheme for enforcing draft registration.

94. *See infra* text accompanying note 142.

95. Brief for the Appellee at 17, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

96. United States v. Oaks, 527 F.2d 937, 940 (9th Cir. 1975) (citing United States v. Scott, 521 F.2d 1188 (9th Cir. 1975)). *See* United States v. Wilson, 639 F.2d 500, 503 (9th Cir. 1981). In *Wilson* the court compared United States v. Gillings, 568 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978) to United States v. Choate, 619 F.2d 21, 23 (9th Cir.), *cert. denied*, 449 U.S. 951 (1980). The *Gillings* court stated that the Ninth Circuit uses the prima facie test of United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (prosecution based on the exercise of constitutional rights is an impermissible ground). The *Choate* court stated that

of the test must often be satisfied by statistical data.[97] While it is suggested that statistical data is sometimes equivocal,[98] it is often the only means available to a defendant to establish nonprosecution of other offenders.[99] The second prong is satisfied by direct or statistical evidence. In early selective prosecution cases, defendants had to show that their prosecution was based on an unjustifiable standard that relied on an "arbitrary classification."[100] This concept was broadened to include not only the exercise of *First Amendment* rights as an impermissible ground for selection for prosecution, but the exercise of *any* constitutional right as well.[101]

Once a prima facie case establishes that a law or its application results in a discriminatory effect, the court will review it under one of three standards to determine if an individual is being denied equal protection of the law.[102]

C. Equal Protection Standards of Review

The traditional standard is the low level of scrutiny used to uphold economic and social regulations as long as they are rationally related to a constitutionally permissible government interest.[103] Laws are presumptively constitutional, just as criminal prosecutions are presumptively un-

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the Ninth Circuit had expanded *Oyler* to include the exercise of First Amendment rights. *Wilson* expressly approved *Gillings* and held that a prosecution based on the exercise of constitutional rights is impermissible. 639 F.2d at 504. The recent Ninth Circuit case of United States v. Christopher, 700 F.2d 1253 (9th Cir.), *cert. denied*, 461 U.S. 960 (1983) prohibits prosecution "based upon impermissible grounds." *Id.* at 1258.

97. *See infra* note 99.

98. While statistical data supports an inference of selective prosecution, courts have indicated two reasons why statistical data may be inadequate in some situations: (1) data showing that similarly situated people have not been prosecuted may mean only that enforcement of the law has been lax; and (2) the failure to prosecute others may reflect only the prosecutor's lack of knowledge that other similarly situated violators exist, so that any resulting selective prosecution would be unintentional. Comment, *supra* note 54, at 65. *See generally supra* notes 58-64 and accompanying text.

99. Statistical data is not only important in establishing a defendant's prima facie case of selective prosecution, but also in satisfying the standard for an evidentiary hearing on the matter. It may be the decisive factor in granting the defendant power to subpoena documents probative of the elements of the defense of selective prosecution. *See Berrios*, 501 F.2d at 1211-12. *See also* United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973) (defendant must show a colorable basis of selective prosecution to be entitled to subpoena documentary evidence required to establish the defense). For a discussion of the importance of statistical data in *Falk*, see *Berrigan*, 482 F.2d at 179 & n.2.

100. *Oyler*, 368 U.S. at 456.

101. *See supra* note 96.

102. *See generally* L. TRIBE, *supra* note 45, at 1000-97.

103. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Lindsley v. Nat'l Carbonic Gas Co. 220 U.S. 61, 78 (1911).

dertaken in good faith and in a nondiscriminatory fashion.[104]

The middle standard provides an intermediate level of scrutiny for quasi-suspect classifications, such as gender-based differentiations.[105] The offending classification or law must serve important governmental objectives and must be substantially related to achievement of those objectives.[106]

The third standard is that of strict scrutiny. It requires an inversion of the normal presumption of constitutionality and demands that the government justify the classification or procedure as necessary to achieve a compelling state interest. Also, there must be no less burdensome alternative available to accomplish the government's interest. The strict scrutiny level of review is triggered when a classification "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage."[107] Laws that interfere with the exercise of fundamental rights and liberties "explicitly or implicitly guaranteed by the Constitution"[108] will be subject to strict scrutiny, and as one scholar notes, "in none of the cases in which the Court has found that a law invaded a fundamental right has it held that the legislation was justified by a compelling state interest."[109]

III. The Two Court Decisions

A. The Trial Court

1. The Prima Facie Case

The district court laid out the two-prong prima facie case for selective prosecution as follows:

> The defendant must show: (1) that others similarly situated have not been prosecuted for conduct similar to that for which the defendant was prosecuted; and (2) that the government's discriminatory selection of the defendant for prosecution was based on impermissible grounds such as race, religion or exercise of the defendant's First Amendment right of free speech.[110]

The authorities cited in support of this framing were *United States v. Scott*[111] and *United States v. Berrios*.[112]

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104. *Falk*, 479 F.2d at 620.

105. *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976).

106. *Id.*

107. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

108. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1972) (education not a fundamental right because neither explicitly nor implicitly guaranteed by the Constitution). *But see* Serrano v. Priest, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (education considered a fundamental interest under the California Constitution).

109. B. SCHWARTZ, CONSTITUTIONAL LAW 374 (1979).

110. *Wayte*, 549 F. Supp. at 1380.

111. 521 F.2d 1188 (9th Cir.), *cert. denied*, 424 U.S. 955 (1975); *see supra* notes 89-95 and accompanying text.

112. 501 F.2d 1207 (2d Cir. 1974); *see supra* note 96.

The court found that Wayte had satisfied the first prong, since well over 500,000 men had also failed to register for the draft in violation of the Selective Service Act, and had not been prosecuted. The two problems commonly associated with an inference from statistical data were not at issue here; the 500,000 figure was not caused by inadvertant lax enforcement or the government's lack of knowledge that other violators existed.[113]

The question left for the court was whether the evidence showed that Wayte's prosecution was based on the impermissible ground of exercise of the defendant's First Amendment rights.[114] Did the passive system operate so that only *vocal* nonregistrants would be selected for prosecution?

The district court concluded that the government's passive enforcement system led only to indictments of vocal nonregistrants; it was therefore constitutionally infirm.[115] Further, the government was completely cognizant of the selective effect of the passive enforcement policy.[116] It also recognized that "the passive program had potentially serious first amendment problems that would lead to selective prosecution claims,"[117] and knew that an "active" system would remedy the defect.[118] Finally, and most importantly, although the government had the means to implement the active system through its own agencies, *it did not.* Instead, it implemented the passive enforcement system, and "must now accept the consequences of that choice."[119] "[A]s *Steele* and *Falk* make clear, this [prosecutive] policy violates the first amendment rights of the vocal nonregistrants by selecting them, alone, for prosecution."[120]

Implicit in its decision is the district court's application of the strict scrutiny standard of review. The government action interfered with the exercise of a constitutional right, thereby qualifying for the strict scrutiny

113. *See supra* note 98 and accompanying text.

114. The district court assumed that Wayte's letter-writing was an exercise of his First Amendment right to free speech. The court simply stated that Wayte was singled out for prosecution because "he exercised his first amendment right to free speech." 549 F. Supp. at 1382. The circuit court opinion did not discuss whether Wayte had exercised his First Amendment right to free speech. Rather, it focused on the lack of impermissible motivation by the government. 710 F.2d at 1387-88. While this Comment was at the printer, the Supreme Court held that Wayte's First Amendment rights were not violated by the government procedure. United States v. Wayte, 53 U.S.L.W. 4319 (March 19, 1985). *See supra* note 7.

115. 549 F. Supp. at 1384-85. *Accord* United States v. Schmucker, 721 F.2d 1046, 1049 (6th Cir. 1983); *contra* United States v. Eklund, 733 F.2d 1287, 1292 (8th Cir. 1984). For discussion of the *Schmucker* and *Eklund* cases, see *infra* note 168.

116. 549 F. Supp. at 1385; *see supra* text accompanying notes 27-42.

117. 549 F. Supp. at 1384; *see supra* text accompanying notes 27-42.

118. *See supra* text accompanying notes 27-42.

119. *Wayte*, 549 F. Supp. at 1384.

120. *Id.*

standard. In addition, the *Steele* and *Falk* cases had established that prosecution of only vocal violators was inherently suspect.[121] The passive enforcement system was therefore subject to the reverse presumption of constitutionality, and the burden was on the government to prove that the passive enforcement system was necessary to achieve a compelling government interest and that no other means of enforcement was available to accomplish the governmental interest. The court found that an alternate means was readily available to the government in either an active system, or an active and passive system together.[122] The district court rejected the government's arguments that the passive enforcement system was necessary to achieve government interests because of a lack of alternative enforcement systems, cost, and deterrence considerations.[123]

2. *The Evidentiary Hearing*

The district court held that Wayte was entitled to an evidentiary hearing on his claim of selective prosecution. The holding was based on the set of facts alleged by Wayte at a pretrial hearing on the issue. The standard required by *United States v. Erne*,[124] a Ninth Circuit case, was that the defendant must allege enough facts to take the question of selective prosecution past the frivolous stage.[125]

Wayte clearly met this standard through the allegation of three facts: (1) that nonregistrants totalled over 500,000 men; (2) that a passive enforcement system existed; and (3) that the system resulted in the indictments of twelve men, including Wayte, all of whom were vocal nonregistrants.[126]

In effect, Wayte's factual allegations raised a "reasonable doubt" under *Falk* that improper prosecutorial motives existed. The circum-

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121. *Falk*, 479 F.2d at 621; *Steele*, 461 F.2d at 1152.

122. The court finds it hard to believe that the prosecutive arm of the Government, with access to Social Security records, could not locate any non-registrants other than those who were vocal in their opposition to draft registration. In fact, the Government concedes that if and when an active enforcement program is implemented, it has the ability to select men to prosecute based on randomness.

Wayte, 549 F. Supp. at 1381.

123. *Id.* at 1384.

124. 576 F.2d 212 (9th Cir. 1978).

125. *Id.* at 216. In United States v. Oaks, 508 F.2d 1404 (9th Cir. 1974), *aff'd after remand*, 527 F.2d 937 (1975), *cert. denied*, 426 U.S. 452 (1976), a tax offender argued under the *Steele* case that he had alleged facts sufficient to require an evidentiary hearing on the issue of selective prosecution. 508 F.2d at 1404. The *Oaks* court observed that hearings on similar pretrial motions are granted when a defendant alleges enough facts to take the question past the frivolous stage, and reasoned that since Oaks had met this standard he was entitled to an evidentiary hearing. *Id.* The *Oaks* standard was adopted in *Erne*, 576 F.2d at 216.

For a discussion of the Seventh Circuit standard for granting an evidentiary hearing, see *supra* notes 81-84 and accompanying text.

126. *See generally supra* notes 11-29 and accompanying text.

stances in *Wayte* raised just the problem in prosecutorial discretion that *Falk* had anticipated.[127] Under either the *Erne* or *Falk* standard, the district court ruling was correct.

B. The Circuit Court

1. The Prima Facie Case

The circuit court laid out the following two-prong prima facie case for selective prosecution: the defendant must show (1) that others similarly situated have not been prosecuted; and (2) that the prosecution is based on an impermissible motive.[128] The cited authority for this framing was *United States v. Ness*,[129] a tax offender case. The second prong is notably different from that used by the district court, which was "based on impermissible grounds such as . . . exercise of the defendant's right of free speech."[130] The difference is noteworthy because it gives the second prong a different aura—one that implies that bad faith must be present and demonstrated. Some early case law had emphasized a showing of this kind,[131] and tax cases such as *Ness* require this more individual-specific approach.[132] In political First Amendment cases, however, the trend has been to consider a showing of objective circumstances, as evidenced by the change in the language of the second prong.

Ness, like *Scott*,[133] is a tax case. As has been noted,[134] a vocal tax offender cannot successfully claim prosecution as a result of a systematic selection system; he must show a more particularized, individual-specific intent by the government to select him for prosecution. The circuit court's use of the *Ness* framing should not change the legal meaning of the test—an "impermissible motive" under *Ness* would be selection for prosecution on the basis of the exercise of Wayte's right of free speech under *Scott* and *Berrios*.[135]

The circuit court held that Wayte had satisfied the first prong of the test, for the same reasons given by the district court.[136] There was simply no way around the fact that many similarly situated men had not been prosecuted.

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127. *See supra* text accompanying notes 81-84.

128. *Wayte*, 710 F.2d at 1380.

129. 652 F.2d 890 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981). In United States v. Eklund, 733 F.2d 1287 (8th Cir. 1984) (en banc), the Eighth Circuit also relied on a tax case. *See infra* note 168.

130. *Wayte*, 549 F. Supp. at 1380.

131. *See supra* notes 62-65 and accompanying text.

132. *See supra* text accompanying notes 50-51.

133. For a discussion of the *Scott* case, see *supra* notes 89-94 and accompanying text.

134. *See supra* text accompanying notes 89-95.

135. *See supra* notes 110-12 and accompanying text; *see also supra* note 96.

136. *Wayte*, 710 F.2d at 1385.

The court concluded that Wayte failed to establish a prima facie case, however, because he did not show "that he was selected from the larger group *because* of the exercise of his Constitutional rights."[137] The use of "because" is critical—it reveals that the circuit court focused on "motive" in an individualized way, instead of focusing on the systematic procedure itself. The phrase "based on" used by the district court[138] to mean "on the basis of"[139] was not used because it could be interpreted to mean "through"—and Wayte was clearly selected for prosecution *through* the exercise of his First Amendment rights. "Because" indicates that the prosecutorial motive must be individual-specific.

The circuit court continued: "The government may not purposefully discriminate against persons who exercise their First Amendment rights [citation omitted]. Wayte contends that the government was aware that its passive enforcement system would result in the prosecution of vocal non-registrants only."[140]

The court's use of "purposefully" seems to mean "individually" in the sense that the government may not go out of its way to prosecute certain individuals. This interpretation is clear from the use of the word "persons" instead of the less specific term "those." "Those" could indicate a class, as well as different individuals. The use of "those" makes the procedure vulnerable since it certainly selected "those who exercised their First Amendment rights."

The implication in the second statement is that the government may not have been aware that its procedure was "designed to insure that only persons who are most adamant . . . will be prosecuted."[141] The court seems to imply that the government may not "purposefully" hunt down individual vocal nonregistrants, but it may institute a procedure that "accidentally" selects them.

The Ninth Circuit finally revealed its hand: "The evidence presented by Wayte does not demonstrate impermissible *motivation*. . . . Wayte made no showing that the government *focused* its investigation *on him* because of his protest activities."[142] The cited authority is *Ness*.[143] But Wayte, of course, never claimed that the government was motivated to prosecute him "individually." As a tax case, *Ness* requires a showing of individual-specific motive as a practical mat-

137. *Id.* (emphasis added). *Accord* United States v. Eklund, 551 F. Supp. 964, 968 (S.D. Iowa 1982), *aff'd*, 733 F.2d 1287 (8th Cir. 1984).

138. *See supra* text accompanying note 110.

139. The *Falk* court also uses these phrases interchangeably. *See supra* text accompanying note 78.

140. *Wayte*, 710 F.2d at 1387.

141. Jensen Memo, *supra* note 20; *see supra* text accompanying notes 20-21.

142. *Wayte*, 710 F.2d at 1387 (emphasis added).

143. 652 F.2d 890 (9th Cir. 1981).

ter.[144] Individual-specific "motivation" was never an issue in this case.[145]

The circuit court destroyed the distinction between *systematic* discrimination and *individual-specific* discrimination that the district court made explicit. In the process of comparing *Falk* to the facts of *Wayte*, the district court stated:

> The *Falk* court was concerned with selective prosecution as it focused on one individual. The court emphasized that the officials mentioned had approved Falk's indictment. The circumstances in this case are different from *Falk*. The constitutional infirmity is the Government's *passive enforcement system itself. It is important to emphasize that no party in this case, nor this court*, has ever suggested that the White House (through Mr. Meese or any staff) or the Task Force were involved *in the decision to prosecute this particular defendant.*[146]

"Motive" was, therefore, not the issue before the court. It would have been if the selection process were designed to be random, but somehow only vocal nonregistrants were prosecuted. The passive enforcement system itself, and its calculated yield, were the real issues before the court.

Once it rejected Wayte's prima facie case, the circuit court needed to legitimize the government's passive enforcement system. Two explanations were offered by the government and accepted by the court.[147] The first was that the government did not know the names of other violators. This is question-begging at its worst. The government by its own admission had access to the names of all violators through Social Security files.[148] Moreover, defense evidence demonstrated that lists of eighteen, nineteen, twenty, and twenty-one year-old men were available through state motor vehicle registration offices.[149] As the district court observed, nonvocal nonregistrants could be identified easily by comparing those lists to the government's list of men who registered.[150] If the government did not know who the other violators were, it was simply because it was

144. *See supra* text accompanying notes 91-95 and 133-35.

145. The use of *Ness* was even more questionable because the Ninth Circuit had just recently reaffirmed the use of the more objective language of "impermissible grounds" in the second prong. United States v. Christopher, 700 F.2d 1253, 1258 (9th Cir.), *cert. denied*, 461 U.S. 960 (1983) (citing United States v. Wilson, 639 F.2d 500, 503 (9th Cir. 1981)). The court elaborated: "The impermissible selection must be shown to be based on an unjustifiable standard such as the exercise of the first amendment right of free speech." 700 F.2d at 1258. *Christopher*, unlike *Ness*, was not a tax case.

146. *Wayte*, 549 F. Supp. at 1383-84 (emphasis added).

147. If the circuit court truly had been concerned with "motive" in the *Wayte* case, it need only have considered evidence that indicated the government targeted only vocal nonregistrants for prosecution. *See supra* notes 20-42 and accompanying text. *See, e.g., infra* note 172.

148. *See supra* notes 23-25 and accompanying text.

149. *Wayte*, 549 F. Supp. at 1381 n.6.

150. *Id.*

not interested in looking for them.[151]

The second explanation offered by the government was that only vocal nonregistrants were prosecuted because their statements were necessary to establish a willful violation of the law.[152] While certainly an ingenious twist, it is hardly satisfactory reasoning. *United States v. Taylor*,[153] which is cited authority for this notion, is inapposite. In *Taylor*, the defendants were prosecuted for participating in an illegal strike. Since absence from work was an equivocal act which could have had a completely innocent and independent explanation (such as illness), the defendants' vocal participation was necessary to establish willfulness.

In *Wayte*, however, the element of willfulness required under section 462(a) of the United States Code was established when Wayte did not respond to letters sent by certified mail from the Selective Service and the United States Attorney for Wayte's district. These letters apprised Wayte of his duty to register and warned him of penalties.[154] Moreover, the government admitted that the Federal Bureau of Investigation conducted an interview with Wayte, during which Wayte "acknowledged receipt of letters requesting him to register."[155] As the dissent in the circuit court opinion points out, there was no need to rely on his First Amendment activities to establish willfulness.[156] Such reliance strongly

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151. As the district court observed:

> [T]he court cannot accept the Government's disingenious argument that it has prosecuted all known non-registrants. It strains credulity to believe that the investigative agencies of our Government, especially the Federal Bureau of Investigation, could not locate any non-vocal non-registrants [footnote omitted]. The inference is strong that the Government could have located non-vocal non-registrants, but chose not to.

549 F. Supp. at 1381. The court then noted that nonregistrants could be located in many states by using motor vehicle registration records. *Id.*

152. The government characterized the letters as "confessions." Brief for the United States at 27, *Wayte*, 710 F.2d 1385 (9th Cir. 1983). *See infra* note 156.

153. 693 F.2d 919 (9th Cir. 1982).

154. *See supra* notes 14-16.

155. Brief for the United States at 8, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

156. 710 F.2d 1385, 1390 (Schroeder, J., dissenting). Apparently, the government does not characterize Wayte's letters as a "simpl[e] . . . exercise of the right to petition the government to protest perceived wrongs or to persuade it to abandon policies deemed unwise or unjust." Brief for the United States at 27, *Wayte*, 719 F.2d 1385 (9th Cir. 1983). "They were unequivocal confessions to the commission of a crime . . . ." *Id.* The government declared that it is "perfectly proper to select for prosecution persons who have facilitated such proceedings by uttering statements demonstrating that their transgressions of the law are willful or intentional," and that "the First Amendment provides no protection against prosecution where the statement 'is the very vehicle of the crime itself'." *Id.*

The government's insistence that Wayte's letters were the "vehicle of his crime" and unprotected under the First Amendment is difficult to understand. As the defense pointed out, "[t]he crime involved here, if any, is willful non-registration, not willful statements in opposition to draft registration. The act of non-registration is analytically separate from statements

suggests the punitive nature of the selection process.[157]

The two reasons offered by the government and accepted by the circuit court to legitimize the passive enforcement system are therefore at best disingenious, and at worst, embarrassing concoctions. The basis of the court's analysis remains unclear; the court apparently rejected the *Steele* and *Falk* standard that prosecution of vocal violators is inherently suspect. It is arguable that the court used a rational basis test and found these two reasons persuasive.

However, a court of appeals may not reverse a district court decision merely because it would have found otherwise. The court must affirm unless the district court's findings are "clearly erroneous" as a matter of law.[158] Since the district court found ample evidence of selective prosecution, the circuit court—notwithstanding its reservations—should have affirmed.

The Ninth Circuit chose to reverse. It baldly stated that because Wayte had presented no evidence of selective prosecution, the district court finding of selective prosecution was clearly erroneous.[159] The circuit court's "blanket rejection"[160] of the district court's factual findings violates both the spirit, and letter, of the law. It is thus that the Ninth Circuit Court of Appeals stands naked.

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announcing or explaining it." Brief for the Appellee at 16 n.10, *Wayte*, 710 F.2d 1385 (9th Cir. 1983).

But perhaps the government's statements reveal its belief that the act of making such statements are somehow criminal in nature. *Id.* The prosecution stated unequivocally, "the record shows that appellee was prosecuted because he directed letters to the Selective Service System . . . ." Brief for the United States at 25, *Wayte*, 710 F.2d 1385 (9th Cir. 1983). The government also (1) referred to the content of the letters as confessions and (2) posited that Wayte was prosecuted for not responding to the government's warning letters. *Id.* But sending a letter of protest—or even of confession—does not violate the draft registration law. Nor is refusing to respond to government inducements to register a violation of that law. Thus, Wayte was prosecuted "because he directed letters to the Selective Service System"; his selection was based impermissibly on this exercise of First Amendment rights.

157. *See infra* notes 167-68 and accompanying text. The government argued that it prosecuted only those who refused to register after attempts to induce them to so do failed. Brief for the United States at 21, *Wayte*, 710 F.2d 1385 (9th Cir. 1983). This argument does not address the problem in the *first* step of selection. The government sent letters of inducement only to the targeted class of *vocal* nonregistrants. The government had *already* chosen them for prosecution through the "Suspected Violator Inventory System." *See supra* text accompanying note 22. To argue that vocal nonregistrants such as Wayte were "chosen" for prosecution because they did not heed government warnings merely evades the problem of the initial impermissible selectivity.

158. *Wilson*, 639 F.2d at 503 & n.2. This standard of review insures the integrity of the trial court's factfinding process.

159. *Wayte*, 710 F.2d at 1388.

160. "The *Wayte* court's blanket rejection of the trial court's factual findings of selective prosecution does not impress us." United States v. Schmucker, 721 F.2d 1046, 1051 (6th Cir. 1983).

2. *The Evidentiary Hearing*

The circuit court held that "because Wayte made no initial showing of selective prosecution, he was not entitled to discovery of government documents."[161] The court's meaning is unclear. If by "initial showing" the court meant establishing a prima facie case, it applied an incorrect test.[162] If the court meant that Wayte had failed to allege facts to take the question past the frivolous stage under *Erne*,[163] or raise a reasonable doubt under *Falk*,[164] then one can only question what more convincing facts[165] could have been added to meet the test for a mere evidentiary hearing,[166] but fail to establish a prima facie case.

3. *The Dissent*

Circuit Judge Schroeder skillfully revealed that the emperors wear no clothes. She found the government interests cited by the majority inadequate to justify a policy and procedure "designed to punish only those who had communicated their violation of the law to others."[167] Her short and cogent analysis focused on *Steele* and *Falk* and found selective prosecution; it rejected as implausible the two reasons offered as justification for the passive enforcement system and distinguished *Taylor*; it affirmed the "clearly erroneous" standard for review of district court findings and concluded that the district court findings were sound.[168]

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161. 710 F.2d at 1388. The government defied a district court order instructing it to turn over specified documents that were to be the basis of Presidential Counselor Edwin Meese's testimony. 549 F. Supp. at 1378. The documents were not disclosed and Meese did not testify because the government claimed executive privilege. *Id.* at 1383. The district court declared, "Since the Government had the burden of rebutting the prima facie case of selective prosecution, its refusal to comply with this court's orders reflects a curious strategy. It also raises serious questions as to whether the Government has pursued this case in good faith." *Id.*

162. "To be granted an evidentiary hearing, the defendant must allege enough facts to take the question beyond the frivolous stage." 549 F. Supp. at 1379 (citing United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978)). *See supra* note 125 and accompanying text.

163. *See supra* notes 124-25, 162 and accompanying text.

164. *See supra* text accompanying notes 83-84.

165. *See supra* text accompanying note 126.

166. There is a split in the two circuits that have dealt with the evidentiary hearing question following *Wayte*. The Sixth Circuit in *Schmucker* found that the defendant was entitled to an evidentiary hearing because he made a preliminary showing that there was a legitimate issue concerning the government's conduct. 721 F.2d at 1049. The Eighth Circuit in *Eklund* found that the defendant had not made a showing sufficient to raise a reasonable doubt as to the government's purpose in prosecuting him. 733 F.2d at 1291. *See supra* text accompanying notes 85-86.

167. 710 F.2d at 1389.

168. *Id.* at 1389-90. Judge Schroeder's dissent has been cited as persuasive authority in one of the other two circuits that have considered the constitutionality of the passive enforcement system after *Wayte*. In United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983), the Sixth Circuit reversed a district court ruling that Schmucker was not entitled to an evidentiary hearing. The district court had determined that selective prosecution was not a valid defense. The

Conclusion

One cannot help but feel that the Ninth Circuit in *Wayte* was not "straight with us."[169] What were the unstated reasons behind the decision? Perhaps one is the historical disinclination to interfere with Selective Service decisions.[170] Or perhaps the court felt that the policy of allowing selective prosecution claims (though few defendants were actually successful) was too broad and its availability should be restricted so "the criminal won't go free."[171] Other reasons might be respect for prosecutorial discretion, or fear that an affirmance of the district court's

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Sixth Circuit disagreed: "The question before us then is whether a prosecutorial policy violates the first amendment if it is directed solely at 'the vocal non-registrant' who openly objects to the law on religious, moral or political grounds. If so, the defendant is entitled to an evidentiary hearing . . . ." *Id.* at 1049. The court found that:

> A prosecutorial policy so limited clearly violates the first amendment. It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strengths of their convictions. It excludes, and therefore rewards, thousands who engage in covert noncompliance and evasion of the law, including all who would confess their violation if sought out and interviewed. It discourages dissenters from expressing their criticisms of government policy. *Id.*

The court determined that the government may not prosecute "only those who publicly express their conscientious refusal to obey the registration law while leaving aside all who engage in covert refusal to obey," *id.* at 1049, and cited the *Falk* case and the *Wayte* dissent in support.

The Sixth Circuit decision dealt squarely with the government contention that the letters were merely confessions proving willful nonregistration. *See supra* note 156. "The fact that criticisms of governmental policy may be accompanied by or construed as confessions does not make such criticisms any less an exercise of first amendment rights." *Id.* at 1051.

The protection that the Sixth Circuit accorded to expressions of dissent was flatly rejected by the Eighth Circuit in United States v. Eklund, 733 F.2d 1287 (8th Cir. 1984) (en banc). *Eklund* and its companion case, United States v. Martin, 733 F.2d 1309 (8th Cir. 1984) (en banc), drew five to four decisions from an *en banc* court. *Eklund* relied on United States v. Catlett, 584 F.2d 864 (8th Cir. 1978), a tax offender case, for the prima facie test and upheld the district court determination that the "[d]efendant has not demonstrated that he is being prosecuted *because* he has expressed his opposition to the draft registration law." 733 F.2d at 1290 (emphasis original). The majority also accepted the government's contentions that no other enforcement procedure was available and that the protest letters were confessions. *Id.* at 1291-92. *See supra* note 156.

169. *See supra* note 6 and accompanying text.

170. *See generally* Doernberg, *Pass in Review: Due Process and Judicial Scrutiny of Classification Decisions of the Selective Service System*, 33 HASTINGS L.J. 871 (1982).

171. The sentiment that the criminal should not go free because the constable blundered, People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.), has ample expression in the field of selective prosecution. It ranges from a policy perspective that our legal system is founded on the rights of the innocent, 48 CONN. B.J. 425, 425 (1974), to consideration of procedural limitations on the availability of the defense in malum in se crimes. *See generally* Comment, *Curbing the Prosecutor's Discretion:* United States v. Falk, 9 HARV. C.R.-C.L. L. REV. 372, 374-75 n.17 (1974) (discussing Comment, *The Right to Non-discriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1106-12 (1961), which suggests that the right to nondiscriminatory enforcement: (1) should not be violated in efforts to insure that the criminal doesn't go free; (2) must protect the innocent *and* the guilty; and (3) exists regardless of the type of crime charged).

decision would flood the courts with selective prosecution cases dealing with all sorts of state and federal procedures for review. It even may have been respect for separation of powers that instilled a reluctance to review decisions made by a string of high level executive government officials on an important and far-reaching policy matter.

The circuit court opinion, however, does not cite such policy considerations. Instead, it seems that the court realized that the government had unwisely failed to insure a constitutional method of draft registration enforcement, but felt that a failure to punish the offenders would make it unlikely that anyone would register for the draft.[172] The implicit premise is that registration efforts are paramount to the constitutional rights of draft resisters.[173] The court apparently felt that the lesser of the two evils was to uphold the prosecution. This premise poses a disturbing question to the court. Were these vocal nonregistrants important: (1) merely because they had broken the law; (2) because they were the first few nonregistrants in the courts; or (3) because they had spoken out against the draft? In this case, the second and third reasons are one and the same. If they are, has not the court accepted and embraced the government's implicit premise that it is acceptable and even desirable to prosecute those who exercise their First Amendment rights in opposition to government policy and procedure as examples in the interest of general compliance with the law?

This result demonstrates the kind of intuitive decisionmaking suggested in the introduction of this Comment. Value laden premises of equal protection decisions not only go unexplained, they are unmen-

172. *Cf.* United States v. Schmucker, 729 F.2d 1040, 1042 (6th Cir. 1984) (Wellford, J., dissenting). "The government's standard was found in *Wayte* to be a good faith assessment by those charged with prosecution of registration law violators that acting in a timely fashion against known violators to preserve the integrity of the [registration] law was deemed important to the national defense." *Id.*

Perhaps the majority in *Eklund* revealed that it, too, gave "national security" priority over the First Amendment. It noted at the outset that "at bottom this case arose because of Eklund's failure to comply with the registration provisions implemented to protect the national security interests cited by President Carter." 733 F.2d at 1289. The court's statement followed actual quotations from President Carter. The *Eklund* majority declared that, "[t]he government would naturally be motivated to prosecute men who made public their violation of the law. Because of the publicity given such violators, failure to do so would only encourage others to violate the law." *Id.* at 1294. The court then observed that, absent bad faith, publicity is a proper consideration. The three cases cited for that notion are tax cases. As has been previously discussed, courts have found that the government does not prosecute *only* vocal tax offenders. *See supra* text accompanying notes 50-51 and notes 89-94 and accompanying text. Deterrence is a proper consideration as long as both vocal *and* nonvocal offenders are prosecuted. Thus, the court failed to address the crucial issue: whether the government may prosecute *only* vocal nonregistrants.

173. The government proceeded with the passive enforcement system despite warnings that it violated the constitutional rights of vocal nonregistrants. *See supra* notes 27-38 and accompanying text.

tioned.[174] If a court believes that it is acceptable to selectively prosecute only those who speak out against government policy, then it should resist the use of judicial legerdemain and boldly state that on balance the vital and constitutional interests of individuals and groups of individuals are overcome by the compelling governmental interest in compliance with the draft law. Surely compliance with the law is in the interest of all, including the government.

But it is also the responsibility of all, including the government. For,

> [n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability. Selective prosecution then can become a weapon used to discipline political foe and the dissident.[175]

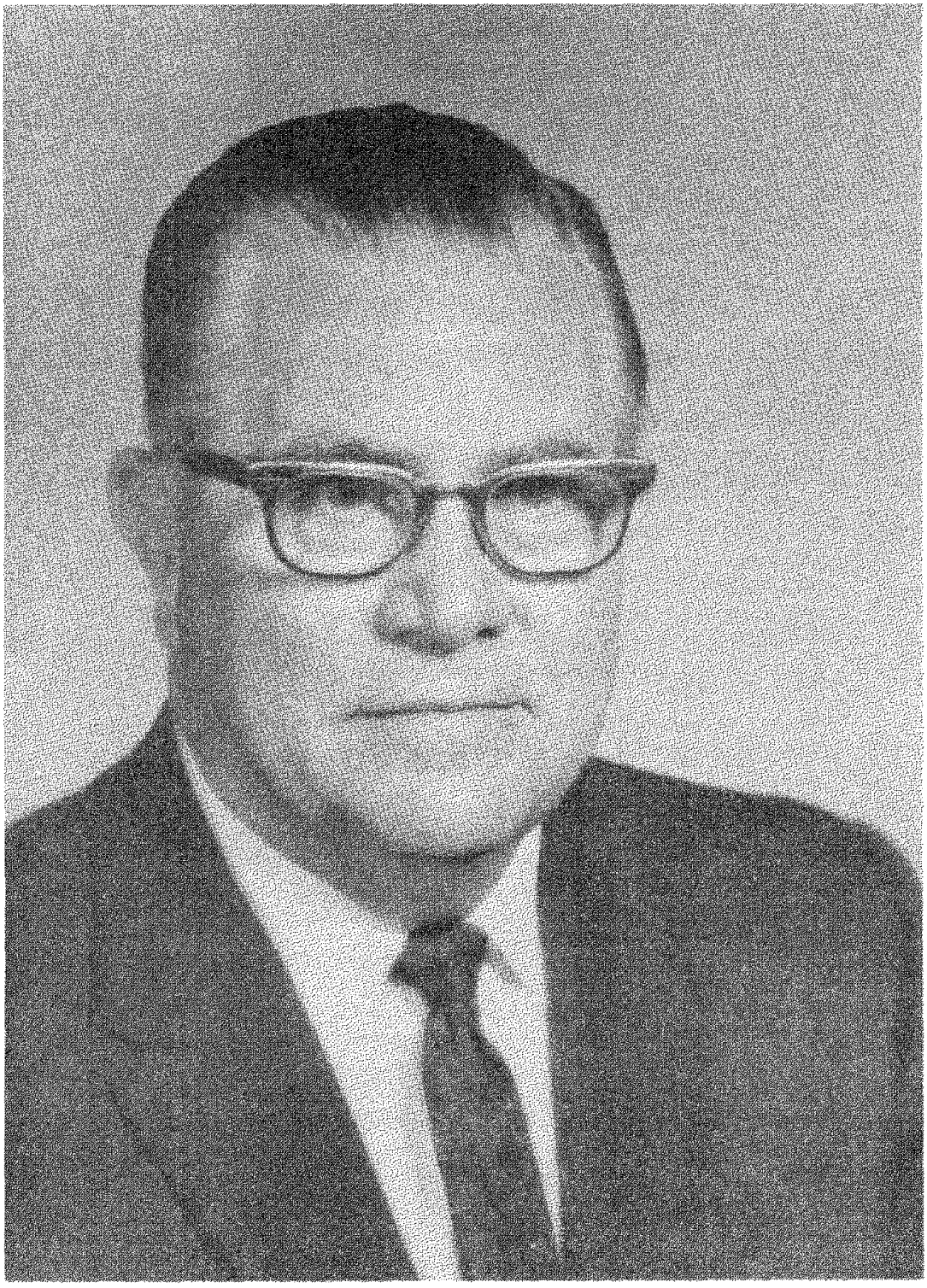
The narrow impact of the decision is clear.[176]

But the wider impact will be on government rights and powers. Fundamental rights guaranteed by the Constitution may one by one fall by the wayside in the interest of order and compliance with the law, as we are led by the government and the courts down a road paved with good intentions.

174. *See supra* notes 3-4 and accompanying text.

175. United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974) (citing as examples United States v. Falk, 479 F.2d 616 (7th Cir. 1973) and United States v. Steele, 461 F.2d 1148 (9th Cir. 1972)).

176. "The effect of the majority's opinion is to permit the government to prosecute a citizen because he has spoken out rather than because he has violated the law. The result weakens our indispensible but fragile freedom to express unpopular ideas." *Wayte*, 710 F.2d at 1390 (Schroeder, J., dissenting).



RUSSELL N. SULLIVAN