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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1292

TITLE DAVID ALAN WAYTE, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE November 6, 1984

PAGES 1 thru 46



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID ALAN WAYTE, :

4 Petitioner, :

5 v. : No. 83-1292

6 UNITED STATES :

7 - - - - -x

8 Washington, D.C.

9 Tuesday, November 6, 1984

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:01 o'clock a.m.

13 APPEARANCES:

14 MARK D. ROSENBAUM, ESQ., Los Angeles, California; on
15 behalf of the Petitioner.

16 REX E. LEE, ESQ., Solicitor General of the United States,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Wayte against the United States.

Mr. Rosenbaum, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK D. ROSENBAUM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROSENBAUM: Mr. Chief Justice, and may it please the Court, a system of justice must of course take advantage of confessions and eye witness reports of criminal activity. We do not attack that proposition, nor do we seek immunity for offenders regardless of how identified.

Rather, this case presents the issue whether the government violates the First Amendment by a policy of enforcing the draft registration law in a way that inherently results in investigating and prosecuting only those who proclaim their noncompliance with registration, a group that would inevitably be limited to political opponents of draft registration.

What is undisputed here may be briefly stated. Of the 700,000 who violated the registration law, as both courts below found, only 13, all of them political or religious protestors against Selective Service, were investigated or prosecuted.

1 QUESTION: Wouldn't it be fair to say that
2 most of the people who fail to register are opponents of
3 the registration process?

4 MR. ROSENBAUM: Chief Justice Burger, there
5 were hearings before a Congressional Committee as to the
6 causes of individuals who did not register. Those
7 hearings before a Senate Subcommittee elicited a variety
8 of reasons, only one of which was religious or political
9 objection to the registration.

10 In fact, as we indicated in our papers,
11 persons felt that the President wasn't serious about
12 draft registration, persons were upset that their peers
13 had been not prosecuted. Six separate reasons were
14 listed. Political and moral objection was only one of
15 them.

16 So, it was not mere statistical happenstance
17 that the only individuals in fact prosecuted were
18 political or religious objectors. From the inception of
19 the government's policy, the Justice Department
20 recognized that investigating and prosecuting only those
21 who proclaimed their noncompliance would result in a
22 skewed sample of nonregistrants, what the government
23 itself termed a not typical sample. The department
24 recognized --

25 QUESTION: What does that term mean in the

1 sense of skewed or non-typical?

2 MR. ROSENBAUM: It meant that out of an entire
3 pool of nonregistrants, individuals who had a variety of
4 reasons for not registering, the only individuals who in
5 fact would be selected, would be singled out, would be
6 those who had actively protested, either by writing the
7 President of the United States or by speaking out
8 against the draft itself.

9 QUESTION: But you are going to single out by
10 some method, have some system for prosecution, so in
11 that sense any system is "skewed" in your terms, isn't
12 it?

13 MR. ROSENBAUM: Any system singles out certain
14 individuals for investigation and prosecution. The
15 critical issue in this case is whether the government
16 can rely upon a policy which is activated only through
17 the exercise of political petition or speech.

18 QUESTION: May I ask, of the total pool I
19 think you mentioned 500,000 or 600,000.

20 MR. ROSENBAUM: Yes, sir.

21 QUESTION: How many of those have been
22 identified by the government as nonregistrants at the
23 time the 15 suits were filed?

24 MR. ROSENBAUM: That is an interesting
25 question that goes to the nature of the government's

1 enforcement policy. In fact, only in the neighborhood of
2 some 500 or 600 individuals had been identified by the
3 government's policy, but that wasn't because the
4 government had sought a variety of methods to identify
5 individuals, and happened only as a matter of chance to
6 elect to find the individuals who had spoken out or who
7 had written the President.

8 The very premise of the government's
9 enforcement policy was that it was not interested, that
10 it showed no concern whatsoever for nonregistrants who
11 had violated the law in any other way. It was as if the
12 law that the government was enforcing was a law that
13 made it a crime to not register when accompanied by
14 protest or speech, not the offense itself.

15 QUESTION: Is my recollection incorrect that
16 the government had explored various ways of ascertaining
17 the identity of a much larger number of a pool?

18 MR. ROSENBAUM: Let me answer that in two
19 respects, Justice --

20 QUESTION: Is that true?

21 MR. ROSENBAUM: It is not true that the
22 government at the time that these individuals had been
23 prosecuted had in fact made a determination to
24 investigate or prosecute by any other system than the
25 passive enforcement system.

1 For First Amendment purposes, whether in fact
2 they had intended another enforcement policy is
3 irrelevant. The cases from this Court from the very
4 beginning of analysis of the First Amendment have
5 consistently held that a First Amendment violation
6 exists by virtue of whether or not there is an impact on
7 the First Amendment.

8 That the government might have had good
9 intentions, might some day have wanted to investigate
10 other individuals has no bearing as to whether or not a
11 First Amendment offense had in fact been committed.

12 But the fact of the case is, as the District
13 Court found, and it was not reversed by the Ninth
14 Circuit, that the government itself had not pursued
15 available alternative methods, that in February of 1982,
16 the government in a volume called Increasing Selective
17 Service Compliance, had examined other alternatives
18 besides the passive enforcement system, had found them
19 viable, reasonable. The only costs it had been
20 concerned about were political costs.

21 In March of 1982, eight months after the
22 government states to this Court that it was interested
23 in another policy, a memo was drafted from the Assistant
24 Attorney General of the Criminal Division to his
25 counterpart in the Selective Service Department which

1 said, the purpose of this memo is to explore whether or
2 not we shall address, whether or not we shall establish
3 an active enforcement system.

4 That is at Page 294 of the memo. And when I
5 questioned David Klein, the Justice Department official
6 who had authored that memo, I said to Mr. Klein, why did
7 you write it in March, '82, eight months after you say
8 that the government was intent upon a system?

9 And Mr. Klein's response, at 798 and at 803 of
10 the record, was that he wanted to push the
11 decisionmakers, he wanted to push Selective Service to
12 the maximum extent possible to establish an active
13 enforcement system.

14 QUESTION: Mr. Rosenbaum, what was the
15 occasion for your questioning Mr. Klein?

16 MR. ROSENBAUM: It was in the course of a
17 hearing before the District Court on the question of the
18 propriety of the prosecution system which the government
19 had employed.

20 QUESTION: The District Court allowed you to
21 take a deposition like that?

22 MR. ROSENBAUM: It was in open hearing. It
23 was an evidentiary hearing in the course of pretrial --

24 QUESTION: Requested by you?

25 MR. ROSENBAUM: Requested by us, but we made a

1 prima facie showing which the District Court found that
2 individuals had been singled out by virtue of their
3 expression of political rights.

4 QUESTION: Mr. Rosenbaum, it sounded to me in
5 looking at the record as though in the court below you
6 had proceeded on a selective prosecution theory, and
7 that up in this Court now you are approaching the
8 problem much as you would in attacking a statute which
9 on its face burdens First Amendment rights.

10 Have you changed your theory and your
11 contentions?

12 MR. ROSENBAUM: No. Justice C'Connor, it is
13 true, as you point out, that the basis of the argument
14 that I am principally making to the Court this morning
15 is as if there was a statute that established this
16 enforcement system, because in fact --

17 QUESTION: Have you abandoned then --

18 MR. ROSENBAUM: No.

19 QUESTION: -- the selective prosecution
20 ground?

21 MR. ROSENBAUM: We have not abandoned the
22 argument that there was intentional discrimination, that
23 Judge Hatter found that intentional discrimination, and
24 that the Ninth Circuit was incorrect in reversing. The
25 Ninth Circuit did not state that in fact there wasn't

1 that intent present.

2 All the Ninth Circuit said was, there are
3 other justifications that exist, stated that the clearly
4 erroneous standard ought to be applied, but never
5 indicated why upon an analysis of the clearly erroneous
6 standard somehow intent would not be there.

7 But it is actually the government that has
8 shifted its argument in this Court. At the Ninth
9 Circuit level and at the District Court level, it was
10 conceded by the government that what was implicated in
11 this case were First Amendment rights, and it is only
12 the government for the first time arguing before this
13 Court that First Amendment rights are not involved in
14 this case.

15 And of course the nature of the policy itself
16 is one that the government has recognized.

17 QUESTION: Well, you don't want us to address
18 that, then? I am a little confused by your response.

19 MR. ROSENBAUM: I am stating to the Court --

20 QUESTION: They can't, of course, raise an
21 issue. It is your petition.

22 MR. ROSENBAUM: No. And we continue to rely
23 upon the District Court's findings, and state that that
24 is an independent ground for which the District Court's
25 decision could be sustained. But the point is in this

1 particular matter that even if there hadn't been a
2 finding of intent, the government policy here, which you
3 correctly state is tantamount to a statute, a statute
4 that would say that those who speak out will be
5 prosecuted --

6 QUESTION: Well, on that point, is it not true
7 that the policy of the government also incorporated
8 prosecution of those reported by third parties --

9 MR. ROSENBAUM: Yes.

10 QUESTION: -- to be violated?

11 MR. ROSENBAUM: Yes, and --

12 QUESTION: So it isn't quite as you have
13 described it.

14 MR. ROSENBAUM: No, Justice C'Connor, the
15 government's argument that the third policy reporting
16 provision doesn't save the First Amendment matter in
17 this case for the government. The government argues,
18 for example, that because there were these third party
19 reports, there was the possibility, the possibility that
20 individuals could be identified who were not involved in
21 exercise of speech.

22 But the government itself recognized in a
23 variety of memoranda in this record that those who would
24 be identified by third party reportings would be the
25 vocal proponents of nonregistration. That's the

1 government's words. And they didn't have to call in a
2 social behaviorist to find that out.

3 QUESTION: But not necessarily. For example,
4 in the Eklund case it was the parents of some young man.

5 MR. ROSENEAUM: Yes, but the high probability
6 which the government recognized was in fact the case.
7 Consider the nature of this case. Consider the way a
8 third party might report -- might report a violation of
9 the registration law. This is not a crime that admits
10 of eye witnesses.

11 Jimmy Stewart could stare out his rear window
12 forever and he would never sight a young man in the act
13 of not registering. Nor is this the sort of crime that
14 an individual over a backyard fence would discuss. An
15 individual is not going to come up and say, good
16 morning, how are you, nice day to day, how are the
17 Redskins doing, by the way, I am still not registered,
18 what are you going to have for dinner tomorrow?

19 There is not a single piece of evidence in
20 this record, either in the course of the trial itself or
21 in the hearings which the government cites that
22 indicates that this individual was anything but
23 hypothetical, the individual who would be reporting
24 outside protected speech.

25 QUESTION: But you concede that the stated

1 policy would have admitted that prosecutions would be
2 based also on third party reports.

3 MR. ROSENBAUM: I would concede that only if
4 we regard this case in a most abstract sense, and not
5 look in the real world, as the government itself
6 understood, how in fact it would be enforced, that the
7 possibility of a significant number of individuals
8 reported by methods not related to use of speech,
9 exercise of speech, could be involved.

10 And, Justice O'Connor, in your decision in the
11 Minneapolis case, Minneapolis Star and Tribune, the ink
12 and paper tax case, the Court there stated that a
13 special tax that singled out the newspaper for a unique
14 burden, a unique disadvantage, would be unconstitutional
15 because of the special disfavor that it placed the First
16 Amendment.

17 Now, imagine in that case if Minnesota
18 responded to that decision and said, we will enlarge the
19 ink and paper tax to include a paper tax on small
20 butcher shops. That mere patch-on of an insignificant
21 number of individuals certainly couldn't rescue the
22 statutory system that was implicated there in terms of
23 its unique disfavor to the First Amendment.

24 QUESTION: Mr. Rosenbaum, can I ask you a
25 question before I lose the -- I think it is relevant to

1 what you are saying. Justice Powell asked you about the
2 size of the universe. You said there were about 500 or
3 600 people that were identified at the same time. Is
4 that correct?

5 MR. ROSENBAUM: I believe the first group was
6 around 130, and by the time the matter was completed, it
7 may have been somewhere in the neighborhood of 900 or
8 1,000.

9 QUESTION: And what happened to the other
10 987?

11 MR. ROSENBAUM: The government had a policy
12 which is colloquially referred to as the beg policy, in
13 which the government would say to an individual, we have
14 information that you are not registered. You have a
15 duty to register. If you don't register within three
16 weeks, you will be prosecuted.

17 QUESTION: You don't -- it won't be
18 prosecuted. Now, did they apply that policy to these 13
19 people?

20 MR. ROSENBAUM: Yes, they did.

21 QUESTION: So within the group of 1,000, was
22 there discrimination against these 13 because of what
23 they said?

24 MR. ROSENBAUM: It is true that the
25 individuals who were singled out for the actual

1 prosecution were those that were most adamant, and that
2 it was the use of that speech --

3 QUESTION: They are the ones who refused to
4 take advantage of the government's offer.

5 MR. ROSENBAUM: That's correct, but the beg
6 system in addition --

7 QUESTION: And would you not say that they
8 were treated -- they were not discriminated against as
9 contrasted with the other members of this -- if we limit
10 the universe for a moment to 1,000 persons, were they
11 treated differently than the 1,000?

12 MR. ROSENBAUM: Well, in the sense, Justice
13 Stevens, that the actual prosecutions were limited to
14 persons who in fact stated their dissent most
15 vigorously. That was the only individuals that would
16 be --

17 QUESTION: Well, they are the ones who refused
18 to register.

19 MR. ROSENBAUM: That's correct.

20 QUESTION: It doesn't matter what words they
21 used in stating -- they said, no, we won't register.
22 That is the speech for which they are being prosecuted.

23 MR. ROSENBAUM: That's correct. I want to
24 make another point.

25 QUESTION: Do you think that they have no

1 right to prosecute somebody for saying I will not
2 register?

3 MR. ROSENBAUM: No, I think the government has
4 an absolute right to prosecute an individual who says I
5 will not register, or that -- admits a confession of any
6 kind.

7 QUESTION: After they identify 1,000 people
8 who -- by some public means they cannot select the 13
9 out of that 1,000 who won't register?

10 MR. ROSENBAUM: No, no objection to
11 prosecuting individuals as an abstract matter who say
12 that they will not register. The concern here is that
13 the only individuals that the enforcement policy was
14 activated against --

15 QUESTION: Were 1,000, not 13.

16 MR. ROSENBAUM: Yes, but that 1,000 was a
17 sample of individuals who had either written the
18 President their opposition or who had expressed publicly
19 their opposition.

20 QUESTION: Their opposition, or their
21 unwillingness to register?

22 MR. ROSENBAUM: Their opposition, Justice
23 Stevens.

24 QUESTION: Do you know that as to all 1,000?

25 MR. ROSENBAUM: I know that the government

1 itself recognized from the outset that the individuals
2 who would be singled out for the application of the beg
3 policy, that is, the individuals who would be
4 investigated and prosecuted, would be individuals who
5 were protesting, not registrants.

6 As recently as the brief filed by --

7 QUESTION: Were there no people called to the
8 attention of the government by informers?

9 MR. ROSENBAUM: There is no --

10 QUESTION: Somebody might get up at a meeting
11 and say, I'd like everybody else to register, but they
12 are never going to catch me. Nobody like that was ever
13 reported to the government?

14 MR. ROSENBAUM: If an individual had been
15 reported in that method, then that individual would have
16 been reported as a result of making a public statement
17 expressing a particular opposition.

18 QUESTION: Well, no, I am saying he is not --
19 he is just opposed to being registered himself. He
20 might get up and make a speech and say, I think the
21 draft is great for everybody else, but nobody can catch
22 me because they don't have an enforcement policy.

23 MR. ROSENBAUM: No.

24 QUESTION: Someone might be offended by that
25 and call the --

1 MR. ROSENBAUM: No example of that in the
2 recrd. In fact, the record is to the contrary.

3 QUESTION: Do we know about most of these
4 1,000 people? That is what I am wondering about.

5 MR. ROSENBAUM: We know that the government
6 understood from the outset that these would be the
7 individuals who would be either writing the President or
8 who would be speaking out and would be making religious
9 or moral objection. We also know another thing, and
10 that is --

11 QUESTION: The thing that puzzles me -- I
12 don't mean to debate with you. The thing that puzzles
13 me is about 90 some percent of this 1,000, who were not
14 all that morally opposed to it, when the chips were
15 down, they decided to sign up?

16 MR. ROSENBAUM: Well, the fact that they may
17 have changed their mind when the chips were down, the
18 fact that these were the most fervent believers, the
19 most fervent dissenters, doesn't mean that the remainder
20 of that 1,000 had not also expressed their dissent.

21 It indicates just as you state, Justice
22 Stevens, that when the crunch actually came, and when
23 they were asked whether or not they wanted to be
24 prosecuted, that they said that they would rather
25 register at that point in time, but that doesn't mean --

1 QUESTION: You are assuming that these other
2 900 all made precisely the same kind of public speeches
3 as the 13, and if that is true, then they were not
4 indicted because of their speech, because they were
5 permitted to register, so the speech really becomes
6 irrelevant.

7 MR. ROSENBAUM: No.

8 QUESTION: If you assume they all said the
9 same thing as the 13.

10 MR. ROSENBAUM: What we are concerned about,
11 Justice Stevens, is an enforcement system. The fact is
12 that the big policy that we are discussing right now was
13 not applied to any other individual who had not
14 exercised speech. The government says, these
15 individuals were like civil contemnners.

16 They had a key to the jail that they could
17 always unlock. But the point of this case, the
18 constitutional vice is that we have a speech-activated,
19 content-based enforcement system for which nonprotesting
20 nonregistrants never had any doors to unlock.

21 What the government said by virtue of this
22 enforcement policy, more than a prosecutor policy, but
23 an enforcement policy, was to give what had to be
24 understood as a guarantee, that silence would be golden,
25 that failure to register would not be of concern to this

1 government, that individuals would not be brought into
2 the sweep of either the beg policy or the --

3 QUESTION: But isn't that a perfectly
4 legitimate position for the government to take, to say
5 that so far as violators of the law are concerned,
6 silence is golden, that it is more important for the
7 government as a law enforcement policy to prosecute
8 violators who publicly proclaim their violation than
9 violators who don't publicly proclaim their violation?

10 MR. ROSENBAUM: If this were a reasonable
11 enforcement system, indeed, if this were an enforcement
12 system as for every other law in the United States that
13 I am aware of, your argument would be correct, Justice
14 Rehnquist.

15 QUESTION: But you know, there aren't a whole
16 bunch of drug pusher that are getting up and saying, I
17 oppose the drug laws. It is just in areas like this
18 that you get people publicly proclaiming their
19 opposition.

20 MR. ROSENBAUM: Yes, and that is precisely the
21 point.

22 QUESTION: So you say if the government
23 applied this policy in all other areas, is there any
24 evidence that it doesn't apply it in other areas?

25 MR. ROSENBAUM: Yes, there's absolutely no

1 evidence that it is applied in other areas, but the --

2 QUESTION: Well, you say there is no evidence
3 that it is applied in other areas. I asked you if there
4 is any evidence that it isn't applied in other areas.

5 MR. ROSENBAUM: I would affirmatively state
6 that it is not applied in any other area, and the --

7 QUESTION: In other words, that there are
8 examples of other kinds of law violators who get up and
9 publicly proclaim they are violating the law, and the
10 government nevertheless does not apply a passive
11 policy?

12 MR. ROSENBAUM: Yes. Absolutely not, Justice
13 Rehnquist.

14 QUESTION: What areas are those?

15 MR. ROSENBAUM: There are a variety of areas
16 for individuals such as the C'Brien statute.

17 QUESTION: That was, what, 20 years ago? I
18 mean, I am talking about present day government
19 policies.

20 MR. ROSENBAUM: There would be other areas
21 where an individual might state a difference, but --

22 QUESTION: You say might, but I thought you
23 said a minute ago that you affirmatively stated that the
24 government didn't apply the same policy in other areas.

25 MR. ROSENBAUM: The difference -- it does not

1 -- the government applies in no other area, Justice
2 Rehnquist, in the way of answering your question, an
3 enforcement policy that absolutely doesn't apply to
4 individuals that don't speak up. The crux of your
5 statement --

6 QUESTION: What are other areas, Mr.
7 Rosenbaum, in prosecuting a federal law violation other
8 than Selective Service where individuals do speak up?

9 MR. ROSENBAUM: Well, there may be -- in a
10 Census statute. There may be a variety of other areas
11 where individuals can express political dissent, but it
12 is that difference that is really the First Amendment
13 issue here.

14 That is, what was implicit in the deterrent
15 statement that you indicate. That is, it makes sense to
16 prosecute a visible individual because of the message to
17 other individuals. Certainly isn't that an appropriate
18 selection process.

19 That only makes sense if in fact all other
20 individuals know that there is a possibility that they
21 may be investigated or prosecuted. In this case, what
22 was deterred was not noncompliance, but in fact what was
23 invited was a quiet breaking of the law. As I indicated
24 to Chief Justice Burger, the government itself
25 acknowledged that though there were religious and

1 political objectors, there were also a variety of other
2 reasons.

3 QUESTION: But surely the government can move
4 one step at a time, and feel that its of primary
5 importance with a limited budget to get the local
6 people, and then if they successfully prosecute a few of
7 them, undoubtedly there would be other remedies brought
8 to bear.

9 MR. ROSENBAUM: No, I would disagree with you,
10 Justice Rehnquist. In the area of the First Amendment,
11 where the palpable result, the predicted, inevitable,
12 inherent result is a violation of the special burdening
13 of First Amendment rights, the government cannot go one
14 step at a time.

15 The government may not single out those
16 protesters. Moreover, if we apply -- determine whether
17 or not there is a close fit, whether or not in fact what
18 you indicate is true, which is, people will see the
19 vocal prosecutor, vocal persons being prosecuted. They
20 will then come into line.

21 The issue before the Court is whether this
22 deterrent system will result in more deterrence than any
23 other system. Obviously, if an individual is
24 prosecuted, any individual, for any reason, there is
25 going to be some deterrent effect, but where the

1 government is moving --

2 QUESTION: Well, surely the government has a
3 great deal of discretion. It doesn't have to pick out
4 the system that will deter most people. It probably
5 can't even know that in advance.

6 MR. ROSENBAUM: The government can pick out
7 any system it chooses, as long as it does not select a
8 content-based, speech-activated system that only singles
9 out for investigation and prosecution individuals who
10 state their protests to the government, and a system
11 which says to everyone else, if you are silent, if you
12 do not exercise your First Amendment rights, you will be
13 absolutely guaranteed that you will not be investigated
14 or prosecuted.

15 QUESTION: Did the government ever do anything
16 like that?

17 MR. ROSENBAUM: Excuse me?

18 QUESTION: Did they ever do anything like
19 that?

20 MR. ROSENBAUM: That is precisely what the
21 government has done in this particular case. The
22 government has said --

23 QUESTION: Where do we find that in the
24 record?

25 MR. ROSENBAUM: The government acknowledged in

1 the record that the only individuals that in fact would
2 be selected would be, to use the government's words,
3 individuals who were vocal proponents of
4 nonregistration --

5 QUESTION: Suppose these people who were
6 concerned about -- started a campaign and said that
7 everyone who is opposed to this draft would meet down at
8 the memorial where the Vietnam names are listed, and we
9 will hold a demonstration, and so 10,000 young people,
10 young men show up there.

11 And the Department of Justice says, get
12 indictments out on 500 of the people who are in this
13 area. There might have been some from Maryland, and
14 some from Virginia, but get out 500 indictments to show
15 that the government can't be intimidated, and they put
16 that in a memorandum.

17 What would your view be? Are they being
18 indicted because they exercised a First Amendment right
19 or because they violated the law?

20 MR. ROSENEAUM: First, the intent of the
21 government is not what is critical. It is the effect on
22 the First Amendment rights. If the issue, and if in the
23 hypothetical that you are giving the individuals are
24 being singled out not because of their speech, that is,
25 there is not a Brandenburg type problem, but they are

1 being singled out because they are visible, the
2 government wants to make an example.

3 That is an appropriate exercise of
4 prosecutorial discretion, but only if there is a general
5 deterrent policy that says to all other individuals,
6 those that don't go down to the memorial, you may be
7 prosecuted, too.

8 Where the message is, if you go down to the
9 memorial you will be prosecuted, if you do not, you will
10 not be investigated or prosecuted, that is an
11 impermissible violation on the First Amendment. That is
12 a violation that says that if you are silent, if you
13 just break the law but are quiet about it, you will not
14 be prosecuted, and that is peculiarly a content-based,
15 speech-activated system that would be impermissible
16 under the First Amendment.

17 QUESTION: Well, Mr. Rosenbaum, somebody who
18 vocally protests the draft but registers is not
19 prosecuted, right?

20 MR. ROSENBAUM: Excuse me?

21 QUESTION: Someone who vocally protests the
22 draft but nevertheless registers is not prosecuted under
23 this policy.

24 MR. ROSENBAUM: Yes, but the issue in the case
25 is not --

1 QUESTION: And so it does appear as though
2 what the government is doing is prosecuting those who
3 don't register under their policy of giving people a
4 chance to register and not be prosecuted.

5 MR. ROSENEAUM: The issue in this case is not
6 whether registrants are permitted to speak out.
7 Obviously, registrants can speak out. The
8 constitutional vice here is that among the pool, among
9 the body of nonregistrants, those individuals who are
10 not registering, whether or not the government can use
11 an enforcement system that singles out for prosecution
12 only those that exercise their petition and speech.

13 The fact that there may be 700,000 people out
14 there who register and then speak out against the draft
15 is not the concern. It is whether or not it can
16 establish a First Amendment trip wire so that everyone
17 else who doesn't exercise that speech in fact knows that
18 they will be guaranteed from prosecution.

19 If the Court has no further questions, I would
20 like to reserve the remainder of my time for rebuttal.

21 CHIEF JUSTICE BURGER: Very well.

22 Mr. Solicitor General.

23 ORAL ARGUMENT OF REX E. LEE, ESQ.,

24 ON BEHALF OF THE RESPONDENT

25 MR. LEE: Mr. Chief Justice, and may it please

1 the Court, I want to correct any misimpression that
2 might exist as to the facts of this case, particularly
3 how this program operated, some of the problems that the
4 government raised, and how it went about solving them.

5 I do so against the background of the well
6 established principle that the selection of
7 prosecutorial choices lies at the heart of the executive
8 responsibility to see that the laws are faithfully
9 executed.

10 The issue in this case is not whether someone
11 else can see another way that the government might have
12 gone about its responsibility to enforce the draft
13 registration laws. Basically there were three options
14 that were available to the government, and all three
15 were considered.

16 The three were, first, sometimes called the
17 active method, was to identify the entire universe of
18 persons who were required to register, match those
19 against those who had registered, and then make a random
20 selection out of the difference between those two
21 groups, who would be the nonregistrants, and prosecute
22 those who were randomly selected.

23 The second option, which is sometimes referred
24 to as the passive method, was narrower in scope and less
25 expensive, would have been simply to prosecute those who

1 the government knew were violators from information that
2 had been supplied either by them or by someone else.

3 What the government in fact elected was to
4 develop an active system, knew that it would take some
5 time to develop the active system. In fact, it took
6 longer than the government anticipated it would take to
7 develop it, with a passive program in effect during the
8 interim while the active method was being developed.

9 Mr. Rosenbaum is just quite wrong when he says
10 that the active system, that there was undue delay in
11 developing it. As set forth at Page 7 of our brief,
12 there was a computer program that had been developed and
13 was ready to go as early as March of 1982.

14 One of the petitioner's main errors, I submit,
15 is his assertion that during this passive phase interim,
16 the event which triggered further prosecution was
17 criticism or dissent. The uncontradicted evidence in
18 this record, which is discussed at Page 13 of our brief,
19 shows that in fact the trigger was evidence of
20 nonregistration.

21 No matter how vehement the letter of protest,
22 no matter how many speeches the individual gave, that
23 activity would result in further investigation only if
24 it included the one thing, the only thing that the
25 government was looking for, and that was some evidence

1 of the sole piece of information which the government
2 was interested in.

3 QUESTION: What you are saying then is that
4 the government received a number of letters complaining,
5 or protesting the policy of the draft which did not
6 announce that the writer was eligible for registration
7 and refused to register, and the government did not
8 investigate whether or not there might be liability for
9 registration on the part of a writer who did not state
10 that he --

11 MR. LEE: Precisely. That kind of person did
12 not become one of the 1,000 who was investigated
13 further.

14 QUESTION: I thought there were some in the
15 group who after investigation it was determined they
16 were over age, or something like that.

17 MR. LEE: Yes, that is correct, but in the
18 initial letter, they might have said, I am not going to
19 register for the draft, and that would put them into the
20 pool of 1,000, but it is true that --

21 QUESTION: They might have said it even though
22 they weren't required, is what you are saying.

23 MR. LEE: That is correct. That is correct.
24 The way it worked was that the --

25 QUESTION: General Lee, did the pool also

1 include those reported by third parties?

2 MR. LEE: It did, Justice O'Connor.

3 QUESTION: Does the record tell us how many
4 people would be included?

5 MR. LEE: Yes, it does, and that's about the
6 only thing that the record tells us about those 1,000
7 people, is that a little over half of them were third
8 party reported. And it also tells us, of course, how
9 they got on that list, and as I say, it was only if
10 there was some evidence of the only piece of information
11 that the government was looking for, which was evidence
12 of nonregistration by a male of draft age.

13 Now, once we had that information, that put
14 them into the pool, and eventually that pool was in
15 excess of 1,000 people, and it was kept by Selective
16 Service.

17 QUESTION: May I ask just while you are right
18 on that point --

19 MR. LEE: Yes.

20 QUESTION: -- General Lee, the 500 or so that
21 are third party reported, your adversaries say, well,
22 they really are not different, because they were only
23 third party reported because they were vocal in the
24 first instance, so they really should be treated alike.

25 MR. LEE: There is nothing in the record that

1 would shed any light on that one way or the other.

2 Now, once Selective Service got its pool of
3 names, the first thing that Selective Service did was to
4 send one of these registration in lieu of prosecution
5 letters, and from that initial screening process the
6 number was narrowed down to about 133.

7 Those were then sent to the Department of
8 Justice, and the U.S. Attorney would send at least one
9 letter advising once again of the registration in lieu
10 of prosecution alternative, and then in most cases,
11 including the petitioner Wayte, there was also a visit
12 from an FBI agent advising him finally of this so-called
13 beg policy.

14 Now, it is not surprising under these
15 circumstances that the only person who would be
16 prosecuted as a result of this process would be
17 protesters, but the only reason that it is not
18 surprising is because the government went the extra mile
19 to attempt to implement what has been its policy
20 throughout, as we argued last April in the Selective
21 Service case, and that is not to put people in jail, but
22 to get them registered.

23 It would be the ultimate irony if the fact
24 that we were willing to go that extra mile to get people
25 registered instead of put in jail would result in the

1 entire process being held unconstitutional, and yet that
2 is the only argument that the petitioner has, is this
3 kind of ultimate effects test.

4 I submit that the key to decision in this case
5 is to make a clean distinction between two separate
6 activities, criticism of the draft and registration for
7 the draft. Criticism is constitutionally protected and
8 any governmental impingement on it can be sustained only
9 if it satisfies the requirements that this Court has
10 identified.

11 Nonregistration, by contrast, enjoys no
12 constitutional protection. Governmental burdens on a
13 person's desire not to register are irrelevant to the
14 First Amendment. No one in this courtroom disputes that
15 David Wayne has violated the law. He is legally
16 obligated to register for the draft, and in refusing to
17 do so he has committed a crime.

18 So that the only question is whether there is
19 something about the fact that the government has
20 prosecuted only him and a few others like him, but not
21 all, that precludes the government from calling this
22 petitioner to account for his acknowledged violation.

23 Now, I must confess that I am confused
24 concerning just what the petitioner's position is with
25 respect to selective prosecution. It is not one of the

1 questions presented. I do not find it argued in the
2 brief.

3 Nevertheless, in our view, it is the only
4 legitimate constitutional question that is before the
5 Court. We think this is not a legitimate First
6 Amendment issue. I will discuss briefly first the
7 selective prosecution issue, and then the First
8 Amendment issue.

9 Building on this Court's statements in *Cyler*
10 versus *Boles* and other cases, the Courts of Appeals have
11 adopted a two-part test with which, so far as I can
12 determine, no court disagrees. It has never been
13 formally adopted by this Court. We would urge its
14 adoption by this Court.

15 We think it represents just the right balance
16 between, on the one hand, wide room for the exercise of
17 prosecutorial discretion that this Court has frequently
18 said the government must have, and on the other hand,
19 preserving the opportunity for a legitimate showing of
20 improper selection in a particular case.

21 It is a two-part test. First, the defendant
22 must show that he was chosen for prosecution, although
23 others similarly situated were not, and second, he must
24 show that the prosecutor intentionally discriminated
25 against him on the basis of some impermissible

1 consideration such as race, religion, or the exercise of
2 a constitutional right.

3 It is that second prong of the selective
4 prosecution test that gives adequate opportunity,
5 adequate protection for the exercise of First Amendment
6 rights.

7 Briefly, with respect to the first prong,
8 petitioner simply has not shown that others similarly
9 situated have not been prosecuted. This case is
10 different insofar as similarly situated is concerned.
11 Justice Rehnquist asked the question, have there been
12 other circumstances where people have announced their
13 protest and then been prosecuted, and the answer is yes,
14 there have.

15 Tax protester cases are such cases. The air
16 traffic control strike cases were such cases. We have
17 universally won those cases in the lower courts except
18 where the government's conduct has been found to violate
19 the rather broad discretionary standards that are given
20 by this test.

21 But this case is different. This is simply
22 not a hard selective prosecution case. And the reason
23 this case is different from the tax protester case and
24 the air traffic controller case is in both of which
25 contexts our conduct has been upheld because of the fact

1 that we get the most, if you will, bang for the buck out
2 of prosecuting the most vocal protesters, is that in
3 this instance we prosecuted everyone similarly
4 situated.

5 Now, in the nature of things, we cannot
6 prosecute those who we do not know have violated the
7 law. And at the end of this screening process, there
8 were only eventually 17 people, 13 as of the time of the
9 trial in this case, whom we knew had violated the law,
10 and we prosecuted every one of them. There was
11 absolutely no discrimination.

12 With regard to the second prong, I simply
13 submit that there was no violation, that the Court of
14 Appeals finding is correct, and in any event, that there
15 has not been any violation of the First Amendment of any
16 kind, and it is to that issue that I now turn.

17 The petitioner's contention that his
18 prosecution violates the First Amendment depends totally
19 on the significance that he ascribes to the fact that
20 all of the men who have been prosecuted had one thing in
21 common. They had all expressed opposition to the
22 draft. In fact, however, those who were prosecuted also
23 have a second thing in common, and that is as to each of
24 them we knew who they were.

25 Two facts, both uncontroverted, make it very

1 clear that it was the second of these common
2 denominators and not the first that constituted, to use
3 the petitioner's term, the trip wire for prosecution.

4 The first is that during the passive phase
5 interim, which incidentally lasted about 15 months, the
6 event which placed a young man on the list for further
7 investigation was his criticism. No matter how vehement
8 the protest, no matter how extensive the protest, it was
9 only if he included that one magic sentence that got him
10 initially into the pool of somewhat over 1,000.

11 And the second fact is that he could quickly
12 get himself off that list by his own selection. This
13 was not, if you will, selective prosecution. This was
14 elective prosecution.

15 The so-called beg policy is relevant not only
16 because it sheds light on the government's objective.
17 It also draws the clean distinction between the two
18 factors that must be distinguished in this case,
19 registration on the one hand and protest on the other.

20 Regardless of what the individual might have
21 done in the past, he is free both to register for the
22 draft, as everyone concedes he is legally obligated to
23 do, and also continue to protest, so long as he
24 registers.

25 Late registrants who spoke against the draft

1 were not prosecuted, and prosecutions were brought
2 against every identified nonregistrant who refused to
3 comply.

4 Just one final point. Even if this were a
5 First Amendment case, even if you could get by the First
6 Amendment threshold, in this instance, there is no
7 suppression of speech, incidental or otherwise. For
8 reasons discussed in our brief, we believe that the
9 relevant First Amendment inquiry is stated by this Court
10 in United States versus O'Brien 16 years ago, and
11 reaffirmed twice just last term in the Jaycees case and
12 in the CCNV Sleeping in the Park case, that incidental
13 restraints on First Amendment interests are permissible
14 so long as what government is attempting to do is, and I
15 am quoting from both Roberts and the Sleeping in the
16 Park case, "unrelated to the suppression of expression."

17 In this case, there is no suppression speech,
18 incidental or otherwise, and the reason is that these
19 two activities, registration and protest, can exist side
20 by side, contrasted in that respect with the Jaycees
21 case.

22 The attainment of Minnesota's
23 antidiscrimination objective as expressed in its statute
24 necessarily affected the associational interests of the
25 Jaycees. Either Minnesota's interest in combatting

1 discrimination or the Jaycees' associational interest
2 had to yield, and that is what brings about a First
3 Amendment problem, when one of them necessarily has to
4 yield to the other.

5 The same was true in Sleeping in the Park.
6 The same was true in O'Brien. And I submit that the
7 same is true in every other legitimate First Amendment
8 case. The feature of true First Amendment cases that
9 brings the First Amendment into play is the fact that
10 the very act of accomplishing the governmental objective
11 necessarily affects First Amendment activity.

12 But here, so long as the protester complies
13 with the legal duty which even he does not dispute, he
14 is free to criticize, and even if he does not register,
15 he is free to criticize. He will be prosecuted, but it
16 will not be for not registering, because it did not
17 depend on the substance of anything that was said other
18 than the reporting of a violation.

19 So that the only incremental risk, the only
20 component of his speech that puts him at all at risk is
21 that single component of his speech that identifies
22 commission of a crime, and there is nothing in the First
23 Amendment, nothing in the Fifth Amendment, and nothing
24 in the Constitution that protects against the
25 government's use of that information.

1 Unless the Court has further questions, I have
2 nothing else.

3 CHIEF JUSTICE BURGER: Do you have anything
4 further, Mr. Rosenbaum?

5 CRAL ARGUMENT OF MARK D. ROSENBAUM, ESQ.,

6 ON BEHALF OF THE PETITIONER - REBUTTAL

7 MR. ROSENBAUM: I do, Mr. Chief Justice.

8 I want to join issue with General Lee in the
9 sense that what is in fact involved in this case is the
10 relationship between criticism and the registration act
11 itself with respect to the individuals that were singled
12 out by this system.

13 If this Court finds that there is no
14 relationship that exists there, that in fact all the
15 individuals who were singled out for investigation or
16 prosecution or the majority of them were individuals who
17 were not at the same time expressing a political
18 opposition to the draft registration and in fact
19 expressing it not only through stating their objection
20 but through the additional statement of saying that they
21 were not registered.

22 What General Lee is indicating in his
23 statement is that that statement itself, that I will not
24 register, is both not protected by the First Amendment
25 and additionally that it adds nothing, either in a

1 cognitive sense or in an emotive sense, to the message
2 that is being communicated.

3 It is as if the government wants to extract
4 that statement out and tell David Wayne, you may say to
5 the government, you may say to the government, I oppose
6 this system in an abstract sort of way, but if you go a
7 step further, and if you want to communicate the
8 additional intimate personal message that I believe in
9 that so strongly that I will not register, I will not
10 register for the draft, then an enforcement system will
11 be activated, and that is the only way that this system
12 will be activated.

13 What General Lee has not denied is that either
14 with respect to the individuals who were prosecuted or
15 the individuals against whom the beg policy was applied,
16 that the only individuals against whom it was applied
17 were those who made some sort of expression of First
18 Amendment activity.

19 If this were an active beg policy --

20 QUESTION: May I ask one question here?

21 MR. ROSENEAUM: Sure.

22 QUESTION: How could the government cure its
23 mistake, accepting your theory of the whole case? If
24 they were then willing to adopt an active enforcement
25 policy and indict 700,000 people, could they then indict

1 your clients?

2 MR. ROSENBAUM: Well, they don't have to
3 indict as many as 700,000.

4 QUESTION: They require everybody to register
5 by enforcing the beg policy, they find everybody, and
6 your people still refuse to register. Can they then
7 indict your people?

8 MR. ROSENBAUM: Yes, as long as we look at
9 that policy and say that it can be applied to both those
10 who speak out and those who don't speak out, the policy
11 is sound. It is the same thing as in the Minneapolis
12 case, where this Court struck down a tax because it
13 specially disadvantaged the newspaper.

14 QUESTION: Well, you are not going to persuade
15 me on the tax case. There are a lot of different things
16 about that case. But in this particular case, if they
17 make enough people register, then they can prosecute
18 your clients? Is that your point?

19 MR. ROSENBAUM: That's correct. If they
20 enforce the law against individuals not on a
21 speech-activated, content-based rationale. If that is
22 not the only way that individuals can be identified,
23 forced to register, or face prosecution, obviously the
24 system is not specially disadvantaging the First
25 Amendment.

1 QUESTION: You would apply this -- it is not
2 the fact that it is a draft case. You would apply it if
3 it was smoking in the elevators, or bootlegging, the
4 same thing if they had a policy that we only prosecute
5 people for smoking in the elevator if it comes to our
6 attention. That is equally protected.

7 MR. ROSENEAUM: Well, I don't think smoking in
8 the elevator --

9 QUESTION: There are people who feel very
10 strongly about the right to smoke.

11 (General laughter.)

12 MR. ROSENBAUM: If this Court held that that
13 was an exercise of First Amendment rights, certainly
14 that --

15 QUESTION: What if he writes a letter in
16 exactly the same pattern, but it is a different
17 violation?

18 MR. ROSENBAUM: Yes, and that is in response
19 to Justice Fehnnquist's point before. That is, the
20 government has a whole variety of offenses, not only tax
21 and census and the other matters that were mentioned,
22 but in every crime there are individuals who stand up
23 and confess, and they are prosecuted.

24 The point is really a dual one, first, that
25 they are prosecuted because their speech -- their speech

1 is not political in all senses. That is, there are
2 people who confess out of a sense of contrition, a sense
3 of guilt.

4 In addition, the enforcement system in those
5 instances is not strictly limited to those who get up
6 like Rcskolnokov and say, I confess out of guilt. It is
7 an across the board policy --

8 QUESTION: I think you have answered the
9 question. I think you have answered the question now,
10 Mr. Rosenbaum, but I have one more.

11 Suppose the State of Virginia passes a statute
12 that has been proposed in many states requiring the
13 registration of all handguns, and quite a number of
14 people who are active in the NRA and otherwise think
15 that there is a constitutional right, so they make
16 speeches, and they take activities, and they won't
17 register because they have moral and constitutional
18 objections to it. Prosecution?

19 MR. ROSENBAUM: I assume in your system you
20 are indicating that these individuals would identify
21 themselves by writing the Governor of the State of
22 Virginia or speaking out. Those individuals --

23 QUESTION: Right, and a lot of their neighbors
24 who think handguns ought to be registered write a letter
25 to the local prosecutor and say, why aren't you going

1 after this fellow?

2 MR. ROSENBAUM: Yes.

3 QUESTION: And so they indict him.

4 MR. ROSENBAUM: As long as that system had, as
5 Justice Stevens indicated, a component that would say,
6 not only those people who are speaking out can be
7 prosecuted. The government may not only prosecute or
8 investigate those individuals. It may make them a
9 priority for nonspeech reasons.

10 QUESTION: How are you going to find out who
11 has a handgun in his house that is not registered? It
12 is pretty difficult, isn't it? You can't have a general
13 warrant to locate all these handguns and then prosecute
14 the people who haven't registered them. So they go
15 after the people who are identified by letters coming in
16 and other methods. Do they get immunity on your
17 theory?

18 MR. ROSENBAUM: There are two answers to that,
19 Chief Justice Burger. First, with respect to the
20 handgun example itself, there is no indication that
21 eyewitnesses couldn't spot an individual with a
22 handgun. There would be no situation, as in this case,
23 that if an individual decided to be silent, would be
24 quiet, that that individual could absolutely guarantee
25 that they would not be found out.

1 But the second point is actually a larger
2 point, and more critical here, and that is that unlike
3 the Virginia handgun situation, this government had
4 alternative enforcement systems, alternative enforcement
5 systems that were available, as the District Court
6 found, from the very beginning.

7 And if the government didn't know who these
8 other individuals were at the time it selected David
9 Wayne, it was because it deliberately elected not to
10 know. It deliberately elected not to go after anyone
11 except those individuals who exercised their First
12 Amendment rights.

13 CHIEF JUSTICE BURGER: Thank you.

14 Thank you, gentlemen. The case is submitted.

15 (Whereupon, at 10:50 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

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#83-1292 - DAVID ALAN WAYTE, Petitioner v. UNITED STATES

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