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Uncle Sam Wants You: Selective Prosecution of Draft Nonregistrants

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Uncle Sam Wants You: Selective Prosecution of Draft Nonregistrants

INTRODUCTION

After the President of the United States issued Presidential Proclamation 4771 in July of 1980, millions of eligible young men registered for the draft with the Selective Service System. Hundreds of thousands, however, did not register as required. The government initially established a “passive enforcement policy” to locate draft law violators. Under this policy, only those young men who reported themselves as nonregistrants or who were reported by others to the Selective Service System would be investigated for potential prosecution. The government did not implement an “active enforcement system,” whereby violators would be randomly selected for investigation and prosecution, until more than two years after the Presidential Proclamation was issued.

Of the many young men who failed to register, the Justice Department indicted only fifteen for draft law violations under the


2. One court indicated that evidence presented to it revealed that a conservative estimate of men who failed to register was over 500,000. United States v. Wayte, 549 F. Supp. 1376, 1379 (C.D. Cal. 1982), rev’d, 710 F.2d 1385 (9th Cir. 1983), cert. granted, 104 S. Ct. 2655 (1984). The head of the Department of Justice, Criminal Division, calculated that there were approximately 527,000 nonregistrants, whereas a Government Accounting Office study estimated that the number was closer to one million. Brief for Appellee at 4, United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983).


4. United States v. Eklund, 733 F.2d 1287, 1307 (8th Cir. 1984) (en banc), affg 551 F. Supp. 964 (S.D. Iowa 1982), petition for cert. filed, 52 U.S.L.W. 3908 (U.S. June 19, 1984) (No. 83-1959). An active enforcement policy, based on random selection or other appropriate criteria, has been found to be a valid means for selection of persons to be prosecuted. See United States v. Kahl, 583 F.2d 1351, 1354 (5th Cir. 1978) (district court properly refused to dismiss indictment based on defendant’s claim of selective prosecution when evidence showed that the government prosecuted both protesters and non-protesters for tax law violations); United States v. Oaks, 527 F.2d 937, 939-40 (9th Cir. 1975) (prosecution for tax law violations was not the result of impermissible motivation where only one half of those referred for prosecution were affiliated with Tax Rebellion group); United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972) (where evidence creates a strong inference of discriminatory prosecution for census law violations, government must show that selection was based on valid ground such as random selection).
active enforcement system. Those prosecuted have frequently raised the defense of selective prosecution. Using this defense, the defendants alleged that the government not only singled them out as "vocal" offenders, but that it did so in order to punish or deter them from exercising their first amendment rights. The young men claimed that they made an adequate preliminary showing of selective prosecution and were entitled to a pretrial evidentiary hearing, including discovery of government materials, in order to prove their claim. Such a hearing would give them the opportunity to further demonstrate, with government documents and testimony, the validity of their defense.

The Sixth, Eighth and Ninth Circuits recently addressed the defense of selective prosecution in the context of the government's passive enforcement policy. The Eighth and Ninth Circuits ruled, over persuasive dissenting opinions, that the defendants did not present sufficient evidence to make a prima facie showing of selective prosecution. Addressing facts nearly identical to those before the Eighth and Ninth Circuits, the Sixth Circuit found that the defendant did in fact make a prima facie showing of selective prosecution. The United States Supreme Court has granted certiorari in United States v. Wayte, and will soon consider the defendant's selective prosecution claim in light of the government's prosecutorial policy.

This note begins with a review of the history of the government's passive enforcement system as well as of the selective prosecution

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The first amendment provides that:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

7. For a discussion of the showing a defendant must make to warrant an evidentiary hearing on his selective prosecution claim, see infra notes 53-66 and accompanying text.
8. See supra note 6 and accompanying text.
Selective Prosecution

1984] Selective Prosecution

doctrine. It then discusses the recent courts of appeals decisions, highlighting the conflicts among the circuits as to the amount and type of evidence a defendant must present to warrant an evidentiary hearing. An analysis of the courts’ opinions focuses on the questions raised by the passive enforcement system regarding the government’s motivation in implementing such a policy. The note then recommends guidelines to be used in evaluating the sufficiency of evidence necessary to demonstrate a prima facie case of selective prosecution. Finally, this note urges the Supreme Court to clearly explicate the legal and factual standards, as well as the proper procedural mechanisms, to be employed when the defense of selective prosecution is raised.

BACKGROUND

The Passive Enforcement System

Pursuant to statutory authority,10 the President issued Proclamation 477111 on July 2, 1980. The proclamation directed male citizens who were born on or after January 1, 1960 and who had attained the age of eighteen to register for the draft.12 Proclamation 4771 also delegated to the Director of the Selective Service the responsibility of preparing other rules and regulations that would fully delineate the legal duty to register.13


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

11. Proclamation No. 4771, 3 C.F.R. 82 (1981), reprinted in 50 U.S.C. app. § 453 app. at 233-34 (1982). President Carter stated, upon signing the Proclamation, that he was “deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union and occupation by them of this innocent and defenseless country.” 16 WEEKLY COMP. PRES. DOC. 1274 (1980). He viewed the initiation of registration as a precautionary measure to any threat to national security that would arise in the future. Id. at 1275.


13. Id. at 84, 50 U.S.C. app. § 453 app. at 234 (1982). All draft registrants were to be classified as I-H, a “holding” category. 32 C.F.R. § 1622.18 (1981). That section states in pertinent part: “In Class I-H shall be placed any registrant . . . not currently subject to processing for induction according to these regulations and the rules prescribed by the Director of Selective Service.” Further classification of draft status would be determined when a draft actually was instituted. See Brief for Appellant at 9, United States v.
In order to enforce the draft registration laws, the Selective Service System developed a “passive enforcement system” to investigate suspected nonregistrants and refer them for potential prosecution. Under this system, the Selective Service would refer to the Department of Justice only the names of young men who fell into one of two categories: (1) those who wrote to the Selective Service, stating their refusal to register, and (2) those who were reported by others as failing to register. After the Department of


14. Memorandum of D. Lowell Jensen, Assistant Attorney General, Criminal Division, United States Dep't of Justice, to Attorney General William French Smith (July 14, 1981) [hereinafter cited as Jensen memo]. The development of an “active enforcement system,” whereby all violators could be identified, was still under consideration at the time of the Jensen memo. Congressional authority granting access to social security records was pending in a defense appropriations bill, H.R. 3915, 96th Cong., 1st Sess. (1981). Jensen indicated that “[a]pparently the Administration has not yet decided whether to support such an enforcement program.” Jensen memo at 1 n.1.

On December 1, 1981, Congress authorized the President to require the Secretary of Health and Human Services to furnish the Director of Selective Service with social security information. See 50 U.S.C. app. § 462(e) (1982). The necessary details were not worked out between the two agencies for six months. See Brief for Appellant at 40, United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983). President Reagan then authorized a grace period from January 7, 1982 through February 28, 1982 during which men who had not registered at their specified times could do so. United States v. Eklund, 733 F.2d 1287, 1307 (8th Cir. 1984) (en banc) (Heaney, J., dissenting), aff'g 551 F. Supp. 964 (S.D. Iowa 1982), petition for cert. filed, 52 U.S.L.W. 3908 (U.S. June 19, 1984) (No. 83-1959).

It should be noted that since the initiation of the active enforcement system, only one indictment has been issued. On September 26, 1983, the 16th indictment for failure to register was brought against Steven Schlossberg in the Minnesota District Court. 11 MIL. L. REP. (PUB. L. EDUC. INST.) 1153 (Nov.-Dec. 1983). Defendant Schlossberg had written to Selective Service, expressing his refusal to register.

15. See Jensen memo, supra note 14, at 1. The Department of Justice recognized the potential impact of the passive enforcement system. In the Memorandum from Lawrence Lippe, Chief of the General Litigation and Legal Advice Section, to Mr. Jensen, (March 19, 1982) [hereinafter cited as Lippe memo], Lippe acknowledged that the system could lead to claims of selective prosecution brought in retribution for the nonregistrant’s exercise of first amendment rights. Lippe memo at 2. Although he realized that the way to avoid these claims would be to wait until an active identification program could be implemented, Lippe concluded that the time element involved precluded further delay. Id. The government had previously recognized the effect of the passive enforcement system. A March 2, 1982 letter to Selective Service, drafted by David J. Kline, and signed by D. Lowell Jensen, indicated that “the chances that a quiet nonregistrant will be prosecuted is [sic] probably about the same as the chances that he will be struck by lightning.” Wayte, 549 F. Supp. at 1384. In a June 29, 1982 memo to the Attorney General, Jensen noted that the Selective Service had access to social security records and explained that, “if the Service can fully implement its active enforcement program, we can anticipate the referral of massive numbers of non-registrants. In the latter event, we shall create an appropriate selection criterion, most probably one based on randomness.” Jensen, Memorandum of June 29, 1982 at 3.
Selective Prosecution

Justice reviewed the files, names of nonregistrants amenable to prosecution were referred to the Federal Bureau of Investigation as well as to the United States Attorney in the nonregistrant's residential district. The Department of Justice Criminal Division policy required that United States Attorneys notify nonregistrants that criminal investigation had begun but would be terminated if they registered prior to indictment. Further, the men were told that failure to register would result in prosecution.

Estimates of the numbers of eligible men who failed to register for the draft ranged from 500,000 to one million. Yet, the Department of Justice ultimately indicted only fifteen men under the passive enforcement system. Many of these defendants claimed that they were victims of impermissible selective prosecution. Because only vocal violators of the laws were indicted, to the exclusion of nonvocal offenders, the defendants claimed that the government sought to silence dissent by selecting them for prosecution. The defendants urged that the indictments against them therefore be dismissed.

The Defense of Selective Prosecution

The Constitutional Basis

When the executive branch of the government adopts a nation-

16. The files were reviewed by David J. Kline, an attorney for the Department of Justice Criminal Division, who was responsible for supervising the selective service statute and for formulating prosecutorial policy. See Brief for Appellee at 6, United States v. Sasway, 12 MIL. L. REP. (PUBL. L. EDUC. INST.) 2217 (9th Cir. Feb. 2, 1984), petition for cert. filed, 53 U.S.L.W. 3001 (U.S. July 3, 1984) (No. 83-2098).
17. Brief for Appellee at 6, United States v. Sasway, 12 MIL. L. REP. (PUBL. L. EDUC. INST.) 2217.
18. Id. at 7. Punishment for knowingly violating the Military Selective Service Act consists of a fine of not more than $10,000 or imprisonment for not more than five years, or both. 50 U.S.C. app. § 462(a) (Supp. V 1981).
19. See supra note 2.
20. 11 MIL. L. REP. (PUBL. L. EDUC. INST.) 1153 (Nov.-Dec. 1983). The 16th indictment was issued under the "active enforcement system." See supra note 14.
21. See supra note 6 and accompanying text.
22. Id.
23. Defendants have also argued that their indictments should be dismissed because Presidential Proclamation 4771 was void for noncompliance with the 30 day notice and comment requirement of § 13(b) of the Military Selective Service Act, 50 U.S.C. app. § 463(b). The issue of improper promulgation of Selective Service regulations is beyond the scope of this article. For further discussion, the reader should refer to United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983); United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983). For discussion of whether failing to register is a continuing offense after the expiration of the registration period, see United States v. Eklund, 733 F.2d 1287 (8th Cir. 1984) (en banc); United States v. Martin, 733 F.2d 1309 (8th Cir. 1984) (en banc).
wide policy that affects hundreds of thousands of men potentially available for military conscription, but selects merely a few for prosecution, those prosecutions must be carried out in accordance with basic constitutional principles. The United States Constitution guarantees every individual equal protection of the laws. The Supreme Court has long recognized that equal protection is not confined to enacting fair and impartial legislation, but extends to the application of such laws. Equal protection principles proceed from the premise that, in order for the government to treat persons differently under the laws, such differential treatment "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

In analyzing equal protection claims, the courts have traditionally looked for a reasonable relationship between the particular classifications of persons in the statute and the legislative purpose. In most circumstances, judicial intervention is minimal. However, where the legislative classifications appear to be "suspect," such as those based on race, or where there is an impact on "fundamental" rights or interests, courts will more closely scruti-

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24. Claims of selective prosecution in federal cases have been based on equal protection principles which are incorporated into the due process clause of the fifth amendment. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981); Bolling v. Sharpe, 347 U.S. 497 (1954). The fifth amendment reads in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The cases generally do not make a distinction between selective prosecution claims brought under the fifth amendment and those brought under the equal protection principles of the fourteenth amendment.

The fourteenth amendment reads in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any individual within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.


25. See Yick Wo v. Hopkins, 118 U.S. 356 (1886). In Yick Wo, the Supreme Court proclaimed:

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

Id. at 373-74.


28. Id.
nize legislative objectives. In such cases, legislation must be justified by "compelling" state interests.

Courts have applied these equal protection principles in cases where defendants have alleged that they were prosecuted for speaking out rather than for violating the law. The selective prosecution defense often has been raised in a first amendment context in tax, strike, and selective service cases. Nevertheless, the Supreme Court has yet to sustain a defendant's claim that he was selected for prosecution in an impermissibly discriminatory manner.

29. Id. at 671-75.
30. Id.
32. See, e.g., United States v. Greene, 697 F.2d 1229 (5th Cir.), cert. denied, 103 S. Ct. 3542 (1983) (defendants failed to make out a prima facie case of selective prosecution); United States v. Taylor, 693 F.2d 919 (9th Cir. 1982) (district court's finding that defendants were not victims of impermissible selective prosecution was not clearly erroneous and should be upheld); United States v. McDonald, 553 F. Supp. 1003 (S.D. Tex. 1983) (indictment dismissed based upon government's failure to rebut defendant's prima facie case of selective prosecution); United States v. Haggerty, 528 F. Supp. 1286 (D. Colo. 1981) (defendants were selectively prosecuted on the basis of their activities).
33. See, e.g., United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) (defendant presented prima facie case of selective prosecution and burden of going forward with proof rests with government). See also supra note 6.
34. See Note, Rethinking Selective Enforcement in a First Amendment Context, 84 COLUM. L. REV. 144, 145 (1984). Additionally, the Supreme Court has never specifically considered whether selection for prosecution is impermissible when based upon the exercise of a constitutional right. Petition for Writ of Certiorari at 10, Wayte v. United States, 104 S. Ct. 2655 (1984). See supra note 30 and accompanying text.

In the Supreme Court's most recent pronouncement on the selective prosecution issue, the Court suggested that selection "deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification" would be impermissible. Oyler v. Boles, 368 U.S. 448, 456 (1962). See infra note 35 and accompanying text. Whether the "denial to prevent the exercise of constitutional rights," as delineated in United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974), would be an arbitrary classification never has been addressed by the Court. However, even the government has recognized that "when the decision to prosecute is based upon an impermissible criterion such as . . . the exercise of constitutional rights, the general rule [of prosecutorial discretion] must yield to an exception." Petition for Writ of Certiorari at 10, Wayte v. United States, 104 S. Ct. 2655 (1984), quoting Brief of the United States at 10, Hobby v. United States, 104 S. Ct. 3093 (1984).
The Judicial Standard Employed in Selective Prosecution Cases

The Court’s most recent pronouncement concerning the selective prosecution defense is found in *Oyler v. Boles*. Although it rejected the defendant’s selective prosecution claim, the *Oyler* Court discussed the circumstances under which such a defense would be appropriate. The Court suggested that prosecutors could exert some selectivity in enforcing the laws as long as the selectivity was not deliberately based on an “unjustifiable standard” so as to deny equal protection.

In recent cases, the courts have not relied upon *Oyler* as the basis of their findings. Instead, most courts refer to the two-part test set out in *United States v. Berrios* when considering a claim of selec-

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35. 368 U.S. 448 (1962). *Oyler* was prosecuted under a state habitual offender statute that imposed more severe penalties on those with prior offenses than those with no previous criminal record. He alleged that statistics from prison records revealed that other offenders subject to the statute were not prosecuted as habitual criminals and, therefore, he was denied equal protection under the laws. The Court found there was no indication that the records *Oyler* relied upon had been available to prosecutors, and his allegations set forth no more than a failure to prosecute others due to lack of knowledge of their prior offenses. *Id.* at 456.

36. *Id.* at 456. Although the Supreme Court has not addressed the selective prosecution defense for more than two decades, the courts of appeals have recognized the defense in a variety of contexts. See *United States v. Pleasant*, 730 F.2d 657 (11th Cir. 1984) (possession of unregistered firearm); *United States v. Hoover*, 727 F.2d 387 (5th Cir. 1984) (participation as government employee in air traffic controllers strike); *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1983) (tax law violations); *United States v. Mangieri*, 694 F.2d 1270 (D.C. Cir. 1982) (making false statements on federal credit union applications); *United States v. Saade*, 652 F.2d 1126 (1st Cir. 1981) (unauthorized entry into military danger zone); *United States v. Rickman*, 638 F.2d 182 (10th Cir. 1980) (willful failure to file income tax returns); *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978) (willful failure to file income tax return); *United States v. Berrios*, 501 F.2d 1207 (2nd Cir. 1974) (holding union office within five years of felony conviction); *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973) (smuggling items into and out of federal prison without warden’s knowledge and consent); *United States v. Falk*, 472 F.2d 1101 (7th Cir. 1972) vacated en banc, 479 F.2d 616 (7th Cir. 1973) (failure to possess selective service registration and classification cards); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (refusal or neglect to answer questions on census form); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) (violation of government regulations relating to “disturbances” and leafletting).


38. 501 F.2d 1207 (2d Cir. 1974). The *Berrios* court enunciated the test as follows:

To support a claim of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government’s discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.
tive prosecution. Under the Berrios test, a defendant must first establish that he was singled out for prosecution from other violators of the law. Second, he must show that his selection was the result of improper motivation on the part of enforcement or prosecutorial officials. The test has been viewed as placing a "heavy burden" on the defendant. The Berrios test is significant because Berrios explicitly recognized the defense of selective prosecution based on a claim of the denial of first amendment rights and remains the current standard.

While the first part of the Berrios test has posed some difficulty for the defendant alleging discriminatory or selective prosecution, the second part, which requires a showing that the government desired to prevent the free exercise of first amendment rights, has created far greater obstacles. Attempts to raise the defense of selective prosecution have been hindered by the unfettered discre-

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39. Id. at 1211.

The Berrios defendants were charged with holding union office within five years of being convicted of a felony, in violation of 29 U.S.C. § 504, and of knowingly and willfully permitting such a person to hold office. Berrios claimed he was selected for prosecution because he was an outspoken supporter of Senator George McGovern in his bid for President, and because he was heading an effort to unionize a corporation that allegedly held close ties to incumbent President Nixon. 501 F.2d at 1209. The district court held that the allegations were sufficient to warrant an evidentiary hearing and created a prima facie case. When the government refused to produce specific documents for an in camera inspection, the court dismissed the indictment. Id. at 1209-10.

The Court of Appeals found that, although it likely would not have granted a hearing or ordered the production of documents based on Berrios' showing, the trial judge had not abused his discretion in ordering documents for inspection. Id. at 1212-13.

40. Id. at 1211.

41. The heavy burden carried by defendants has been referred to as "proving intentional and purposeful discrimination." Berrios, 501 F.2d at 1211 (citing Snowden v. Hughes, 321 U.S. 1, 8 (1944)).

42. See, e.g., United States v. Scott, 521 F.2d 1188 (9th Cir. 1975).

43. See supra note 38 and accompanying text.

44. See generally Note, supra note 34, at 146. The author points out that courts have disagreed as to whether the selective prosecution defense requires only proof that other violators were not prosecuted, proof that the government knew of other violators and did not prosecute them, or proof that the government knew generally of other violators who were not prosecuted. See also Cardinale and Feldman, The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View, 29 SYRACUSE L. REV. 659, 669 (1978).

tion the prosecutor has traditionally enjoyed in making prosecutorial decisions. Courts have been reluctant to review the prosecutor's decisions, citing as a basis the constitutional separation of powers, as well as the avoidance of intrusion into areas of the prosecutor's expertise. Moreover, a prosecutor's decisions are presumed to have been made in a nondiscriminatory fashion. Thus, the defendant attempting to demonstrate intentional and purposeful discrimination bears the additional burden of overcoming a long history of judicial deference to the prosecutor's discretionary selections.

Two additional factors further increase the already heavy burden borne by the defendant in presenting a selective prosecution defense. First, courts frequently have accepted the argument that enforcement policies which select the most notorious or visible violators are reasonable because such policies deter others from violating the law. Thus the "visible" or "vocal" offender claiming he was prosecuted for exercising his first amendment freedom of speech has been greatly impeded by the courts' acceptance of the


47. See Davis, supra note 46, at 209-11. Professor Davis strongly disagrees with the view that, based on the separation of powers, "the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965). Davis urges that potential abuse of discretion by executive officials must be checked in order to maintain our fundamental democratic institutions. Davis, supra note 46, at 210. Although he believes that the rationale of prosecutorial expertise provides a more convincing argument, Davis indicates that even this reasoning is based more on tradition rather than on recognition of the successes of limited judicial review in many areas. Id. at 210-11. See also Givelber, supra note 24, at 102-04. But see Cardinale and Feldman, supra note 44, at 689-91.

48. Snowden v. Hughes, 321 U.S. 1, 8 (1944). See also Givelber, supra note 24, at 104-05. Professor Givelber explains that the judiciary has not been responsive to claims of selective prosecution because broad acknowledgment of the defense may create extensive litigation including additional delays and a further drain of judicial and prosecutorial resources.

49. United States v. Falk, 472 F.2d 1101, 1107 (7th Cir. 1972), vacated en banc, 479 F.2d 616 (7th Cir. 1973) ("[I]t is unquestionably a legitimate enforcement technique to seek indictments against a notorious violator . . . to deter other violators and secure general compliance [with the law]"); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975) ("It is not surprising that the government might prosecute those cases in which the violations of the tax laws appeared most flagrant"). But see Note, supra note 34, at 173-74 ("The government has no valid interest in protecting its citizens from accurate information . . . [t]he 'deterrence' illusion destroys the search for political truth that is vital to a representative democracy.").
deterrence rationale. Second, selection of the most flagrant violators for prosecution has been justified on the basis that such selection minimizes the use of government resources, both in terms of costs and manpower.\textsuperscript{50} The potential evidentiary value provided by defendants' statements regarding their violations of the law has been viewed as a cost-saving measure in establishing a defendant's intent, thereby relieving investigators of accumulating unnecessary proof of criminal acts.\textsuperscript{51} Such arguments have been persuasive in selective prosecution cases.\textsuperscript{52}

Raising the Selective Prosecution Defense

A defendant alleging selective prosecution in a criminal case must raise the defense in a pretrial motion to dismiss the indictment.\textsuperscript{53} A hearing is then held to determine whether the defendant is entitled to an evidentiary hearing on his claim.\textsuperscript{54} In order for the court to grant a pretrial evidentiary hearing, the defendant must make a prima facie showing of selective prosecution.\textsuperscript{55}

A prima facie case is made when the defendant presents a "legitimate issue regarding the government's conduct" or "raises a reasonable doubt as to the prosecutor's purpose" under the Berrios test.\textsuperscript{56} The defendant must present credible evidence which indi-

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\textsuperscript{50} See United States v. Ojala, 544 F.2d 940, 945 (8th Cir. 1976) ("The government lacks the means to investigate and prosecute every suspected violation of the . . . laws"); United States v. Wilson, 639 F.2d 500, 505 (9th Cir. 1981) (the government may be constrained "because of budgetary and other institutional limitations").

\textsuperscript{51} See United States v. Taylor, 693 F.2d 919, 923 (9th Cir. 1982) (the government may "consider whether the potential defendants have, by their public statements . . . made clear their . . . participation in the illegal activity"). \textit{But see} United States v. Wayne, 549 F. Supp. 1376, 1384 (C.D. Cal. 1982) ("An effort by the Government to save money is not an adequate justification for violating a person's first amendment rights.").

\textsuperscript{52} See, \textit{e.g.}, Brief for Appellant at 23, United States v. Wayne, 710 F.2d 1385 (9th Cir. 1983), in which the government argued that "it is perfectly proper to select for prosecution persons whose criminal acts have been particularly flagrant. . . ."

\textsuperscript{53} \textit{Fed. R. Crim. P.} 12(b).

\textsuperscript{54} United States v. Wayne, 549 F. Supp. 1376, 1379 (C.D. Cal. 1982) \textit{rev'd}, 710 F.2d 1385 (9th Cir. 1983), \textit{cert. granted}, 104 S. Ct. 2655 (1984). Both the prosecution and the defense may have the opportunity to present oral arguments on the issue. \textit{See, e.g.}, United States v. Berrios, 501 F.2d 1207, 1210 (2d Cir. 1974). \textit{See also} Brief for Appellant at 11, United States v. Wayne, 710 F.2d 1385 (9th Cir. 1983).

\textsuperscript{55} \textit{See supra} note 38.

\textsuperscript{56} United States v. Schmucker, 721 F.2d 1046, 1049 (6th Cir. 1983) (evidentiary hearing should be granted when defendant raises legitimate issue concerning government's conduct); United States v. Larson, 612 F.2d 1301, 1304-05 (8th Cir. 1980) (evidentiary hearing necessary when motion alleges sufficient facts to take question past frivolous state and raises reasonable doubt as to prosecutor's purpose); United States v. Brown, 591 F.2d 307, 310-11 (5th Cir. 1979) (evidentiary hearing should be held when defendant proves "colorable entitlement" to dismissal for selective prosecution).
icates that the government has intentionally and purposefully discriminated against him. 57

Once the court determines that the defendant has presented evidence sufficient to establish a prima facie case, 58 it may order the government to produce documents 59 and witnesses 60 at the evidentiary hearing. Discovery of documents and other information pertinent to the defense of selective prosecution is crucial because most of the evidence is exclusively within the prosecutor’s control. 61 Since it is unlikely that government officials will admit to having used improper selection criteria, the defendant’s opportunity to establish his defense hinges upon obtaining evidence through a discovery order. 62

Once the defendant makes a prima facie showing, the burden of production shifts to the prosecution to rebut the inference that the selection was made in a discriminatory manner. 63 The ultimate burden of persuasion, however, remains with the defendant as long

57. United States v. Torquato, 602 F.2d 564, 570 (3d Cir. 1979). It should be noted that the amount of evidence necessary to establish a prima facie case of selective prosecution has not been clearly explicated by the courts and may differ depending on the facts of the case. See 13 AM. JUR. P.O.F. 2D 631.

58. See, e.g., United States v. Falk, 472 F.2d 1101 (1972) vacated en banc, 479 F.2d 616 (7th Cir. 1973) (government attorney’s statement that defendant was selected because of draft-counseling activities, in combination with other evidence, established a prima facie case); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (inferential proof of government’s knowledge of nonvocal census resisters is prima facie case); United States v. McDonald, 553 F. Supp. 1003 (S.D. Tex. 1983) (priority of United States Attorney to prosecute highest officials of air traffic controller’s union established a prima facie showing). See also supra note 38; Givelber, supra note 24, at 112. Professor Givelber indicates that the Berrios standard for a prima facie case is met when:

(a) there is evidence that a generally unenforced law has been sporadically enforced against only a very few of the knowable violators; or (b) when there is evidence that a law has been enforced against only a fraction of the knowable violators, and that fraction is unrepresentative of the total group of violators with respect to a characteristic which is irrelevant to valid law enforcement purposes.

59. FED. R. CRIM. P. 17(c). See also 13 AM. JUR. P.O.F. 2D 635.

60. FED. R. CRIM. P. 17(a). See Wayte, 549 F. Supp. at 1383.

61. See 13 AM. JUR. P.O.F. 2D 635.

62. Id. at 632-36. Despite a claim of executive privilege regarding a discovery request, the government has submitted such documents to the court for an in camera inspection. Wayte, 549 F. Supp. at 1385. In addition, one court has indicated that a defendant’s claim for documents should not depend on whether the documents are confidential. Rather, the appropriate “test for disclosure should be the relevancy of the evidence to the specific defense for which it is sought, not its lack of confidentiality.” Berrios, 501 F.2d at 1212.

as the prosecution presents rebuttal evidence.\textsuperscript{64} If the defendant meets his burden and the government fails to meet its burden, the defendant's motion is granted, and he is entitled to dismissal of the case.\textsuperscript{65} However, as previously noted, defendants rarely have been able to satisfy the second part of the Berrios test.\textsuperscript{66} The defendant's difficulty is due, in part, to the absence of standards to guide courts in recognizing the amount and type of evidence necessary to establish a prima facie case of selective prosecution.

\section*{DISCUSSION}

Three United States Courts of Appeals have addressed defendants' allegations of improper selective prosecution in relation to the government's passive enforcement policy. As \textit{United States v. Wayte},\textsuperscript{67} \textit{United States v. Schmucker},\textsuperscript{68} and \textit{United States v.}

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\bibitem{64} The standard or sufficiency of proof that the government must meet in rebuttal has not been clearly delineated by the courts. \textit{United States v. McDonald}, 553 F. Supp. at 1006. Courts generally agree that the burden which shifts is one of production rather than persuasion. \textit{Falk}, 479 F.2d at 620-21. \textit{See also} 13 Am. Jur. P.O.F. 2d 632. However, one court has stated that it is the "ultimate burden of proof" which shifts to the government. \textit{Berrios}, 501 F.2d at 1212 n.4.

\bibitem{65} 13 Am. Jur. P.O.F. 2d 632. It should be noted that a finding of selective prosecution requires only dismissal of the charges against a defendant. The charges can be reinstituted under appropriate selection criteria without placing the defendant in double jeopardy. \textit{See Note, supra} note 34, at 174-75. \textit{See also} Cardinale and Feldman, \textit{supra} note 44, at 680-81 & n.151.

\bibitem{66} \textit{See supra} notes 45-52 and accompanying text. Various courts and commentators also have questioned whether a finding of intentional and purposeful discrimination under a Berrios-type standard should be necessary in a selective prosecution claim based upon the exercise of first amendment rights. The motive requirement necessary to an equal protection analysis of a selective prosecution defense is not necessary in other first amendment contexts where governmental procedures have been challenged. \textit{See generally, Note, supra} note 34. \textit{Cf.} \textit{United States v. Falk}, 472 F.2d 1101 (1972), \textit{vacated en banc}, 479 F.2d 616 (7th Cir. 1973). One commentator has suggested that \textit{Falk} "allows the defense of discriminatory prosecution despite the total absence of any malice or bad faith." \textit{See Developments, supra} note 45, at 1133. \textit{See also} United States v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969), about which a commentator remarked that "[i]mplicit in the Robinson decision is the belief that presence of an invidious motive for prosecution is not required for a finding of discriminatory enforcement." \textit{See Constitutional Law, supra} note 45, at 1242.

Recently, one court impliedly questioned whether the Berrios-type test was appropriate. Observing that the defendant did not suggest that such a test did not control his selective prosecution claim, the court noted that it had no occasion to alter its rules for the resolution of his case. \textit{United States v. Eklund}, 733 F.2d 1287, 1295 (8th Cir. 1984) (en banc).


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Eklund aptly demonstrate, the application of the selective prosecution defense to actions resulting from this enforcement policy has produced confusing, if not inconsistent, approaches to the issue of the amount and type of evidence a defendant must present to make a prima facie showing of improper government motivation.

United States v. Wayte

Procedural History

In Wayte, the defendant wrote several letters to the Selective Service and to the President stating his refusal to register for the draft. As a result, the Selective Service entered Wayte’s name into its “Suspected Violator Inventory System.” His case was referred to the Department of Justice for investigation and prosecution. Wayte was indicted for failure to register for the draft. In his defense, Wayte raised a claim of selective prosecution.

After pretrial hearings, the district court found that Wayte had established a prima facie case of selective prosecution. Accordingly, the court ordered the government to provide Wayte with certain documents and further ordered that Edwin Meese III, Counselor to the President, testify at an evidentiary hearing on the issue of selective prosecution. When the government failed to respond after six months elapsed, Wayte wrote another letter to the Selective Service again stating his refusal to register and claiming that he would be “travelling the nation ... encouraging resistance and spreading the word about peace and disarmament.”

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71. Brief for Appellant at 3, United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983).
72. Id. at 5.
73. See supra notes 16-18 and accompanying text.
75. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982). The district court found that Wayte’s factual allegations demonstrated that the question was “beyond the frivolous stage” as required for an evidentiary hearing. Id. at 1379-80. The fact that the government could have located more than one-tenth of one percent of at least 500,000 nonregistrants created an inference that the government chose not to do so and was sufficient evidence to meet the first prong of the Berrios test. Id. at 1380-81. Furthermore, the fact that the government was aware of the effect of the passive enforcement policy and that agencies other than the Selective Service and Department of Justice had been involved in prosecutorial decisions created a strong inference of improper motivation on the part of the government, thus meeting the second Berrios prong. Id. at 1381-82. See infra note 78 and accompanying text.
76. Wayte, 549 F. Supp. 1376, 1378 n.1. Regarding the documents, the government maintained that a qualified executive privilege existed and, therefore, the documents need not be produced. The court, which previously had inspected the specific documents in
comply with this order, Wayte moved for dismissal of the indictment.\textsuperscript{77} After a lengthy analysis of the selective prosecution issue, the district court held that the prima facie finding had not been rebutted and thus granted Wayte's motion to dismiss on the basis of the government's prosecutorial policy.\textsuperscript{78} The government appealed the district court's dismissal.

The Majority Opinion

The Ninth Circuit Court of Appeals reversed the holding of the district court.\textsuperscript{79} The majority found that Wayte failed to make an initial prima facie showing and, therefore, was not entitled to discovery of government documents and testimony.\textsuperscript{80} The panel agreed that Wayte established that he was singled out from others similarly situated and thus met the first element of the Berrios test; however, it held that he did not demonstrate that the selection was

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\textsuperscript{77} Wayte, 549 F. Supp. at 1378. Wayte moved for dismissal on the grounds that (1) the Government had refused to comply with the court's order; (2) Mr. Meese had refused to comply with the order; (3) the Government had not rebutted the court's prima facie finding of discriminatory prosecution; and (4) the Selective Service draft regulations and Presidential Proclamation 4771 were improperly promulgated and therefore invalid.

\textsuperscript{78} Id. at 1385. In examining the selective prosecution claim, the court relied on the prior Ninth Circuit decisions of United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) and United States v. Scott, 521 F.2d 1188 (9th Cir.), cert. denied, 424 U.S. 955 (1975). Both cases utilized a Berrios-type test, supra notes 38-43 and accompanying text. In addition, both recognized the validity of selective prosecution claims based upon the denial of first amendment rights.

The district court in Wayte found that the second part of the Berrios test was supported by the record. The court emphasized that "[a]n enforcement procedure that focuses on 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." 549 F. Supp. at 1381 (quoting United States v. Steele, 461 F.2d at 1152). Because the government was aware of the impact and potential problems of its passive enforcement policy and still chose to use a policy that was "constitutionally infirm," 549 F. Supp. at 1384, the court concluded that "[t]he Government must now accept the consequences of that choice." 549 F. Supp. at 1384.

\textsuperscript{79} United States v. Wayte, 710 F.2d 1385, 1389 (9th Cir. 1983), rev'd 549 F. Supp. 1376 (C.D. Cal. 1982).

\textsuperscript{80} Wayte, 710 F.2d at 1388.
deliberately based upon an unjustifiable standard, that is, upon the exercise of his first amendment rights. 81

In explaining its conclusion, the court stated that Wayte had shown neither that the government focused its investigation on him because of his protest activities nor that discriminatory policies underlay the selection of cases for prosecution. 82 It distinguished an earlier Ninth Circuit case, *United States v. Steele*, 83 in which the defendant established that he was selectively prosecuted for refusing to participate in the census. According to the *Wayte* majority, Selective Service procedures, unlike those of the Census Bureau, would not, in their normal course, automatically reveal the identities of nonregistrants. 84 Noting that the government had investigated all persons brought to its attention, the *Wayte* court accepted the government's two explanations for its procedures: first, the identities of other violators were unknown; and second, willful violation of the law was clear from the violator's express refusal to register. 85

The court found that the government's first explanation was logical and not suggestive of impermissible motivation. 86 In the court's view, the government had attempted to establish a system that would identify nonregistrants not otherwise brought to its attention. 87 Furthermore, the court indicated that, in making prosecutorial decisions, the government may appropriately consider whether the public statements of a defendant made clear

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81. *Id.* at 1387, *citing* *Steele*, 461 F.2d at 1151. The court defined those similarly situated as other young men who failed to register. It found that all men indicted were vocal nonregistrants.


83. 461 F.2d 1148 (9th Cir. 1972). In *Steele*, the defendant refused to answer questions on the 1970 Census Form because his answers might have disclosed violations of the Honolulu Zoning Code. Only four persons had been prosecuted for violations, all of whom were vocal opponents of the census. *Id.* at 1150-51. Steele, locating six nonvocal opponents who were not prosecuted, raised a claim of selective prosecution in his defense. *Id.* at 1151. The government gave no explanation other than prosecutorial discretion for its actions. The Ninth Circuit thus reversed Steele's conviction on the grounds that the defendant made a showing of impermissible selective prosecution. *Id.* at 1152.

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

85. *Id.* *See supra* note 51 and accompanying text.

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

87. *Id.* In contrast, the district court indicated that nonregistrants could have been located through motor vehicle records in many states. A law student working for Wayte's defense had phoned four states at random and found that lists of eighteen-year olds were easily obtainable. 549 F. Supp. at 1381 n.6.
either actual or intended participation in an illegal activity. Thus, the government’s second explanation likewise did not suggest impermissible motivation.

Because Wayte did not present evidence which would demonstrate that the government prosecuted him for his first amendment activities, he did not raise a legitimate issue regarding the government’s conduct under the second part of the Berrios test to entitle him to an evidentiary hearing. Without such a showing, Wayte was not entitled to discovery of government documents, and the government’s refusal to comply was justified. The court thus concluded that the district court’s finding of selective prosecution was “clearly erroneous.”

The Dissenting Opinion

The Wayte dissent sharply disagreed with the majority’s conclusions regarding the selective prosecution defense. Finding that the passive enforcement system was deliberately designed to punish only offenders of the law who communicated their violations to others, the dissent concluded that Wayte initially had established a prima facie case and was entitled to an evidentiary hearing. The evidence presented to the court regarding improper motivation in establishing the passive enforcement system outweighed the government’s rationale for its policy.

The government’s contention that the passive enforcement system was necessary to establish the willfulness of violators, according to the dissent, was not persuasive. The government had a method independent of the suspected violator’s communications to

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88. Wayte, 710 F.2d at 1388, citing United States v. Taylor, 693 F.2d 919, 923 (9th Cir. 1982). See supra note 51 and accompanying text.
89. See supra notes 38-52 and accompanying text.
90. Wayte, 710 F.2d at 1388.
91. Id. The court did not consider a number of issues raised by the lower court. Specifically, the court did not address the validity of the passive enforcement system itself, a system that located and ultimately referred for prosecution only persons who were vocal nonregistrants. In addition, the participation of White House officials and the Presidential Military Manpower Task Force was not considered. See supra note 76. Particularly significant is the fact that the district court had inspected, in camera, government documents that supported its finding of selective prosecution. This was another issue not mentioned in the appellate decision.
92. Wayte, 710 F.2d at 1389-90 (Schroeder, J., dissenting).
93. Id. at 1389 (Schroeder, J., dissenting).
94. Id. (Schroeder, J., dissenting). Although Judge Schroeder did not explicitly state that Wayte established a prima facie case, her finding that he ultimately proved improper selective prosecution implies that the district court’s initial finding of a prima facie case was proper.
95. Id. at 1390 (Schroeder, J., dissenting).
exclude from prosecution those who innocently failed to register. The offender's statements were neither necessary nor useful to establish willfullness. In addition, because nonvocal nonregistrants easily could have been traced, the government's argument that it was unable to locate other violators was equally implausible. The dissent emphasized that the government's eventual implementation of an active enforcement system did not excuse the fact that the system was not implemented at an earlier date.

The dissent recounted that the decision of the majority effectively allowed prosecution of an individual for speaking out rather than for violating the law. The result, the dissent urged, undermined the freedom given by the first amendment to express unpopular ideas. Because the government failed to rebut Wayte's prima facie case, the dissent argued that Wayte established that he was impermissibly selected for prosecution because of his first amendment activities.

96. Prior to initiating prosecution, the government contacted suspected violators and urged them to register in order to avoid prosecution. See supra notes 16-18 and accompanying text.

97. Wayte, 710 F.2d at 1390 (Schroeder, J., dissenting).

98. Id. (Schroeder, J., dissenting). See supra note 87.

99. Wayte, 710 F.2d at 1390 (Schroeder, J., dissenting). Judge Schroeder also noted that prosecution of vocal violators would be permissible if other violators were prosecuted as well. Accord United States v. Stout, 601 F.2d 325, 328 (7th Cir.), cert. denied, 449 U.S. 979 (1979). See also supra note 87.

100. Wayte, 710 F.2d at 1390 (Schroeder, J., dissenting).

101. Id. (Schroeder, J., dissenting).

102. Id. at 1389 (Schroeder, J., dissenting). After the Wayte decision, a different Ninth Circuit panel considered the appeal of Benjamin Sasway, who also had moved to dismiss an indictment against him on the grounds of selective prosecution. United States v. Sasway, 12 MIL. L. REP. (PUB. L. EDUC. INST.) 2217 (9th Cir. Feb. 2, 1984), petition for cert. filed, 53 U.S.L.W. 3001 (U.S. July 3, 1984) (No. 83-2098). Sasway, the first person indicted under the passive enforcement policy, raised the defense of selective prosecution. After an evidentiary hearing, the district court denied Sasway's motion to dismiss the indictment, finding that he failed to make the necessary showing on either of the two elements necessary to sustain his allegation.

On appeal, the Ninth Circuit affirmed Sasway's conviction based upon the Wayte decision. However, Judge Norris, "reluctantly" concurring, indicated that while bound to follow Wayte, he believed that Wayte was wrongly decided. Rather, he agreed with the Wayte dissent and the Sixth Circuit decision in United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983). See infra notes 103-23 and accompanying text. He recommended that Wayte be reconsidered by an en banc panel of the court. 12 MIL. L. REP. (PUB. L. EDUC. INST.) 2217 (March-April 1984.)
United States v. Schmucker

Procedural History

In Schmucker, the defendant wrote a letter to the government stating that, due to his religious convictions, he would not be registering for the draft. He was subsequently indicted for willful violation of the draft registration laws. The district court denied Schmucker an evidentiary hearing on his selective prosecution defense. He was later convicted as charged.

On appeal, Schmucker contended that the district court erred in refusing him a pretrial evidentiary hearing. He alleged that the government had abridged his first amendment rights to free speech and to the free exercise of religion by prosecuting only those persons who refused to register and who publicly disagreed with the registration laws.

The Sixth Circuit Decision

The Sixth Circuit reversed the district court and held that Schmucker was entitled to a full evidentiary hearing on his selective prosecution claim. The court found that Schmucker made a preliminary showing of a “legitimate issue concerning the government’s conduct” under the two-part Berrios test. Schmucker es-

104. Schmucker, 721 F.2d at 1048. The registration form provided no place for an individual to indicate a desire for conscientious objector status. Like the defendant in Wayte, Schmucker declined the offers of the Selective Service, the FBI and government attorneys to avoid prosecution by registering. Schmucker was indicted for having “knowingly and willfully failed, evaded, and refused to submit to registration,” in violation of 50 U.S.C. app. §§ 453, 462 (1982).
105. Schmucker, 721 F.2d at 1048.
106. See Brief for Appellant at 3, United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983). The brief, without stating reasons, indicates that all requests for hearings on Schmucker’s motion to dismiss were denied by the district court.
107. Schmucker, 721 F.2d at 1048.
108. Id.
109. Id.
110. Id.
111. Id. at 1048-49. The panel adopted the test as set out in United States v. Hazel, 696 F.2d 473 (6th Cir. 1983). The Hazel defendants claimed that they were entitled to an evidentiary hearing because the Internal Revenue Service attempted to suppress their expression as leaders of a tax rebellion movement. They appealed from convictions for tax-related offenses. 696 F.2d at 474. The court found that the Hazel defendants arguably had been singled out from others similarly situated who were not prosecuted. Nevertheless, the court held that the defendants did not establish that they were prosecuted based on impermissible considerations. Id. at 475.
Relying on United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978), the Hazel court
established the first element of the test because prosecution of nonregistrants was limited to those who publicly expressed their refusal to register, whereas other men who refused to comply with the law were not indicted.112

In analyzing Schmucker's defense, the court did not focus strictly on the government’s motivation in developing and implementing the passive enforcement scheme. Rather, the court stated that the issue before it simply was whether such a policy violated the first amendment, because it was directed only at the vocal offender who openly objected to the draft registration laws on religious, moral or political grounds.113 The court used a traditional first amendment analysis114 in determining whether the defendant’s letters to the government were protected speech.

The government argued that Schmucker’s letter to the Selective Service was an unequivocal confession to his violation of the law and not simply a petition protesting perceived wrongs.115 This argument was firmly rejected.116 The court stated that the passive enforcement policy violated the first amendment by punishing those who expressed opposition to the draft to the exclusion of those who remained silent.117 The government’s prosecutorial discretion, the court emphasized, does not extend to the adoption of a policy whereby only those who admit their failure to register and criticize the draft are prosecuted.118 Such a policy could be supported only by compelling justifications.119 Furthermore, the court noted that construing Schmucker's criticisms of the draft registration laws as “confessions” did not preclude such criticism from being protected under the first amendment.120

112. Schmucker, 721 F.2d at 1049.
113. Id. The court explained that, if the policy was violative of the first amendment, Schmucker would be entitled to an evidentiary hearing to attempt to prove his allegations. If not, then no evidentiary hearing would be necessary. Id. at 1050.
114. See supra note 66.
115. Schmucker, 721 F.2d at 1050.
116. Id.
117. Id. at 1049.
118. Id. at 1050. In support of its finding, the court cited Carey v. Brown, 447 U.S. 455, 461-62 (1980) in which the Court stated that: “[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”
119. Schmucker, 721 F.2d at 1050. See supra notes 27-30 and accompanying text.
120. Schmucker, 721 F.2d at 1051. In finding that Schmucker’s alleged “confession”
Although the government urged the court to follow the *Wayte* decision, the Sixth Circuit emphasized that it was not impressed by that decision, particularly the appellate court's "blanket rejection of the trial court's factual findings." Rather, the court was persuaded by the *Wayte* dissent as well as by a prior Seventh Circuit decision. Thus, Schmucker was entitled to a full evidentiary hearing on his selective prosecution claim.

*United States v. Eklund*

Procedural History

In *Eklund*, the defendant was an opponent of the registration program who informed the Selective Service that he would not be registering for the draft. After rejecting opportunities to avoid prosecution by registering, Eklund was indicted by a grand jury was the exercise of a constitutionally protected right, the court referred to Justice Harlan's warning in *Cohen v. California*, 403 U.S. 15, 26 (1971) in which he stated that: "[w]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." The Sixth Circuit emphasized that the *Cohen* analysis was applicable in *Schmucker* because the government in effect forbade criticism of itself by prosecuting violators on the basis of their "confessional words." See infra notes 191-92 and accompanying text.

121. *Schmucker*, 721 F.2d at 1051. See *supra* notes 79-91 and accompanying text for discussion of the *Wayte* findings.

122. See *supra* notes 92-102 and accompanying text.

123. United States v. Falk, 472 F.2d 1101 (1972), vacated en banc, 479 F.2d 616 (7th Cir. 1973). The *Falk* defendant, prosecuted for failing to possess a draft registration card, claimed that the government selectively prosecuted him as punishment for his draft-counseling activities and to prevent the exercise of his first amendment rights. The majority held that the evidence Falk presented was sufficient to shift to the government the burden of proving nondiscriminatory enforcement of the law. For an extensive discussion of the *Falk* decision, see Comment, *Developments*, supra note 45.

124. *Schmucker*, 721 F.2d at 1052.

The *Schmucker* court retained jurisdiction over other issues raised on appeal, pending the outcome of the evidentiary hearing. After the court rendered its decision, the government filed a petition requesting a rehearing with a suggestion for rehearing en banc. The Sixth Circuit, one judge dissenting, denied the en banc request and referred the petition for rehearing to the hearing panel for disposition. United States v. Schmucker, 721 F.2d 1046 (1983), reh'g en banc denied, 729 F.2d 1040 (6th Cir. 1984).


126. In his letter, Eklund volunteered to be the first nonregistrant prosecuted. Prior to writing the letter, Eklund had been a participant and speaker in a public demonstration against draft registration. His remarks were quoted in a Des Moines, Iowa newspaper. *Eklund*, 551 F. Supp. at 966.

127. See *supra* notes 16-18 and accompanying text.
for failure to register with the Selective Service. Moving to dismiss the indictment, Eklund claimed he was the victim of impermissible selective prosecution. After the district court ruled that he had not established a prima facie showing of selective prosecution to warrant an evidentiary hearing, the case went to trial. Eklund was convicted by a jury and sentenced to two years in prison. On appeal, Eklund again raised the defense of selective prosecution.

The Majority Opinion

In an en banc hearing, a 5-4 majority of the Eighth Circuit affirmed the district court, holding that Eklund did not "raise a reasonable doubt as to the government's purpose" in prosecuting him. The court initially indicated that Eklund's admission that he violated the law was not protected speech. Prosecution on the basis of the admission would not be improper, according to the majority. In applying the Berrios test, the court therefore fo-

130. Id. at 968-69. The district court found that, although Eklund established that he was singled out for prosecution from others similarly situated, he failed to establish that his selection was based on an impermissible ground. The court stated that Eklund did not demonstrate that he was prosecuted as a result of his expressed opposition to the laws. Furthermore, Eklund made no showing that persons who spoke out against the law without identifying themselves as violators were prosecuted. The court admitted that, had the government actively sought out and prosecuted only persons who publicly spoke out against the draft registration law, Eklund's selective prosecution defense might have merit.
131. Eklund, 733 F.2d at 1288.
132. Id.
133. The en banc court heard the Eklund appeal together with United States v. Martin, 733 F.2d 1309 (8th Cir. 1984). The issue in Martin was whether the failure to register was a continuing offense, a question also raised in Eklund. See supra note 23.
134. See supra notes 53-57 and accompanying text. In evaluating Eklund's claim, the court relied on a prior Eighth Circuit decision which incorporated the Berrios test as the appropriate one to use in evaluating a selective prosecution claim. United States v. Catlett, 584 F.2d 864 (8th Cir. 1978). Catlett was a long-time active and public protestor of government policies, particularly those relating to the use of funds for military-related activities. Catlett refused to pay taxes even after the Internal Revenue Service pursued civil remedies against him. Thereafter, he was criminally prosecuted. Raising a claim of selective prosecution in his defense, Catlett contended he was entitled to discovery and a hearing or an in camera inspection of certain government documents. Id. at 865.
On appeal, the Eighth Circuit held that, under the Berrios test, Catlett was not entitled to discovery and a hearing on his claim. The court emphasized that the policy attacked by Catlett merely discriminated between nonfiling protestors whose protests received publicity and nonfiling protestors whose protests received no publicity.
135. Eklund, 733 F.2d at 1291.
136. Id. The court cited no authority for its conclusion. See infra notes 188-92 and accompanying text.
cused on Eklund’s presentation of evidence regarding improper government motivation.\textsuperscript{137} In doing so, the majority accepted the lower court’s conclusion that Eklund met the first part of the \textit{Berrios} standard;\textsuperscript{138} however, he was not entitled to an evidentiary hearing because he failed to make a prima facie showing on the second element of the test.\textsuperscript{139}

In his defense, Eklund cited three specific factors to demonstrate the government’s impermissible motivation: (1) the government’s delay in implementing a broader enforcement system; (2) statements included in government memoranda; and (3) the participation of high-level executive officials in formulating prosecutorial policy.\textsuperscript{140} The majority evaluated each of these factors before concluding that Eklund was not entitled to an evidentiary hearing.

First, the court determined that the government had considered an active enforcement system, but that difficulty in gaining access to Social Security records impeded its implementation.\textsuperscript{141} Because the government intended to eventually prosecute a greater number of nonregistrants through an active enforcement system, the court held that Eklund did not establish a genuine question regarding the government’s motive.\textsuperscript{142} Moreover, the Justice Department had been willing to forego prosecution if Eklund registered prior to indictment.\textsuperscript{143} The court, therefore, was satisfied that the government’s focus was on Eklund’s failure to register and not on his views.\textsuperscript{144}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Eklund}, 733 F.2d at 1290. The court stated that, even though it need not decide whether Eklund met the first element of the test, “for purposes of discussion we will assume the district court properly defined the group of persons similarly situated and that Eklund was singled out from this group for prosecution.”

\textsuperscript{139} \textit{Eklund}, 733 F.2d at 1295.

\textsuperscript{140} \textit{Id.} at 1291. Some courts have determined that the participation of high-ranking government officials in the formulation of prosecutorial policy is not customary procedure and, therefore, raises an inference of improper motivation. \textit{See, e.g.}, United States v. Wayte, 549 F. Supp. 1376, 1382 (C.D. Cal. 1982); United States v. Falk, 479 F.2d 616, 622 (7th Cir. 1973) (en banc).

\textsuperscript{141} \textit{Eklund}, 733 F.2d at 1291. The court noted that many addresses in the Social Security files were obsolete and that the Internal Revenue Service refused to provide more accurate data. \textit{Id.} at 1292. In the latter part of 1982, Selective Service finally resorted to using state driver’s license records for updated information. \textit{Id.}

\textsuperscript{142} \textit{Id.} at 1292. The court admitted that, if the government had no plans to implement a system broader than passive enforcement, questions regarding the government’s motivation would be raised. \textit{Id.} Thus, the government’s long-range plans to identify and prosecute both vocal and silent offenders satisfied the court that no wrongful purpose could be inferred.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}
Second, the majority was not impressed with Eklund's presentation of documents revealing the government's awareness of the impact of the passive enforcement system on religious and moral dissenters. The court disagreed with Eklund's contention that the documents showed that the government consistently recognized that all men prosecuted would be protestors against draft registration. The majority further found that the government's awareness that those prosecuted would consist largely of "vocal offenders" did not compel the inference that prosecutions were motivated by the offenders' exercise of constitutional rights. According to the Eklund court, the passive enforcement policy was applicable to nonvocal, as well as vocal, nonregistrants; however, the court neglected to explain how the system would operate to locate silent offenders. The fact that vocal offenders who registered prior to indictment would not be prosecuted impressed the court. It emphasized that, absent bad faith, prosecuting those who made public their violation of the law was legitimate in order to deter others from such violations.

With respect to Eklund's contention that the participation of high-level officials led to an inference of improper governmental motivation, the majority concluded that no evidence existed upon which to infer that the officials based their decision to prosecute on expression of opposition to the draft. Because the government's policy relating to enforcement of the draft registration laws pertained to national security interests, involved a massive number of offenders, and potentially included other executive agencies in the enforcement process, the court found that the inclusion of high level officials was unremarkable.

145. Id.
146. Id. at 1293 (citing Appellant's Brief at 33, United States v. Eklund, 733 F.2d 1287 (8th Cir. 1984)). Eklund had contended that "all men whose names have been referred for prosecution—and therefore all men in fact prosecuted—will have protested against the draft and draft registration: the system cannot operate in any other manner." (emphasis in original).
147. The definition of who is a "vocal offender" has been subject to various interpretations. See infra notes 179-87 and accompanying text.
148. Eklund, 733 F.2d at 1293.
149. Id. The court stated that Eklund did not show that the government declined to prosecute known silent offenders. However, the Eighth Circuit did not set forth clear descriptions of "vocal" and "silent" offenders. See also infra notes 179-87 and accompanying text.
150. Id. at 1294 (citing United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978); United States v. Ojala, 544 F.2d 940, 944-45 (8th Cir. 1976)). See also supra notes 49-52 and accompanying text.
151. Eklund, 733 F.2d at 1295.
152. Id.
In the majority's view, Eklund failed to show that the government had prosecuted him because of his public refusal to register. Accordingly, the court found that first amendment values were not threatened, implicated, or involved in his prosecution. Because Eklund failed to make a prima facie showing on his selective prosecution claim, the court held he was not entitled to an evidentiary hearing.

The Dissenting Opinion

Four dissenting judges believed that Eklund raised a "reasonable doubt" regarding the government's motive and thus met the required standard to justify an evidentiary hearing. Agreeing with the majority opinion in Schmucker and the dissenting opinion in Wayte, the dissent stated that Eklund had presented sufficient evidence in three particular areas to make the necessary showing of improper governmental motives.

The dissent first emphasized that the government's awareness of the impact of the passive enforcement system was a key element in establishing impermissible motivation. Next, the dissent addressed the government's two-year delay in implementing an active enforcement system. Because state driver's license records apparently were available during the entire period in question, the dissent was not persuaded by the government's assertion that it could not locate violators because Social Security records were unavailable. According to the dissent, the record included no justification for the failure to resort to other identification plans.

The Eklund dissent considered one additional issue previously left unaddressed by the Wayte and Schmucker courts. It noted that the record before it suggested that the passive enforcement

153. Id.
154. Id.
155. Id. It is significant that the court remarked that Eklund did not contend that Catlett should not be controlling in his case. This raises the question whether the court might have considered an analysis other than the Berrios test had Eklund raised the issue. See supra note 66.
156. Eklund, 733 F.2d at 1307 (Heaney, J., dissenting).
157. Id. at 1307-08 (Heaney, J., dissenting). See supra note 140 and accompanying text.
158. Eklund, 733 F.2d at 1307-08 (Heaney, J., dissenting). The dissent noted the statement of one government official who remarked that "the chances that a quiet non-registrant would be prosecuted is [sic] probably about the same as the chances that he will be struck by lightning." Id. (citing United States v. Wayte, 549 F. Supp. 1376, 1384 (C.D. Cal. 1982), rev'd, 710 F.2d 1385 (9th Cir. 1983)).
159. Eklund, 733 F.2d at 1307 (Heaney, J., dissenting).
160. Id. (Heaney, J., dissenting).
system itself was implemented in a discriminatory manner. After Selective Service sent warning letters to 103 nonregistrants, only sixteen responded and all of them indicated their refusal to register. The thirteen eventual indictees only included men who had responded to the Selective Service. The government had neither pursued nor prosecuted the other known nonregistrants. The dissent believed that these facts alone were enough to raise a question as to the government’s motive.

**Analysis**

The Sixth, Eighth, and Ninth Circuits were presented with essentially the same set of facts in the cases before them. They basically agreed that the defendants were "singled out for prosecution from others similarly situated," and thus met the first part of the *Berrios* test. Each court, however, addressed distinct issues in focusing on the sufficiency of evidence necessary to warrant a full evidentiary hearing on a selective prosecution claim. The decisions illustrate the difficulty courts have had in determining the amount and type of evidence necessary to make a threshold showing of improper government motivation under the *Berrios* test.

The *Schmucker* court found that, absent compelling justifications, the government's passive enforcement policy violated the defendant's first amendment rights. The court discussed the fact that Schmucker was prosecuted because he admittedly violated the law; it only inquired minimally into the government's explanations for its actions. Moreover, evidence that the system operated in such a manner so as to select only those who openly dissented was sufficient to establish a prima facie case of selective prosecution

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161. *Id.* (Heaney, J., dissenting).
162. Of the remaining nonregistrants to whom letters were sent, some did not reply, other letters were returned undelivered, and some letters had "unknown delivery status." Although Selective Service initially sent 134 files to the Justice Department, 31 had incomplete addresses. *Id.* at 1307 (Heaney, J., dissenting).
163. Two additional nonregistrants were indicted under the passive enforcement system after Eklund. *See supra* note 5 and accompanying text.
164. *Id.* at 1307-08 (Heaney, J., dissenting).
165. *Id.* at 1308 (Heaney, J., dissenting).
166. Without specifically addressing the issue, the Eighth Circuit accepted the lower court's finding that Eklund was singled out from other nonregistrants. *See supra* note 138.
167. *See supra* notes 44-52, 57-58, 66 and accompanying text.
Selective Prosecution

and warrant Schmucker a full evidentiary hearing. The Schmucker court's narrow focus on the impact of the passive enforcement policy on the defendant's first amendment rights, rather than on the government's motivation in establishing and implementing such a policy, implies that an inference of improper motivation can be made from the resulting effect of the passive enforcement scheme.

In contrast to Schmucker, the Wayte opinion focused directly on the government's motive for its prosecutorial policy. The court was unwilling to infer that the government was impermissibly motivated merely because it was aware of the impact of the system. Rather, Wayte's failure to present specific evidence that he was targeted for investigation because he protested, combined with the government's rationale for its policy, persuaded the court that Wayte did not make an initial showing of selective prosecution.

The Eklund majority also found that the defendant's evidence did not demonstrate that the government manifested impermissible motivation in pursuing its passive enforcement scheme. Eklund's evidence of the government's lengthy delay in implementing an active system, its awareness of the system's effect, and the involvement of high-level executive officials in the development of prosecutorial policy was not sufficient to make a prima facie showing that the government prosecuted Eklund for exercising his first amendment rights.

In light of the disparate thresholds of evidence required in these cases, it is difficult to determine how any given court would resolve the question of whether a defendant raising a selective prosecution defense presented sufficient evidence to warrant an evidentiary hearing. The courts' apparent disparate evidentiary requirements arguably reflect the inconsistent manner in which the courts have

169. Schmucker, 721 F.2d at 1052.
171. See supra text accompanying note 89.
172. See supra text accompanying notes 86-88.
173. See supra text accompanying notes 89-91.
174. See supra text accompanying note 139.
176. Eklund, 733 F.2d at 1292-94. See also supra notes 145-50 and accompanying text.
177. Eklund, 733 F.2d at 1294-95. See also supra text accompanying notes 151-52.
178. Eklund, 733 F.2d at 1295.
settled other basic questions with respect to the selective prosecution defense. One question is whether the scope of the government's prosecutorial policy was limited to vocal nonregistrants to the exclusion of nonvocal violators. A second question is whether a defendant's admission to violations of the draft laws should be considered speech protected by the first amendment.

Although each circuit found that the defendants were singled out for prosecution, the decisions reveal disagreement as to whether the government's general policy was to prosecute only vocal offenders. To properly address this question, the Schmucker and Wayte courts believed it necessary to determine when an offender becomes "vocal." The Schmucker court determined that the passive enforcement system selected for prosecution only those who publicly expressed their refusal to register. The Wayte majority similarly found that all men indicted were vocal nonregistrants. Neither Schmucker nor Wayte differentiated between men who initially reported themselves and those reported by a third party. The conclusion, therefore, is that the class of vocal offenders under Schmucker and Wayte consisted of eligible men who, in any manner, announced their refusal to register.

The Eklund majority, in contrast to the Wayte and Schmucker courts, emphasized that the passive enforcement system was designed to prosecute both nonvocal and vocal offenders. It determined that Eklund made no showing that the government would decline to prosecute known silent offenders. The court, however, failed to offer any explanation as to how a known silent offender would come to the attention of the government without becoming classified as a vocal offender under a Wayte or Schmucker definition. A prosecutorial policy that focuses only on those who exercise their first amendment rights by expressing their dissatisfaction with the laws should be subject, under equal

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179. See supra text accompanying note 112. The government did not deny that all thirteen men indicted had expressed opposition to the draft registration law, either by a letter to the government or in a public speech. Schmucker, 721 F.2d at 1049.
180. See supra note 81.
181. Conceivably, one who had expressed to a third party his refusal to register, either in a public speech or in an informal conversation, could be considered a vocal dissenter by having made his intent public.
182. Wayte, 710 F.2d at 1388.
183. Eklund, 733 F.2d at 1293. See supra text accompanying note 149.
184. See supra note 146 and accompanying text.
185. Despite its apparent definition of "vocal" offender, the Wayte majority accepted the government's explanations for its actions. See supra notes 79-91 and accompanying text.
Selective Prosecution principles, to the closest scrutiny by the courts. Because the Eklund majority believed that both vocal and nonvocal nonregistrants would be prosecuted under the passive enforcement system, a finding that Eklund was prosecuted for exercising his first amendment rights hardly would be expected. However, had the court recognized that the system ensnared only those who spoke out, it may have concluded that the defendant did in fact set forth sufficient evidence to establish a prima facie case of selective prosecution.

A court's determination of the class of offenders affected by the government's policy, either as limited to those who are vocal, or as extended also to those who are nonvocal, may influence the court's determination of whether there is sufficient evidence to warrant an evidentiary hearing. Similarly, the manner in which a court characterizes the defendant's admission of purposeful draft registration evasion can also determine the success of the defendant's selective prosecution defense. For example, the Eklund majority found

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186. See supra notes 24-34 and accompanying text. The passive enforcement policy did not distinguish among those active in public demonstrations, those who expressed their dissent only in letters, and those who, at minimum, expressed their refusal to register to another person who reported them. See supra notes 14-23 and accompanying text.

187. See, e.g., United States v. Kahl, 583 F.2d 1351, 1354 (5th Cir. 1978); United States v. Oaks, 527 F.2d 937, 939-40 (9th Cir. 1975); see also supra note 4. It is interesting to note in this context that the Eklund court found that a defendant could be appropriately prosecuted based on the amount of publicity the prosecution would receive. 733 F.2d at 1294 (citing United States v. Catlett, 584 F.2d 864 (8th Cir. 1978)). See supra note 134. However, reliance on the facts of Catlett is misplaced within the context of the prosecution of draft nonregistrants. First, the Eklund court failed to acknowledge that any prosecution, whether of a silent or vocal offender, is bound to receive publicity that the government may claim is necessary to deter other violators and compel them to comply with the law. See supra note 49 and accompanying text. The Department of Justice has ample means to inform the media and other sources of its enforcement measures and prosecutorial selections. Thus, the selection of one who has spoken out is not necessary to justify the deterrence rationale. Second, Catlett discriminated between nonfiling tax protestors whose protests received publicity and nonfiling protestors whose protests did not receive publicity. 584 F.2d at 866. This prosecutorial policy is distinguishable from the government's passive enforcement policy. In Catlett, the Internal Revenue Service placed emphasis on investigating cases where violators achieved notoriety in their protests. The greater the publicity a tax protestor received, the greater the likelihood that he would be subject to criminal rather than civil prosecution. Selection was made not on the basis that one spoke out, but rather on how much they spoke out. Id. In contrast, the passive enforcement policy applied to the cases at issue did not identify nonregistrants based on the amount of publicity their protests received. Rather, nonregistrants who protested by speaking out in any manner were targeted by the passive enforcement system, to the exclusion of those who remained silent.

188. See supra notes 115-20, 135-37 and accompanying text. See United States v. Falk, 479 F.2d 616, 625-26 (7th Cir. 1973) (en banc) (Cummings, J., dissenting).

The Supreme Court has stated that an eligible male who refuses to register for the draft is subject to prosecution, although he is not compelled by law to acknowledge his viola-
that the defendant's admission was not speech protected by the
first amendment. Consequently, the defendant was unable to es-


The Schmucker court, in contrast, held that the defendant's admission was to be granted protected first amendment status. As a result, the defendant was able to make a threshold showing of improper government motiva-
tion in selecting him for prosecution.

If the admissions are characterized as protected speech, the in-
trusion upon the defendants' first amendment rights must be sub-
ject to close scrutiny by the courts and supported by compelling
government interests. If, on the other hand, the defendant's ad-
mission is not considered protected speech, the court may look for
a less substantial relationship between the purpose of the policy
and its ultimate effect. In either situation, however, the possibility
that prosecution is based upon an arguably fundamental right of
protected speech provides further justification for affording a de-


Cases which have refused to grant defendants immunity from, or a defense to,
prosecution can be distinguished from the recent prosecutions of draft nonregistrants.
The Seventh Circuit refused to grant first amendment protection to a defendant's written
statements which attracted the attention of the Internal Revenue Service to his violations
of the tax laws. United States v. Stout, 601 F.2d 325 (7th Cir. 1979), cert. denied, 444

Stout, an alleged tax protestor, was prosecuted for failing to file returns, supply infor-
mation or pay federal income tax, and for supplying a false or fraudulent statement. He
filed blank tax forms, giving only identifying information. Attached to the forms were
materials including his objections to specific questions, copies of I.R.S. dossiers, copies of
letters to Congressmen in which he complained about dossiers, and copies of some of the
Congressmen's replies.

In holding that Stout's written statements were not protected by the first amendment,
the Seventh Circuit indicated that selecting the defendant for prosecution was appropri-
ate because other non-protesting delinquent taxpayers were prosecuted as well. Id. at
328. Accord, United States v. Heilman, 614 F.2d 1133, 1139 (7th Cir.), cert. denied, 447
(refused to grant first amendment protection to statements made by a defendant when the
statements were "the very vehicle of the crime itself").
Establishing the Selective Prosecution Defense

The courts' refusals, in *Wayte and Eklund*, to find that the defendants established a prima facie case of selective prosecution reflects the heavy burden borne by the defendant who attempts to make a threshold showing.193 Evidence of the government's awareness that only those who openly dissented were prosecuted, of the two-year delay in implementing an active enforcement system, and of the participation of high-ranking executive officials in the formation of prosecutorial policy did not raise sufficient question, according to the *Wayte* and *Eklund* courts, as to the government's motivation. Given the courts' findings in these cases, it is possible to conjecture that the courts are looking for direct evidence that the government implemented and maintained its policy in bad faith.194

Potential constitutional problems exist when a defendant is required to carry such a heavy burden to establish a threshold showing of selective prosecution. When the government adopts a nationwide prosecutorial policy that selects for prosecution only persons who exercise their first amendment rights by speaking out against the laws, it must demonstrate compelling justifications.195 A system that selects only those whose admissions to violations of the laws include criticism of government policies, but excludes nonprotesting violators from prosecution, should create a strong inference of discriminatory procedures and thus bolster a finding of a prima facie case of selective prosecution.196 Government explanations regarding, for example, deterrence, cost-saving measures, and the evidentiary significance of defendants' statements should not justify the denial of a full evidentiary hearing. A defendant needs this avenue of discovery in order to have any hope of success on his selective prosecution defense.197 Because first amendment rights are arguably implicated under the passive enforcement policy, a defendant must be afforded the opportunity to demonstrate he was prosecuted for speaking out rather than for violating the law.

Some courts and commentators have questioned whether the

193. See *infra* notes 41, 53-66 and accompanying text.
194. See, e.g., United States v. Kahl, 583 F.2d 1351 (5th Cir. 1978); United States v. Oaks, 527 F.2d 937 (9th Cir. 1975).
195. See *infra* notes 118-19 and accompanying text.
196. See, e.g., United States v. Steele, 461 F.2d 1148 (9th Cir. 1972).
197. See, e.g., United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972) ("It is neither novel nor unfair to require the party in possession of the facts to disclose them."). See *infra* notes 58-62 and accompanying text.
Berrios equal protection analysis is the appropriate one to use in the cases of draft nonregistrants. Nevertheless, as long as Berrios remains the current doctrine, courts should modify their application of the test in analyzing a selective prosecution defense. Rather than narrowly focusing on direct evidence of improper government motivation, courts should evaluate the totality of the relevant facts to determine if an inference of impermissible motivation can be made. Such an evaluation is most appropriate for the defendant attempting to establish a prima facie case, since the defendant likely would not have had access to testimony and documents that may provide the evidence necessary to prove his defense.

Under such an approach, the first part of the Berrios test is still met by evidence of disproportionate impact on vocal offenders. Although government awareness of the potential discriminatory effect of the system may not itself be evidence of improper motivation, such an inference should arise when the government's awareness is coupled with its failure to consider or make use of alternative identification procedures during a reasonable period of time. Evidence of departures from traditional modes of prosecutorial decision-making by inclusion of high-level executive officials must also be considered as suggestive of improper motivation and, therefore, subject to careful scrutiny by the courts. The accumulation of such factual evidence presented by a defendant, connoting improper governmental motivation, should be sufficient to demonstrate a prima facie case of selective prosecution.

Analysis of the cases in light of this approach illustrates that the

198. See supra note 66.
199. The Supreme Court has stated that, in a case alleging racial discrimination in the selection of juries, an invidious discriminatory purpose can "often be inferred from the totality of relevant facts." See Washington v. Davis, 426 U.S. 229, 242 (1976). The Washington Court indicated that a prima facie case of discriminatory purpose could be proved by the absence of blacks on a jury combined with the failure of jury commissioners to be informed of such eligible jurors, id. at 241, citing Hill v. Texas, 316 U.S. 400 (1942), or combined with racially nonneutral selection procedures. 426 U.S. at 241 (citations omitted). In comparison, because the passive enforcement policy was directed solely at the vocal nonregistrant who admitted a violation when he openly objected to the law on religious, moral or political grounds, Schmucker, 721 F.2d at 1049, it was not a neutral selection procedure. Had the government's prosecutorial policy located these young men as well as willful nonregistrants who quietly evaded the law, a different question would be presented. See supra note 4. The existence of the passive enforcement system, combined with the fact that the government failed to pursue identifiable silent violators, further supports a prima facie finding of selective prosecution.
200. See supra notes 59-62 and accompanying text.
201. See, e.g., Wayte, 710 F.2d at 1387; Schmucker, 721 F.2d at 1049; Eklund, 733 F.2d at 1290.
defendants presented persuasive evidence that they were prosecuted by the government for speaking out rather than for violating the law. The Selective Service and the Department of Justice undoubtedly knew of the impact that the passive enforcement system would have on draft nonregistrants.\(^\text{202}\) Even prior to implementing its policy, the government recognized that silent offenders would not be affected.\(^\text{203}\) Furthermore, the realization that “appropriate” selection criteria would be used at a later date leads to the conclusion that officials acknowledged that the passive enforcement system was an “inappropriate” policy to pursue.\(^\text{204}\)

Even though it recognized the infirmities of its enforcement policy, the government failed to implement available alternative identification procedures during the two years it waited for access to Social Security records. Neither Wayte nor Eklund addressed this fact. The government’s failure to expeditiously obtain information regarding nonvocal nonregistrants raises serious questions as to its motivation in pursuing only vocal offenders, thus adding justification for the defendants’ entitlement to an appropriate evidentiary hearing. The absence of further inquiry and knowledge casts suspicion as to the government’s motivation. Combined with the additional evidence that high-level executive officials were involved in the selection procedures and that the passive enforcement system itself operated in a discriminatory manner, a finding of a prima facie case of selective prosecution, based on the totality of the relevant facts, was warranted.

The courts’ difficulty in delineating the amount and type of evidence necessary to establish a prima facie showing of selective prosecution demonstrates that much guidance still is needed. In addition, questions regarding the appropriate definition of a “vocal” offender, as well as of the status of the defendants’ admissions to violation of the laws, further illustrate the need for consistency. The complexity of the issue is compounded by the fact that the United States Supreme Court has never specifically considered whether selection for prosecution is impermissible when it is based upon the exercise of first amendment rights.\(^\text{205}\) Nor has the Court delineated the appropriate burdens and standards for proving a selective prosecution defense.\(^\text{206}\) United States v. Wayte presents the Supreme Court with the opportunity to clearly define the legal and

\(^{202}\) See supra note 15.
\(^{203}\) Id.
\(^{204}\) Id.
\(^{205}\) See supra note 34.
\(^{206}\) See supra note 64.
factual standards, as well as the procedural mechanisms, to be appropriately employed. The Court should make clear that lower courts may consider inferential as well as direct evidence in determining whether improper government motivation is present in a particular case.

CONCLUSION

After the President reinstituted draft registration in 1980, Selective Service implemented a passive enforcement policy to locate nonregistrants and refer them for prosecution to the Justice Department. Those men indicted for failure to register raised the defense of selective prosecution. They alleged that they were prosecuted because they spoke out rather than because they violated the law and, thus, were denied equal protection of the laws. In analyzing the cases, the courts of appeals have differed considerably in determining the amounts and type of evidence necessary to establish a prima facie showing of selective prosecution. Defendants’ failure to present direct evidence of improper government motivation usually has been fatal to their defense, precluding access to crucial documents and testimony. By adopting a standard that would permit courts to assess all of the relevant facts regarding government motives, the Supreme Court can provide a workable framework for future courts faced with a selective prosecution defense.

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