

# The Burger Court Opinion Writing Database

## *Wayte v. United States*

470 U.S. 598 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 2, 1985

Re: No. 83-1292 - David Alan Wayte v. United States

Dear Lewis,

I join.

Regards,



Justice Powell

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APR 11 4-11-85

20543

OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES  
WASHINGTON, D.C. 20543

M

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 9, 1984

No. 83-1292

Wayte v. United States

Dear Thurgood,

You and I are the only dissenters  
in this. Would you mind taking on the  
dissent?

Sincerely,

*Bul*

Justice Marshall

.84 4A-D 6:58

*I will be happy to do the dissent*

*M*

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 2, 1985

No. 83-1292

Wayte v. United States

Dear Lewis,

I'll await the dissent.

Sincerely,



Justice Powell

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 13, 1985

No. 83-1292

Wayte v. United States

Dear Thurgood,

Please join me.

Sincerely,

*Bill*

Justice Marshall

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.91 87 13 4150

Supreme Court of the United States  
Washington, D. C. 20543

72: 11A 2- MAR. 48

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 9, 1985

Re: 83-1292 - Wayte v. United States

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Dear Lewis,

Please join me.

Sincerely yours,



Justice Powell

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 13, 1984

Re: No. 83-1292-Wayte v. United States

Dear Bill:

I will be happy to do the dissent.

Sincerely,

*JM.*

T.M.

Justice Brennan

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Marshall**

Circulated: **MAR 11 1985**

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1292

DAVID ALAN WAYTE, PETITIONER *v.*  
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[March —, 1985]

JUSTICE MARSHALL, dissenting.

The Court decides today that petitioner "has not shown that the Government prosecuted him *because of* his protest activities," and it remands to permit his prosecution to go forward. However interesting the question decided by the Court may be, it is not necessary to the disposition of this case. Instead, the issue this Court must grapple with is far less momentous but no less deserving of thoughtful treatment. What it must decide is whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution.

The District Court ordered such discovery, the Government refused to comply, and the District Court dismissed the indictment. The Court of Appeals reversed on the grounds that Wayte had failed to prevail on the merits of his selective prosecution claim, and that the discovery order was improper. If Wayte is entitled to obtain evidence currently in the Government's possession, the Court cannot dismiss his claim on the basis of only the evidence now in the record. To prevail here, then, all that Wayte needs to show is that the District Court applied the correct legal standard and did not abuse its discretion in determining that he had made a non-frivolous showing of selective prosecution entitling him to discovery.

STYLISTIC CHANGES THROUGHOUT

+ pp. 1, 8-9

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1292

DAVID ALAN WAYTE, PETITIONER *v.*  
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[March —, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins,  
dissenting.

The Court decides today that petitioner “has not shown that the Government prosecuted him *because of* his protest activities,” and it remands to permit his prosecution to go forward. However interesting the question decided by the Court may be, it is not necessary to the disposition of this case. Instead, the issue this Court must grapple with is far less momentous but no less deserving of thoughtful treatment. What it must decide is whether Wayte has earned the right to discover Government documents relevant to his claim of selective prosecution.

The District Court ordered such discovery, the Government refused to comply, and the District Court dismissed the indictment. The Court of Appeals reversed on the grounds that Wayte had failed to prevail on the merits of his selective prosecution claim, and that the discovery order was improper. If Wayte is entitled to obtain evidence currently in the Government's possession, the Court cannot dismiss his claim on the basis of only the evidence now in the record. To prevail here, then, all that Wayte needs to show is that the District Court applied the correct legal standard and did not abuse its discretion in determining that he had made a non-frivolous showing of selective prosecution entitling him to discovery.

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2

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 2, 1985

Re: No. 83-1292, Wayte v. United States

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

84 JAN -5 615:28

213 12

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12/30

To: The Chief Justice  
Justice Brennan  
Justice White  
~~Justice Marshall~~  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: DEC 31 1984

Recirculated:

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1292

DAVID ALAN WAYTE, PETITIONER *v.*  
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[January —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, violates the First and Fifth Amendments.

### I

On July 2, 1980, pursuant to his authority under Section 3 of the Military Selective Service Act, 62 Stat. 605, as amended, 50 U. S. C. App. §453,<sup>1</sup> the President issued Presidential Proclamation 4771, 3 CFR ch. 32, subch. A. This proclamation directed male citizens and certain male

<sup>1</sup>Section 3 provides in pertinent part:

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

The United States requires only that young men *register* for military service while most other major countries of the world require actual service. The International Institute for Strategic Studies, *The Military Balance 1983-1984* (1983); see *Selective Service System v. Minnesota Public Service Research Group*, — U. S. —, — n. 2 (1984) (POWELL, J., concurring in part and concurring in the judgment).

01/04

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

**Stylistic Changes Throughout.**

From: **Justice Powell**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1292

**DAVID ALAN WAYTE, PETITIONER v.  
UNITED STATES**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT**

[January —, 1985]

**JUSTICE POWELL** delivered the opinion of the Court.

The question presented is whether a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, violates the First and Fifth Amendments.

**I**

On July 2, 1980, pursuant to his authority under § 3 of the Military Selective Service Act, 62 Stat. 605, as amended, 50 U. S. C. App. § 453,<sup>1</sup> the President issued Presidential Proclamation No. 4771, 3 CFR 82 (1981). This proclamation directed male citizens and certain male residents born during

<sup>1</sup>Section 3 provides in pertinent part:

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

The United States requires only that young men *register* for military service while most other major countries of the world require actual service. The International Institute for Strategic Studies, *The Military Balance 1983-1984* (1983); see *Selective Service System v. Minnesota Public Service Research Group*, 468 U. S. —, —, n. 2 (1984) (POWELL, J., concurring in part and concurring in judgment).

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03/13

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

Circulated: \_\_\_\_\_  
Recirculated: MAR 14 1985

changes:  
6, 9-10

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1292

DAVID ALAN WAYTE, PETITIONER *v.*  
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[March —, 1985]

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a passive enforcement policy under which the Government prosecutes only those who report themselves as having violated the law, or who are reported by others, violates the First and Fifth Amendments.

I

On July 2, 1980, pursuant to his authority under § 3 of the Military Selective Service Act, 62 Stat. 605, as amended, 50 U. S. C. App. § 453,<sup>1</sup> the President issued Presidential Proclamation No. 4771, 3 CFR 82 (1981). This proclamation directed male citizens and certain male residents born during

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The United States requires only that young men register for military service while most other major countries of the world require actual service. The International Institute for Strategic Studies, *The Military Balance 1983-1984* (1983); see *Selective Service System v. Minnesota Public Service Research Group*, 468 U. S. —, —, n. 2 (1984) (POWELL, J., concurring in part and concurring in judgment).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 26, 1985

MEMORANDUM TO THE CONFERENCE

We voted to hold the following three cases pending disposition of Wayte v. United States, No. 83-1292:

- 1) Ecklund v. United States, No. 83-1959. Petitioner was prosecuted and convicted under the passive enforcement system upheld in Wayte. The en banc CA8 rejected his principal claims of selective prosecution for the reasons we affirmed in Wayte. We denied cert in Wayte itself as to two of the other issues petitioner presents and the en banc CA8 correctly decided a final, statutory issue over which there is no conflict in the circuits. No issue in this case is certworthy. I will vote to deny cert.
- 2) United States v. Schmucker, No. 83-2035. Petitioner challenged his conviction for failure to register on the ground of selective prosecution. The DC denied his motion to dismiss the indictment because he had failed to show both that he had been singled out for prosecution from a group of similarly situated individuals and that the government's decision to prosecute was based on impermissible considerations. The CA6 reversed. It held that since "[t]he Government lacks the power to adopt a stated policy of prosecuting people who publicly confess their failure to register ... [while] criticiz[ing] government policy," App. to Pet. for Cert. 6a, petitioner was entitled to an evidentiary hearing. It retained jurisdiction as to unspecified "other issues" raised in the appeal. Since the CA6's decision conflicts with Wayte, I shall vote to GVR.
- 3) Sasway v. United States, No. 83-2098. The DC denied petitioner's motion to dismiss the indictment on the ground of selective prosecution. The CA9 affirmed, citing its decision in Wayte. It also upheld the DC's refusal to permit petitioner to testify at trial as to his motives for failing to register because it believed such testimony was irrelevant to intent. It refused to reach the question whether petitioner's failure to register was a continuing offense

because the indictment charged failure to register during a period that included at least the latter portion of petitioner's registration period. I will vote to deny the petition in this case. The selective prosecution issue is identical to that in Wayte and was, like the evidentiary issue, decided correctly below. And, although the CA9 appears to have erred in not considering whether failure to register is a continuing offense, all the circuits that have considered the issue on the merits have ruled against petitioner's position. Deny cert.

Sincerely,

L. F. P.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 4, 1985

Re: 83-1292 - Wayte v. United States

Dear Lewis:

Please join me.

Sincerely,

*WM*

Justice Powell

cc: The Conference

83-1292-4

1985  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 2, 1985

Re: 83-1292 - Wayte v. United States

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

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*b*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 3, 1985

Re: 83-1292 David A. Wayte v. United States

Dear Lewis,

Please join me.

Sincerely,

*Sandra*

Justice Powell

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20543

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