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Independence Day 1984

National Resistance "Conspiracy"?

"TYPED: 7-1-82

"Re: [deleted] --Alleged Selective Service Counseling Violations

"Dear [deleted]

"By letter dated June 17, 1982, you requested authority to prosecute [deleted] for allegedly counseling others to refuse to register with the Selective Service System....

"In your latest letter, you note that an article appeared in the [deleted] which told of [deleted] history of convictions..in connection with his draft resistance. The article also quoted him as claiming that he is presently counseling others not to register with Selective Service. You also said that Mr. Beyer heads an organization called 'Upstate Resistance,' and you included copies of material provided by that organization. Finally, you suggested that since [deleted] is 'certainly much more mature than the average 18 and 19 year olds he is counseling not to register' he should be prosecuted before non-registrants are prosecuted.

"Although we do not know the particulars of [deleted] alleged counseling violations, we suspect that the information now known to your office generally consists of his letter and public statements. The essence of his letter and, we suspect, his public statements is as follows:

'Today, in violation of the United States Criminal Code...I have once again encouraged young men to violate federal regulations which force them to register with the Selective Service System. I have actively counseled, and am willing to aid and abet any young man who chooses the path of resistance to draft registration.'

"If our suspicion is correct, then an investigation into his alleged violation would necessarily mean contacting members of his [deleted] organization and interviewing them concerning [deleted] counseling violations. We further suspect that the group will prove

resistant to the investigation, possibly compounding even further the first amendment problems which will undoubtedly arise in a non-registrant counseling prosecution.

"Public attention will necessarily be focused on the first several non-registrant prosecutions. Consequently, our primary concern is that such prosecutions be successful. A loss and its attendant publicity in a non-registrant counseling violation case will not only encourage others to counsel non-registrants but will probably encourage persons of registration age simply to refuse to register. Therefore, we prefer that United States Attorneys first bring non-registrant prosecutions and, through successfully prosecuting such cases, establish that the failure to register is a serious matter. After the first few successful non-registrant prosecutions, United States Attorneys can then tackle non-registrant counseling violations with the possibly troublesome first amendment issues connected with such violations.

"In short, we suggest that you first bring several successful non-registrant prosecutions in your district. Then, if [deleted] is found counseling non-registrants to violate the law, he should be prosecuted. Please note that even then, counseling violations under 50 U.S.C. App. S462(a) require the Department's approval before they are brought.

"Sincerely,

"LAWRENCE LIPPE, Chief, General Litigation and Legal Advice Section, Criminal Division [, U.S. Department of Justice]

BY:

"DAVID J. KLINE, Senior Legal Advisor"¹

This letter, one of many internal memos made public during the prosecution in Los Angeles of nonregistrant David Wayte, is part of a growing body of evidence suggesting that the Justice Department is actively considering the prosecution of draft counselors and resistance organizers, and that the possibility of such prosecutions is being used as the excuse for increasingly intrusive surveillance of the resistance movement.

The Military Selective Service Act, 50 United States Code Appendix, Section 462(a), provides, "Any person... who knowingly counsels, aids, or abets another to refuse or evade... any of the requirements of this title... or who conspires to commit any...such offense... shall, upon conviction... be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment".

1. The references to "Mr. Beyer" and "Upstate Resistance" were marked for deletion and were apparently left in only by accident. The letter was probably sent to the United States Attorney for the Western District of New York at Buffalo.

There is surprisingly little question as to the constitutionality of this law. The few cases brought under it have produced uniformly bad legal precedents.

In the only such case to reach the Supreme Court, Larry Gara was convicted of counseling resistance for saying, as a friend was being arrested for nonregistration, "Do not let them coerce them into changing your conscience", and, in a letter to the U.S. Attorney, "We have advocated disobedience to the law". (The "we" refers to Larry and his wife, who also signed the letter but whom the U.S. Attorney, with characteristic sexism, never prosecuted.) The Supreme Court upheld Larry's conviction and the circuit court's decision that "the Selective Service Act does not even purport to enter the field of restriction of speech or of publication".²

The best-known conspiracy prosecution was that of William Sloane Coffin, Jr., Michael Ferber, Mitchell Goodman, Marcus Raskin, and Benjamin Spock following an October 1967 draft card turn-in at the Justice Department. Many people remember only that the defendants eventually "got off" and that their prominence and respectability proved embarrassing to the government. But they "got off" for reasons entirely unrelated to the constitutionality of the charge.³

They were charged with neither counseling nor conspiracy to resist but the twice-removed "conspiracy to counsel". The Court of Appeals for the First Circuit was then, as it is now, considered the most "liberal" circuit in its interpretation of the First Amendment. But the majority found no constitutional fault with the charge itself. Nor had they any objection to its application to open, non-violent political organizing evidenced only by public speeches.⁴

These provisions have been applied only sporadically, however, especially in comparison with the tens of thousands of prosecutions of young male resisters themselves subject to the draft.⁵ While advocacy of resistance was the excuse for government suppression of socialist, communist, and anarchist agitation against World Wars I and II and the Korean and Vietnam Wars, most prosecutions for conspiracy, aid, and abetment have involved forged documents, fraudulent deferments, bribery of draft boards, or the like.⁶

2. *U.S. v. Gara*, 178 F. 2d 38 (6th Circuit, 1949), affirmed by an equally divided court, *per curiam*, 340 U.S. 857, rehearing denied 340 U.S. 893

3. Raskin was acquitted by the jury. The convictions of Ferber and Spock were reversed by the circuit court on the grounds that there was insufficient evidence of their "specific intent to adhere to illegal aspects" of the conspiracy, only some aspects of which were illegal. The convictions of Coffin and Goodman were vacated on the grounds that the trial judge, by the form of his instructions, had unduly attempted to influence the jury's verdict; their cases were remanded for a new trial. The government chose never to retry them (though it kept the threat to do so over them for some time). Jessica Mitford, *The Trial of Dr. Spock* (Vintage Books, 1970)

4. *U.S. v. Spock, et al.*, 416 F. 2d 165. Judge Collins' dissent from this decision is one of the best judicial critiques of conspiracy law. See Mitford, *The Trial of Dr. Spock*, pp. 61-72, for a perceptive treatment of the implications of this decision.

5. "Judiciary Implications of Draft Registration – 1980", Hearings, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, 14 April 1980 and 22 May 1980 (U.S. Government Printing Office, 1980), pp. 309-323

6. Lawrence M. Baskir and William A. Strauss, *Chance and Circumstance: The Draft, the War, and the Vietnam Generation* (Vintage Books, 1978), p. 91

Prosecutions for counseling have been even less common, despite repeated attempts to entrap draft counselors into advocating resistance.⁷

As early as 22 August 1980, long before the SS had processed any registrations or was able to prosecute any nonregistrants, U.S. Attorneys were told, "Since prosecutions under the counseling prohibition of section 462 are liable to generate sharp First Amendment issues, such prosecutions...should not be undertaken without prior approval by the General Litigation and Advice Section (FTS [Federal Telephone System] 724-7144)".⁸

The telephone number given was that of David Kline.⁹ "Mr. Kline's function is to render advice on and supervise the administration of certain federal statutes, among them 50 U.S.C. App. S451 et seq."¹⁰ Although his recommendations were reviewed by higher Justice Department and White House officials,¹¹ Kline (with his colleague at Selective Service, attorney Edward A. Frankle)¹² drafted most of the policies for handling Selective Service cases.¹³ In light of his policy-making role, Kline's private memos are probably the best available indication of the Department's motives.¹⁴

7. I have gotten first-hand accounts of such entrapment attempts from Vietnam-era draft counselors too numerous to list.

8. *United States Attorneys' Manual*, volume 28, number 18

9. Kline, Telexes to all U.S. Attorneys, 16 December 1981, 21 May 1982, and 14 June 1982

10. Terry J. Hatter, Jr., District Judge, "Order and Opinion", *U.S. v. David Alan Wayte*, CR 82-630-TJH, Central District of California, 15 November 1982, p. 10. This order dismissed the indictment of David Wayte.

11. "A nexus has been established between the White House, through Edwin Meese III, Selective Service, and the Department of Justice. Mr. Meese is also a member of the Presidential Military Manpower Task Force ('Task Force'), an agency established to advise the President on military personnel matters. Numerous documents disclosed to the defendant by the Government indicate White House interest in the prosecution of non-registrants.... The list of officials involved in the prosecutive policy concerning non-registrants... begins with Mr. Meese and other White House staff. It continues with the Task Force, which includes, among others, Mr. Meese, the Secretary of Defense, the Director of the Office of Management and Budget, the White House National Security Advisor, the Chairman of the Joint Chiefs of Staff, and the Director of Selective Service." Hatter, "Order and Opinion", *U.S. v. Wayte*, pp. 9-10, 12-13

12. "We are most anxious to provide you with whatever additional information or assistance you may need in the processing of these cases. I will be the contact point in Selective Service for any inquiries or requests relating to these referrals." Frankle (Associate Director, Policy Development and Administrative Legal Systems, Selective Service System), memos to Lippe, 20 July 1981 and 21 October 1981

13. "2. I have operational responsibility for Criminal Division actions concerning Selective Service nonregistrant violations. 3. All Selective Service referrals of possible non-registrants for investigation and possible prosecution have been made to me.... 4. Once the decision was made to go forward with names that had been brought to Selective Service's attention, all decisions concerning which files to refer for investigation and prosecution were made by me.... 5. It is my belief that most of the policy memoranda and letters in the Department which have any effect on prosecutions were drafted by me, although various supervisors did make or require changes as they thought appropriate." ("First Declaration of Department of Justice Attorney David J. Kline", *U.S. vs. Wayte*, 3 October 1982.) Kline personally received the original files on all suspected non-registrants from Frankle, hand-carried them to the FBI, and sent copies to appropriate U.S. Attorneys. (Kline, memoranda to the files, 18 November 1981, 9 June 1982, and 29 September 1982.) He instructed U.S. Attorneys how to handle the cases and answered requests for assistance from those with special problems. (See, for example, notes 1, 20, and 25.) He also received the master file copies of all internal Department of Justice memos concerning Selective Service cases. It was Kline who made the ill-fated remark, "The chances that a quiet non-registrant will be prosecuted are probably about the same as the chances that he will be struck by lightning". (Kline, memo drafted for the signature of D. Lowell Jensen (Assistant Attorney General, Criminal Division, Department of Justice) to Herbert C. Puscheck (Associate Director, Plans and Operations, Selective Service System), 2 March 1982, quoted in Hatter, "Order and Opinion", *U.S. v. Wayte*, p. 14)

Extensive debate on the prosecution policy occurred during the 1982 "grace period" delay in the start of prosecutions. Some of the tactics which were considered but rejected were the following:

- Registering people against their will ("constructive registration"): Unfortunately, Kline noted, "Our one experience with attempting to constructively register a non-registrant ended dismally when the non-registrant moved, thus making his address incorrect."¹⁵ Second,... once it became known that the government was engaged in constructive registration on a large scale, the incentive to register voluntarily would vanish."¹⁶
- Avoiding the complications of jury trials by asking courts to enjoin resisters to register and to hold in contempt those who still refuse: Kline rejected this as likely to be rejected by the courts and as being insufficiently threatening to those who could wait until enjoined to register. But his final footnote contained the only acknowledgement I have found of the government's fear of jury nullification: "Our memorandum does not address the issue of... whether an injunction action should be brought if juries nullify the prohibition [on nonregistration] in a significant number of cases."¹⁷
- Hand-picking the first districts and defendants: "The Department will be subjected to severe criticism if we... have to inform the court, during a selective prosecution hearing, that we chose the district because we expected a sympathetic forum....Even if we take no role in determining the districts in which the initial prosecutions will occur, the first

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14. None of these memoranda (those cited, for example, in notes 1, 8-9, 12-14, 16-28, 36, 41, and 44-46) were intended to be public or were released voluntarily. The overall prosecution policy for Selective Service cases ended, "This memorandum is not for public consumption. Freedom of Information Act requests for it should be forwarded to the Executive Office for United States Attorneys". Jensen, memo to all U.S. Attorneys, 17 August 1981, based on Kline draft, 6 July 1981. Later, when such an FOIA request was made, Kline wrote, "Since the prospective prosecution of non-registrants appears to generate a large amount of public interest, the manner in which the Department handles these cases is likely to have great impact on the continued viability of the registration scheme". A footnote to another page (all of which was deleted except the footnote) of the same memo read, "Our position might change in the future if, for example, the memorandum is leaked to the press or if we are compelled to disclose the memorandum during a criminal prosecution". Kline, memo over Lippe's signature to Fred Hess (Office of Legal Support Services, Criminal Division, Department of Justice), 20 October 1981
 15. This was the case of Iowa nonregistrant Rusty Martin. The U.S. Attorney for the district informed Rusty that he had registered Rusty with the SS. Later, after a new U.S. Attorney had taken office, Rusty was indicted for nonregistration. The district court dismissed the indictment on other grounds. The government appealed to the circuit court, which reinstated the indictment. Both Rusty's trial (at which constructive registration will, presumably, be an issue) and his appeal to the Supreme Court on other grounds are pending. "Non-Registration Bulletin" (Central Committee for Conscientious Objectors, 2208 South Street, Philadelphia, PA 19146), 15 May 1984
 16. Kline, memo over Lippe's signature to Jensen, 11 January 1982
 17. Kline, memo over Lippe's signature to Jensen, 9 March 1982. None of the five juries that have heard nonregistration cases to date have "nullified" the law by acquitting the defendant in spite of the evidence of legal guilt. (The majority decision cited in note 4 is one of the best of those affirming the right of any jury in a criminal case to do so.) Judges have excluded testimony and argument concerning jury nullification. Juries have been instructed to hew to the letter of the law and have deliberated only briefly before convicting nonregistrants. Russell F. Ford was tried before thirteen jurors (Hartford, CT, 14 April 1983), one of whom was randomly selected as the alternate after all thirteen had heard the case. During the ten minutes it took the twelve jurors to return with their guilty verdict, the alternate told reporters she would have held out for acquittal.

cases will be brought in forums which are receptive to non-registrant prosecutions.... United States Attorneys and FBI agents in 'bad' districts are unlikely to forge ahead while those in 'good' districts will. Thus we should not take an active role in choosing the first districts for prosecution."¹⁸

- Declining to prosecute "those who were not wanted in the military": "Distinctions could be made on the basis of mental and physical handicaps, sexual preference, health problems, and height and weight problems....We do not believe that the Department of Justice should decline cases based on any of these categories except... extreme and patent mental and physical disability such that a jury would likely be offended by the prosecution."¹⁹

The most controversial issue seems to have been the prosecution of obviously sincere religious conscientious objectors to registration. At least one U.S. Attorney balked at this, and Kline replied that he was, "not unsympathetic to your request for declination authority [i.e. permission not to prosecute]. We realize that the prospect of prosecuting young men, who otherwise seem to be scrupulously law abiding and claim that they are motivated by sincere religious objections, is not necessarily attractive."²⁰

The decision to prosecute even religious nonregistrants was based partly on fear that "insincere believers" might otherwise escape prosecution.²¹ The primary reason for the decision was Kline's oft-repeated expectation that, "Persons who object on religious and moral grounds...are liable to be sympathetic defendants;... persons who publicly refuse to register [i.e. on political or legal grounds] are liable to raise thorny selective prosecution claims".²²

The enforcement strategy that was eventually adopted was explained by Kline as follows: "The total number of nonregistrants will doubtless remain very high when measured against the Department's prosecutive resources. However, an initial round of well-publicized,

18. Kline, memo over Lippe's signature to Jensen, 19 May 1982

19. Kline, memo over Lippe's signature to Jensen, 11 January 1982. See Joseph Schuman, "Gay and Draftable?", *Gay Community News*, 23 January 1982, p. 7, for more on the legal and administrative status of gays under the Military Selective Service Act. So far as I know, only one gay man has been indicted for nonregistration. He did not make his sexual preference a public issue in connection with his resistance. Several openly gay men, for whom being gay was a major factor in the decision not to register and to do so publicly, are currently under investigation and may yet be indicted. See Kenneth Hale-Wehmann, "Conscientious Resistance", *Gay Community News*, 9 April 1983, p. 5, for one such man's analysis of the relationship of sexual liberation and draft resistance.

20. Kline, letter drafted for Lippe and sent over Jensen's signature to a U.S. Attorney (name and address deleted), 23 July 1982. Perceptions of religious sincerity have been a major influence, perhaps the largest one, on the wildly varied sentences given the eight convicted nonregistrants. Only one of the four whose reasons for refusing to register were perceived as primarily religious was sentenced to prison (Samuel Eakes Matthews; the sentences of Enten Eller, Mark Schmucker, and Kendal Warkentine were suspended). Three of the four whose reasons were perceived as primarily political (i.e. non-religious) were sentenced to prison (Gary Eklund, Russell F. Ford, and Ben Sasway; Edward Hasbrouck's sentence was originally suspended).

21. Kline, memo over Lippe's signature to Jensen, 11 January 1982

22. Kline, memos to the Attorney General (29 June 1982), U.S. Attorneys (9 July 1982), and Jensen (14 July 1982). In each case the quoted section was followed by a deleted section from one sentence (29 June) to two paragraphs (14 July) long.

successful prosecutions should have a dramatic effect in further reducing the number of non-registrants.... We first would have to accept the simple fact that, although some persons will be prosecuted, there will be others who are neither registered nor prosecuted. Nevertheless, such a policy, geared to present funding levels, might well yield sufficient general deterrence so that the Selective Service system receives sufficient registrations to maintain the credibility of the system."²³

He instructed the U.S. Attorneys accordingly: "We request that United States Attorneys assign any non-registration matters in their districts to experienced Assistant United States Attorneys and ensure that such matters are handled on a priority basis. If the non-registration matters pending within your district can be sufficiently investigated within a short period of time, indictments should be sought before the end of June [1982]."²⁴

It was in the context of this decision to focus initially on vigorous prosecution of a few nonregistrants that the policy against prosecutions for counseling was reconsidered and reaffirmed.²⁵ The reasons for the reaffirmation were deleted from Kline's memo when it was released.²⁶ They were, presumably, those given shortly afterward in the letter from him to a U.S. Attorney which began this article. Those reasons were (1) "first amendment problems" specific to the investigatory tactics which might have to be used and (2) desire to concentrate on the first several prosecutions for nonregistration.

When Kline first briefed the Attorney General on this counseling policy, he told him that, "After the first several successful [nonregistration] prosecutions, the [Criminal] Division will prepare a United States Attorneys' Manual item reflecting the lessons learned from the prosecutions."²⁷

Kline predicted that, once the prosecutions began, "After the passage of four to six months, we should be in a position to measure the impact of the Administration's support for registration and the initial prosecutions. If the rate of non-registration has declined to a

23. Kline, memo over Lippe's signature to Jensen, 11 January 1982

24. Kline, Telex to all U.S. Attorneys, 14 June 1982. The first indictment was returned 30 June 1982 against Ben Sasway by a grand jury for the Southern District of California in San Diego.

25. "Deputy Assistant Attorney General Mark Richard informed us on May 12, 1982, that we were to prepare a memorandum to all U.S. Attorneys concerning prosecutions for the failure to register with the Selective Service System. Specifically, Mr. Richard directed us to consider the following five issues:... 4. Whether the Department should require that prosecutions for counseling violators receive prior Department of Justice approval.... Attached please find a proposed memorandum to U.S. Attorneys. The memorandum would direct U.S. Attorneys to... (3) obtain Departmental approval prior to instituting prosecutions of persons for counseling others to refuse registration with the Selective Service System." Kline, memo over Lippe's signature to Jensen, 19 May 1982. This proposal was approved: "No prosecutions should be instituted against persons for counseling the refusal to register (50 U.S.C. App. S462(a)) without prior Department of Justice approval." Kline, letters to Stephen S. Trott, U.S. Attorney, Central District of California (re "[deleted] and David Wayte"), 7 June 1982, and to Peter K. Nunez, U.S. Attorney, Southern District of California (re Ben Sasway), 10 June 1982

26. Kline, memo over Lippe's signature to Jensen, 19 May 1982

27. Kline, memo over the signature of Philip B. Heyman (Assistant Attorney General, Criminal Division, Department of Justice) to the Attorney General and the Deputy Attorney General, 16 September 1980

manageable figure, we suggest that the Department continue with its current policy.... If, however, non-registration proves to be at a rate which cannot be accommodated by the criminal justice system without an infusion of additional resources in the Executive and Judicial Branches, we suggest that the Department modify its policy.... The exact proportions and details of that modification can best be worked out once the magnitude of non-registration is known."²⁸

It has been two years since the first indictment of a nonregistrant. During those years, the prosecutions have failed to imprison, to intimidate, or to reduce the numbers of nonregistrants. The Selective Service System has begun to see its opposition as coming more from an organized resistance movement and less from individual nonregistrants. Many intrusive and previously questionable Federal investigatory tactics have been legalized. The Department of Justice now has both more reason and more ability to prosecute counselors and conspirators.

The update to the U.S. Attorneys' Manual has not yet been made public. I can only suspect, in light of these developments, that one of the "details of that modification" it was to have included has been a lifting of the hold on counseling and conspiracy investigations and prosecutions.

The government neither anticipated nor took seriously the popular resistance to registration. SS officials confidently set their standard of success at 98% registration. When the *Boston Globe* broke the news of 75% registration during the initial mass registration period (July-August 1980), the SS simply denied that it could be so.²⁹

Even when they were forced to concede that registration was low and getting lower, they blamed "confusion" produced by the much-publicized circuit court decision which had briefly threatened to prevent the resumption of registration.³⁰

Four years, a new SS Public Affairs Director, and a new advertising agency later, even the SS can no longer believe (as I think they actually once did) that most nonregistrants don't know that they are supposed to have registered. Yet it is extremely threatening to the self-image of people in power for them to admit to themselves that their power is limited by the willingness of large numbers of other people to carry out their instructions. It is threatening to anyone to admit that hundreds of thousands of people don't like them.

For these and other reasons, SS and military officials still don't believe that any significant number of nonregistrants really don't want to register. They don't think much of young people's (even, sexist as they are, young men's) ability to think for ourselves, and they

28. Kline, memo over Lippe's signature to Jensen, 11 January 1982

29. The anti-draft movement was equally surprised by the extent of nonregistration. I know of no one who had predicted it and many who were almost as reluctant as the SS to admit that it could be true.

30. This decision was first stayed and later reversed by the Supreme Court. The issue in the case – the constitutionality of requiring men but not women to register – is legally unrelated to the issues in any of the pending nonregistration cases.

have especially low regard for the intelligence of the men of color who comprise the majority of nonregistrants. If they took us seriously, they would not have shown such ageist contempt for us as to support the draft in the first place.

Nonregistrants must, they conclude, have been duped, stampeded, or misled. They blame (who else is left to blame?) the visible activists in the organized anti-draft movement. Their prevailing view seems to be that of a general who told Congress, "We have seen the students marching against registration, but I would hope that this country will not permit a relatively few students, whose actions may be generated by activists seeking a cause, to keep the country from doing what is necessary in order to go to war".³¹

This misperception has led both to the strategy of prosecuting the "most adamant" nonregistrants and to that strategy's failure.³² Selective prosecution succeeded in intimidating many current and potential members of the anti-draft movement and in reducing the number of nonregistrants willing to be vocal about their resistance.³³ It failed to intimidate the overwhelming majority of nonregistrants who weren't and never had been vocal about their resistance. To the contrary, the more nonregistrants heard about the prosecutions, the more they heard that only if they told the government what they hadn't done (or at least were among the "most adamant" nonregistrants) did they risk prosecution. Selective prosecution led more people not to register.³⁴

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31. General Bernard W. Rogers (U.S. Army Commander in Chief, U.S. European Command), "Department of Defense Authorization for Appropriations for Fiscal Year 1981", Hearings, Committee on Armed Services, U.S. Senate, 19 February 1980 (U.S. Government Printing Office, 1980), p. 359
 32. "We believe that only a relatively small number of non-registrants have 'knowingly' neglected their duty. We believe it is incumbent upon us to intensify our outreach program in order to insure that all young men understand their personal responsibility to contribute to the Nation's security by registering with Selective Service.... I fear that some young men have postponed registering because they have received false signals, dubious advice, and illogical 'counseling'." General Thomas K. Turnage (Director of Selective Service), Hearings, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, 28 July 1982 (U.S. Government Printing Office, 1982). This view is, of course, absurdly unrealistic. Most nonregistrants have never met anyone who considers themselves part of (much less an activist in) the anti-draft movement. Most have never seen a draft counselor or any counseling literature. The only information (if any) they have gotten from activists or from the movement has been that which has been included in media accounts of the prosecution of nonregistrants. I am concerned here not with the truth of the belief but with the fact that the SS has acted upon it.
 33. The National Resistance Committee, for example, recently got a letter from a high-school anti-nuclear organization saying, "We... concluded that it was not in [our] best interests to have workshops on the draft or on non-registration for important legal reasons". One of the most insidious and least-noticed effects of selective prosecution has been its success in suppressing youth (especially, in conjunction with the Solomon Amendment, student) organizing on other issues. Most male potential youth organizers did not register for the draft and are justifiably afraid to attract the government's attention by speaking out on other issues (about which they are concerned for the same reasons they did not register). I have heard from numerous such people. This chilling effect on all youth organizing is a large factor in the current low profile of the youth and student movements.
 34. The first indictment for nonregistration was in San Diego. All defense motions were summarily denied. Ben Sasway was convicted, jailed for the month between his conviction and sentencing, and sentenced to 30 months imprisonment, the longest sentence since registration was reinstated. (He remains "free" on a recognizance bond while his appeal to the Supreme Court is pending.) Within six months after his indictment registration in San Diego County had fallen by ten percentage points. *San Diego County Draft Resisters Defense Fund Newsletter* (P.O. Box 33544, San Diego, CA 92103)

The government is aware of, and embarrassed by, the failure of the selective prosecutions.³⁵ In June 1982, Kline Telexed U.S. Attorneys to, "assign any non-registration matters in their districts to experienced Assistant United States Attorneys and ensure that such matters are handled on a priority basis".³⁶ Less than seven months later, a Justice Department spokesman lied to the *New York Times*, "Our instructions to the U.S. Attorneys were that they were to deal with these cases in a routine fashion, and not to put them at the top of their things-to-do list", in order to explain why so few had been indicted.³⁷

Recent reports on nonregistration cases take for granted that, "The government has abandoned its initial enforcement approach".³⁸ The SS would like the Department of Justice to prosecute private nonregistrants, and has been telling the courts for two years that at least some such prosecutions are imminent. There is still, however, no evidence that they are. The DoJ could not, in any case, threaten more than a trivial percentage of all nonregistrants.³⁹ It would still have to offer those threatened another chance to register.⁴⁰ Such threats and offers could only convince more people not to register unless and until they were personally targeted and threatened.⁴¹

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35. This is, of course, publicly denied: "Your readers should not be deluded by Mr. Hasbrouck's misrepresentations. Draft registration is not a failure; there is a political and social consensus in this country supporting peacetime registration.... Mr. Hasbrouck dishonors his peers when he alleges that 'many' young men born in the 1960's registered out of fear and would resist a draft if the Congress determines that world events made that necessary.... Mr. Hasbrouck would also have us believe that 'the Government' is 'frustrated by its inability to prosecute most draft resisters.'... Any frustration suffered by the Government most likely occurs when that rare individual determined to choose prison over registration in order to make a political statement. It is difficult to fathom how an individual arrives at the decision not to register. Men who register remain free to go to school, to work, to travel, to marry, to enjoy all the fruits of living in this great country of ours." Wil Ebel (Assistant Director, Government and Public Affairs, Selective Service System), Letter, *New York Times*, 5 April 1984, p. A22
36. Kline, Telex to all U.S. Attorneys, 14 June 1982
37. John Russell (Assistant Director of Public Affairs, Department of Justice), quoted in "New York State Draft Sign-Up Rate Is Termed Fifth-Lowest in Nation", *New York Times*, 9 January 1983
38. Linda Greenhouse, "High Court to Rule on Selective Draft Prosecution", *New York Times*, 30 May 1984, p. B7
39. The SS wishes to obscure this fact, and has given notice of its intent to send its own (SS) threatening ("warning") letters on DOJ letterhead.
40. An element of the offense of "knowing and willful refusal to present [oneself] for and submit to registration" is actual knowledge of the registration requirement. It would not be enough merely to prove that the SS has put ads on radio, television, billboards, and buses, and it would be almost impossible to prove that a defendant had read and understood such an ad. In each trial the government's evidence of knowledge has been a certified letter sent to the defendant prior to his indictment informing him that he was supposed to register and offering him a chance to do so. So essential have these "warning" letters been to the government's case that Ben Sasway was ordered by the judge to provide handwriting samples that could be compared by a government expert with his signature on the return receipt for the certified letter, thus proving that he had in fact gotten notice that he was supposed to register.
41. The government is acutely aware of this problem: "The Attorney General and I have discussed the questions you have raised concerning the prosecution of those individuals who have failed to register for the draft.... Perhaps someone in your Division can begin to formulate guidelines on factors to guide our prosecutive decisions. Generally, we might consider:... (3) prosecuting only those who fail to register only after a warning (although this tends to take the teeth out of any mandatory system)." Rudolph W. Giuliani (Associate Attorney General), memo to Jensen, 19 June 1981. The task of formulating the guidelines fell, as we have seen, to Kline, who was also aware of this risk: "Our policy requires that United States Attorneys notify non-registrants by registered mail and inform them that unless they register within a specified time, prosecutions will be considered.... In most, if not all, instances, we anticipate that a Federal Bureau of Investigation agent will also interview alleged non-registrants prior to the initiation of prosecutions. Nevertheless, if a non-registrant registers prior to indictment, no further prosecutive action will be taken. Our policy is designed to ensure

For the time being, the SS is emphasizing one of the tactics it had earlier considered and rejected: the Solomon Amendments. These addenda to non-military bills make proof of "registration compliance" a condition for federal employment and student aid.⁴² As implemented by the agencies which oversee these programs (the SS does not administer the Solomon Amendments), the required proof of compliance has been a statement resembling a loyalty oath which must be signed by all applicants to such programs.⁴³

Selective Service itself considered proposing such sanctions for nonregistration. The main reason it did not was that sanctions would not affect most nonregistrants:

"Assuming 15% of a year group (about 300,000 men) has not registered... A sanction program would likely identify about 100,000 men per year group, most of whom would probably already have registered.⁴⁴ The yield of non-registrants from this population is

that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted. The negative aspect of the policy is that if it becomes public, its provisions may act as a disincentive, until the last possible moment, to registration.... We have so far resisted releasing the policy memorandum under the Freedom of Information Act. One FOIA suit has been filed." Kline, memo over Jensen's signature to the Attorney General, 29 June 1982

42. Solomon Amendments to the Higher Education Act (student loans and grants) and the Job Training and Partnership Act are now in effect. Representative Solomon has pledged to sponsor similar amendments to all federal benefit programs: "We're hearing a lot these days about 'yuppies,' the young urban professionals from the baby boom now on the cusp of political and economic power. I'd hate to think they still cling to the 'me generation' notion that the working taxpayers of this country owe them a college education and upward mobility, no questions asked. If I had my way, those who do not register would lose not only the 'right' to a student loan but every other taxpayer-funded benefit. To paraphrase John Houseman's: Let them get a college education the old-fashioned way. Let them earn it." Solomon, Letter, *New York Times*, 5 April 1984, p. A22
43. Whether the Solomon Amendments authorized, and whether the Constitution permits, these agencies to require people who were not required to register (usually because of age or sex) to sign such statements has been the subject of at least two lawsuits. The defendants in one of those cases (the SS, the Department of Education, Boston University, and their officials) have been ordered not to withhold or delay student aid to the plaintiffs (three students at the B.U. School of Theology) for their refusal to sign the statements. Motions to convert the temporary restraining order to a permanent injunction and to enlarge the case to a class action are pending. Robert E. Keeton, District Judge, "Memorandum and Order", 11 April 1984, and "Order", 19 April 1984, *Michael Alexander, et al., v. Trustees of Boston University, et al.*, C.A. No. 83-986-K, District of Massachusetts. See Charles S. Sims (Staff Counsel, American Civil Liberties Union, New York City), Letter, *New York Times*, 13 May 1984, p. E22, for an excellent analysis of the dangers of this aspect of the Solomon Amendments.
44. "18 YEAR OLD MEN RECEIVING FEDERAL BENEFITS

"Program	Number
"Federal Employment	30,000
"Unemployment Compensation	50,000
"VA Dependant Benefits	8,500
"Social Security Survivor Benefits	60,000
"CETA Program	65,000
"Student Loan/Grant Program	20,000

"...Federal programs to which sanctions could be applied are generally the same as those shown in the table....Some men may possibly be included in more than one program due to the nature of benefit programs." Puscheck, "Increasing Selective Service Registration Compliance", draft memo, 17 February 1982, pp. 13-14

estimated at 30,000, or 10 percent of the total non-registrants in any given year group.... A sanction program may discriminate against the poor or minorities who receive Federal benefits, yield relatively few non-registrants, would be difficult to administer, and increase the workload of the agencies involved."⁴⁵

Representative Gerald B. Solomon (Republican--24th District, New York) introduced the Solomon amendments on his own initiative. Although the SS did not oppose them (to do so would have required admitting that the problem of nonregistration was too vast to be solved that way) there is no evidence that they have been any more successful than the SS had expected.

It is true that many people have been forced to register or to leave school or job training. Students are a relatively privileged group of young people, so the effects on them of the Solomon Amendment have been particularly visible to those in power. Students have also been more involved than other young people in the visible, organized anti-draft movement. Public interest and debate on the draft are now focused, accordingly, on the Solomon Amendments.

Most nonregistrants, however, are neither students nor participants in federal job training. Even before the passage of the first Solomon Amendment, nonregistration was highest among poor people and people of color, those least likely to be college students. Most nonregistrants--90% of them, if we accept the SS prediction -- have been entirely untouched by the Solomon Amendments.

Neither the SS nor the DoJ is concerned with enforcing registration. Registration, like taxation, depends on voluntary compliance. Enforcement is impossible, and they know it. Their goal is to "maintain the credibility of the system".⁴⁶ As long as many people are perceived to be "getting away with" nonregistration, the SS must be perceived to be "doing something" about it (something, I might add, with a perceived chance of success).

In this sense, and in this sense only, the Solomon Amendments have succeeded. Most of the people who are concerned about the issue think that the Solomon Amendments are getting "everyone" to register. The Solomon Amendments have failed to solve the problem of nonregistration,⁴⁷ but they have enabled the SS to postpone trying to solve it.

At the time I write this, the Supreme Court has not yet ruled on the legality of the Solomon Amendments. The court heard arguments on this issue in the spring of 1984, and a ruling in the case is due any day. Whatever the ruling, it will force the SS to do something new about the resistance.

45. Puscheck, "Increasing Selective Service Registration Compliance", draft memo, 17 February 1982, pp. 14-16

46. Kline, memo over Lippe's signature to Jensen, 11 January 1982

47. Solomon, of course, denies even this. New York Times, 5 April 1984, p. A22

If the Solomon Amendments are upheld, they still won't apply to most nonregistrants. Most still won't register. The SS will no longer be able to attribute noncompliance to "confusion about the legal status" of either registration or the Solomon Amendments. Successive SS cover-ups of nonregistration have in time been exposed by Congressional committees, the General Accounting Office, the press, and the resistance movement. The SS will lie, as it does now, but it is as unlikely as ever to get away with any one lie indefinitely.⁴⁸ If, on the other hand, the Solomon Amendments are overturned, the crisis of credibility and enforcement will be not eventual but immediate.

What will the SS do next?

They might, I suppose, give up. This is hardly likely, although I think they will eventually have to. To admit failure would cost them prestige, power, jobs, perhaps careers. They won't do so if they see any other choice, and before they do so they will get very desperate.

Desperate people do dangerous things. Most supporters of the draft are openly Machiavellian: they acknowledge that draftees aren't free but believe that the end (peace) justifies the means (slavery).⁴⁹ People who think this way are likely to accept other risky and repressive means that seem essential to achieve the same end. I expect very little restraint on

48. The most recent lie was that given 29 February 1984 by Turnage to a Congressional committee. Turnage presented a table alleging 98.9 compliance with registration. Among its distortions were the following:

1. The "Potential Registrant Population" was, "Adjusted to account for the Census Bureau overcount of the registration age male population... plus aberrations such as registration by illegal aliens". The Census Bureau has been widely criticized for its *undercount*, and illegal aliens are in fact required to register.
2. The "Draft Eligible Population" for which the figures were given consisted of men born in the years 1960 through 1964. Most of these men are too old to be likely to be drafted if the draft is reinstated. Many registered several years late once they were old enough for registration not to involve much risk of the draft. Those most likely to be drafted are those born in 1965 and 1966. "Turnage reported [although his table omitted] that most nonregistrants are in the most recent (1965-1966) year-of-birth groups. Selective Service estimates that there are currently 115,000 nonregistrants in the 1960-1964 groups [79,000 of them in the 1964 group], but 310,000 in the 1965 group alone."
3. Registrations on hand as a percentage of potential registrants are given as the "% of compliance". Many, perhaps most, of those who have registered are not in compliance with registration. They have moved, they have not notified the SS of their new addresses, and they could not be located for induction. "The Selective Service System has been advised by the General Accounting Office that the failure of draft registrants to notify the service of address changes would seriously impede any future conscription. The report, issued Thursday by the Congressional investigative agency, said..., 'Eighty-five percent of persons who moved after registering in 1980 did not notify the service of their mailing address changes.' The report said that meant 20 to 40 percent of the registrants might not get their induction notices in a military draft was instituted. By the end of the eight years that young men are eligible for the draft, 75 percent of the addresses could be outdated, the report asserted. Selective Service might not then be able to notify enough young men of their induction to fill quotas set by the military." Richard Halloran, "Registrants Failing to Report Moves", *New York Times*, 3 October 1982

The Reporter for Conscience's Sake (National Inter-Religious Service Board for Conscientious Objectors, 550 Washington Bldg., 15th St. and New York Ave., Washington, DC 20005), volume 40, number 3, April/May 1984, pp. 4-5

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the part of those who fear that registration (and all hope of a draft) may have to be abandoned.

Desperation and frustration lead to scapegoating, and the government has already become more paranoid of the visible, organized resistance. One member of the Military Manpower Task Force told the task force, "My feeling is that felony prosecutions at this time may have an awful lot to do with the anti-nuclear movement. I think we ought to proceed really cautiously on this particular point. This would be a real rallying point....I think the cases should be quiet, and pick the right jurisdiction so you don't end up in New York or Chicago and end up in Omaha or somewhere like that for your first few trials."⁵⁰

There was little basis for such fear. The anti-nuclear movement had been, and has continued to be, only slightly involved in anti-draft work.

The resistance movement had been largely dormant since the resumption of continuous registration in January 1981. Its supporters came out of the woodwork when Ben Sasway was indicted 30 June 1982. Within a week there were rallies, pickets, vigils, and demonstrations in over 110 cities and towns throughout the country.

Most of these demonstrations took place at courthouses and other Federal buildings. Federal agents have been monitoring the overt activities of anti-draft groups for years.⁵¹ But the surveillance and harassment of these demonstrators was particularly intense.

The most disturbing incident was an attempt by Federal police to recruit a reporter to inform on the movement.⁵² Shortly afterward, a small army of feds watched and filmed the

49. Lest there be any doubt, I don't think the draft is (or can be) a means to peace. I am saying only that its supporters think it is.
50. John Herrington (Assistant Secretary of the Navy), Military Manpower Task Force, Department of Defense, Arlington, VA, 12 April 1982, pp. 45-46. Transcripts of the Task Force meetings were leaked to the *Washington Post* and later introduced in court by nonregistrants. "Exhibits in Support of Defendant's Motion for an Evidentiary Hearing Re Discriminatory Prosecution, *U.S. v. Wayte*, 6 September 1982, Exhibit 10
51. Several incidents of such monitoring at the time registration was reinstated are described in *Organizing Notes* (Campaign for Political Rights, 201 Mass. Ave., NE, Washington, DC 20002), November-December 1980, p. 5. For example: "In response to [an FOIA] request... the FBI's Austin office released three pages of routine unclassified memos revealing that the FBI is monitoring the activities of Austin anti-draft activists. Based on information obtained from a CARD flyer, the memos discuss upcoming rallies, meetings, and workshops, and a proposed demonstration which the FBI noted may involve civil disobedience. The documents state that the size of the proposed demonstration is unknown, but that 'leafletting by the same organization (ACARD) on occasion within the last several months has only involved five or six individuals.'... It further indicates that the Secret Service, Postal Inspectors, Austin Police Department, and Assistant US Attorney in Austin have all been notified of the proposed action. In response to a similar FOIA request, the General Services Administration in Fort Worth denied that it had any documents or reports on ACARD and stated specifically that GSA employee Jane Hoster attended civil disobedience training workshops on her off-duty day as a private citizen, not as a representative of the GSA."
52. "Mike Rush, a reporter for WRFG community radio in Atlanta, says that a federal agent there attempted to recruit him to inform on local political demonstrations. According to Rush, Federal Protective Service officer J.S. Runions approached him at a July 3 anti-draft rally outside the federal building on Peachtree Street. The Federal Protective Service, a subdivision of the General Services Administration, is charged with protecting federal buildings throughout the country. Rush said that Runions asked him about the groups involved in the demonstration and requested to hear the

few dozen people who demonstrated outside the Federal prison where the first two nonregistrants had been jailed.⁵³

SS officials must have felt even more threatened when the coordinators of those demonstrations announced plans for a weekend of actions in Washington 16-18 October 1982. These were the first national anti-draft actions since 20,000 people marched on the Capitol 22 March 1980; they included a blockade of the SS headquarters building in Georgetown.

Joan Lamb (Public Affairs Director of Selective Service) virtually admitted that agents systematically attended meetings and collected information on the plans for this action:

"You know, we were supposed to have a massive demonstration out here, uh, two weeks ago, three weeks ago. Uh, a month before, uh, the r, the demonstration was planned, we knew that, that because we got copies of them, uh, that were sent to us just by people – I don't know whether at the universities or where. But, but a whole lot of pamphlets went out all over the Northeast Corridor saying, 'Come on down to Washington and close down Selective Service so we can get the message across that, uh, we're opposing registration.'..."

"I get a tremendous amount of mail here, uh, like anonymous mail that is, um, as I said, no memo. Like with those, uh, pamphlets. At the bottom they'd say, 'Distributed at _____', wherever. And, and it would just be addressed to me, and that was real, well, my name has appeared in the paper a few times, so they know, I guess, who to send it to. But we got an awful lot of those things. Um, if I go to, um, a group and speak, I'll pick up some of the literature, because I want to know what they're, what, uh, kind of things they're saying. But that's all. I mean, we do not have a, other than,..."⁵⁴

Neither the blockade nor any of the other actions that weekend included violence or damage to property. A few hundred people, 63 of whom were arrested, demonstrated in front of the SS building for a morning. A week later the SS asked Congress for an emergency appropriation of \$50,000 to replace all its windows with bulletproof glass.⁵⁵

Some indicted nonregistrants were given unsolicited denials that the government had used wiretapping or other electronic surveillance. When Ben Sasway filed affidavits detailing the evidence that his telephone calls had been monitored, the government replied, "Sasway

tape Rush had made of the event. When Rush replied that it would be unethical for him to let Runions hear his tape, the officer invited Rush back to his office. At Runions' office, the agent told Rush that most of the participants in the anti-draft demonstration were 'communists.' He said he kept files on organizations (but stressed not individuals) and that he wanted to know about future demonstrations in the area. He gave Rush his business card, adding, 'If there's anything I can do, give me a call.' He then told Rush that if anyone questioned him about his visit with Runions, to 'tell them we didn't get along--I'll back you up.'" *Organizing Notes*, September-October 1982, p. 2

53. This took place in August 1982 outside the Federal Correctional Institution in Danbury, CT, where Russell F. Ford and I were being held.

54. Lamb, interview with Matt Nicodemus (2356 Palos Verde Ave., E. Palo Alto, CA 94303), 5 November 1982, unpublished transcript, pp. 22, 24

55. "Washington Briefing", *New York Times*, October 1982

has failed to make a showing that electronic surveillance was utilized in this case. His attached affidavits do nothing more than reveal that the affiants' telephones are in need of repair or that the affiants are all paranoid."⁵⁶

My suspicions are heightened by some of the events which led Judge Hatter to dismiss the indictment of David Wayte. Although attention has focused on the issue of selective prosecution, that was only one of four reasons that the indictment was dismissed.⁵⁷

One of the other reasons for the dismissal was the government's refusal to produce various documents which Judge Hatter, at the defendant's request, had ordered the government to provide to the defense.

The government had already provided sufficient evidence to convince Judge Hatter that the prosecution was discriminatory. According to his decision:

"Once this court found that a *prima facie* case of selective prosecution had been established, the burden shifted to the Government to prove that its policy was not based on impermissible selective prosecution. The Government has failed to meet its burden.

"On October 7, 1982, the court held a pre-trial evidentiary hearing on the matter of selective prosecution. At the hearing, the Government called David J. Kline....Mr. Kline testified and documents were introduced through him at the hearing. In addition, the Government submitted affidavits of D. Lowell Jensen, Edward Frankle,...Thomas K. Turnage and David J. Kline. Richard Romero, the Assistant U.S. Attorney prosecuting this case, also testified at the hearing. This constituted the Government's only attempt to rebut the *prima facie* finding. After hearing Mr. Kline's testimony and examining the documents submitted by the Government, this court was convinced that the *prima facie* finding had not been rebutted.

56. "Government's Response and Opposition to Defendant's Motions...for Discovery", *U.S. v. Benjamin H. Sasway*, CR 82-0504-GT, Southern District of 11 August 1982, p. 57

57. "Defendant moves this Court to dismiss the indictment on several bases. First, defendant urges this court to dismiss the indictment on the ground that the Government has refused to comply with this Court's order of October 29, 1982. [footnote: "The October 29th Order directed that the Government provide Defendant with certain documents and that Edwin Meese III, Counselor to the President, testify at the evidentiary hearing on selective prosecution."] Second, the court ordered Edwin Meese III, Counselor to the President, to appear as a witness in an evidentiary hearing on selective prosecution. Mr. Meese has refused to comply with the court's order. Therefore, defendant moves the court for dismissal of the indictment as the appropriate sanction for the Government's recalcitrance. Third, defendant asserts that the Government has not rebutted the court's *prima facie* finding of discriminatory prosecution. Finally, defendant seeks dismissal of the indictment on the basis that the Selective Service System's draft registration regulations and Presidential Proclamation 4771... were illegally promulgated and, therefore, invalid. Each of the defendant's asserted bases for dismissal of the indictment will be addressed.... For the reasons stated, defendant's motion to dismiss is granted and the indictment shall be dismissed." Hatter, "Order and Opinion", *U.S. v. Wayte*, pp. 1-2, 31-32. Judge Hatter's decision's on all these issues were reversed by the Court of Appeals for the Ninth Circuit. The Supreme Court has agreed to review only the legality of selective prosecution. (This lets stand the circuit court's decisions on the other issues.) Meese's refusal to testify and his attitude toward selective prosecution were among the issues about which Meese was questioned during the Senate Judiciary Committee hearings on his confirmation as Attorney General. (Those hearings have been suspended.) Several aspects of Meese's apparently corrupt relationship with the SS were included in the charge to the special prosecutor who is now investigating Meese.

These documents were all introduced into evidence and disclosed to the defendant. There was no objection by the Government to having any of these documents examined by the court or the defendant.

"In preparation for the evidentiary hearing, the defendant requested that the Government produce certain additional documents and witnesses. After numerous orders by this court to produce these documents and witnesses, the Government declined to do so. The Government has based its refusal on a claim of executive privilege.

"Since the Government had the burden of rebutting the *prima facie* case of selective prosecution, its refusal to comply with this court's orders reflects a curious strategy. It also raises serious questions as to whether the Government has pursued this case in good faith."⁵⁸

It also raises serious questions as to what else the government, which had already admitted to selective prosecution, was trying to hide.⁵⁹

I know of only one previous case in which the government refused to obey a court order to produce relevant documents even when it knew that refusal would cause the charges to be dismissed. It is a disturbing precedent; the purpose of the refusal was to hide the

58. Hatter, "Order and Opinion", *U.S. vs. Wayte*, pp. 10-11

59. The issue now before the Supreme Court in David Wayte's case is widely thought to be "whether the government selectively prosecuted only the most vocal nonregistrants". This is a factual question; it was decided by the district court and is no longer at issue. The question on appeal is whether this selective prosecution is discriminatory and hence illegal. The government admits to selective prosecution and asserts that it is a legitimate exercise of prosecutorial discretion. "Although the Justice Department has prevailed so far in the Wayte case, it urged the Supreme Court to hear the California man's appeal in order to resolve the conflict [between the Courts of Appeals for the Sixth and Ninth Circuits] and to establish guidelines for prosecutorial discretion." *New York Times*, 30 May 1984, p. B7

involvement of the National Security Agency in surveillance of the peace movement.⁶⁰ There are striking similarities between the circumstances of that case and of David Wayne's:

"In December [1970], a federal grand jury in Detroit handed out secret indictments against fifteen members of the radical weatherman organization.... The indictments set off a massive hunt by the FBI.... During mid-1971, as the White House began putting more pressure on the federal law enforcement and intelligence community to crack down on radicals, the FBI and the Secret Service added the Weathermen to their NSA watch lists. In short order they began receiving copies of communications to, from, or about members of the group, communications that had been intercepted by the [NSA]....

"Lawyers representing the Weathermen...filed a motion requesting disclosure of all illegal federal surveillance directed against the defendants.... On June 5, 1973, Federal District Court Judge Damon J. Keith approved the motion and ordered the agencies to comply. Two days later, Assistant U.S. Attorney William C. Ibershof returned to court to ask for reconsideration of the motion, saying, mysteriously, that 'there were other considerations' involved, but refusing to elaborate. The plea rejected, Ibershof later that month offered an affidavit by the FBI absolving itself of any illegal or 'authorized' activity in investigating the Weathermen. As to the other agencies, said Ibershof: 'The Government doesn't believe this is a proper forum for a trial of Government misconduct.'

"Judge Keith was unimpressed. Calling the denial a 'perfunctory' response that 'failed to go to the crux of the matter,' he ordered the prosecution to produce, by September 3, 'sworn statements from a person or persons with full knowledge of the actions of each specified group

60. The NSA is the Thought Police: "The N.S.A. is much more than a massive computerized funnel... The National Security Agency, an arm of the Defense Department..., is an electronic spying operation, and its leverage is based on a massive bank of what are believed to be the largest and most advanced computers available to any bureaucracy in the world: computers to break codes, direct spy satellites, intercept electronic messages, recognize target words in spoken communications and store, organize and index all of it.... 'The watch-list activities and the sophisticated capabilities that they highlight present some of the most crucial privacy issues now facing this nation,' the [Senate Intelligence] committee warned. 'Space-age technology has outpaced the law. The secrecy that has surrounded much of the N.S.A.'s activities and the lack of Congressional oversight have prevented, in the past, bringing statutes in line with the N.S.A.'s capabilities. Neither the courts nor Congress have dealt with the interception of communications using the N.S.A.'s highly sensitive and complex technology.'" (David Burnham, "The Silent Power of the N.S.A.", *New York Times*, 27 March 1983, section 6, pp. 60-63.) "As a result of this overwhelming passion for secrecy, few persons outside the inner circle of America's intelligence community have recognized the gradual shift in power and importance from the Central Intelligence Agency to the NSA.... By 1978 the CIA's Operations Division had been reduced from a peak of eight thousand during the Vietnam War to less than four thousand. Although the NSA had also suffered cutbacks, particularly once the Vietnam War ended, by 1978 it still controlled 68,203 people – more than all of the employees of the rest of the intelligence community put together. Despite its size and power, however, no law has ever been enacted prohibiting the NSA from engaging in any activity. There are only laws to prevent the release of any information about the Agency. ... The NSA has technological capabilities beyond imagination. Such capabilities once led former Senate Intelligence Committee member Walter F. Mondale to point to the NSA as 'possibly the single most important source of intelligence for the nation.'... Today the NSA's enormous basement, which stretches for city blocks below the Headquarters-Operations Building [in Fort Meade, MD], undoubtedly holds the largest and most advanced computer operation in the world.... Were the Puzzle Palace to be assessed for the full costs of its space program, its budget would most likely double or even triple." (James Bamford, *The Puzzle Palace: A Report on America's Most Secret Agency* (Houghton Mifflin, 1982), pp. 2-4, 101, 204

or agency' and set for later a hearing on the question of whether any of the evidence had been 'tainted' by the government.

"The order rocked the NSA. A public affidavit by the Agency admitting the interceptions would expose the Minaret and Shamrock operations as well as the watch list procedure.⁶¹ Compliance was unthinkable. On August 28, therefore, NSA officials at last informed Assistant Attorney General Henry Petersen of the problem, telling him that communications involving the Weathermen defendants had been intercepted, but strongly opposing 'any disclosure of this technique and program.'...

"The immediate problem now was how to handle Judge Keith.... Prosecutors asked for an extension of time on the judge's order for sworn statements from the various agencies, citing the court's unusual requirement for affidavits from sensitive federal agencies not under Justice Department jurisdiction.⁶²...

"Petersen next advised [Attorney General Elliot] Richardson that the current number of individuals and organizations on NSA watch lists submitted by the FBI was 'in excess of 600' and warned of the numerous legal problems involved....

"Meanwhile, as [Lieutenant General Lew] Allen [, Jr., Director of the NSA], Richardson, and Petersen were exchanging worried notes, the prosecution in Detroit was in a shambles. On

61. "MINARET is established for the purpose of providing more restrictive control and security of sensitive information derived from communications... which contain (a) information on... individuals who may foment civil disturbance or otherwise undermine the national security of the U.S. An equally important aspect of MINARET will be to restrict the knowledge that information is being collected or processed by the National Security Agency. 2. MINARET specifically includes communications concerning individuals or organizations, involved in civil disturbances, antiwar movements/demonstrations and Military deserters involved in the antiwar movements." Charter for Sensitive SIGINT Operation MINARET, "The National Security Agency and Fourth Amendment Rights", Hearings, Select Committee to Study Government Operations with Respect to Intelligence Activities, U.S. Senate, 94th Congress, 1st Session, p. 1 (quoted in Bamford, *The Puzzle Palace*, pp. 253-254). Shamrock was an operation in which commercial communications companies voluntarily provided the NSA with copies of all their transmissions between the U.S. of A. and other countries. Shamrock began in 1945 with ITT Communications, RCA Communications, and the Western Union Telegraph Company, although all three were worried that it was illegal. "Fearing exposure by a persistent press and increasingly aggressive congressional committees, NSA director Lew Allen, Jr.,...May 12, 1975,... at last ended what Senate Select Intelligence Committee chairman Frank Church once labeled 'probably the largest governmental interception program affecting Americans ever undertaken.'" (Bamford, *The Puzzle Palace*, pp. 236-238.) Shamrock has since been legalized: "A Federal Court of Appeals recently ruled that the largest and most secretive intelligence agency in the United States, the National Security Agency, may lawfully intercept the overseas communication of Americans even if it has no reason to believe they are engaged in illegal activities. The ruling... also allows summaries of these conversations to be sent to the federal Bureau of Investigation." (*New York Times*, 27 March 1983, section 6, p. 60.) Watch lists are the lists of key strings of characters used to screen the communications obtained from Shamrock and other sources. NSA computers "could be programmed to 'kick out' any telegram containing a certain word, phrase, name, location, sender or addressee, or any combination. It might be a name from a watch list, any message containing the word demonstration, or any cable to or from the Israeli UN delegation. In microseconds the full text of any telegram containing selected material could be reproduced." (Bamford, *The Puzzle Palace*, p. 245)
62. The prosecution raised similar objections to Judge Hatter's orders (and those of other judges) for testimony and documents from Meese and other officials involved in developing the policies for prosecution of nonregistrants. See, for example, "United States' Memorandum Concerning White House Invocation of Privilege", *U.S. v. Russell F. Ford*, CR 82-1059 (MJB), District of Connecticut, 28 February 1983.

September 12, U.S. Attorney Ralph B. Guy, Jr., notified Judge Keith that the government wished to submit for in camera inspection an affidavit from an unspecified federal agency.... But after consideration, the prosecution decided that even this was too dangerous, and on October 15, as Judge Keith was still considering the in camera issue, the government threw in the towel and moved to dismiss the case without argument,, rather than risk exposure of NSA's involvement.... The Justice Department had been forced to drop a case it had spent almost three years building."⁶³

I don't know if the NSA (or other agencies) was conducting illegal (or legal) surveillance of David Wayne. I do suspect that something more than discriminatory prosecution was covered up by the government's refusal to comply with the court's order for discovery.

I also suspect, for the reasons given above, that the SS and the DOJ already want (or will soon want, after the Supreme Court rules on the Solomon Amendment) to try the last remaining weapon in their legal arsenal: prosecutions for counseling and/or conspiracy to resist.

Regardless of what tactics the government used to investigate nonregistrants, concern for the legality of those tactics (or of others which it might want to use) need no longer concern the government in deciding whether to bring counseling or conspiracy prosecutions. New guidelines for FBI "domestic security investigations" have authorized all of the previously-questionable investigatory tactics which the government is known or suspected to have used against draft resisters and the resistance movement.⁶⁴

Kline was, as we saw earlier, concerned that a resistance "group will prove resistant to the investigation, possibly compounding even further the first amendment problems which will undoubtedly arise in a non-registrant counseling prosecution". That concern was probably alleviated by the following provisions of the new FBI guidelines:

63. Bamford, *The Puzzle Palace*, pp. 289-294

64. "Culminating an eight-month review process, Attorney General William French Smith issued revised guidelines on FBI domestic security investigations March 7. The new rules...replace the so-called 'Levi guidelines'.... The new directive was issued in the wake of pressure from New Right 'internal security' advocates to loosen restrictions on investigations of 'terrorist' and 'subversive' political organizations." (*Organizing Notes*, April-May 1983, p. 3.) "One... reform, issued under President Ford by Attorney General Edward Levi, came in response to public disclosures that the FBI had devoted much of its resources in the 1960's and '70's to spying on civil rights feminist, gay, anti-war and leftist groups, as well as the Ku Klux Klan and a few other right-wing organizations. What became known as the Levi guidelines was a comprehensive set of rules for the initiation and conduct of so-called 'domestic security investigations.' By the FBI's own reckoning, the Levi guidelines narrowed the focus of its investigative efforts so dramatically that the number of domestic security investigations dropped from somewhere in the thousands to 'well under a hundred.'" (Larry Goldsmith, "New FBI Rules to Broaden Investigations", *Gay Community News*, 16 April 1983, p. 3.) The new guidelines are part of a trend toward surveillance and intrusive investigatory tactics prompted by the success of ABSCAM and by rulings in ABSCAM cases which have essentially legalized entrapment. See Gerald M. Caplan, editor, *ABSCAM Ethics: Moral Issues and Deception in Law Enforcement* (The Police Foundation, 1983), for the government's rationale for this approach. The essays by Irving B. Nathan (the Deputy Assistant Attorney General who coordinated the ABSCAM prosecutions) and by Mark H. Moore ("Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement") are especially revealing.

"The standards used for the initiation of an investigation are dramatically lower... A 'reasonable indication' that persons are involved in the furtherance of political goals 'wholly or in part' through criminal conduct is all that is needed."⁶⁵

"A reasonable indication may be found simply in oral statements advocating criminal conduct – mere speech – even if there is no imminent likelihood of such criminal conduct occurring."⁶⁶ "Public advocacy of nonviolent resistance is enough, under the new standards, to throw the FBI apparatus into high gear...The new rules empower the Bureau to: Spy on groups that use their First Amendment rights to advocate breaking the law or to espouse engaging in violence as a way to 'achieve political or social change.'"⁶⁷

"The new rules empower the Bureau to...collect publicly available information on groups or persons not under investigation, and snoop indefinitely on organizations that were once thought to be parties to crime."⁶⁸ "The new guidelines allow the FBI to continue an investigation even when the organization in question is inactive, not engaged in recent acts of violence, and poses no 'immediate threat of harm.'"⁶⁹

"The new guidelines...allow the FBI to cross organizational lines and focus on a wide field of individual and organizational alliances rather than on 'individual participants and specific criminal acts.'"⁷⁰ "Explains the Justice Department statement...'The new approach recognizes that terrorist groups today have a fluid membership and often lack organizational structure, yet function as a single enterprise directed toward a common goal.'"⁷¹

"The new rules empower the Bureau to...recruit informants and infiltrate organizations even before perceiving a 'reasonable indication of criminal activities.'"⁷²

"Once an investigation has begun, the FBI has broad authority to use intrusive techniques including undercover agents, infiltrators, and electronic surveillance."⁷³ "The use of informers to probe suspect organizations is explicitly authorized."⁷⁴

"The guidelines are ambiguous but conceivably allow the FBI to 'influence' the political activities of an organization. By using undisclosed participation from undercover agents or

65. *NCARL DC Memo* (National Committee Against Repressive Legislation, 201 Mass. Ave., NE, Washington, DC 20002), March/April 1983

66. *NCARL DC Memo*, March/April 1983

67. "Fear of Freedom", *Progressive*, May 1983, pp. 10-11

68. *Progressive*, May 1983, p. 11

69. *NCARL DC Memo*, March/April 1983

70. *NCARL DC Memo*, March/April 1983

71. *Gay Community News*, 16 April 1983, p. 3

72. *Progressive*, May 1983, p. 11

73. *NCARL DC Memo*, March/April 1983

74. *Progressive*, May 1983, p. 10

informers, the FBI can affect the work of a political group in ways which may endanger the group's success or which may provoke the group to take illegal actions."⁷⁵

The government had earlier investigated several women and older men who had written the letters to the SS saying that they hadn't registered. Once they found out that these people weren't supposed to have registered, however, the investigations ceased. This was the case even in districts where those who had written such letters and who were supposed to register were still being actively investigated.⁷⁶ (The SS had also threatened at least one resistance organizer with prosecution for conspiracy, but there was no evidence of active investigation of the case.)⁷⁷

Within a month after these FBI guidelines were issued, FBI agents located one such woman at a new address. A year earlier they had investigated only whether she was required to register. This time they said the U.S. Attorney wanted to know "what people were trying to do by writing these letters" and "why he was getting so many of them".⁷⁸ Another U.S. Attorney threatened to prosecute several such women for conspiracy.⁷⁹

An older man who had written such a letter (whom the FBI had long since determined was not required to register and who had even filed an affidavit to that effect in another case) requested a copy of his FBI file under the Freedom of Information Act. His request was refused on the grounds that his file contained information on a pending criminal investigation of him.⁸⁰ Draft resistance was the only illegal activity with which he was associated.

A nonprofit educational organization had been targeted under Reagan's "defund the left" campaign for investigation and possible loss of its tax-exempt status. In response to an FOIA request concerning the investigation, the organization received documents indicating that it had been targeted as a result of its association with a particular draft resistance organization. At the same time, the government refused to release other documents which, it said, pertained to an ongoing criminal investigation of another party or parties (presumably the resistance organization and/or individuals associated with it).⁸¹

All of these incidents occurred in federal judicial districts among those to which the largest numbers of letters from nonregistrants had been referred for prosecution.⁸² They were

75. *NCARL DC Memo*, March/April 1983

76. Larry Gara (see note 2) was among these people, to his amusement and (once they realized his age) the SS's embarrassment.

77. Unpublished interview by the author

78. Unpublished interview by the author

79. Unpublished interview by the author

80. Unpublished interview by the author

81. Unpublished interview by the author

82. "A San Diego reporter recently obtained a list of the districts to which the first 159 non-registration cases were referred, and the number of cases in each district. They are:..." Mailing to Task Force members and chapter contacts, Military Law Task Force, The National Lawyers Guild (1168 Union St., San Diego, CA 92101), 8 February 1983

also, so far as I know, among those in which the largest proportion of those letters were from people who were not supposed to register and in which organized draft resistance has been most visible.

I do not know whether anyone or any organization will be indicted for counseling or conspiracy to resist.⁸³ I know that much of the evidence I have given is circumstantial and that the circumstances may well change. The evidence and the circumstances are significant in themselves, however, and even the possibility of such prosecutions is not widely known.

Draft counselors, anti-draft organizers, and draft resisters of all sorts should be aware that prosecutions for counseling and conspiracy are, at the very least, a definite possibility. They should also be aware that, even if no one is ever indicted, the possibility of such indictments may be being used to justify ongoing surveillance and investigation of resisters and the resistance movement. All such people – especially those with contacts in the government and those who obtain documents from the government through pre-trial discovery or the FOIA – should be alert for any evidence for or against these possibilities. All such evidence should be widely and rapidly disseminated.⁸⁴

I am not calling, "Wolf!". I am calling a warning: there are wolves in these woods. Let us all beware.

[Re-generated August 2020 from original 1984 DECmate WPS file. Endnotes converted to footnotes; text, notes, and numbering of notes unaltered from 1984 original. Contact as of 2020: Edward Hasbrouck, 1130 Treat Ave., San Francisco, CA 94110. +1-415-824-0214, edward@hasbrouck.org, <https://hasbrouck.org/draft>.]

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83. One reason I have withheld this article from publication for the last year has been that some of those who might be indicted for counseling and/or conspiracy feared that its publication might provoke the government to prosecute them. I doubt this. The more the government knows that we are prepared for such indictments, the less likely it will be to bring them. (For example, opponents of the draft within the Reagan administration used information on our plans to protest the first indictment for nonregistration to convince pro-draft Ray-gunners to postpone the first indictment from December 1981 to June 1982.) In deference to their fear that identifying them might provoke retaliation, I have left the sources and subjects of the information in notes 77-81 anonymous.
84. Please contact me (Edward Hasbrouck, 13 Valentine St., Cambridge, MA 02139, 617-354-7885) if you have any evidence for or against my speculations. I will attempt to disseminate all such information I receive to all those to whom this article has been distributed.