The Burger Court Opinion Writing Database

Selective Service System v. Minnesota Public Interest Research Group

468 U.S. 841 (1984)

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

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

From: The Chief Justi

Circulated: MAY 22 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[May ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide (a) whether § 1113 of the Department of Defense Authorization Act of 1983, which denies federal financial assistance under title IV of the Higher Education Act of 1965 to male students who fail to register for the draft under the Military Selective Service Act, is a Bill of Attainder; and (b) whether § 1113 compels those students who elect to request federal aid to incriminate themselves in violation of the Fifth Amendment.

I

Section 3 of the Military Selective Service Act, 50 U. S. C. App. § 453 (Supp. V), empowers the President to require every male citizen and male resident alien between the ages of 18 and 26 to register for the draft. Section 12 of that Act imposes criminal penalties for failure to register. On July 2, 1980, President Carter issued a proclamation requiring young men to register within 30 days of their eighteenth birthday. Procl. No. 4771, 45 Fed. Reg. 45247 (1980).

Appellees are anonymous individuals who were required to register before September 1, 1982. On September 8, Congress enacted the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* Section

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

CHAMBERS OF
THE CHIEF JUSTICE

May 23, 1984

MEMORANDUM TO THE CONFERENCE:

Re: 83-276 - Selective Service Service v. Minnesota Public Interest Research Group

Please withhold action on this case. The "wrong" draft got out.

Correct draft on its way.

Regards,

WEB

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

From: The Chief Justi

Circulated: MAY 26 1984

Recirculated:

CHANGES AS MARKED: pp 14-16

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[May ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide (a) whether § 1113 of the Department of Defense Authorization Act of 1983, which denies federal financial assistance under title IV of the Higher Education Act of 1965 to male students who fail to register for the draft under the Military Selective Service Act, is a Bill of Attainder; and (b) whether § 1113 compels those students who elect to request federal aid to incriminate themselves in violation of the Fifth Amendment.

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Appellees are anonymous individuals who were required to register before September 1, 1982. On September 8, Congress enacted the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 718 *et seq.* Section 1113(f)(1) provides that any person who is required to register and fails to do so "in accordance with any proclamation"

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

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1984

PERSONAL

Re: 83-276 - Selective Service System v. Minnesota

Dear Lewis:

If you are going to write, I'll let you include the suggested footnote.

Regards,

Justice Powell

P.S. I'd put it in as follows - essentially your version.

Young men in the United States are required only to register for military service when most of the other major countries of the world require actual service. Most of our European Allies in NATO, for example, have compulsory military service: Belgium, Denmark, France, Greece, Italy, Netherlands, Norway, Portugal, Spain, Turkey and West Germany. Switzerland also has compulsory service as do - of course - all the communist countries. See, The International Institute for Strategic Studies, The Military Balance 1983-1984 (1983).

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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Appellees are anonymous individuals who were required to register before September 1, 1982. On September 8, Congress enacted the Department of Defense Authorization Act of 1983, Pub. L. 97-252, 96 Stat. 718. Section 1113(f)(1) provides that any person who is required to register and fails to do so "in accordance with any proclamation" issued under the

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

CHAMBERS OF
THE CHIEF JUSTICE

June 29, 1984

MEMORANDUM TO THE CONFERENCE

Re: No. 83-276, Selective Service System v. Minnesota Public Interest Research Group

I have sent to the printer the following footnote, which will follow the last sentence of text in Part III of this case:

"The dissent reads Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), to create in this case an exception to the normal rule requiring assertion of the Fifth Amendment privilege. In Marchetti and Grosso, however, anyone who asserted the privilege on a wagering return did not merely call attention to himself; the very filing necessarily admitted illegal gambling activity. Those cases are therefore clearly distinguishable on their facts. See Grosso, at 73 (Brennan, J., concurring); United States v. Sullivan, 274 U.S. 259, 263 (1927)."

Regards,

WEB/mp

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

June 29, 1984

CHAMBERS OF
THE CHIEF JUSTICE

MEMORANDUM TO THE CONFERENCE:

Re: Case held for No. 83-276, Selective Service v. Minnesota Public Interest Research Group

Minnesota Public Interest Research Group v. Selective Service, No. 83-637, is the only case held for Selective Service v. Minnesota Public Interest Research Group, No. 83-276.

Appellant brought this action challenging the constitutionality of §1113 of the Department of Defense Authorization Act of 1983. Appellant also asserted that §1113 violated the Privacy Act of 1974. The DC found that appellant MPIRG did not have standing to bring this action, and dismissed appellant from the suit. In the DC's view, MPIRG could not claim representational standing because (1) the claim asserted was not "germane" to the purposes of the organization, and (2) there existed a "diversity of view" amongst MPIRG's members thereby requiring individualized participation in the suit. Appellant went to the CA8 on May 13, 1983, on June 16, 1983, the DC granted the individual student plaintiffs' motion for summary judgment. After the government filed a direct appeal in this Court from the DC's June 16 judgment, it moved to dismiss MPIRG's appeal in the CA8 based on 28 U.S.C. §1252, which provides:

> "A party who has received notice of appeal under this section shall take any subsequent appeal or cross-appeal to the Supreme Court. All appeals or cross-appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court." (emphasis added).

By order, the CA8 (Heaney, Ross, Arnold) transferred the appeal to this Court.

I am unpersuaded by MPIRG's argument that the CA8 improperly transferred the appeal to this Court pursuant to §1252. Section 1252 is certainly broad enough to cover an appeal taken from a dismissal under Fed. R. Civ. P. 54(b). MPIRG's contention is also contrary to the policy against splitting cases between appellate courts. In my view, MPIRG's appeal was therefore properly transferred to this Court.

MPIRG's constitutional claims, however, will be mooted by our holding in Selective Service, (No. 83-276)

JUL 2 - 1984

CHANGES AS MARKED: 11, 16, 17

SUPREME COURT OF THE UNITED STATES

No. 83–276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[July 5, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide (a) whether § 1113 of the Department of Defense Authorization Act of 1983, which denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students who fail to register for the draft under the Military Selective Service Act, is a Bill of Attainder; and (b) whether § 1113 compels those students who elect to request federal aid to incriminate themselves in violation of the Fifth Amendment.

I

Section 3 of the Military Selective Service Act, 50 U. S. C. App. § 453, empowers the President to require every male citizen and male resident alien between the ages of 18 and 26 to register for the draft. Section 12 of that Act imposes criminal penalties for failure to register. On July 2, 1980, President Carter issued a Proclamation requiring young men to register within 30 days of their 18th birthday. Presidential Proclamation No. 4771, 3 CFR 82 (1981).

Appellees are anonymous individuals who were required to register before September 1, 1982. On September 8, Congress enacted the Department of Defense Authorization Act of 1983, Pub. L. 97–252, 96 Stat. 718. Section 1113(f)(1) provides that any person who is required to register and fails to do so "in accordance with any proclamation" issued under the

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

CHAMBERS OF
THE CHIEF JUSTICE

December 5, 1984

RE: No. 83-276 - Selective Service System v. Minnesota Public Service Research Group

MEMORANDUM TO THE CONFERENCE:

This opinion was released last July. Throughout, the opinion refers to section 1113 of the Department of Defense Authorization Act of 1983 as the substantive provision under review. The Reporter of Decisions has brought to my attention that subsection 1113(a) of the Department of Defense Authorization Act of 1983 merely amended the Military Selective Service Act to add subsection 12(f). (See attachment). It is subsection 12(f) of the Military Selective Service Act that provides, inter alia, that any person who is required to register under Section 3, but who fails to do so, shall be ineligible for assistance under Title IV of the Higher Education Act of 1965. It is subsection 12(f), of course, that we interpreted.

Before the opinion appears in the U.S. Reports, the Reporter will make the changes necessary to reflect that subsection 1113(a) simply added subsection 12(f) to the Military Selective Service Act, and that the Court was interpreting subsection 12(f) of that Act, not, technically, section 1113 of the Department of Defense Authorization Act of 1983. I understand that Bill Brennan and Lewis have already made this change in their separate opinions.

This is a routine change and absent dissent, I will have Henry Lind proceed to do what is needed.

Regards,

WEB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 26, 1984

No. 83-276

Selective Service System, et al.
v. Minnesota Public Interest
Research Group, et al.

Dear Chief,

I note you have listed the above for announcement on Friday. Perhaps I didn't make it as clear as I should have at this morning's Conference, but I'm not completely at rest in that case and may want to add a short opinion of my own.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 29, 1984

No. 83-276
Selective Service System v. Minnesota PIRG

MEMORANDUM TO THE CONFERENCE:

I am sending the following down to the printer in this case.

"JUSTICE BRENNAN, dissenting.

For the reasons stated in Part II of JUSTICE MARSHALL's dissenting opinion, I too would affirm the judgment of the District Court on the ground that §1113 of the Department of Defense Authorization Act of 1983 compels students seeking financial aid to incriminate themselves and thereby violates the Fifth Amendment."

Sincerely,

W.J.B. Jr. 1/s

W.J.B., Jr.

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

From: **Justice Brennan**

Circulated: 6/29/84

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[July ——, 1984]

JUSTICE BRENNAN, dissenting.

For the reasons stated in Part II of JUSTICE MARSHALL's dissenting opinion, I too would affirm the judgment of the District Court on the ground that § 1113 of the Department of Defense Authorization Act of 1983 compels students seeking financial aid to incriminate themselves and thereby violates the Fifth Amendment.

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

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 25, 19[illegible] 84 MAY 25 A11:34

Re: 83-276 - **Selective Service System v. Minnesota Public Interest Research Group**

Dear Chief,

I agree.

Sincerely yours,

The Chief Justice

Copies to the Conference

cpm

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

From: Justice Marsha

JUN 26 1984

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June ——, 1984]

JUSTICE MARSHALL, dissenting.

In 1980, after a five-year suspension, the United States Government reinstituted registration for military service. By Presidential Proclamation, all men born after January 1, 1960, were required to register with the Selective Service System within thirty days of their eighteenth birthday.[1] The issue in this case is not whether Congress has authority to implement the law, but whether the method it has chosen to do so offends constitutional guarantees of individual rights. I conclude that § 1113 fails to pass constitutional muster on two grounds. First, it compels self-incrimination, in violation of the Fifth Amendment. Second, it violates the right to equal protection of the laws guaranteed under the Due Process Clause of the Constitution.

I

At the time of the enactment of the statute before the Court today, Congress understood that, of the draft-eligible

[1] Registration consists of completing SSS Form 1, available at any post office. The form requires the registrant to provide date of birth, sex, social security number, name, current and permanent mailing address, current telephone number, affirmation that the information provided is true, and date of that affirmation. A postal clerk date-stamps and initials the form, indicating whether the registrant produced identification. The registrant is under a continuing duty to notify Selective Service of changes in this data.

pp. 2, 6, 12, 13, 20, 7

STYLISTIC CHANGES THROUGHOUT.

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

From: **Justice Marsha**

Circulated: _____

Recirculated: JUL 2 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[July ——, 1984]

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At the time of the enactment of the statute before the Court today, Congress understood that, of the draft-eligible

[1] Registration consists of completing SSS Form 1, available at any post office. The form requires the registrant to provide date of birth, sex, social security number, name, current and permanent mailing address, current telephone number, affirmation that the information provided is true, and date of that affirmation. A postal clerk date-stamps and initials the form, indicating whether the registrant produced identification. The registrant is under a continuing duty to notify Selective Service of changes in this data.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1984

Re: No. 83-276 - Selective Service System
v. Minnesota Public Int. Research Group

Dear Chief:

Although I listened to the oral argument in this case, I shall recuse myself. At the end of your opinion, therefore, will you please add: "JUSTICE BLACKMUN took no part in the decision of this case."

Sincerely,

HAB.

The Chief Justice

cc: The Conference

HAB

June 8, 1984

Re: No. 83-276 - Selective Service System v.
Minnesota Public Interest Research Group

Dear Chief:

Your third draft received today has just arrived.

I repeat my request of May 30 that, at the end of the opinion, the following should be added: "JUSTICE BLACKMUN took no part in the decision of this case."

Sincerely,

HAB

The Chief Justice

May 26, 1984

83-276 Selective Service System v. Minnesota

Dear Chief:

I am writing you a separate join note in this case. I do suggest that you consider adding a footnote along the following lines:

> "Young men in the United States are required only to register for military service when most of the other major countries of the world require this service. In NATO, for example, the following countries have compulsory military service: Belgium, Denmark, France, Greece, Italy, Netherlands, Norway, Portugal, Spain, Turkey and West Germany. Switzerland also has compulsory service as do - of course - all the communist countries. See, The International Institute for Strategic Studies, The Military Balance 1983-1984 (1983)."

I have the copy of the Military Balance if you or your clerk wish to see it. The library obtained it for me.

It is possible that I may write a very brief concurrence. If so, I will circulate it early next week so you will not be held up.

Sincerely,

The Chief Justice

lfp/ss

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

From: Justice Powell

Circulated: JUN 1 1984

Recirculated: _____

1st Draft

No. 83-276

Selective Service System v. Minnesota

JUSTICE POWELL, concurring.

I do not disagree with the holding or, indeed, with most of the Court's opinion. As I view the issue presented, much of the opinion is unnecessary.

Unless §1113 of the Defense Authorization Act of 1983 is punitive in its purpose and effect, there is no Bill of Attainder. Nixon v. Administrator of General Services, 433 U.S. 425, 472 (1977). The term "punitive" connotes punishment as for a crime. Young men who knowingly have failed to comply with the registration requirements of the Selective Service Act have committed a crime for which the Act itself provides the only punishment.[1] Section 1113 is in no sense punitive; it

[1]Section 12 of the Military Selective Service Act provides, in relevant part:

Footnote continued on next page.

06/02

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

From: **Justice Powell**

Circulated: JUN 4 1984

Recirculated: _____

Previously circulated in typewritten form.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June ——, 1984]

JUSTICE POWELL, concurring.

I do not disagree with the holding or, indeed, with most of the Court's opinion. As I view the issue presented, much of the opinion is unnecessary.

Unless § 1113 of the Defense Authorization Act of 1983 is *punitive* in its purpose and effect, there is no Bill of Attainder. *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 472 (1977). The term "punitive" connotes punishment as for a crime. Young men who knowingly have failed to comply with the registration requirements of the Selective Service Act have committed a crime for which the Act itself provides the only punishment.[1] Section 1113 is in no sense punitive; it authorizes no punishment in any normal or general acceptance of that familiar term. Rather, it provides a

[1] Section 12 of the Military Selective Service Act provides, in relevant part:

"[A]ny person who . . . evades or refuses registration or service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, . . . or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdicton, 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. . . ." 50 U. S. C. App. § 462.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June ——, 1984]

JUSTICE POWELL, concurring.

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Unless § 1113 is *punitive* in its purpose and effect, there is no Bill of Attainder. *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 472 (1977). The term "punitive" connotes punishment as for a crime. Young men who knowingly have failed to comply with the registration requirements of the Selective Service Act have committed a crime for which the Act itself provides the only punishment.[1] Section 1113 is in no sense punitive; it authorizes no punishment

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06/13

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

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 14 1984

Stylistic Changes Throughout

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June ——, 1984]

JUSTICE POWELL, concurring.

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p. 1

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

From: Justice Powell

Circulated: _____

Recirculated: JUN 30 19[illegible]

SUPREME COURT OF THE UNITED STATES

No. 83–276

SELECTIVE SERVICE SYSTEM ET AL. *v.* MINNESOTA PUBLIC INTEREST RESEARCH GROUP ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[July 5, 1984]

JUSTICE POWELL, concurring in part and concurring in the judgment.

I do not disagree with the holding or, indeed, with most of the Court's opinion. As I view this case, however, the Bill of Attainder issue can and should be disposed of solely on the ground that § 1113 of the Defense Authorization Act of 1983 is not *punitive* legislation.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 29, 1984

Re: No. 83-276 Selective Service System v. Minnesota Public Interest Research Group

Dear Chief:

Please join me.

Sincerely,

WEB

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 22, 1984

Re: 83-276 - Selective Service System v.
Minnesota Public Interest Research Group

Dear Chief:

Please join me.

Respectfully,

John

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 29, 1984

Re: 83-276 - Selective Service System v.
Minnesota Public Interest Research Group

Dear Chief:

I am still with you.

Respectfully,

The Chief Justice

Copies to the Conference

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

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

May 22, 1984

No. 83-276 Selective Service System v.
Minnesota Public Interest Research Group

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference