

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-276

TITLE SELECTIVE SERVICE SYSTEM, ET AL., Appellants
v. MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

PLACE Washington, D. C.

DATE April 23, 1984

PAGES 1 thru 40



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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -x
3 SELECTIVE SERVICE SYSTEM, ET AL., :
4 Appellants, :
5 v. : No. 83-276
6 MINNESOTA PUBLIC INTEREST :
7 RESEARCH GROUP, ET AL. :
8 - - - - -x
9 Washington, D.C.
10 Monday, April 23, 1984
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:01 o'clock a.m.
14 APPEARANCES:
15 REX E. LEE, ESQ., Solicitor General of the United States,
16 Department of Justice, Washington, D.C.; on behalf of
17 the Appellants.
18 WILLIAM J. KEPPEL, ESQ., Minneapolis, Minnesota; on
19 behalf of the Appellees.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Selective Service System against
4 Minnesota Public Interest Research.

5 Mr. Solicitor General.

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

7 ON BEHALF OF THE APPELLANTS

8 MR. LEE: Mr. Chief Justice, and may it please
9 the Court, on July 2nd, 1980, President Carter, pursuant
10 to statutory authority, reactivated a draft registration
11 requirement for men between the ages of 18 and 26.
12 After about two years, almost 7 percent of those
13 eligible still had not complied with the registration
14 requirement, in some cases deliberately, and in some
15 through inadvertence.

16 In 1982, sponsors in both Houses of Congress
17 introduced as a floor amendment to the 1983 Defense
18 Authorization Act Section 1113, which would condition
19 eligibility for Title 4 college student aid on
20 compliance with the applicant's draft registration
21 obligation.

22 Much of the language of the amendment, which
23 is sometimes called the Solomon Amendment, was supplied
24 by Secretary Bell, who worked closely with the sponsors
25 in both Houses. After vigorous debate, it passed both

1 Houses by overwhelming bipartisan majorities.

2 This case is an appeal from a District Court
3 holding that that 1982 Solomon Amendment violated two
4 constitutional guarantees, the prohibition against bills
5 of attainder contained in Article 1, Section 8, Section
6 9, and the privilege against compelled
7 self-incrimination.

8 There are two separate and independently
9 sufficient reasons why the District Court's bill of
10 attainder holding must be reversed. The first is --
11 this is spelled out more completely in our reply brief
12 -- that each of the appellants' contentions rests
13 squarely on their premise that the law does not permit
14 aid to late registrants. That is, those who register
15 more than 30 days after their 18th birthday.

16 And the second reason is that even if the
17 Appellees were correct on the late registration issue,
18 this statute still is not a bill of attainder.

19 I will deal first with the late registration
20 issue. It is beyond dispute that the Secretary of
21 Education's regulations do provide that those who
22 register late are eligible for aid regardless of when
23 they register. There is accordingly no question that if
24 the individual appellees in this case comply with their
25 obligation to register, the government will give them

1 the aid that they say they must have.

2 That is what the regulations provide, and that
3 has been the consistent practice. In providing that
4 those who register late are eligible, the regulatory
5 scheme in this as is in other respects is faithful to
6 the statutory purpose. Congress's objective in passing
7 this statute was not to catch wrongdoers and punish
8 them. It was rather to increase the number of people
9 who are on the draft registration roles by providing
10 both a reminder, because in many cases the reason for
11 non-registration was simple inadvertence, and also an
12 economic incentive.

13 We turn then to the language of the statute,
14 and there is nothing in that language that prohibits
15 this result which the regulations provide. The statute
16 requires registration in accordance with any
17 proclamation, rule, or regulation, and the President's
18 proclamation does require registration within 30 days of
19 the registrant's 18th birthday.

20 The apparent reason for the statutory
21 reference in the Solomon Amendment to rules,
22 regulations, and proclamations is that Section 3 of the
23 Civil Service Act which requires registration is not
24 self-executing and does not come into play until there
25 is some proclamation, rule, or regulation. But in any

1 event it is far from clear that in accordance with means
2 within the time fixed by.

3 And another part of the statute, Subsection
4 F(4), which is really the fourth subdivision of the
5 Solomon Amendment, supports the view that in accordance
6 with means in the manner required by rather than within
7 the time fixed by.

8 In any event, either explanation is
9 plausible. Certainly neither is implausible, and under
10 those circumstances it is appropriate to consult the
11 statutory purpose, the statutory history in determining
12 the validity of these regulations.

13 QUESTION: May I ask, Mr. Solicitor General,
14 what is the dimensions of this problem? How many have
15 not registered who are eligible to?

16 MR. LEE: To date?

17 QUESTION: Yes.

18 MR. LEE: To date. As of the date of the
19 Solomon Amendment, the legislative history sometimes
20 says 500,000, sometimes says seven, and sometimes says
21 eight. As of last week, it was approximately half that,
22 about 350,000. There is little doubt --

23 QUESTION: What is the total number who have
24 registered?

25 MR. LEE: I will give you some figures and you

1 can extrapolate and I can extrapolate. I think I can
2 tell you approximately what the number is. That number
3 of somewhere between 350 and 380 represents about 3.1
4 percent of those who should register, whereas the
5 earlier figure was about 7 percent.

6 There is little doubt that the Members of the
7 House and the Senate who enacted this law thought of the
8 statute as designed to create an incentive to register,
9 and that as a consequence late registrants would be
10 eligible. The ample supports for this rather pervasive
11 view among the Members of the House and the Senate are
12 contained in the brief, and there are many on both
13 sides. .

14 Senator Stennis, for example, referred to some
15 youngster who might have overlooked signing up.
16 Nevertheless, in the Senator's language, all this
17 youngster will have to do is just to comply with the
18 law, and that will automatically make him eligible.
19 There are many similar statements cited in our briefs.

20 Finally, there is the matter of the
21 regulations themselves. This is the strongest possible
22 case for deference to the administrative regulations.
23 These regulations were not only adopted right after the
24 passage of the statute, through the joint efforts of the
25 two agencies charged with its implementation. This is

1 also literally a case where the draftsmen of the
2 statute, or one of the draftsmen of the statute was also
3 the draftsman of the regulations, and that person is, of
4 course, Secretary Bell.

5 In short, every single guide to statutory
6 construction points in the same direction, and if this
7 statute is interpreted consistent with its purpose, its
8 history, and its implementing regulations, then
9 constitutional issues disappear, because neither this
10 nor any other court has ever invalidated as a bill of
11 attainder any statute whose applicability or
12 non-applicability depended upon what the individual
13 would or would not do in the future.

14 It is at least anomalous, maybe revealing is
15 the better word, that the appellees' argument with
16 respect to the meaning of this statute on the late
17 registration issue would if successful make it more
18 difficult for them to get financial aid. They are
19 arguing for an interpretation of the law which actually
20 makes it harder for them to get what they assure us that
21 they must absolutely have.

22 This shows that their real disagreement is
23 with the Congressional policy decisions that there
24 should be a draft registration and that people should be
25 encouraged to register, policy decisions which clearly

1 fall within Congress's constitutional authority.

2 I turn now to our second point.

3 QUESTION: Why, Mr. Solicitor General, did
4 Congress -- is there any indication in the history --
5 why did they want the registration without the actual
6 authority to draft?

7 MR. LEE: That decision, of course, was made
8 at an earlier point in time, and I guess it was made in
9 1980, and actually was reflected in President Carter's
10 proclamation, but I would assume that it is simply a
11 readiness statute. The policymakers of our nation
12 concluded that we are not yet at the stage that we need
13 to move to the draft itself, but just to a readiness
14 position in the event that the draft is necessary.

15 Even if this statute could be construed to
16 prohibit aid to late registrants, it is still not a bill
17 of attainder. This Court clarified in Nixon versus the
18 Administrator that to qualify as a bill of attainder a
19 statute must meet each of three tests. Namely, it must
20 apply only to a specific individual or group. Second,
21 it must inflict punishment. And third, it must deny
22 judicial process.

23 This statute does not one of those three
24 things. First, the Solomon Amendment simply is not
25 punitive within the bill of attainder sense of that

1 word. At common law, bills of attainder were
2 legislative death sentences, usually for treason, but it
3 is clear that Article 1, Section 9, also includes common
4 law bills of pains and penalties, which included such
5 penalties as imprisonment, banishment, and confiscation
6 of property, and as the Court pointed out in Nixon
7 versus Administrator, our own American experience has
8 added one other category, and that is disqualification
9 from certain kinds of employment because of a
10 legislative determination of past wrongdoing by
11 particular individuals or groups.

12 But punishment for bill of attainder purposes
13 clearly does not extend to any circumstance of
14 non-realization of an economic benefit which any
15 individual would like to have, and the square holding of
16 Fleming versus Nestor is that the mere denial, in
17 Fleming's words, the mere denial of a non-contractual
18 governmental benefit does not amount to punishment for
19 bill of attainder purposes, and that is all we have
20 here, the mere denial of a non-contractual governmental
21 benefit.

22 If it was not punishment to deprive Mr. Nestor
23 of his Social Security benefits after he had paid into
24 the fund for 19 years, then a fortiori it is not
25 punishment to condition student aid to registration with

1 the draft.

2 QUESTION: Do we know, Mr. Solicitor General,
3 how many of that 350 to 380,000 who have not registered
4 are receiving financial aid?

5 MR. LEE: We do not.

6 QUESTION: Or are asking for it?

7 MR. LEE: We do not. There is no way, I
8 guess, that the government would have access to that
9 kind of information.

10 I turn now to the other two elements of bill
11 of attainder. With regard to specificity, this law
12 applies to non-registrants. It is the complete
13 antithesis, the complete opposite end of the spectrum
14 from the specific identification that we experienced at
15 common law or any other instance in which any statute
16 has ever been held unconstitutional as a bill of
17 attainder.

18 It is an open-ended group whose fluctuating
19 membership will be determined by events which are yet to
20 occur in the future, and that argument does not depend
21 on our position with regard to late registration,
22 because even if we are wrong on late registration, the
23 class affected is nonetheless one that changes every day
24 and whose composition is constantly subject to future
25 contingencies as more young men turn 18 and either

1 register or neglect or decline to register.

2 And as I stated a moment ago, never in the
3 history of our Republic has any statute ever been held
4 unconstitutional as a bill of attainder where its
5 membership depended upon events which might yet occur in
6 the future.

7 With regard to denial of judicial process, the
8 only relevant issue or determination through the
9 judicial type process, whether the individual does or
10 does not fall within the legislative target area, is
11 whether the individual has registered. It is therefore
12 completely unlike the circumstance in United States
13 versus Brown, in which the issue was whether communism
14 was an adequate proxy for -- to engage in political
15 strikes.

16 And since this statute and these regulations
17 do provide for the individual who wants to show that in
18 fact he has registered, this characteristic, this factor
19 also has been satisfied.

20 I turn finally to the appellees' privilege
21 against self-incrimination argument. There are three
22 short reasons why this is not a violation of the Fifth
23 Amendment. The first is that there is no compulsion.
24 There is no compulsion in prescribing standards of
25 eligibility for student aid. Indeed, non-registrants

1 are not only not compelled to apply for student aid. It
2 would be useless for them to do so because they are
3 ineligible, and it is not a crime not to apply for
4 student aid.

5 Moreover, the privilege against
6 self-incrimination does not assure that there will be no
7 adverse economic consequences from remaining silent.
8 The Garrity, Spevack, Gardner, Lefkowitz line of cases
9 on which the appellees rely stand for the proposition
10 that government may not compel self-incrimination, may
11 not compel self-incriminating testimony without a grant
12 of immunity.

13 They do not stand for the proposition, as this
14 Court made very clear in the Gardner case, that nothing
15 that the person says or doesn't say can ever be used to
16 his economic advantage, or disadvantage.

17 Surely, for example, the Drug Enforcement
18 Administration is entitled to ask a job applicant
19 whether he uses drugs. Surely in employing lawyers from
20 my office we are entitled to ask whether the applicant
21 has ever stolen money from a client. Surely the
22 Department of Agriculture is entitled to ask an
23 applicant for federal crop insurance whether he is
24 growing marijuana on his farm.

25 And in the administration of Title 4 itself,

1 surely the Department of Education can ask whether the
2 applicant is legally in this country, because that is
3 one of the qualifications for student aid.

4 Third, there is an element of unreality about
5 the appellees' Fifth Amendment argument. The purpose of
6 this statute after all is to get people registered. A
7 major objective, a major theme in the legislative
8 history is that those people who had not registered on
9 time should register late, and that was a major purpose
10 of this statute, to get those who had not registered on
11 time to register late.

12 It would be a perversion of that purpose to
13 prosecute late registrants, to prosecute for doing the
14 very thing that the statute was passed to encourage, and
15 it has never been done. This Court said in *Marketti*
16 that the central standard for the privileges application
17 has been whether the claimant is confronted by
18 substantial and real as opposed to mere trifling or
19 imaginary hazards of incrimination.

20 I cannot imagine any hazards of incrimination
21 that more appropriately fit that definition, trifling
22 and imaginary. One person of the presumably tens of
23 thousands, probably even hundreds of thousands, who have
24 registered late thus far has been prosecuted, and that
25 is firmly opposed to government policy.

1 One final note, and on this I will close. It
2 probably is not -- it may not be independently
3 dispositive, but at the very least there is an
4 additional consideration which should influence the
5 standard of review for this Congressional exercise of
6 the spending power, regardless of whether it applies to
7 bill of attainder or the Fifth Amendment.

8 Last term, in *Regan versus Taxation With*
9 *Representation*, this Court held that Congress is
10 entitled to great deference in making its judgments
11 concerning how the nation's revenues are to be gathered
12 and the tax burden distributed among different persons
13 and groups.

14 I know of no basis for distinguishing in this
15 respect between Congress's power to tax as in *Regan*
16 *versus Taxation With Representation* and its power to
17 spend as in this case. The language of the Constitution
18 locks them together, and this Court's decisions
19 consistently treat them as subject to identical
20 constitutional standards.

21 Mr. Chief Justice, I will save the rest of my
22 time.

23 QUESTION: General Lee?

24 MR. LEE: Yes.

25 QUESTION: I notice that the individual

1 plaintiffs in the District Court were all anonymous.

2 Did the government make any objection to that?

3 MR. LEE: No, not as far as I know.

4 CHIEF JUSTICE BURGER: Mr. Keppel.

5 ORAL ARGUMENT OF WILLIAM J. KEPPEL, ESQ.,

6 ON BEHALF OF THE APPELLEES

7 MR. KEPPEL: Mr. Chief Justice, and may it
8 please the Court, the question before you today is
9 whether the Constitution will countenance now and for
10 the future the use of leverage of a statutory benefits
11 program to enforce an unrelated penal statute. Approval
12 of the scheme under challenge here will sanction the use
13 of a test oath as a law enforcement device contrary to
14 the basic principles of our criminal justice system.

15 Section 1113 substitutes a presumption of
16 guilt for that of innocence. It reverses the historical
17 burden of proof. It imposes a punishment without
18 judicial trial.

19 QUESTION: Would you view in the same way a
20 statute that provided that no loan applicant would be --
21 receive aid if he owed any delinquent taxes to the
22 federal government?

23 MR. KEPPEL: The repayment of a loan, Mr.
24 Chief Justice, is at least related to the payment of
25 other obligations. The statute that is under scrutiny

1 here has no relationship whatsoever to the Higher
2 Education Act benefits programs which are far-reaching
3 indeed, and for that reason that hypothetical is
4 different from the case before you.

5 QUESTION: What about -- Let me try this
6 hypothetical. Suppose there were a provision in the
7 Medicaid or Medicare Act -- I get the two of them
8 confused -- either one of them, that if a physician was
9 seeking to participate, that is, to charge fees, that he
10 would have to certify under oath that he had repaid any
11 student loan that he may have had to get his medical
12 education. Would you think that would be the same
13 pretty much as the case before us today?

14 MR. KEPPEL: The repayment of the loan, Mr.
15 Chief Justice, is not in itself a crime.
16 Non-registration, on the other hand, is a crime
17 punishable by imprisonment by up to five years and a
18 fine of \$10,000 or both, and so the difference between
19 many of those kinds of conditions if they are bona fide
20 and rationally related to the goal of the Congress is a
21 different thing.

22 In addition, if the underlying act is a
23 criminal act in itself, that carries us one further away
24 from the case here. The consequences of your decision
25 then will extend far beyond this case. If Section 1113

1 survives scrutiny, it will be followed. Indeed, it has
2 already been followed by a rash of similar laws by which
3 government on all levels, federal, state, and local,
4 will demand citizens to swear or certify under pain of
5 perjury in return for some form of government benefit
6 that they have not broken one law or another.

7 These laws not only undercut the judicial
8 system, but they serve as an affront to the dignity and
9 the integrity of our citizens. Fortunately the
10 Constitution, through its bill of attainder clause,
11 through the proscription on self-incrimination, and
12 through its guarantee of equal protection, does not
13 tolerate laws such as 1113.

14 Section 1113 violates the prohibition against
15 bills of attainder. It targets a clearly identifiable
16 group. It imposes punishment, and it does so without
17 the protections of a judicial trial. Section 1113
18 accomplishes this, as I mentioned, through the device of
19 a test oath by which the applicant for aid must certify
20 under pain of perjury that he has complied, he has
21 submitted to registration under Section 3 of the
22 Selective Service Act.

23 And in addition, as is true of the classic
24 test oath cases, the conduct here is perceived by some
25 to be disloyal or at least politically unpopular. In

1 spite of the government's protestations, there can be no
2 doubt that all three of the elements or requirements to
3 proscribe the statute as a bill of attainder are met
4 here.

5 This statute clearly focuses on non-registrant
6 students who need financial aid. In Footnote 29 of the
7 Brown case, the Court said that as long as you can
8 ascertain a group that is the focus of a statute -- in
9 that case they cited, for example, a statute with regard
10 to operating machinery. If you can describe symptoms,
11 or if you can describe a disease, or some other
12 guideline by which the group could be ascertained, that
13 is sufficient.

14 Here, the statute itself identifies a group,
15 and there is no question but that who is within its
16 proscription.

17 QUESTION: Mr. Keppel, is there anything in
18 the record that tells what percentage of all applicants
19 to colleges in Minnesota, if that is the relevant -- are
20 eligible for financial aid? I mean, is it a small
21 percent or a large percent?

22 MR. KEPPEL: The affidavit of Robert Kusenko
23 and the brief of the amicus group of colleges headed by
24 the University of Minnesota indicates that about 80
25 percent of all financial aid money is federally funded

1 and comes within this statute. In addition, anywhere,
2 depending on the program, from two-thirds to
3 three-quarters of the students fall within families who
4 have total family income of \$18,000 or less, which is
5 considerably less than the average family income for the
6 country.

7 And so, while we can't define exactly the
8 numbers who would fall within it, we can see that it is
9 a high percentage of students and the funds available to
10 students generally are overwhelmingly the federally
11 financed funds under Title 4.

12 QUESTION: Do those statistics show -- perhaps
13 you have answered it and I just didn't get it -- what
14 percentage of the applicants for -- the ratio perhaps
15 the people who would be eligible for these federal funds
16 bear to the total number of applicants for admission or
17 the total number of people admitted?

18 MR. KEPPEL: That is not in the record, Your
19 Honor.

20 QUESTION: Mr. Keppel, isn't a class an open
21 -- certainly as applied to people who are becoming 18?
22 Now they are aware of the provisions of the draft
23 registration law and aware of the financial aid
24 requirements, and as to them it is just a requirement
25 for future conduct, isn't it?

1 MR. KEPPEL: Justice O'Connor, this Court has
2 indicated that inescapability, and that is the rubric
3 that the government uses in describing what you are
4 talking about, inescapability is not required. Footnote
5 32 in the Brown case makes it clear that this is not a
6 prerequisite to finding an ascertainable or identifiable
7 group. It is merely one factor that might be
8 considered.

9 But in this case the government agrees that
10 the act of non-registration is complete upon the
11 expiration of a 30-day period after attaining one's 18th
12 birthday. Now, whether they forebear from prosecuting
13 or not is not the point, but the past and ineradicable
14 act exists upon the expiration of that time period, and
15 so any of these people could be prosecuted at any time
16 if the government changed its policy.

17 And during the late sixties and the early
18 seventies, the government did in fact prosecute late
19 registrants, so I think we can see that this is an
20 identifiable group. The crime, if you will, is
21 complete. The past act is complete. The inescapability
22 is not a prerequisite, and so the group is clearly
23 identifiable.

24 QUESTION: Mr. Keppel, would it not be a
25 permissible construction of the statute to avoid the

1 constitutional question to treat it the way the
2 Solicitor General suggested, that -- in accordance with
3 means and the manner required by rather than within the
4 time required? Wouldn't that eliminate this problem?

5 MR. KEPPEL: In the manner required is not a
6 literal interpretation.

7 QUESTION: Wouldn't that be in the best
8 interests of your clients to so construe the statute?

9 MR. KEPPEL: My clients, Your Honor, do not
10 fall within the group of people who are unaware of their
11 obligation to register, and so with the threat of
12 criminal prosecution hanging over them because the
13 government has been careful not to grant immunity to
14 late registrants, with the threat of criminal
15 prosecution hanging over them, it would not be in their
16 best interest.

17 QUESTION: In other words, you are saying they
18 wouldn't register anyway? I wonder if they have
19 standing to make the particular argument you are making
20 then.

21 MR. KEPPEL: There is no question but that
22 they are adversely affected. There is no hearing
23 available to them. There is no redress available to
24 them but to attack the statute itself, and whether they
25 have standing to attack late registration or not, it

1 seems that they would. In fact, one of the appellees
2 contacted me about a month ago and said he couldn't
3 continue. The economic pressures were too great. He
4 had to register.

5 And so these people, if the government can
6 leverage them enough, can coerce them enough, can be
7 compelled not only to violate their Fifth Amendment
8 rights, but to violate their conscience and register.
9 For that reason, they would have standing.

10 QUESTION: What would you say about a person
11 who had been convicted of some criminal act and in
12 prison and then a fugitive, escaped from the prison,
13 that had a pension due him either from the government or
14 from some private source. Make it the government. He
15 would certainly have some disincentive to apply for his
16 pension, would he not, because that would identify him?
17 Would you say there is some violation there of his
18 rights?

19 MR. KEPPEL: There --

20 QUESTION: He has to show up in order to get
21 the benefit. But if he shows up he is going to be
22 apprehended as a fugitive and put back in prison.

23 MR. KEPPEL: The statute in that case, Mr.
24 Chief Justice, is evenhanded. It applies to all. It
25 does not have a law enforcement purpose, which Section

1 1113 does. You can call it an economic incentive, but
2 you can also use other euphemisms. I think I would more
3 accurately describe it as a penalty for non-compliance,
4 and I think that is one distinguishing feature, that the
5 statute which you describe or the contractual
6 obligation, if it is one, is at least evenhanded. This
7 one is directed to non-registrants to coerce their
8 registration, and for that reason the situations would
9 be different.

10 QUESTION: You referred to the Act as it was
11 in the sixties, I think you said the seventies also.
12 Was that a registration in connection with a draft
13 potential, or was it just a pure registration as it is
14 now? In other words, was the draft in effect in the
15 sixties?

16 MR. KEPPEL: Yes, the draft was in effect at
17 the time, Your Honor.

18 QUESTION: That makes it somewhat different,
19 doesn't it? There would be a reason for prosecuting
20 non-registrants who were not only evading the
21 registration requirement but also evading the draft
22 itself.

23 MR. KEPPEL: That is correct, Your Honor, but
24 by the same token, that provides the argument that there
25 is nothing sacred about their present forbearance.

1 Once this case is decided, the government could go ahead
2 and start prosecuting late registrants, or if the
3 international conditions changed as you describe, the
4 government could decide to prosecute.

5 And these people who did so would be
6 susceptible to prosecution. On the other hand, if they
7 were outspoken critics of government policy, even though
8 they late register, the government would always have
9 that club hanging over their head by which it could
10 prosecute outspoken critics, and I think as long as they
11 are unwilling to grant immunity, which they could do if
12 they were serious, as long as they are unwilling to
13 grant immunity, the potential for criminal prosecution
14 is clear.

15 Now, the second requirement of a bill of
16 attainder is that it inflict punishment.

17 QUESTION: One question. What about -- you
18 say forever this is there? No statute of limitations
19 involved?

20 MR. KEPPEL: There is a statute of limitations
21 in prosecutions for non-registration, Justice Marshall,
22 and that has been extended, as the government notes in
23 its reply brief to five years after one attains his 26th
24 birthday.

25 QUESTION: So, I mean, you keep saying

1 forever. You don't really mean that. You mean five
2 years.

3 MR. KEPPEL: The effect on these young men
4 could be viewed as longlasting, and certainly beyond the
5 statutory period, because their college degrees are
6 being terminated with the termination of their aid.

7 QUESTION: I am only talking about
8 prosecution, criminal prosecution.

9 MR. KEPPEL: And that criminal prosecution --

10 QUESTION: Five years.

11 MR. KEPPEL: -- potential ceases five years
12 after attaining the 26th birthday.

13 QUESTION: Mr. Keppel, would you have
14 difficulty if the government just gave an outright
15 financial grant of, say, \$50 a person to get people to
16 register for the draft? I mean, that is some kind of
17 leverage, I suppose.

18 MR. KEPPEL: That would be leverage far less
19 drastic than is the leverage here. These people are cut
20 off from financial aid which the District Court found
21 clearly was required for them to proceed with their
22 college education.

23 QUESTION: Well, if the grant program operated
24 the same way, and they are cut off from the outright
25 grant if they don't register, how is that different?

1 MR. KEPPEL: In this case, they are required
2 to certify themselves. They are required to confess to
3 late registration, if you will, in the certification.

4 QUESTION: Well, that is your
5 self-incrimination argument. What about the bill of
6 attainder argument? Is that offended by a grant?

7 MR. KEPPEL: This Court has noted that
8 punishment has to be determined in the context of the
9 particular case. In this case, we see a drastic penalty
10 or sanction inflicted on these non-registrants. The
11 situation which you describe, while a matter of degree,
12 is --

13 QUESTION: It is just less money, I suppose.

14 MR. KEPPEL: It is less money, but it also has
15 a far less drastic impact on the young men, because they
16 may not be penalized by \$50, but when you are cutting
17 them off completely, we are talking about quite a
18 different matter. We have to remember that we are not
19 only talking about college students and university
20 students. The Higher Education Act covers technical
21 schools, vocational schools. It covers direct student
22 loans, even the guaranteed programs -- grants, state
23 incentive loans. It even covers the work-study programs
24 by which --

25 QUESTION: Mr. Keppel, take Justice O'Connor's

1 example a point further. Supposing Congress were to say
2 that we are sufficiently concerned with failure to
3 register for the draft that we are going to channel all
4 aid to higher education, which formerly went into the
5 Higher Education Act in the form of scholarship grants
6 to people who register for the draft after they get out
7 of the Army, if they ever do. And so the only aid,
8 federal aid to higher education is available to you only
9 if you register for the draft under that Act.

10 Now, would that pose -- would you feel that
11 would come under your argument, or that it would be
12 different?

13 MR. KEPPEL: If it targets an identifiable
14 group and if it inflicts punishment --

15 QUESTION: Well, I ask you to answer a
16 question yes or no.

17 MR. KEPPEL: I would consider that very close
18 to what we are talking about here, absent the
19 self-incrimination problem that we have also in Section
20 1113.

21 QUESTION: So you feel that, too, would be a
22 bill of attainder?

23 MR. KEPPEL: It would in my judgment, Justice
24 Rehnquist. This Court has held that punishment need not
25 be directly inflicted. What cannot be accomplished

1 directly cannot be accomplished indirectly, and
2 deprivation under any form, however disguised, is
3 prohibited by the bill of attainder law.

4 And so, consequently, in the Cummings case
5 over 100 years ago the Court held that deprivation of
6 any civil right or political right may be punishment,
7 and they looked at disqualification from positions of
8 trust, from pursuit of certain vocations, from being a
9 guardian or an executor was a sufficient punishment,
10 even disqualification from federal employment. We are
11 not cutting in the Lovett case off these individuals
12 from any kind of employment. All we are saying is, you
13 can't work in the federal government, and that was
14 sufficient. From practicing law in the federal courts
15 in the Ex Parte Garland case, not forbidding you from
16 practicing law in state courts, or writing wills, or
17 closing real estate transactions, but merely practicing
18 in the federal courts.

19 And all of these were viewed to be sufficient
20 penalties. In this case, we are cutting these young men
21 off from proceeding with their college degrees, which
22 the District Court held could only be done with federal
23 aid, and by not attaining the college education in this
24 increasingly complex society, we are cutting these young
25 men off from any number, not only of learned educations

1 but any number of skilled pursuits or vocations under
2 the technical and vocational school reach of this
3 statute.

4 And that inflicts punishment in a real sense
5 perhaps far more extensive than in the previous cases of
6 this Court.

7 QUESTION: It is a punishment that can easily
8 be avoided, can it not?

9 MR. KEPPEL: The punishment --

10 QUESTION: The punishment as you describe it.

11 MR. KEPPEL: It can be avoided, Chief Justice,
12 by registering, but this Court has also held that, in
13 cases like Spevack, that the ability to obtain other
14 kinds of work or the like cannot be imposed, and
15 furthermore, in Grasso and Marketti, the Court said it
16 is not whether these young men have a right to register
17 or not to register, but once having chosen not to,
18 whether they can be compelled to incriminate themselves,
19 and contrary to what the government suggests, this is
20 not a separate or this is not a combined argument.

21 The bill of attainder stands separate and
22 independent of the Fifth Amendment, and as the
23 government keeps urging and urging that late
24 registration qualifies you for aid, we get further and
25 further into Fifth Amendment problems, because by late

1 registering, they are confessing to having late
2 registered, and are providing a link in the chain of
3 evidence which may be used to convict, and that is what
4 this Court has held to be sufficient to violate the
5 Fifth Amendment.

6 QUESTION: Mr. Keppel, do you disagree with
7 the basic figures as I understand the other side to give
8 us that there have been 300,000 or 400,000 people who
9 have been late registrants, and none of them have been
10 prosecuted?

11 MR. KEPPEL: I have no reason to quarrel with
12 that, Justice Stevens.

13 QUESTION: So the probability of prosecuting,
14 getting prosecuted for a late registration is really
15 quite low.

16 MR. KEPPEL: The probability today is quite
17 low, but as I mentioned, late registrants have been
18 prosecuted in the past. The government in its reply
19 brief suggests that it may be changing its policy with
20 regard to late registrants who are registering after
21 they get warning letters from the Selective Service
22 System and as they can change that, they can get back to
23 the policy that they were practicing back in the late
24 sixties and early seventies.

25 QUESTION: Has anyone ever been prosecuted

1 when there was just a registration requirement without a
2 draft system?

3 MR. KEPPEL: Please, I missed the question.

4 QUESTION: Has anyone ever been prosecuted for
5 failing to register except when there was a draft system
6 extant?

7 MR. KEPPEL: I am aware of no such situation.

8 QUESTION: There have been prosecutions for
9 failure to register, haven't there, in different
10 jurisdictions?

11 MR. KEPPEL: There have been a number of them
12 in the last few years. Not a large number, but they
13 have prosecuted non-registrants.

14 QUESTION: Mr. Keppel, are you about to
15 address your privilege argument?

16 MR. KEPPEL: Yes.

17 QUESTION: May I ask this? Do I correctly
18 understand the statute that he doesn't get aid if he
19 refuses to certify that he has complied with the
20 registration requirement. That is true, isn't it?

21 MR. KEPPEL: That is true.

22 QUESTION: Well, isn't it also true that if he
23 were to say, I waive my privilege against
24 self-incrimination, I admit that I have not registered,
25 would he not also be denied any aid?

1 MR. KEPPEL: The waiver of the privilege would
2 not get him federal aid.

3 QUESTION: Then my question is, where is the
4 coercion in this scheme, the compulsion to force
5 students to waive?

6 MR. KEPPEL: The compulsion is in their need
7 for financial aid. They need --

8 QUESTION: If it dcesn't make any difference
9 whether they admit or refuse to say whether they have
10 registered, in both cases, they would be denied aid, how
11 does the scheme work with compulsion?

12 MR. KEPPEL: The scheme of Section 1113 is
13 part of the reason why it violates the Fifth Amendment.
14 The student is faced with the cruel trilemma of either
15 foregoing financial aid, of committing perjury in
16 falsely certifying compliance, or in waiving his Fifth
17 Amendment rights, and in those --

18 QUESTION: But as I understand it, if he
19 waives by admitting that he has not complied, he is not
20 going to get any aid anyway.

21 MR. KEPPEL: But for this section, which has
22 been found to be unconstitutional, he would get aid.
23 These young men, all six of them, received federal
24 financial aid. They qualified for federal financial aid
25 before Section 1113 was enacted, and but for that

1 section, they would be receiving it today. This Court
2 has held time and time again that you cannot enforce an
3 unconstitutional condition as a requisite for receipt of
4 aid, whether it be a federal job or some other benefit.

5 QUESTION: If this statute said, if you will
6 waive, you will get -- and admit that you have not
7 complied, you will get the aid, I can see the compulsion
8 then of the provision, but if he is not to get it, at
9 least as to this scheme, it is difficult to see where
10 the government compulsion is for purposes of the
11 privilege.

12 MR. KEPPEL: The compulsion is that they need
13 the aid. They have to have the aid to continue, and
14 that is important enough a price to pay, as this Court
15 has noted in the Spevack versus Klein case, too costly a
16 price to give up your Fifth Amendment rights, and so it
17 is that leverage or coercion or compulsion based on need
18 that renders the argument that this is a voluntary
19 application to be really begging the question.

20 QUESTION: Mr. Keppel, what if we disagree
21 with you on the first part of your argument, and say
22 that late registration is permissible under the
23 statute? Is the case over then? You still have a Fifth
24 Amendment issue, don't you?

25 MR. KEPPEL: Justice White, we do.

1 QUESTION: And in that situation, if he says,
2 no, I have not registered but I want to register now in
3 order to get the aid, your Fifth Amendment argument is
4 still there, I take it.

5 MR. KEPPEL: It is indeed.

6 QUESTION: And Justice Brennan's question
7 would be answered, wouldn't it?

8 MR. KEPPEL: It would, Your Honor.

9 QUESTION: They could get the aid, as long as
10 they registered --

11 MR. KEPPEL: As long as --

12 QUESTION: -- and in the course of doing so,
13 admitting that they were late.

14 MR. KEPPEL: And that's what they'd be doing.
15 They'd be signing their confession when they signed the
16 certification of compliance or non-compliance, or if
17 they left it blank.

18 QUESTION: But if you agree with that
19 construction of the statute, the violation of law has
20 dissipated. There is no violation of law, as soon as he
21 registers, so where is the -- you know, I don't
22 understand.

23 MR. KEPPEL: Looking at the Fifth Amendment
24 problem as one in which invoking one's right to remain
25 silent makes the price that is paid too costly, as this

1 Court held in Spevack --

2 QUESTION: The price is zero. You comply with
3 the law and you have no penalty. What is the price?

4 MR. KEPPEL: If there is immunity, there is no
5 problem. If they will grant immunity from prosecution.

6 QUESTION: So in other words your argument
7 fails if the statute is construed the other way. Your
8 compulsion is a compulsion to comply with the law, not
9 to say anything.

10 QUESTION: Maybe your bill of attainder
11 argument might fail, but that doesn't mean that he still
12 couldn't be prosecuted for a crime, for having --
13 failing to register. Even if they accept late
14 registration. As long as you register, you get the
15 aid. But that doesn't mean that you can't be
16 prosecuted.

17 MR. KEPPEL: That is exactly correct, Justice
18 White. As they argue, late registration is permissible
19 for bill of attainder purposes. The case of
20 self-incrimination becomes stronger. They can't have it
21 both ways. They have to select one or the other.

22 Now, the violation of the Fifth Amendment, as
23 I stated, is not cured by late registration, and under
24 any of the tests of the cases cited both by the
25 government, the Garrity, the Lefkowitz cases, the

1 Spevack cases, the price paid in cutting off financial
2 aid, in terminating college, in hampering or perhaps
3 terminating the pursuit of one's chosen vocation is too
4 costly to make the imposition or the invocation of the
5 Fifth Amendment in the context here.

6 This Court, as I said, in *Torasco versus*
7 *Watkins*, *Wyman versus Updegraff*, held that
8 unconstitutional conditions in the award of public
9 employment or in the holding of public office cannot
10 stand, and for them to say consequently that we can use
11 unconstitutional conditions to bootstrap their Fifth
12 Amendment argument again is unsuccessful.

13 Given the increasingly pervasive reach of
14 government into virtually all of our lives, in the
15 increasing numbers of federal jobs, of loans and grants
16 and licenses, permits, employment, the decision in this
17 case will have far-reaching consequences. If the Court
18 approves this scheme reflected in Section 1113 there is
19 nothing to stop the federal government from conditioning
20 any aid or any contract or job of any kind on a test
21 oath affirming registration not only for the draft but
22 affirming non-violation or compliance with any penal
23 criminal statute.

24 QUESTION: May I ask you another question,
25 because I am a little confused on the statutory scheme.

1 Assume the government is right on the construction with
2 respect to 1113 for the moment. It permits late
3 registration to comply. And assuming you, before you
4 applied for student aid, you registered, but you were
5 late in doing so. You had been guilty of a crime up to
6 the time you registered. Now, after that, you apply for
7 student aid. Must you disclose the fact that you had
8 not registered on time?

9 MR. KEPPEL: That fact will be known to the
10 government.

11 QUESTION: Well, that is not my question.
12 Must you disclose it in your application for student
13 aid?

14 MR. KEPPEL: In the application itself, you do
15 not disclose --

16 QUESTION: You just have to say you have
17 registered.

18 MR. KEPPEL: That you have registered.

19 QUESTION: So that if you follow that sequence
20 of events, you can avoid the compulsion to incriminate
21 yourself.

22 MR. KEPPEL: You are still susceptible to
23 criminal prosecution.

24 QUESTION: I understand, but you haven't
25 incriminated yourself in the document you have been

1 compelled to file.

2 MR. KEPPEL: The document itself does not
3 contain a date, but the verification procedures in
4 Section 1113 will quickly uncover the fact of late
5 registration, and again, it is late registration itself
6 that might be -- might qualify one for financial aid but
7 which is clearly an independent crime which cannot be
8 cured in the context here without the grant of some kind
9 of immunity.

10 And so if this scheme is approved, there is
11 nothing not only to stop the federal government but to
12 stop state governments from conditioning benefits, such
13 as the driver's license, the attendance at any state
14 school, occupational licenses

15 CHIEF JUSTICE BURGER: Your time has expired
16 now, Mr. Keppel.

17 MR. KEPPEL: Thank you.

18 CHIEF JUSTICE BURGER: Do you have anything
19 further, Mr. Solicitor General?

20 ORAL ARGUMENT BY REX E. LEE, ESQ.,

21 ON BEHALF OF THE APPELLANTS - REBUTTAL

22 MR. LEE: The one thing I planned to say was
23 what Justice Stevens has just clarified, and unless
24 there are any further questions with regard to that
25 matter or anything else, I have nothing further.

1 CHIEF JUSTICE BURGER: Very well. Thank ycu,
2 gentlemen. The case is submitted.

3 (Whereupon, at 10:49 o'clock a.m., the case in
4 the above-entitled matter was submitted.)

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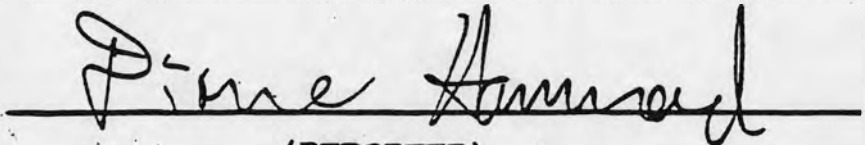
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#83-276 - SELECTIVE SERVICE SYSTES, ET AL., Appellants v. MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

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