

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 94 Orig.

TITLE SOUTH CAROLINA, Plaintiff v. DONALD T. REGAN;
SECRETARY OF THE TREASURY OF THE UNITED STATES

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

SOUTH CAROLINA,

Plaintiff

v.

DONALD T. REGAN, SECRETARY OF THE
TREASURY OF THE UNITED STATES

No. 94 Orig.

Washington, D.C.
Wednesday, October 5, 1983

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:03 a.m.

APPEARANCES:

HUGER SINKLER, ESQ., Columbia, S.C.; on behalf
of the Plaintiff.

MS. SUSAN LEE VOSS, ESQ., Attorney General of
Texas, Austin, Texas; as amici curiae.

LOUIS F. CLAIBORNE, Office of the Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Defendant.

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1 comment on the true issues are involved here.

2 This case really has a historic background.

3 In 1894, Congress enacted an Income Tax Law which was
4 broad and widesweeping. It included a provision taxing
5 the interest on notes and bonds of whatever nature,
6 except those bonds of the United States which, by the
7 terms of their issuance, were exempt from taxation.

8 That produced the famous litigation of Pollock
9 against Farmers' Loan and Trust Company which was twice
10 heard by this Court.

11 At all times, it was unanimous that the very
12 nature of the federal system prevented the imposition
13 of the tax on the interest on state bonds. However,
14 because of its holding with respect to the lack of power
15 to impose an excise tax on interest and dividends and
16 rents, the law was declared -- which had been declared
17 unconstitutional by five to four in Pollock, really
18 resulted in the adoption of the 16th Amendment.

19 Now, from the time of Pollock until 1982,
20 with the enactment of TEFRA, Congress had conceded,
21 although it was done originally by Mr. Cordell Hull
22 as Chairman of the Ways and Means Committee in 1913,
23 the fact that interest on state bonds was immune from
24 taxation, but in TEFRA we see a direct challenge.
25 And, meanwhile the Court, while never having precisely

1 this question before it, repeatedly said time after
2 time that the doctrine of reciprocal immunity, which
3 was essential to the federal system, resulted in the
4 freedom from taxation of interest on state bonds.

5 That lasted until 1982 when TEFRA challenges
6 both the meaning of the 16th Amendment, as has been
7 announced by this Court, although technically, I suppose,
8 those pronouncements are dicta. They were pronounced
9 so many times they seemed to work themselves into the
10 body and tradition of the law. And, they have further
11 challenged -- Must further argue that the 16th Amendment
12 permits this tax. We don't think it does.

13 The Solicitor General has urged that this
14 Court should not take jurisdiction of this case despite
15 the fact that the second clause of the second section
16 of Article III of the Constitution specifically grants
17 to this Court original jurisdiction in actions which
18 involve a state and a citizen of another state.

19 What we are doing here, of course, is to seek
20 an injunction against the Secretary of the Treasurer
21 in the traditional fashion of enjoining an officer of
22 the United States for performing -- acting under an
23 unconstitutional statute, and, thus, performing an
24 illegal act. I think Marbury against Madison got into
25 this Court in the same way.

1 QUESTION: Mr. Sinkler, can I ask you one
2 question?

3 MR. SINKLER: Surely.

4 QUESTION: You have left the merits and are
5 going to the injunction act. In your uview, would
6 Congress have the power to pass a statute that said
7 all bonds traded in the interstate market must be in
8 registered form, including those issued by a state,
9 without any taxation as a penalty?

10 MR. SINKLER: I don't think they do. I think
11 that is an envasion of the state's right. I think maybe
12 in that case you might get yourself -- Your determination
13 might rest on a balancing of equities as has been
14 traditional where the commerce clause is involved. Whereas
15 here, where the taxation clause power is involved, what you
16 really have here is a question of reciprocal immunity,
17 one that really goes to the very nature of the federal
18 system.

19 QUESTION: But, that would be a lesser burder
20 or a greater burden on the state than the one they
21 have now because you can avoid the tax by selling --

22 MR. SINKLER: I think we meet both burdens,
23 sir.

24 QUESTION: You do?

25 MR. SINKLER: I think we can meet both burdens

1 and show you. For instance, South Carolina sold \$65
2 million of bonds on September 13 which we will deliver
3 in New York next week. We normally pay for paying agent
4 services on an issue of \$65 million -- I think we have
5 had some before and we figure it to be about \$85,000.
6 The cost of paying registered -- of issuing registered
7 bonds. Now, they are not so terribly expensive. The
8 cost of arranging for their transfers and arranging
9 for checks to go out, we have an estimate from the Morgan
10 Bank, which is our fiscal agent and bond registrar,
11 that the cost of this issue, which has an average life
12 to 11 years and extends to 00, will be \$385,000. South
13 Carolina -- which is an additional cost of, oh, I think
14 it is \$310,000.

15 It happens that South Carolina has approximately
16 a debt of about \$600 million and the state treasurer
17 has structured that debt on a short-term basis so he
18 will be able to come back to the trough more frequently.

19 Well, if you just -- assuming it was \$650
20 million, you really have added costs in the neighborhood
21 of over \$3 million. That is a good deal of money.

22 QUESTION: Are you saying the federal government
23 may not impose any regulation on the issuance of bonds
24 that imposes any cost on the state? You say they require
25 to be printed in English and have certain disclosures

1 and the like?

2 MR. SINKLER: I think what you really do --
3 I don't think the federal government, if we are going
4 to have the traditional federal system, which is espoused
5 really as far back as Weston against the City of
6 Charleston, in which they said at that time that the
7 doctrine of immunities springs from the very union of
8 the states and the national government. I realize you
9 can also justify that under the Supremacy Act which,
10 I think, several members of this Court have made that
11 statement. I have no quarrel with that, but certainly as
12 far as the reciprocal immunity which is granted to the
13 states that results from the nature of the compact.
14 There is no provision in the Constitution of the United
15 States to that effect.

16 As a matter of fact, the case, of course,
17 went through the South Carolina constitutional court
18 and by a four to three decision the majority said there
19 is nothing in the Constitution of the United States
20 which says we can't do this.

21 The dissenting judges said the very nature
22 of the system makes it impossible for the state to tax
23 the obligation of the federal government, because to
24 do so -- and I thought the interest rate comment was
25 marvelous -- even though Congress provide that the money

1 be lent at ten percent, if the states can tax it, the
2 Treasury of the United States will be powerless to borrow.

3 And, that is -- See, the burden takes place,
4 according to Chief Justice Marshall, the very existence
5 of it creates a burden on the contract which has a
6 sensible impact on the interest of the -- influence
7 on the contract itself.

8 And, furthermore, when one government can
9 control the provisions, the actions of another govern-
10 ment, then you obviously have that type of governmental
11 interference which I personally believe the federal
12 system precludes.

13 QUESTION: Of course, the doctrine of inter-
14 governmental immunity kind of reached a high point in
15 the 1870's or 1880's and then some of this Court's cases
16 in the 30's rather drastically cut back on this,
17 especially where states are concerned.

18 MR. SINKLER: I think you did, but I think
19 you have got good distinction. Take, for instance,
20 the most famous of all the people who were really
21 affected by this case, Chief Justice Hughes, who in
22 Wilcutts against Bunn, reaffirms and points out that
23 the difference between the imposing of tax on capital
24 gains and on the interest on bonds is that one trans-
25 action -- The transaction between the state and its

1 lender has been finished and that is a totally new trans-
2 action which results in part from the acumen of the
3 person who bought the bonds.

4 QUESTION: Did that case involve intergovern-
5 mental immunities?

6 MR. SINKLER: He quotes Weston and reaffirms
7 everything I said. Of course, Governor Hughes started
8 the great debate with his message -- As governor with
9 his message to the General Assembly of New York in
10 January of 1910 and that produced the language and the
11 16th Amendment came into focus. There was this great
12 debate which was joined in by Senator Bora, by Senator
13 Ellihue Root, and President Taft himself, on the basis
14 of the apparent success in persuading the public, the
15 16th Amendment was adopted.

16 Hughes twice took a curtain call on the scene.
17 He was a Justice in the case of Brushaber against Union
18 Pracific, the first case following the adoption of the
19 16th Amendment, which held that it merely sought to
20 accomplish that which Pollock denied, the right to tax
21 rents, interest, and income.

22 Hughes, of course, writing Willcutts against
23 Bunns as Chief Justice, reaffirms all of that.

24 QUESTION: What about federal taxation and
25 the salaries of state employees?

1 MR. SINKLER: Well, there the taxes paid by
2 the individual employee -- It is a nondiscriminatory
3 tax so widespread that it does not affect -- This
4 honorable Court has held that it does not affect --

5 QUESTION: Well, I suppose it might increase
6 the state's cost of its labor force.

7 MR. SINKLER: I think it probably might but
8 that is an incidental cost that this Court saw fit to
9 declare --

10 QUESTION: Suppose the government, instead
11 of speaking about registered bonds, just subjected to
12 income taxation all of the interest on all state bonds?

13 MR. SINKLER: Well, if you do that --

14 QUESTION: And, of course, that tax would
15 be paid by the holders of the bonds.

16 MR. SINKLER: Let me suggest to you some of
17 the -- The taxes paid by the state itself, the fact
18 that there can be a tax makes the state pay the tax.

19 Now, when we sold these bonds, we had no choice
20 of taking -- of issuing coupon bonds. That would have
21 been ridiculous. We couldn't get a market on that.
22 We obviously had to sell fully registered bonds.

23 I did provide the proceedings that if this
24 litigation resulted they way I hope it would, we might
25 later issue coupon bonds, but from a practical standpoint,

1 we issued bonds. I think the difference in cost to
2 the State of South Carolina on a \$65 million issue --
3 We paid 8.1. I think it would run to perhaps 11. I
4 am comparing South Carolina's AAA credit -- IBM is
5 AAA credit. IBM is obviously more --

6 QUESTION: So you think South Carolina is
7 paying an increased interest, the equivalent of the
8 tax burden on the holder?

9 MR. SINKLER: Yes, we pay it. We obviously
10 pay. There is no question about it. The market would
11 demand otherwise. People don't buy such state bonds.
12 They are looking for the net interest cost. That is
13 all very carefully calculated.

14 Now, this TEFRA also put in a provision which
15 limited the deduction that banks might take for borrowed
16 money, and I suppose all bank money is borrowed money.
17 When they came to calculate their income tax, it included
18 15% of the tax-exempt interest.

19 Now, that is not challenged, because I think
20 the Court could levy a tax without -- The Congress could
21 levy a tax without any exemptions. I think that is
22 a totally different situation.

23 But, immediately after that 15% went into
24 effect, rates were adjusted by major banks so that they
25 ended up by the issue of paying that additional tax.

1 It is inevitable. There is no possible way that the
2 issue can escape the tax.

3 But, I think even worse, the consequences
4 of this is the consequences of Congress taking over
5 the local affairs of government.

6 CHIEF JUSTICE BURGER: Ms. Voss?

7 ORAL ARGUMENT OF SUSAN LEE VOSS, ESQ.

8 AS AMICI CURIAE

9 MS. VOSS: Mr. Chief Justice, and may it please
10 the Court:

11 An immeasurable and heavy financial burden
12 has been put on the key sovereign operations of the
13 states by the enactment of this particular section of
14 TEFRA against a dubious benefit to treasury, enforcing
15 the prevention of tax evasion.

16 Moreover, the Solicitor General has suggested
17 in his brief that tax exemption of municipal bonds as
18 a matter of constitutional right is a debatable proposition.

19 My portion of this argument will try to show
20 the financial consequences of the effects of those two
21 propositions and why this appeal to the Court's original
22 jurisdiction is necessary for the protection of the
23 states.

24 QUESTION: Ms. Voss, there are many things
25 the federal government does by way of congressional

1 or regulatory requirements that end up costing states
2 a lot of money. So, how does the financial burden alone
3 support your argument?

4 MS. VOSS: This particular financial burden
5 goes to the basic premise in the Constitution of
6 federalism, something which has been guaranteed to the
7 states since constitution law started. You can trace it back
8 to McCullough versus Maryland if you wanted to.

9 But, each day this law is in effect -- In
10 Texas alone, you have at least one issuer going to market,
11 paying somewhere between \$5,000 and \$14,000 in registrar
12 fees that they didn't have to pay before a year. Now,
13 you are talking of each one of 3,395 Texas issuers goes
14 to market one time, about \$17 million annually in
15 additional registrar costs. These are costs that these
16 issuers did not have to bear before. There are about
17 47,000 municipal issuers in this country.

18 And, those registrar costs hit the little
19 issuers a lot harder than they hit the big issuers.
20 One of the big guys like the University of Texas that
21 doesn't really usually go to market for less than \$20
22 million at a time is going to pay lower registrar fees
23 than some little school district that can barely issue
24 on its tax base maybe \$1 million to renovate a 60-year
25 old schoolhouse. And those figures only represent the

1 registrar's fees. Additional attorney's fee are extra,
2 additional costs of documentation are extra. Registrar
3 fees do not even include the postage for mailing out
4 the interest checks.

5 QUESTION: And the income from the oil wells.

6 MS. VOSS: I beg your pardon?

7 QUESTION: And the income from the oil wells
8 at the University of Texas.

9 MS. VOSS: Well, that is permanent university
10 fund money.

11 But, we are not just talking about a financial
12 burden alone. It is a financial burden that is going
13 to help cripple the ability of issuers to perform their
14 governmental functions.

15 You are talking about a jail. As many of
16 you probably know, Texas probably has five inmates to
17 a cell that was meant to hold two and is under federal
18 court order to improve conditions.

19 QUESTION: General Voss, could I ask you, --

20 MS. VOSS: Yes.

21 QUESTION: -- supposing the federal government
22 were to have regulations with the kind of disclosures
23 a borrower has to make when it issues bonds and they
24 say you have to file a registration statement and tell
25 where you are financially solvent and all that sort

1 of thing which is costly to hire accountants to prepare
2 the statement.

3 Could they require a state issuer to comply
4 with rules of that kind do you think?

5 MS. VOSS: As as a matter of marketing bonds,
6 state issuers presently comply with those sorts of re-
7 quirements.

8 QUESTION: No, but assume -- Could the federal
9 government compel them to, and, say, could they change
10 those to make them more burdensome without violating
11 their --

12 MS. VOSS: That particular issue has never
13 been challenged as to its constitutionality. The states
14 have been complying with it as a marketing matter and
15 I have serious questions as to its constitutionality.

16 QUESTION: It seems to me your argument would
17 apply to that as well. You are basically arguing that
18 there is no power in the federal government to impose
19 any burden whatsoever upon a state issuing bonds which
20 is a rather extreme position. But, that is your position,
21 I take it?

22 MS. VOSS: Yes, sir.

23 When you have something like the jail renova-
24 tions which are required to be done and there is no
25 money to do them because you had to replace a school

1 that burned down and you had increased cost of issuance
2 on those bonds -- Probably the school burned down
3 because you knew you needed the fire house over there,
4 but you didn't have money for that, because you had
5 more cost of issuance on the sewage treatment plant.
6 You are talking about serious problems with that.

7 And, as to the removal of the income tax exemption
8 altogether, you are going to foreclose many issuers from
9 the market place completely. The only attraction that
10 their paper has in the market place right now is that
11 tax-exempt feature.

12 QUESTION: Of course, we don't have to decide
13 that in this case, do we, whether or not the federal
14 government has the power to tax the income from muni-
15 cipal bonds?

16 MS. VOSS: No, that is not before you, sir.

17 South Carolina has made an appropriate call
18 as the real party in interest to the jurisdiction of
19 this Court as constitutionally provided and it is simply
20 inconceivable that an act of Congress could deprive
21 the state of that forum, particularly with the financial
22 burden to our governmental functions that this law has
23 created.

24 I submit that this is as appropriate case
25 for this Court's original jurisdiction.

1 CHIEF JUSTICE BURGER: Mr. Claiborne.
2 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.
3 ON BEHALF OF THE DEFENDANT

4 MR. CLAIBORNE: Mr. Chief Justice, and may
5 it please the Court:

6 Let me say straight away, lest the contrary
7 impression has been given by our concentration on
8 jurisdictional obstacles to this Court entertaining
9 the case, that we are not in the least shy in reaching
10 the merits.

11 If the Court concludes, contrary to our sub-
12 mission, that the Anti-Injunction Act is not a barrier,
13 we are not reluctant to meet South Carolina's con-
14 stitutional challenge.

15 And, while this Court is not required to hear
16 the case, the Secretary is content that the merits be
17 decided here.

18 Indeed, we submit, as has been said, that
19 the constitutionality of the statute is sufficiently
20 clear that the Court could properly dispose of the case
21 at this stage on this motion for leave to file.

22 After all, what is -- And, all that is involved
23 here is an indirect -- is only indirect requirement
24 that all obligations which extend for more than a year,
25 no matter by whom issued, whether by the United States,

1 by corporations, by states and municipalities, if issued
2 to the general public, shall be in registered form.

3 Now, this is in no sense discriminatory.

4 It is only the mildest intrusion on states' sovereignty.

5 It seems to us far less so than the requirements sus-
6 tained, for instance, for withholding income tax from state
7 employees.

8 QUESTION: What is the government's interest,
9 Mr. Claiborne?

10 MR. CLAIBORNE: Congress determined, on the
11 basis of elaborate hearings and evidence before it,
12 that there are bonds where one common means, device,
13 for avoiding gift tax, estate tax, capital gains tax
14 on the exchange of those bonds, that is was moreover
15 a haven for illegally obtained monies and finally its
16 right to add that theft and interstate transportation
17 of stolen securities is facilitated when bonds are
18 in bearer rather than registered form.

19 Those considerations, all of which bear on
20 plain powers of Congress inferred by Article I, fully
21 justify the federal interest in enacting this statute.

22 QUESTION: Since I am old enough to remember
23 when registered bonds were rather frequently encountered,
24 they disappeared over the years. Certainly there can't
25 be much federal government interest in getting to the

1 tax as such.

2 MR. CLAIBORNE: Quite candidly, Justice Blackmun,
3 this is not a revenue agency matter. It has a revenue
4 aspect. It is an exercise of the taxing power in that
5 it is necessary and proper means to attempt to diminish
6 tax evasion and tax avoidance. In that sense, it is
7 an exercise of the taxing power.

8 But, the object of the exercise is not to
9 raise additional taxes.

10 QUESTION: Except that the government -- the
11 Congress retreat from the withholding of interest and
12 dividends that makes this argument sound rather hollow,
13 doesn't it?

14 MR. CLAIBORNE: It may be that there is some
15 tension between those two contradictory actions of the
16 Congress, but we are here defending that portion of
17 the legislation which did pass and which, to some degree
18 at least, avoids what is otherwise determined to be
19 a common way of avoiding, as I say, both gift and estate
20 taxes and also capital gains taxes.

21 Now, the burden imposed on the states as a
22 result of this is surely less than the burden imposed
23 by many other federal regulations, including the one
24 I have just mentioned, the requirement of withholding.

25 And, as to the costs, the additional costs

1 imposed on the states, we have not attempted to produce
2 counter affidavits, but it is fair to surmise that there
3 would be offsetting economies in the area of insurance
4 and handling, and, of course, the statute does not require
5 that the bonds, though issued in registered form, be
6 issued through certificates.

7 QUESTION: If the burden is a factual matter,
8 you are suggesting that we ought to surmise that there
9 would be offsetting benefits really doesn't dispense
10 with the necessity of some sort of an inquiry if a there
11 is a factual -- if the factual question of burden should
12 play a part in deciding the case.

13 MR. CLAIBORNE: Quite so, Justice Rehnquist,
14 though I take Justice O'Connor's point that the exact
15 degree of the burden is not constitutionally relevant
16 so long as there is a plain exercise of the power Congress
17 under Article I and even, accepting the allegations
18 of the plaintiff states, no impermissible burden imposed
19 on the power of the State of South Carolina or any other
20 to raise revenues.

21 This is simply a question of what form of
22 revenue shall be raised. It is not an attempt to tax
23 the interest on all state and municipal bonds. And,
24 of course, it is in no sense a prohibition or inhibition
25 on the states' power to raise monies.

1 We would answer Justice Stevens' question,
2 whether if this statute were not in the form of a tax,
3 but was simply a uniform requirement imposed on all
4 issuers of all obligations of a certain character, that
5 they be in registered form. We would defend that statute
6 in the same way that we do this one.

7 QUESTION: Mr. Claiborne, may I ask, if our
8 decision is to grant the motion for leave to file, would
9 it be necessary to appoint a special master?

10 MR. CLAIBORNE: We would say not and we would
11 say not for the reasons I have suggested in invoking
12 Justice O'Connor's comment.

13 It may be that the Court will feel that the
14 degree of the burden, as Justice Rehnquist suggests,
15 is a matter which -- and the question of whether there
16 are, indeed, offsetting economies, is one that appro-
17 priately requires the hearing of evidence, in which
18 event a master --

19 QUESTION: But, that would be the only inquiry
20 that need be made?

21 MR. CLAIBORNE: As I see it, Justice Brennan.
22 That is the only potential question that a master might
23 be able to take evidence and help this Court toward
24 its --

25 QUESTION: Mr. Claiborne, does the federal

1 government have the authority to withdraw altogether
2 the tax exemption on income from state and municipal
3 bonds?

4 MR. CLAIBORNE: Justice Powell, we would say
5 yes.

6 QUESTION: The government does have the auth-
7 ority?

8 MR. CLAIBORNE: We so allege.

9 QUESTION: Yes.

10 MR. CLAIBORNE: We do not think it is necessary
11 for the Court to reach that question in this case.

12 QUESTION: But, is there a limiting principle,
13 and, if so, where is it?

14 MR. CLAIBORNE: Well, if contrary to our position,
15 the United States cannot deny exemption to state and
16 municipal obligations altogether, then there must be
17 a limit. We would say that this doesn't approach that
18 limit since it doesn't deny the exemption to all registered
19 bonds and merely requires that in order to earn the
20 exemptions the bonds be issued in that in that form.

21 QUESTION: But, that is a matter --

22 MR. CLAIBORNE: Which is a traditional form.
23 It is not an exceptional requirement.

24 QUESTION: Could the federal government do
25 what it has done to the rest of the public and that

1 is start with a very low income tax on state and
2 municipal securities and gradually move it up?

3 MR. CLAIBORNE: Justice Powell, I haven't
4 had an opportunity to consider that question. I would
5 suppose that the power to tax when abused amounts to
6 destroying the states' -- how to raise revenue, but
7 this Court has said we sit here to assure that that
8 limit is not reached. What that limit is --

9 QUESTION: The power to tax is not limited
10 by the 10th Amendment?

11 MR. CLAIBORNE: The power to tax may be limited,
12 but it is not eliminated by the 10th Amendment.

13 QUESTION: Mr. Claiborne, you don't concede
14 that this is a tax on the state, do you? It is a tax
15 on the bond holders.

16 MR. CLAIBORNE: It is a tax on the bond interest.

17 I am assuming, for the purpose of answering
18 Justice Powell, that the state's immunity does run to
19 the bond holder, otherwise, there is no question of
20 a limitation.

21 Now, we have invoked jurisdictional barriers
22 to this Court's entertaining the case and we have done
23 so because we deemed it our duty to bring to the Court's
24 attention what seemed to us plain obstacles to reaching
25 the merits in this case. It is principle that no court

1 should decide that which it lacks jurisdiction to decide
2 or that it ought not be decided prematurely is a
3 principle of more importance than the result in any
4 given case. It is important for the maintenance of
5 the Court system.

6 And, in this instance, it is important for
7 the government's interest.

8 It is familiar that few things are more
9 salutary to our tax system than the rule embodied in
10 statute for over a hundred years that no suit will lie
11 to enjoin the collection of taxes. And, indeed, most
12 states -- I don't know whether it be true or not with
13 respect to South Carolina and Texas, but it is the general
14 rule in most states that they have a light rule with
15 the respect to enjoining of the collection of their
16 own taxes.

17 QUESTION: Mr. Claiborne, is your position
18 about the power of Congress to limit the Court's juris-
19 diction somewhat contrary to Marbury versus Madison?

20 MR. CLAIBORNE: We, Justice O'Connor, do not
21 view it as a contradiction with the dictum in Marbury
22 versus Madison because it seems to us that this is simply
23 a procedural limitation on when this Court, as any other
24 court, may entertain an action of this kind.

25 It is common ground, I take it, that a statute

1 of limitations governs this Court in the exercise of
2 its original jurisdiction as it governs every other
3 court.

4 QUESTION: Can the Congress limit the remedies
5 that this Court can provide in the exercise of its
6 jurisdiction, its original jurisdiction?

7 MR. CLAIBORNE: We would say, yes, Justice
8 O'Connor, that at least so long as the rule is uniform
9 and non-discriminatory against the Court and it is simply
10 a rule of procedure which announces when an injunction
11 is appropriate.

12 For instance --

13 QUESTION: By that argument, can Congress
14 limit the term in which this Court can sit or estab-
15 lish filing fees that would determine what cases could
16 be taken?

17 MR. CLAIBORNE: Not what cases could be taken
18 in terms of classes of cases. My impression is that
19 Congress does set the tone of this Court by statute.
20 But, I assume there are limits there. I don't suppose
21 the Congress could say this Court shall not sit for
22 two years.

23 I assume, on the other hand, that it is
24 permissible, as is present law, that the Congress may
25 say that the Court shall begin its new term on the first

1 Monday in October.

2 QUESTION: If you were correct on the juris-
3 dictional part, is there any way at all that South Carolina
4 could get a hearing on its question in any court?

5 MR. CLAIBORNE: It is not we who are preventing
6 South Carolina from testing the issue by issuing their
7 bonds, albeit it may be that those bonds may have to
8 be issued in order to find purchasers at an abnormally
9 high rate of interest.

10 But, if they wish to press the matter, that
11 is obviously an available way in which it can be done.
12 It need not be a large issue.

13 QUESTION: Well, then, the purchaser himself
14 would have to file a suit, not South Carolina.

15 MR. CLAIBORNE: Indeed. But, there is no
16 bar to the purchaser either challenging the deficiency
17 in the Tax Court if he has failed to pay his interest
18 on that issue of the bonds he holds or by refund suit
19 in the District Court or the Claims Court.

20 But, whether or not there will, at the end
21 of the day's practical matter, be an occasion to test
22 the constitutionality of this statute is no reason why
23 no other court can presently entertain this suit.

24 This Court ought to be driven to take juris-
25 diction; that is, it seems to us, entirely backwards.

1 Congress has, in the interest of sparing this
2 Court's burdened docket, given concurrent jurisdiction
3 in a case of this kind to the District Courts and what
4 South Carolina would suggest is that because the anti-
5 injunction statute bars the District Court from enter-
6 taining the suit, it out to be bounced back to this
7 Court, the Court of all Courts, which ought to be less
8 hospitable to litigation than the District Courts whose
9 primary role is to entertain original cases.

10 QUESTION: Well, that goes to the proper use
11 of the discretion of this Court, whether to accept it
12 or not, don't you think? You are arguing instead that
13 this Court cannot accept it.

14 MR. CLAIBORNE: Justice O'Connor, I argue
15 both. I say that the legislative bar imposed by the
16 Anti-Injunction Act, just like the legislative bar
17 imposed by statute of limitations, just like the legis-
18 lative bar imposed by the Norris-LaGuardia Act which,
19 in turn, supplied to all the courts of the United States,
20 which this is one, does apply here, and, hence, if it
21 prevents the District Court from hearing the case,
22 likewise prevents this Court from doing so.

23 This Court, however, may choose not to deter-
24 mine that issue and may, as a matter of its own
25 discretion with an eye to the congressional policy,

1 determine that it is inappropriate for this Court to
2 do the business which other courts have been prevented
3 from doing in obedience to a legislative policy of such
4 longstanding and with such obvious salutary reasons
5 behind it.

6 And, therefore, as a matter of discretion,
7 if not as a matter of necessity, this Court ought to
8 decline to entertain the action.

9 QUESTION: Mr. Claiborne, have you considered
10 the case of Allen against the Regents of the University
11 of Georgia in connection with your argument, whether
12 that isn't a response that you ought to deal with?

13 MR. CLAIBORNE: Justice Stevens, I am aware
14 of that case and it is very relevant to the present
15 case. I take it, however, that the way in which it
16 was dealt with by this Court's opinion in the Bob Jones
17 case indicates that in the Court's view it is no longer
18 good law any more than the case on which it was based,
19 the Beechnut case which had, in the Court's terms,
20 eroded, if not scuttled, the Anti-Injunction Act.

21 In Allen, which was a five to three decision
22 on this point, the Court felt constrained to allow,
23 not as an original suit, to concede that the anti-
24 injunction action there did not bar a suit to challenge
25 the requirement that the University collect amusement

1 tax on tickets sold at football games. And, that may
2 be very comparable to this case.

3 But, it does seem to us that that was a
4 circumvention of the anti-injunction statute and, more
5 importantly, it seems to us that the Court has so treated
6 in its now current opinion in Bob Jones University versus
7 Simon, and, indeed, in the companion case.

8 The argument the other way was put as eloquently
9 as could be in the Americans United case by the dis-
10 senting opinion of Justice Blackmun and -- But, that
11 view did not prevail and it seems to us that that view
12 is precisely the view of what had been embraced by the
13 Court in the Allen case.

14 Let me say one final thing with respect to
15 the question of Marbury versus Madison and our argument
16 seeming in contradiction with it.

17 Marbury versus Madison, of course, holds that
18 the Congress cannot add to the Court's original juris-
19 diction, and, indeed, an argument could be made that,
20 therefore, invoking the Declaratory Judgment Act here would be
21 adding to the jurisdiction of this Court in some sense.

22 We would not make that argument. And, in
23 the same vein, we would not hear say that the anti-
24 injunction action, statute, takes away from the Court's
25 jurisdiction. It simply instructs all courts of the

1 United States when they may hear a controversy, not
2 what controversies they may hear.

3 And, it cannot be different, whether the rule
4 is that it is too late to hear it, as in the case of
5 the statute of limitations, or too soon to hear it.

6 QUESTION: Mr. Claiborne, how could the Court
7 ever hear on appeal a case to which South Carolina was
8 a party in connection with this task if we can't hear
9 it here?

10 MR. CLAIBORNE: There could be no such case
11 in which South Carolina was plaintiff, but that is often
12 true. The reason South Carolina --

13 QUESTION: Well, you are then saying that
14 South Carolina could never have an adjudication in this
15 Court at its instance.

16 MR. CLAIBORNE: Well, with respect to this
17 particular issue, I think that is so. South Carolina,
18 of course, need not sit and tarry on the sidelines when
19 the taxpayer files his refund suit.

20 QUESTION: If the taxpayer ever does. As
21 a taxpayer, he is going to be getting higher interest
22 rates, what has he got at stake?

23 MR. CLAIBORNE: Well, he would just as soon
24 pocket all that higher interest rate rather than pay
25 half of it to the Treasury.

1 QUESTION: Well, I know, but he has to hire
2 a lawyer and he is not getting any less out of his bonds
3 than he ever did. Only South Carolina is getting less
4 out of its bonds.

5 MR. CLAIBORNE: Well, it may be, and this
6 is precisely the argument that Justice Blackmun made
7 in Americans United, that such a suit might never come
8 about because the organization, among other things,
9 might change its activity or because the contributor
10 wouldn't find it worthwhile hiring a lawyer and going
11 through the cost and delays of filing a suit to which
12 the Court said that is no reason to break the rule of
13 the anti-injunction statute.

14 QUESTION: Well, the state is a party here.
15 That wasn't involved in the Bob Jones case.

16 MR. CLAIBORNE: I appreciate that the state
17 has a claim and that the state is different from an
18 ordinary party.

19 Of course, with respect to ordinary taxpayers,
20 it must happen every day; that people who would engage
21 in a certain commercial transaction, if they were assured
22 of the tax consequences, but not being able to obtain
23 a declaration from a court in advance and not being
24 able to obtain a favorable revenue ruling, simply demur
25 and do not engage in that transaction and the matter

1 is never tested judicially. That is no reason to allow
2 an advance declaratory or injunctive action. And, it
3 seems to us, the same reasoning must apply in this case.

4 After all, the original jurisdiction of this
5 Court was afforded to states in order to available them
6 of a forum which was thought equal to their sovereign
7 dignity. But, it was not a forum that was meant to
8 be more open or more hospitable than the other forum
9 equally available to the states.

10 QUESTION: Is there now a withholding on
11 interest on bonds issued by private issuers?

12 MR. CLAIBORNE: My impression is that that
13 statute was repealed and is not presently the law.

14 QUESTION: So that South Carolina, if it --
15 would be under no obligation now to file any withholding
16 statements or to report to the government how much
17 interest it was paying to people?

18 MR. CLAIBORNE: I think not.

19 One final thing on that score. The most
20 recent amicus brief filed, and I am not confident whether
21 the Court has granted leave to file it, but suggests
22 that the alternative to this statute is a requirement
23 that the issuer's paying agent report to whom the bearer
24 bonds have been delivered, keep records of any payments
25 of interest and thereby furnish a trail for the federal

1 Revenue officers to satisfy themselves that there has
2 been no attempted avoidance or evasion of tax.

3 I am frankly baffled about what is different
4 about conceding that those requirements would be proper
5 and challenging this more straightforward requirement
6 that the bonds be issued in registered form as an issue.

7 We submit that the Court ought not grant leave
8 to file because, as a matter of the anti-injunction
9 statute applicable here as well as elsewhere, the Court
10 cannot entertain the suit. It should not --

11 QUESTION: Mr. Claiborne --

12 MR. CLAIBORNE: I am sorry.

13 QUESTION: Finish your sentence.

14 MR. CLAIBORNE: But that if the merits are
15 appropriately reached, they are sufficiently clear that
16 the suit should be dismissed at this stage.

17 QUESTION: Mr. Claiborne, I just wanted to
18 go back for a moment to the Allen case again and be
19 sure I understand your submission, because as I glance
20 again at the opinion, the Court did, in that case, rely
21 to some extent on the fact that you -- a state had interest
22 involved, the University of Georgia, the Board of Regents
23 of the University of Georgia was speaking on behalf
24 of the state, and to the extent that you rely on Bob
25 Jones as in effect repudiating the rationale of that

1 case, it really couldn't repudiate that aspect of the
2 case. So, maybe it at least survived when the person
3 seeking to bring the litigation is the state as opposed
4 to a private university or something like that.

5 MR. CLAIBORNE: Well, I perhaps missed the
6 passage Your Honor refers to in the Allen case. I had
7 not appreciated that the Court felt that because it
8 was state rather than an ordinary taxpayer the anti-
9 injunction statute prohibition ought to be relaxed.

10 QUESTION: That was the fact though in the
11 case.

12 MR. CLAIBORNE: It was indeed.

13 QUESTION: And, I may read too much into it.
14 It isn't as clear as it might be. I am not suggesting
15 you misread it.

16 But, that is really your response to the case,
17 to that case is almost exclusively that Bob Jones has
18 undermined it?

19 MR. CLAIBORNE: Well, that case was wrongly
20 decided as Bob Jones indicates.

21 QUESTION: The reasoning of Allen is totally
22 inconsistent with the reasoning of Bob Jones, isn't
23 it?

24 MR. CLAIBORNE: Well, exactly so, Justice
25 Rehnquist. I cannot reconcile them and I don't think

1 this Court attempted to do so in Simon. But, the Court
2 clearly repudiated the case on which Allen is in turn
3 relying and mentioned Allen as simply following in that
4 erroneous view. And, while the case is not in terms
5 overruled, I take it its holdings have been effectively
6 eroded I submit.

7 CHIEF JUSTICE BURGER: Do you have anything
8 further?

9 REBUTTAL ARGUMENT OF HUGER SINKLER, ESQ.

10 ON BEHALF OF THE PLAINTIFF

11 MR. SINKLER: Mr. Chief Justice, if it please
12 the Court:

13 I would like to suggest to the Court the con-
14 sequences of permitting the national government to
15 inject itself into the issuance of state bonds. I am
16 talking about state bonds issued for state purposes.
17 I am not talking about industrial revenue or those type
18 of bonds.

19 If the Congress can tell South Carolina it
20 has got to issue revenue bonds, then it can tell South
21 Carolina that it can only issue bonds of a certain kind
22 or if it issues those bonds, it must issue a different
23 kind of bond. You are really going to move the seat
24 of government from the local capitals to Washington,
25 because if you just look at the Internal Revenue Act,

1 Section 103 was about two lines until they started this
2 sort of esoteric type of borrowing. You now find 15
3 pages and hundreds of pages of regulations. That is
4 what you are going to have if you once let the camel
5 put his nose under the tent and tell states when they
6 should or should not issue bonds or how they should
7 issue bonds.

8 I am talking about state bonds for state
9 public purposes, Your Honor.

10 QUESTION: Mr. Sinkler, may I ask -- I don't
11 think you have suggested a response to the government's
12 argument. The Tax Injunction Act bars this Court's
13 jurisdiction of this suit.

14 MR. SINKLER: Excuse me, sir?

15 QUESTION: I don't think you have addressed
16 the government's argument, have you, that the Tax
17 Injunction Act bars this Court's jurisdiction of this
18 suit?

19 MR. SINKLER: Well, in the first place, Your
20 Honor, I think that this case involves something a great
21 deal more than a tax. This is referred to in the joint
22 committee reports as a sanction, not a tax, this pro-
23 vision.

24 But, this is a matter where this Court should
25 take jurisdiction, because this case really involves

1 the right of the national government to impose its will
2 upon the governments of the states. It is a fundamental
3 question.

4 Also, he has boldly announced -- I didn't
5 think he was going to boldly announced, I thought he
6 would try to get away from it -- that the 16th Amendment
7 prevents federal government to tax state bonds which
8 overrules certainly the dicta of this Court for 60 years.

9 MR. SINKLER: Now, Mr. Sinkler, if we do grant
10 your motion for leave to file, should we appoint a special
11 master?

12 MR. SINKLER: Not at all, sir. The facts
13 are here, the facts are here. The basic question is
14 intrusion.

15 QUESTION: Well, what if we agree with you?
16 What should we do at this juncture? We haven't granted
17 leave to file yet.

18 MR. SINKLER: I think you ought to let us
19 file our motion.

20 QUESTION: Then what?

21 MR. SINKLER: And fight for the briefs and
22 further argument I would assume.

23 QUESTION: You mean you have some arguments
24 on the merits you haven't presented now?

25 MR. SINKLER: I think there are a considerable

1 number of arguments. I think this Court would find itself
2 interested in the history of the whole problem, because
3 case really goes --

4 QUESTION: But, if you are going to do that,
5 why wouldn't you want the opportunity to support some
6 of your factual obligations about the burdens on the
7 state and maybe the federal government would want to --

8 MR. SINKLER: I would have no objection to
9 that.

10 QUESTION: -- have testimony with respect
11 to what kind of a basis there is for requiring registered
12 bonds.

13 MR. SINKLER: We certainly would have no
14 objection to it, Your Honor.

15 There happens to be about a half trillion
16 dollars of coupon bonds outstanding now that are not
17 covered by this thing.

18 QUESTION: Yes.

19 MR. SINKLER: So that the result the government
20 seeks is not going to come about probably for a great
21 many years.

22 QUESTION: Mr. Sinkler, you have asked for
23 a preliminary injunction, I thought.

24 MR. SINKLER: I was denied that, Your Honor.

25 QUESTION: So that is out of the case?

1 MR. SINKLER: I was denied that. I didn't
2 know anything about appealing.

3 QUESTION: You can renew the motion right
4 now, I suppose.

5 (Laughter)

6 QUESTION: You will take it with or without
7 a master, right? If we take jurisdiction, you don't
8 care whether there is a master or not?

9 MR. SINKLER: That is right, sir.

10 CHIEF JUSTICE BURGER: Thank you, counsel.
11 The case is submitted.

12 We will hear arguments next in Russello
13 against the United States.

14 (Whereupon, at 10:58 a.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

SOUTH CAROLINA, Plaintiff v. DONALD T. REGAN, SECRETARY OF THE
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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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