

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CHARLES J. REICH, Petitioner v. MARCUS E.  
COLLINS, REVENUE COMMISSIONER OF GEORGIA,  
ET AL.

CASE NO: 93-908

PLACE: Washington, D.C.

DATE: Tuesday, October 11, 1994

PAGES: 1-47

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Washington, D.C.  
Tuesday, October 11, 1994

APPEARANCES:

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 93-908, Charles Reich v. Marcus E. Collins.  
5 Mr. Henson.

6 ORAL ARGUMENT OF CARLTON M. HENSON

7 ON BEHALF OF THE PETITIONER

8 MR. HENSON: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 This is yet another, and hopefully the last, in  
11 a series of cases involving the State's unconstitutional  
12 taxation of Federal retirement benefits. Since at least  
13 1985, when Federal retirees first filed suit in Georgia.  
14 Federal retirees across this country have been trying to  
15 collect refunds of taxes that were illegally and  
16 unconstitutionally collected from them by the States.

17 In 1989 in Davis, this Court confirmed that a  
18 State may not impose an income tax on Federal retirement  
19 benefits if it simultaneously provides an exemption from  
20 State retirement benefits.

21 Two years later in Barker, the Court confirmed  
22 that the holding in Davis applied to military retirement  
23 benefits, and in 1993, in Harper, this Court confirmed  
24 that its decision in Davis must be applied retroactively.  
25 Harper, however, stopped short of awarding refunds.

1           Thus, after almost a decade of effort by Federal  
2 retirees, this case ultimately presents the question of  
3 whether the Constitution requires refunds to Federal  
4 retirees under the circumstances here presented.

5           This question has already been answered in the  
6 affirmative by this Court. As the Court held in McKesson,  
7 our precedents establish that if a State penalizes  
8 taxpayers for failure to remit their taxes in timely  
9 fashion, the Due Process Clause requires the State to  
10 afford taxpayers a meaningful opportunity to secure post  
11 payment relief.

12           Further, the Court held that if a State avails  
13 itself of this approach, establishing various sanctions  
14 and summary remedies designed so that taxpayers tender tax  
15 payments before the objections are entertained and  
16 resolved, the State does not provide a meaningful  
17 predeprivation hearing.

18           Georgia does not dispute that it has established  
19 summary sanctions, summary remedies and sanctions here,  
20 nor does it dispute that the purpose of these sanctions  
21 and remedies is designed to ensure payment.

22           On page 30 of the brief of the respondents, they  
23 write, "Georgia's statutory provisions concerning the  
24 nonpayment of taxes are all reasonable measures designed  
25 to see that taxes are paid if they are legally owed."

1 QUESTION: Well, Mr. Henson, in your view, what  
2 can a State do to ensure that taxes are paid without  
3 running afoul of this coercion, or whatever you want to  
4 call it?

5 MR. HENSON: Without triggering the requirement  
6 to provide meaningful --

7 QUESTION: Yes.

8 MR. HENSON: -- backward-looking relief?  
9 O'Connor talks about reasonably equal terms, and Harper  
10 references constitutionally significant duress, so by  
11 implication there's some level where there is  
12 constitutionally insignificant duress, or the terms might  
13 be unequal but not reasonably unequal.

14 I don't have a specific formula to present to  
15 the Court. If the States are looking for a bright line  
16 rule, then I think parity is one that's fairly read from  
17 the cases, but this case is far beyond anything that the  
18 Court --

19 QUESTION: Well, can a State require payment  
20 under protest?

21 MR. HENSON: I don't think there's any question  
22 that McKesson clearly holds that.

23 QUESTION: And payment, rather than just  
24 protest.

25 MR. HENSON: I think that's clear from McKesson,

1 Your Honor. The sanctions that the State has here,  
2 though, are much more severe than just some minimal  
3 requirement that the taxpayer pay under protest.

4 QUESTION: Would you agree that if the State's  
5 insurance consisted of a lien and interest running on any  
6 unpaid balance at something substantially equivalent to  
7 market rate, that that would create no problem?

8 MR. HENSON: I think that's a closer case, Your  
9 Honor. I think that probably would satisfy the McKesson  
10 standard.

11 QUESTION: What about the posting of a bond?

12 MR. HENSON: By itself, no financial sanctions,  
13 no penalty, in that case, Your Honor, I think that's very  
14 much like the Chief Justice's pay-under-protest  
15 hypothetical, basically.

16 QUESTION: Well, when you say no penalty, does  
17 that assume that if the taxpayer prevails, he's entitled  
18 to reimbursement for the bond premium?

19 MR. HENSON: Well --

20 QUESTION: Suppose he's out the bond premium?

21 MR. HENSON: I'm sorry, I didn't hear the  
22 question.

23 QUESTION: Suppose the taxpayer has to pay for  
24 the cost of the bond premium, and there's no reimbursement  
25 in the event he prevails.



1 MR. HENSON: That, to my ear that sounds like he  
2 runs afoul of McKesson. That -- that is more than just  
3 the -- more than just insignificant duress.

4 QUESTION: What if --

5 MR. HENSON: That's a real cost that the  
6 taxpayer begins to bear there.

7 QUESTION: Yes.

8 QUESTION: He could pay under protest --

9 MR. HENSON: That's right.

10 QUESTION: -- instead of doing that, and that  
11 would be okay. He has the option of either paying under  
12 protest, or posting a bond.

13 MR. HENSON: All right.

14 QUESTION: That would be okay, wouldn't it?

15 MR. HENSON: I think you're right, Your Honor.  
16 Of course, what we have here is far more severe than  
17 either of those hypotheticals.

18 QUESTION: Let me just ask a little bit about  
19 what we have here. Suppose you have, hypothetically, a  
20 State with an adequate predeprivation remedy, and it also  
21 has a refund statute. The taxpayer elects the refund  
22 route, and the refund statute's repealed.

23 MR. HENSON: Ex post facto?

24 QUESTION: Yes.

25 MR. HENSON: I think that would be

1 unconstitutional, Your Honor.

2 QUESTION: Is that what happened here?

3 MR. HENSON: Well, it was rep -- effectively,  
4 yes. There was absolutely no doubt that the refund  
5 statute applied to these Federal retirees, and the  
6 respondents repeatedly wrote in briefs before the Georgia  
7 supreme court and in other courts of Georgia that -- there  
8 were Georgia supreme court cases on point.

9 QUESTION: Isn't the problem that Georgia  
10 supreme court said, no, it doesn't apply to a  
11 constitutionally invalid tax, that's what our law is now,  
12 that's what our law was then, and we have the same right  
13 to take the position, in fact obligation, that everything  
14 we say about what the law is, was, is fully retroactive,  
15 the same right and obligation that the U.S. courts do?

16 MR. HENSON: If -- if that was the case, I would  
17 agree with Your Honor, except here, both the -- the  
18 legislative history of the statute clearly established  
19 that the purpose of the statute was to provide for refunds  
20 of taxes that were later declared unconstitutional.

21 The Georgia supreme court had issued a decision  
22 in the Parke, Davis case that expressly held that the  
23 refund statute was the appropriate procedure for  
24 challenging an unconstitutional tax under the Federal  
25 Constitution, in that case a Commerce Clause challenge.

1 QUESTION: Well, you --

2 MR. HENSON: So --

3 QUESTION: Do we have to hold that Georgia  
4 changed its law? I mean, I'm willing to accept what the  
5 Georgia supreme court said. If Georgia supreme court says  
6 that was always Georgia law, it was always Georgia law.  
7 But your argument would remain, well, if it was Georgia  
8 law, it certainly didn't seem to be Georgia law.

9 MR. HENSON: Precisely, Your Honor.

10 QUESTION: And -- but isn't that the only point  
11 you have to make? You don't really have to argue that  
12 Georgia changed its law. You only have to argue that  
13 Georgia should have made its law clear so that a taxpayer  
14 would know how to get a refund and not be snookered by  
15 thinking he could proceed one way and then be told after  
16 the fact that he couldn't.

17 MR. HENSON: That's exactly right, Your Honor.

18 The rule this --

19 QUESTION: Well, is Georgia now, as you  
20 understand it, asserting sovereign immunity and just  
21 saying, we do not waive our sovereign immunity for  
22 backward-looking relief? Is that what Georgia is saying  
23 today?

24 MR. HENSON: That does seem to be their latest  
25 idea, Your Honor.

1 QUESTION: What if this suit were in Federal  
2 court? Would the Eleventh Amendment enable Georgia to  
3 take that position and defeat a remedy if the suit were in  
4 Federal court?

5 MR. HENSON: I think we would have a problem  
6 under the Eleventh Amendment with respect to the  
7 Department of Revenue as a defendant. With respect to the  
8 individual claims against Marcus Collins as the Revenue  
9 Commissioner, my understanding of the Court's  
10 jurisprudence is that we would not. I think that --

11 QUESTION: But you say that if the suit is in  
12 the State's own court it can't assert sovereign immunity.

13 MR. HENSON: Well, no, Your Honor, not under the  
14 circumstances of this case, and particularly here. You  
15 know, they put this forward as a threshold issue regarding  
16 the State's interpretation of its own sovereign immunity.

17 Well, presumably the Georgia supreme court is  
18 part of the sovereign, and presumably it's a pretty good  
19 arbiter of what the sovereign immunity would be, but they  
20 stepped right over that threshold. They didn't hesitate  
21 for a nanosecond to get to the merits of this issue. They  
22 didn't have any problem with sovereign immunity.

23 QUESTION: Well, this is a pretty Pyrrhic  
24 victory, then, for -- maybe not for your clients, but  
25 certainly for future taxpayers who are treated similarly.



1 You're saying that all the State has to do is enact a  
2 statute closing its doors to claims for retroactive tax  
3 relief.

4 MR. HENSON: No, Your Honor.

5 QUESTION: I thought you said that. They can't  
6 come into Federal court, and so long as the State closes  
7 the State court, where do you expect them to sue, in  
8 another State?

9 MR. HENSON: I'm not suggesting for a moment,  
10 Your Honor, that the State can close the door. I'm simply  
11 suggesting that this Court need not reach that issue here  
12 because the Georgia supreme court did not reach it.  
13 However, I do believe that this Court's precedents  
14 establish that the Fourteenth Amendment prevails over  
15 sovereign immunity in cases such as this.

16 Carpenter v. Shaw is this case. It was a case  
17 brought against the Oklahoma State auditor. It was a case  
18 where the Court recognized that refunds were going to be  
19 paid out of the State Treasury. The Court had no problem  
20 awarding refunds in this case.

21 In Ward v. Love, it was a case involving a  
22 county defendant, but the Court expressly distinguished  
23 the sovereign immunity issues raised in Ex Parte Young.  
24 It said, this is not Ex Parte Young because this is a  
25 takings case under the Fourteenth Amendment.

1                   QUESTION: Well, Mr. Henson, what if we decide  
2 this point the way you want us to. Is that going to open  
3 the States up, States if they don't have a tort claims  
4 act? Are they going to be met with the argument, well, if  
5 we're injured, we've got a right to sue you for whatever  
6 damages we've got, even though you haven't waived  
7 sovereign immunity?

8                   MR. HENSON: I'm not sure I under --

9                   QUESTION: Well, if sovereign immunity is not a  
10 defense on the part of the State, even though -- which has  
11 not waived it for a claim for a tax refund, how about a  
12 constitutional claim, or asserted claim for other kinds of  
13 injuries, personal injuries, say, at the behest of a State  
14 vehicle, or something like that? Why wouldn't that  
15 argument be equally available to them?

16                  MR. HENSON: Well, I believe the Court's  
17 jurisprudence in the Fourteenth Amendment area is what  
18 answers the question for this case.

19                  I'm not familiar enough with the Court's  
20 decisions under the Tort Claims Act that would resolve  
21 that for other areas, but I think the Carpenter v. Shaw,  
22 Ward v. Love, the bank cases, I think they clearly answer  
23 that question, at least for unconstitutional deprivation  
24 through taxing and, indeed, I think the rule that the  
25 Court has enunciated in McKesson has been consistently

1 applied, and I don't think the State really disputes, as I  
2 pointed out, that it has these sanctions, it has these  
3 remedies.

4 Indeed, much of the State's briefing is  
5 designed, or answers, deals with this issue of this  
6 critical need to have sanctions and summary remedies, but  
7 that issue's been decided. That's not the issue here. As  
8 the Court noted in McKesson, the Court has long held that  
9 the State may impose such sanctions and remedies in tax  
10 cases, but if a State establishes those sanctions and  
11 summary remedies, it does not provide a meaningful  
12 predeprivation hearing.

13 In McKesson, the Court described the meaningful  
14 predeprivation hearing again as the root requirement of  
15 due process, and when a State does not provide this root  
16 requirement, it must provide backward-looking relief.  
17 That's the trade-off. That's the price, and it's not a  
18 tremendous or high price.

19 Virtually every State has some sort of refund  
20 statute. The United States Government has a refund  
21 statute. Even Georgia has a refund statute. It just  
22 doesn't apply here.

23 But that's not good enough for the States. They  
24 want you to say that you really didn't mean it in  
25 McKesson. They want to have it both ways. They want you

1 to overrule McKesson and Harper. They want to have their  
2 cake and eat it, too. In short, they want you to change  
3 the rules, and why, because they've changed the rules on  
4 the retirees over and over and over again.

5 QUESTION: Are you saying that the system that  
6 Georgia now has in place -- let's say there has been no  
7 appearance that there was a refund remedy available, and  
8 what Georgia now lists as its remedies is all there is,  
9 and it's clear that in this class of cases there's no  
10 refund remedy. Would the list of remedies that Georgia  
11 sets out and says it now has for this category of cases,  
12 would that be constitutionally adequate?

13 MR. HENSON: No, Your Honor, because of the  
14 summary remedies and sanctions that the State has  
15 established, and they concede in their brief they've  
16 established these, and they concede that the purpose of  
17 these is to require taxpayers to make payment. They are  
18 constitutionally permissible, but because the State  
19 chooses to have these remedies, it must provide meaningful  
20 backward-looking relief. I mean, that's the issue, is --

21 QUESTION: Isn't the State saying that if you --  
22 if there's been an assessment and you appealed it  
23 successfully, you would lose nothing, you would not --  
24 there would be no penalty, and the only thing you would  
25 lose is the bond premium?



1           MR. HENSON: That's correct, Your Honor. That  
2 is their argument. However, that does not comply with  
3 this Court's statements in O'Connor and McKesson.

4           All the while, while you're litigating your  
5 claim in Georgia, you're subject to criminal prosecution,  
6 you're subject to the possibility of a penalty, you're  
7 subject to 12 percent interest, you're subject to levy,  
8 execution, and garnishment.

9           They would have the taxpayer run the risk of all  
10 those sanctions in the hopes that in the end the taxpayer  
11 might win. That is a far cry from what Justice Holmes  
12 talked about as reasonably equal terms in O'Connor.

13           QUESTION: Incidentally, if that were to happen,  
14 what is the mechanism for the taxpayer to get redress.  
15 Suppose his property is seized pending the assessment  
16 procedure, and then he wins in the assessment procedure.  
17 What is the statutory mechanism for repayment?

18           MR. HENSON: There is none that I'm aware of,  
19 Your Honor. He's just out of luck. I mean, he's lost his  
20 property. If they come and garnish his bank account --

21           QUESTION: Has there been any administrative  
22 practice of paying the money back if it's been seized and  
23 the assessment procedure continues?

24           MR. HENSON: There's none that I'm aware of,  
25 Your Honor, and there's none reflected in the record in

1 this case.

2 QUESTION: Do I understand you correctly that  
3 you're not seeking a refund back to 1980, that it's only  
4 3 years back from the first time you made a protest noise,  
5 is that correct?

6 MR. HENSON: Well, that's correct, Your Honor.  
7 That was my mistake. I foolishly believed that the refund  
8 statute applied in this case, and that the limitation  
9 period in the refund statute would preclude us from going  
10 back, so when we appealed from the trial court, the trial  
11 court applied the refund statute to this petitioner and  
12 said, the limitation period precludes you.

13 I thought it was so clear that it applied, I did  
14 not appeal that part of the judgment, so those tax years  
15 are not properly before the Court.

16 QUESTION: You don't really mean foolishly  
17 believed.

18 MR. HENSON: I'm -- I'm --

19 QUESTION: You're --

20 MR. HENSON: That's correct, Your Honor.

21 (Laughter.)

22 MR. HENSON: No, not --

23 QUESTION: You mean reasonably believed.

24 (Laughter.)

25 MR. HENSON: In short, Georgia, what Georgia

1 really wants here is the discretion to pick and choose  
2 when it wants to apply its refund statute. If you're a  
3 Federal retiree with a constitutional claim, the refund  
4 statute doesn't apply to you. If, on the other hand,  
5 you're a liquor distiller like the folks in Beam, and  
6 you've got a claim based on the U.S. Constitution there  
7 also, well, guess what, the refund statute applies to you,  
8 but we're sorry, folks, the limit -- the procedural  
9 barriers there preclude you from having standing.

10 But if you happen to be a taxpayer who pays a  
11 sales tax on a private sale of used cars in Georgia, and  
12 you say that that tax violates State law, Georgia wants to  
13 be able to say, well, of course, your claim violates State  
14 law. Of course our refund statute applies to you, and  
15 here's millions and millions of dollars in refund for you  
16 folks.

17 After almost 10 years, it's time to stop  
18 changing the rules. What Georgia and the other States  
19 seem to have overlooked is that it's not the role of  
20 courts to change the rules, but to apply the rules, and a  
21 straightforward application of the rule in McKesson,  
22 O'Connor, and Harper, requires the entry of judgment in  
23 favor of petitioner in this case.

24 QUESTION: Well, McKesson did not involve a case  
25 where the State had not waived its sovereign immunity, did

1 it? I mean, in Florida the State had waived it.

2 MR. HENSON: Well, that's an interesting point,  
3 Your Honor. I'm not sure I agree with that proposition.  
4 McKesson and Harper are very similar to the case here in  
5 that regard, because in both instances the whole predicate  
6 of the cases being here was that the State refund statute  
7 did not apply as a matter of State law, so if it doesn't  
8 apply in Harper and McKesson, yet the court sovereign  
9 immunity does not preclude the court reviewing it, then  
10 why should it preclude review here, and I think the answer  
11 is, it doesn't.

12 It's a Fourteenth Amendment claim. That's the  
13 way the Court treated it in McKesson. That's the way it  
14 treated it in Harper, and that's the way it is here, and  
15 that's consistent, as I suggested, with the Court's  
16 jurisprudence beginning with O'Connor, Carpenter v. Shaw,  
17 Ward v. Love, and those cases.

18 If there are no further questions --

19 QUESTION: I have just one question.

20 MR. HENSON: Yes, Your Honor.

21 QUESTION: Is your argument equally strong if  
22 the basis of invalidity is addressed entirely on the  
23 statute, rather than the Constitution?

24 MR. HENSON: I'm not --

25 QUESTION: Well, in Davis, the Court construed



1 section 111, and arguably it may or may not have decided a  
2 constitutional question. Does it make any difference to  
3 you?

4 MR. HENSON: I'm not sure that it does. I'm not  
5 aware of any authorities, and I don't think it does. If  
6 it's illegal under Federal law, it's illegal.

7 QUESTION: Very well, Mr. Henson.

8 Mr. Calvert, we'll hear from you.

9 ORAL ARGUMENT OF WARREN R. CALVERT

10 ON BEHALF OF THE RESPONDENT

11 MR. CALVERT: Mr. Chief Justice, and may it  
12 please the Court:

13 As recognized in Harper, a State which has  
14 provided predeprivation due process to a taxpayer is under  
15 no obligation to return amounts which the taxpayer chooses  
16 instead to pay, even if it is subsequently determined that  
17 the tax in question was unconstitutional.

18 Now, the petitioner in this case had available  
19 to him under Georgia law numerous predeprivation remedies  
20 by which he could have contested Georgia's income tax  
21 treatment of his Federal retirement benefits.

22 QUESTION: But subject to 12 percent a year and  
23 the 25 percent penalty, isn't that correct?

24 MR. CALVERT: Georgia does provide for  
25 12 percent annual interest in the event the taxpayer

1 loses, that's correct, Your Honor.

2 QUESTION: And a penalty up to 25 percent?

3 MR. CALVERT: There's the possibility of an  
4 assertion of a penalty.

5 QUESTION: But nobody can tell in advance  
6 whether it will be asserted or not, so I mean, it has to  
7 be considered. There's no way -- in other words, there's  
8 no way to guard against its imposition, I take it?

9 MR. CALVERT: The way one guards against its  
10 imposition, Your Honor, is to assert reasonable arguments  
11 only. The statute by its terms provides that the  
12 penalty --

13 QUESTION: On the theory that a State official  
14 will not act unreasonably to penalize a taxpayer?

15 MR. CALVERT: Well, the question, Your Honor, is  
16 whether the taxpayer's position was reasonable. The code  
17 section provides the penalty may not properly be imposed  
18 if the failure to pay was due to reasonable cause.

19 Now, of course, initially, the State Revenue  
20 Department, when it issues its assessment, makes its own  
21 evaluation of the reasonableness of a taxpayer's position,  
22 but ultimately that's a question for the courts to decide.

23 QUESTION: Has it been determined that a  
24 misperception of the law is ever reasonable cause?

25 I mean, if I read that phrase, I would think

1 reasonable cause means, you know, I had an emergency. I  
2 had to save my child's life, or something. You're saying  
3 it's reasonable cause if the taxpayer is wrong about the  
4 law? Reasonably wrong about it, but wrong about it.

5 MR. CALVERT: Yes, Your Honor.

6 QUESTION: That's Georgia law.

7 MR. CALVERT: I believe it is, Your Honor, and I  
8 say that -- there are no --

9 QUESTION: You believe it, or there are cases to  
10 that effect?

11 MR. CALVERT: There are no cases that have  
12 interpreted that section, Your Honor, and I submit the  
13 reason that's the case is because there simply have been  
14 no instances where the Revenue Department has tried to  
15 assert that penalty in situations where it was arguable  
16 that the taxpayer had a reasonable basis for his argument.

17 QUESTION: So where is it established that that  
18 determination one way or another by the Georgia  
19 Commissioner would be reviewable in court? You said it  
20 would be reviewable in court, the reasonableness of the  
21 taxpayer's erroneous action.

22 MR. CALVERT: Well, Your Honor, the particular  
23 penalty would have to be assessed by the Revenue  
24 Department, and the issuance of the assessment triggers  
25 the right to go into court. That's how you'd get a

1 judicial determination of that.

2 QUESTION: And one of the -- a reviewable item  
3 would be the Commissioner's discretion about whether this  
4 was a reasonable action on the taxpayer's part?

5 MR. CALVERT: Yes, Your Honor.

6 QUESTION: And you're saying there are cases  
7 which the taxpayer has lost on the merits before the  
8 Commissioner, but which -- in which he did not attempt to  
9 impose any penalty?

10 MR. CALVERT: I'm not aware of any instance,  
11 Your Honor, where the Revenue Department has, in fact,  
12 attempted to impose this penalty on someone who has  
13 contested their liability.

14 QUESTION: Is there also a potential criminal  
15 penalty in Georgia for nonpayment of taxes when due?

16 MR. CALVERT: There are two criminal statutes to  
17 which the petitioner in this case refers. One of the two  
18 statutes was held unconstitutional by the Georgia supreme  
19 court prior to the time when the return for the first tax  
20 period that's at issue in this case would have been due.

21 The second statute has a willfulness requirement  
22 in it, and it's -- we submit that a taxpayer who has  
23 pursued a reasonable argument pursuant to an accepted  
24 predeprivation procedure in Georgia has not acted wilfully  
25 within the meaning of those criminal statutes.



1 QUESTION: Again, there are no cases, I suppose.

2 MR. CALVERT: No, Your Honor. The particular --  
3 of the two criminal statutes in question, the one that is  
4 still valid in Georgia is patterned after a similar  
5 provision of the Internal Revenue Code.

6 QUESTION: Would a reasonable taxpayer in  
7 Georgia in the 1980's have assumed that a post deprivation  
8 remedy was available by way of refund for an  
9 unconstitutional tax?

10 MR. CALVERT: We cannot assert, Your Honor, that  
11 it would have been unreasonable to have read the refund  
12 statute in that way. We do assert, however, that in the  
13 absence of any prior construction of that statute by the  
14 Georgia supreme court, in the absence of any reported  
15 decisions that we're aware of where refunds of  
16 unconstitutional taxes have in fact been provided under  
17 that statute, that the taxpayers -- taxpayers assume the  
18 risk that the ultimate interpretation may turn out to be  
19 other than they believe, and we believe that -- we submit  
20 that's what happened in this case.

21 QUESTION: Was one of the bases for the supreme  
22 court of Georgia's opinion that an injunctive action could  
23 have been brought?

24 MR. CALVERT: It's last opinion in this case,  
25 Your Honor?

1 QUESTION: Yes.

2 MR. CALVERT: The Georgia supreme court  
3 concluded that one of the predeprivation remedies that  
4 could have been brought by these taxpayers was an action  
5 for declaratory or injunctive relief prior to the time  
6 when the taxes were due.

7 QUESTION: And the statute on page 20 of the  
8 blue brief, Georgia 48-7-84, on its face says no action  
9 for the purpose of restraining the assessment shall be  
10 maintained in any court.

11 It's hard for me to square that with our  
12 requirement that there be a clear avenue of predeprivation  
13 relief for the taxpayer.

14 MR. CALVERT: Your Honor, one thing we would  
15 like to note is, until the filing of the brief in this  
16 Court, the petitioner had never mentioned that particular  
17 code section, had never pointed it out to the parties or  
18 to the Georgia supreme court as representing a bar to that  
19 particular type of action.

20 QUESTION: Well, then, the Georgia supreme court  
21 might be wrong in saying there's an injunctive possibility  
22 here?

23 MR. CALVERT: Oh, no, Your Honor. I think it's  
24 correct. This --

25 QUESTION: Well, what about the statute?

1           MR. CALVERT: That particular code section,  
2       again, it's a statute that has never been applied or  
3       interpreted. However, we think, based on the Georgia  
4       supreme court's interpretation of 48-3-26, which provides  
5       generally that there can be no judicial interference with  
6       the collection or levy of taxes in general, that that --  
7       that 48-7-84 would be interpreted as no bar to an action  
8       for injunction where the tax was alleged to be  
9       unconstitutional.

10           QUESTION: Well, the question is whether or not  
11       this was clear to the taxpayer at the time, and the  
12       Georgia supreme court cites, as I recall, a sales tax  
13       case, Beam, and this is a statute that applies to income  
14       tax.

15           MR. CALVERT: Well, I believe, Your Honor, that  
16       the question in this case, we take -- we initially take --  
17       we dispute the taxpayer's statement of the standard of  
18       clarity that a predeprivation remedy has to provide before  
19       it can satisfy a State's due process obligations.

20           What the Court has indicated in McKesson and  
21       Harper is that a State must provide a fair opportunity to  
22       litigate your liabilities, and a clear and certain remedy  
23       in the event that you prevail.

24           In the McKesson case, for example, the State of  
25       Florida attempted to argue that McKesson could be put back

1 in a hypothetical position of parity vis-a-vis other  
2 distributors.

3 QUESTION: Well, injunctive action is a remedy,  
4 isn't it?

5 MR. CALVERT: We say it's a predeprivation  
6 procedure that the --

7 QUESTION: Are you saying that the injunctive  
8 action that the supreme court of Georgia suggests was  
9 available to the plaintiff was clear and certain before  
10 that opinion?

11 MR. CALVERT: I submit that it was, Your Honor,  
12 for several reasons.

13 The Georgia supreme court's decision regarding  
14 declaratory and injunctive relief was based on numerous  
15 prior Georgia decisions that had talked about the  
16 availability of that type of relief where you were talking  
17 about unconstitutional taxes.

18 There had also been other cases involving income  
19 taxes where those types of actions had been entertained by  
20 the Georgia courts notwithstanding 48-7-84 -- for example,  
21 the case of Parrish v. Employees' Retirement System, which  
22 was an action brought by State retirees immediately after  
23 the Davis case, when the Georgia supreme court, when the  
24 Georgia legislature had amended its statutes to provide  
25 for equal treatment of Federal and State retirement



1 benefits.

2 State retirees filed an action for declaratory  
3 and injunctive relief against Georgia, contesting the  
4 constitutionality of Georgia's new income tax statutes,  
5 and the Georgia courts entertained that case and decided  
6 it on its merits.

7 QUESTION: But didn't this petitioner try a  
8 declaratory judgment action, and wasn't he thrown out?

9 MR. CALVERT: In the Salter case, Your Honor,  
10 that was an action that was filed, eventually went to  
11 Fulton County Superior Court. That was an action that was  
12 filed subsequent to the Davis decision, and after this  
13 taxpayer had already paid the taxes that he now wants  
14 returned.

15 What happened in that case is, after the Georgia  
16 General Assembly amended the income tax statutes and  
17 provided for equal treatment for Federal, State, and  
18 private pensions, the trial court in that case dismissed  
19 the action. We submit it was moot.

20 QUESTION: You say there's no remedy if you  
21 overpay, is that --

22 MR. CALVERT: Well, Your Honor, the Georgia  
23 supreme court has found that the income tax refund statute  
24 does not apply to taxes paid under a statute later found  
25 unconstitutional. We submit that what -- that these

1 taxpayers should have pursued the predeprivation remedies  
2 which were available to them under Georgia law.

3 If it please the Court, I'd like to talk  
4 specifically about those aspects of the Georgia tax system  
5 which this petitioner contends subjected it to  
6 constitutionally significant duress.

7 Now, it's important to note that the petitioner  
8 is arguing only that he was subject to implied duress.  
9 It's undisputed that in this case he was never so much as  
10 threatened with a levy, attachment, any criminal  
11 prosecution, garnishment, or any other sanctions if he did  
12 not pay the taxes that he now seeks to have refunded.

13 QUESTION: But didn't the latest bill that he  
14 got include a penalty assessment? Didn't it have the  
15 interest and penalty on it?

16 MR. CALVERT: He received an assessment notice  
17 with respect to the 1988 taxes --

18 QUESTION: Right.

19 MR. CALVERT: -- which he showed as due on his  
20 return as filed, and which he did not pay. He got a  
21 computer-generated assessment notice which basically said,  
22 you've reported this as due on your return, therefore  
23 we're assessing it, and here's the interest and penalty.

24 QUESTION: So it's an automatic assessment of a  
25 penalty?

1 MR. CALVERT: The computer essentially spit it  
2 out that way. That's correct, Your Honor. But as far as  
3 the taxes that he wants returned in this case --

4 QUESTION: Well, does your computer follow  
5 Georgia law?

6 (Laughter.)

7 MR. CALVERT: It's -- certainly we hope so, Your  
8 Honor, and the point the court is making is this. The  
9 computer, if you will, made the initial determination that  
10 if one has reported a liability as due on your return, and  
11 you do not pay it, that that penalty is appropriate.

12 If the taxpayer in this case had filed his  
13 return, and removed from the tax base the Federal  
14 retirement benefits, the Revenue Department would have  
15 been obligated to issue an assessment to him which would  
16 have triggered the right to go into court.

17 QUESTION: Well, would that have subjected him  
18 to criminal penalties, if he omits it from the return?

19 MR. CALVERT: Your Honor, if a taxpayer has made  
20 full disclosure on his return that he's taking an item out  
21 based on a constitutional objection, I don't see how he  
22 can be subject to criminal prosecution.

23 QUESTION: Well, isn't that exactly what -- I  
24 thought that's exactly what he did here. He said it's  
25 owing under the Georgia statute, but the Georgia statute

1 is unconstitutional. Isn't -- that's just the substance  
2 of what you've just described, isn't it?

3 MR. CALVERT: But he -- but he's not been  
4 criminally prosecuted, Your Honor. Now, he's asserted in  
5 this case --

6 QUESTION: But I thought you were suggesting  
7 that he should have done something other than he did in  
8 his return.

9 MR. CALVERT: Oh, no. No, Your Honor. I'm  
10 saying that if -- clearly when one reports -- reflects on  
11 your return the constitutional objection that you're  
12 making, that -- I submit that whether that objection is  
13 reasonable or unreasonable, that you have not acted  
14 wilfully within the meaning of the criminal statutes.  
15 That's what I --

16 QUESTION: Are you serious about that?  
17 Supposing -- you know, there are a lot of tax protesters  
18 out there who think all income taxes are unconstitutional,  
19 and they would never be subject to this penalty, you say,  
20 if they put an appropriate recital in about how bad taxes  
21 are, and so forth.

22 MR. CALVERT: Your Honor, this Court dealt with  
23 that question in Cheek v. United States, and my reading of  
24 Cheek is that the taxpayer in that case, because of his  
25 constitutional objections, which were constitutional



1 objections that had been repeatedly rejected by the  
2 courts, simply withdrew himself from the tax system.

3 He filed excess withholding allowances so that  
4 he had no withholding on his wages, and he simply didn't  
5 file returns, and the Court found in that case that it was  
6 inappropriate to have a jury instruction that a sincerely  
7 held constitutional believe that wages were not income  
8 could subject him from criminal penalties under the  
9 Internal Revenue Code under those circumstances.

10 But at the same time, the Court's opinion  
11 suggested that if he had filed his return, made full  
12 disclosure on his return, and utilized the predeprivation  
13 procedures before the United States Tax Court, that that  
14 would have been a much different story.

15 And that's what we're suggesting here, that this  
16 taxpayer had predeprivation remedies available. If he  
17 makes full disclosure on his return and pursues one of  
18 those procedures, he's not -- he's not properly subject to  
19 prosecution in Georgia.

20 QUESTION: Mr. Calvert, can I ask you about the  
21 refund statute which you say he should have known, or at  
22 least shouldn't have been sure provided for refund? It's  
23 Appendix G to the petition for certiorari.

24 MR. CALVERT: Yes, Your Honor.

25 QUESTION: It says, "A taxpayer shall be

1     refunded any and all taxes or fees which are determined to  
2     have been erroneously or illegally assessed and collected  
3     from him under the laws of this State, whether paid  
4     voluntarily or involuntarily."

5             These taxpayers thought that that would enable  
6     them to obtain a refund of taxes that were determined to  
7     have been illegally assessed and collected under the laws  
8     of Georgia.

9             Two Federal courts had held that that's what the  
10    statute meant, and that therefore the Federal Tax  
11    Injunction Act applied, since there was an adequate State  
12    remedy under this provision and -- among others, and yet  
13    you tell me that it was reasonable to expect him to know  
14    that this would not apply to that one category of illegal  
15    taxes that consist of taxes unconstitutional under the  
16    Federal Constitution.

17            I mean, if the Georgia supreme court wants to  
18    make that up and read the statute that way, that's fine,  
19    that's State law. But you tell me that a lawyer reading  
20    that should have known that he couldn't get a refund?

21            MR. CALVERT: Well, Your Honor, there -- I  
22    submit that there -- every day lawyers make their best  
23    decisions concerning the interpretation of procedures and  
24    the substantive law, and many times they turn out to be  
25    wrong.

1           QUESTION: Illegally assessed and collected from  
2 him under the laws of this State, whether paid voluntarily  
3 or involuntary.

4           MR. CALVERT: Your Honor, I believe -- I believe  
5 what the Georgia supreme court -- the way the court  
6 arrived at its construction is this. There had been no  
7 prior Georgia cases interpreting the refund statute.

8           QUESTION: And there was a lot of money owing.

9           MR. CALVERT: Well, certainly, Your Honor.

10          (Laughter.)

11          MR. CALVERT: But there were no reported  
12 instances in which taxes of unconstitutional --  
13 unconstitutional taxes had in fact been repaid under that  
14 statute. At the same time --

15          QUESTION: And the word illegally does not cover  
16 unconstitutionally.

17          MR. CALVERT: Well, at the same time, Your  
18 Honor, there were --

19          QUESTION: You should get less of a remedy for  
20 an unconstitutionally assessed tax.

21          MR. CALVERT: Well, Your Honor, at the same  
22 time, there were many decisions, prior decisions of the  
23 Georgia appellate courts which had recognized that a  
24 refund statute is in the nature of an action for money had  
25 and received, and that the plaintiff coming in under a

1 refund statute bore the burden of showing that the  
2 defendant held money which he was not in equity and good  
3 conscience entitled to hold.

4 There were also -- and we've cited these cases  
5 in our brief in opposition to cert in this case. There  
6 are also many cases where the Georgia courts have found  
7 that where statutes were invalidated, retroactive relief  
8 need not necessarily be provided if, because of the  
9 reliance interests of the parties and other similar  
10 considerations, unjust results would follow.

11 QUESTION: We took care of that in our Federal  
12 constitutional decisions, I had thought.

13 MR. CALVERT: Well, I submit, Your Honor, that  
14 what the Georgia supreme court was doing in its  
15 interpretation of the refund statute was drawing upon  
16 these prior principles of Georgia law and extending them  
17 in construing the statute.

18 QUESTION: It seems to me that if this is not a  
19 snare and a delusion to any taxpayer who had a valid  
20 claim, I don't know what would be. This in effect  
21 announces, don't worry, you don't have to protest in  
22 advance, we have a refund statute that says you can be  
23 refunded all taxes that are illegally assessed and  
24 collected. I could not imagine a more deceptively phrased  
25 statute if one had set out to do it.



1 MR. CALVERT: Well, Your Honor, I believe the  
2 Court's concern, though, has already been addressed and  
3 disposed of in the Brinkerhoff case. That case  
4 recognizes, and other cases recognize generally, that --  
5 that a court's construction of its own laws, even if it's  
6 an unexpected construction, does not necessarily give rise  
7 to a due process problem.

8 In that particular case, in Brinkerhoff, the  
9 Court found that there was a due process problem. The  
10 taxpayer in Brinkerhoff had pursued the only tax procedure  
11 which was then available to him under settled Missouri  
12 law. He -- the trial court found against him. He took it  
13 on appeal to the Missouri supreme court.

14 The Missouri supreme court reversed its prior  
15 decisions and announced -- and found a newly announced but  
16 time-barred procedure which it said the taxpayer should  
17 have used, and this Court said that under those  
18 circumstances, the taxpayer was effectively left without  
19 any remedy at law. He didn't have -- the court had found  
20 that the one he chose was not available, and by the time  
21 they found that out, the one they said he could have used  
22 was not available.

23 But the Court said that absent -- in the absence  
24 of a prior construction of the statute by the State's  
25 highest court, the plaintiff would have to assume the risk

1 that the ultimate interpretation of the statute might  
2 differ from his own.

3 QUESTION: Any risk at all. A statute can mean  
4 anything in the world, and there's no due process claim.  
5 A statute says black, and the supreme court of a State  
6 interprets it as white, and that's no due process problem.  
7 It reads out the word, not. It reads it as saying yes,  
8 when it reads no. No due process problem at all.

9 MR. CALVERT: Your Honor, I don't believe that  
10 the Georgia supreme court's reading of the refund statute  
11 is that extreme.

12 QUESTION: I think it is, and is the argument  
13 that you're making that no matter how contrary to the  
14 words of a statute a supreme court's interpretation is,  
15 there is no due process problem so long as it's the first  
16 time the court has ever interpreted it?

17 MR. CALVERT: Your Honor, I believe -- I believe  
18 that is the -- that is the holding of the Court in the  
19 Brinkerhoff case.

20 QUESTION: All right.

21 MR. CALVERT: Again, I submit that that's not --  
22 that does not comport with the facts in this case, but I  
23 believe Brinkerhoff settles that if a -- that State courts  
24 interpret their State procedures and their substantive  
25 law, and except in extraordinary circumstances which we

1 believe are not present in this case --

2 QUESTION: So the answer's no. You say there  
3 are circumstances where that will not comport with due  
4 process.

5 MR. CALVERT: I'm no sure which question --

6 QUESTION: I asked whether it is always the case  
7 that so long as it's the first time a supreme court of a  
8 State is interpreting a statute, it can interpret it to  
9 mean whatever it wants so long as it's the first time it's  
10 ever interpreted it. Is that your position?

11 MR. CALVERT: I believe that's what Brinkerhoff  
12 stands for.

13 QUESTION: All right, but now, most recently  
14 you've said, except in extraordinary circumstances.

15 MR. CALVERT: Well, what I -- what I intended to  
16 say, Your Honor, is that the Court in Brinkerhoff  
17 indicated that except in extraordinary circumstances an  
18 interpretation by a State court of particular procedures  
19 available to taxpayers is not going to give rise to due  
20 process problems.

21 QUESTION: Maybe what it meant by extraordinary  
22 circumstances was an interpretation that is so flatly  
23 contrary to the language of the statute. I consider that  
24 a pretty extraordinary circumstance to read this language  
25 to mean that you can't get a refund.

1 MR. CALVERT: Well, I think there is also one  
2 other factor, Your Honor, in Brinkerhoff, which I believe  
3 compelled the result in that case, and that is, by virtue  
4 of the timing of the Missouri supreme court decisions,  
5 this taxpayer was effectively left with never having had  
6 an opportunity to contest his liability, and in this  
7 particular case there were predeprivation procedures  
8 available to the petitioner which he chose not to use.

9 QUESTION: He chose not to use them because this  
10 statute announced to them that he didn't have to use them,  
11 that he could always get a refund later.

12 MR. CALVERT: Well, that was his reading of the  
13 refund statute --

14 QUESTION: Ah -- and he shouldn't have read it  
15 the way it was written.

16 MR. CALVERT: And Brinkerhoff --

17 (Laughter.)

18 MR. CALVERT: And Your Honor, and Brinkerhoff  
19 stands for the proposition that in the absence of a prior  
20 controlling decision by that statute, that's the risk that  
21 all litigants run.

22 QUESTION: Isn't there -- aren't there two prior  
23 controlling decisions? As I read the brief, there was a  
24 case called Wright, and a case called Henderson.

25 I looked at those Georgia cases, and it seemed

1 as -- my first reaction was both of those cases held that  
2 the reason a person couldn't enjoin an unconstitutional  
3 tax in Georgia is because there's a perfectly good remedy  
4 for him to get a refund later.

5 And just to be sort of absolutely definite about  
6 it, one of them quoted the Governor, who sent a message  
7 when he passed this refund statute, and the Governor said,  
8 I'm sending you over this statute to pass because certain  
9 taxes have been paid into the State Treasury under laws  
10 that have been declared unconstitutional, and so I'm  
11 passing this statute so that you'll have a remedy.

12 So it wasn't as if they came into court with an  
13 open question. I mean, don't we have here this extreme  
14 case? If we do have the extreme case, what do we do next?

15 That is, suppose that we decided this -- so I  
16 really have two questions. Do you want to deal with the  
17 first and then ask the second?

18 MR. CALVERT: Yes, Your Honor. I believe that  
19 the first question concerned the Henderson and the Wright  
20 v. Forrester cases, and also the legislative history, or  
21 the statement of the Governors that is quoted in the  
22 Wright case.

23 What is clear, Your Honor, is that  
24 notwithstanding what the Governor had hoped to achieve by  
25 way of enacting the refund statute, the language that



1 was -- what the General Assembly did in enacting the  
2 refund statute did not have fully that effect.

3 He had certain specific taxes in mind, and in a  
4 subsequent case -- I believe it was Eibel v. Forrester --  
5 the Georgia supreme court said that the legislature had  
6 not made the statute retroactive to the tax periods in  
7 question, so the particular taxpayers he had hoped to  
8 benefit were not benefited.

9 We submit that there's nothing, other than the  
10 mere statement from the Governor that's cited in that  
11 case, to suggest that the language that the General  
12 Assembly actually used was intended to have scope broad  
13 enough to encompass unconstitutional taxes.

14 The Court's second question --

15 QUESTION: I haven't asked.

16 MR. CALVERT: If you could repeat it, please.

17 QUESTION: Well, suppose that we think they've  
18 been getting what you might call colloquially the run-  
19 around. I gather that if the State has money that belongs  
20 to them under the substantive constitutional law, they  
21 would like to get it back.

22 Assuming that's so, they say here they've tried  
23 this route. The refund statute suddenly is interpreted  
24 against them. All right, suppose you lose on that. From  
25 your brief, it appears you're going to assert sovereign

1 immunity next. I don't quite know how you do that, since  
2 it's a State court, not a federal court. The Eleventh  
3 Amendment doesn't apply. And then I take it you have  
4 several other things that you're not telling us about,  
5 but -- or you might.

6 What should we do as a remedy if we think what  
7 the State is done is awfully unfair, unfair to the point  
8 where it falls within McKesson? What should this Court  
9 do? Should this Court say, for example, just pay them,  
10 enough is enough? Do we have authority to do that?

11 What do we do about other people? I mean, since  
12 you have no refund statute which happened to limit refunds  
13 to 3 years, is there now no limitation? And since you've  
14 interpreted that away, anyone who ever has paid this tax  
15 can bring a lawsuit? What are we supposed to do next, in  
16 your view, assuming you lose on the merits? I'm not  
17 saying you will, but I'm just saying, assuming that.

18 MR. CALVERT: I think, Your Honor, the argument  
19 that the tax -- that the petitioner in this case has made  
20 is that if we lose on the adequacy of our predeprivation  
21 procedures, that we are obligated to refund these amounts,  
22 and that all other taxpayers, regardless of any statute of  
23 limitations, are open.

24 Now, the Georgia -- the basic Georgia tax scheme  
25 was in effect since the 1940's. Assumedly under that

1 argument someone would try to assert refunds back to the  
2 1940's, assuming they're still here to make those claims.

3 QUESTION: I thought it was conceded in this  
4 case that you could go back only to 1985.

5 MR. CALVERT: It is in this case, Your Honor,  
6 but there are other cases pending in Georgia where that  
7 limitation is not being applied, where the petitioners are  
8 seeking to collect taxes back beyond 3 years.

9 But I think the question, Your Honor, concerning  
10 sovereign immunity, we've asserted that even if -- even if  
11 Georgia's predeprivation remedies are found to be  
12 constitutionally insufficient, that that raises the  
13 question regarding whether a State can be sued in its own  
14 courts for monetary -- retroactive monetary relief  
15 notwithstanding sovereign immunity, and I submit that  
16 that's a question that is very much left open by the  
17 McKesson case.

18 In McKesson, the taxpayer had filed an action  
19 under Florida's repayment of funds statute, and the Court  
20 was careful to note in its opinion that, under the  
21 particular facts of that case, there was a Federal due  
22 process obligation for the payment of relief, or backward-  
23 looking relief pursuant to that particular State's post  
24 deprivation procedure. So the Court was very careful to  
25 note that there was the waiver of sovereign immunity.

1           The Court has indicated in numerous cases that  
2       absent a waiver of its sovereign immunity the States  
3       generally can't be sued in any court by any person on any  
4       cause of action, and we submit that that --

5           QUESTION: What would be left of the essential  
6       holding of McKesson, then, that the State must provide an  
7       adequate remedy, if we can say, well, we'll elect to rely  
8       on our sovereign immunity? Wouldn't the whole point of  
9       the whole doctrine be gone?

10          MR. CALVERT: Well, I think, Your Honor, that  
11       what -- if I understand the question, or what the concern  
12       is, is that you could have a constitutional violation with  
13       no effective remedy.

14          We submit that the various immunities and  
15       similar doctrines that have been recognized by this Court  
16       generally demonstrate that there can be many circumstances  
17       where, because of qualified immunity, or absolute  
18       immunity, or the bar of the Eleventh Amendment, that  
19       retroactive monetary relief may be unavailable, and we  
20       submit that this is just such a situation.

21          QUESTION: Are you suggesting that in a whole  
22       line of cases, including the Brandeis decision in Iowa-  
23       Des Moines National Bank v. Bennett, that there was an  
24       initial step that was just skipped over? Didn't Brandeis  
25       say in that case taxpayer complaints about unequal

1 treatment, the State can remedy it in one of two ways,  
2 either give him a refund or tax his neighbor, but the  
3 State's got to do one or the other?

4 Or not because he was -- did he just overlook  
5 the threshold question of sovereign immunity?

6 MR. CALVERT: As far as I can tell from the  
7 reading of those cases, Your Honor, sovereign immunity did  
8 not come up as a direct issue, and again, I believe that  
9 the Court has indicated in the McKesson case, in my  
10 reading of the oral arguments in that case, a concern that  
11 sovereign immunity is very much an issue in the context of  
12 a situation like this.

13 Thank you.

14 QUESTION: Thank you, Mr. Calvert.

15 Mr. Henson, you have 12 minutes remaining.

16 REBUTTAL ARGUMENT OF CARLTON M. HENSON

17 ON BEHALF OF THE PETITIONER

18 MR. HENSON: Thank you, Your Honor.

19 QUESTION: Mr. Henson, would you address the  
20 question of how far back a taxpayer could go?

21 MR. HENSON: Yes, Your Honor. The limitation  
22 period that's applicable to taxpayers, for taxpayers  
23 besides the particular petitioner, is unresolved.

24 In briefs both parties have argued at different  
25 points in time in this case that the money had and



1 received statute would be the most analogous limitation  
2 period, which would be 4 years, and would either --  
3 depending on when you started it would either be tax years  
4 '85 through '89, or tax years '84 through '89, and there  
5 is an issue with regard to tolling, because some 40,00  
6 retirees relied on Georgia's refund statute, which makes  
7 you wait a year before you file suit.

8 So, for example, this suit did not arise until  
9 April of 1990, rather than in the weeks right after Davis  
10 was decided, so that -- you know, in this case the State  
11 has not disputed, as far as I read their briefs, that the  
12 tax years '85 through '89 are properly before the Court.

13 I'd like to address briefly Justice Breyer's  
14 question, and that is the issue of remand. The Court did  
15 remand in McKesson, and the Court remanded in Harper, and  
16 the State's response in both of those cases has been to  
17 continue to deny relief to the taxpayers. In the  
18 record -- there's no evidence in this record that Georgia  
19 will do any better if those questions are left open.

20 Iowa Bank and the Montana National Bank cases  
21 are both instances where the Court said, refunds are  
22 appropriate. The States have had a chance to look at it.  
23 The State didn't do -- didn't choose an appropriate  
24 remedy. The Georgia legislature has met in special  
25 session to address Davis. It provide only prospective

1 relief. The Georgia supreme court has had this case twice  
2 since Davis was decided and McKesson was decided, and  
3 still has denied relief.

4 In short, in response to Justice Breyer's  
5 question, enough is enough. These people are entitled to  
6 refunds.

7 Thank you.

8 QUESTION: Do you think the State really has  
9 waived it's sovereign immunity? A State can consent to be  
10 sued. It went right to the question, engaged the due  
11 process question.

12 MR. HENSON: Your Honor, I don't think the State  
13 can come in at this date and talk about sovereign  
14 immunity. As I responded to the Chief's question earlier,  
15 I believe this Court's Fourteenth Amendment's  
16 jurisprudence covers that, but also, in Georgia, Georgia  
17 allows under -- as a matter of State law, allows takings  
18 claims brought directly against the State, and there's no  
19 State sovereign immunity, and if they were going to say,  
20 well -- I mean, it's the same thing all over again.

21 They want to say, well, you can have a direct  
22 takings claim against the State of Georgia based on State  
23 law and based on the State constitution, and we won't  
24 assert sovereign immunity, but if you want to assert it  
25 based on the Federal Constitution, we're going to raise

1 State sovereign immunity, and the authorities for that are  
2 CFI Construction v. Board of Regents, it's 145 Georgia  
3 Appeals 471, a 1978 case, and State Board of Education v.  
4 Drewery, D-r-e-w-e-r-y, 263 Georgia 429.

5 They just want to change the rules over and over  
6 again. It's time to stop. These people are entitled to a  
7 refund.

8 QUESTION: Mr. Henson, these people are all  
9 retirees, I suppose.

10 MR. HENSON: And perhaps --

11 QUESTION: As this drags on, many of them are  
12 never going to see what they're entitled to, I suppose.

13 MR. HENSON: Many of them already won't, Your  
14 Honor. I estimate that at least 15 or 20 percent have  
15 already died since Davis.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Henson.  
18 The case is submitted.

19 (Whereupon, at 1:52 p.m., the case in the above-  
20 entitled matter was submitted.)

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## CERTIFICATION

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

CHARLES J. REICH, Petitioner, v. MARCUS E. COLLINS, REVENUE COMMISSIONER OF GEORGIA, ET AL.

CASE NO.: No. 93-908

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Don Mari Federico

(REPORTER)