

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: JANET RENO, ATTORNEY GENERAL, ET AL.

Petitioners v. CHARLIE CONDON, ATTORNEY

GENERAL OF SOUTH CAROLINA, ET AL.

CASE NO: 98-1464 C-1

PLACE: Washington, D.C.

DATE: Wednesday, November 10, 1999

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Supreme Court U.S.

1                   IN THE SUPREME COURT OF THE UNITED STATES

2                   -X

3   JANET RENO, ATTORNEY GENERAL, :  
4   ET AL.,                         :  
5                   Petitioners      :  
6                   v.                 : No. 98-1464  
7   CHARLIE CONDON, ATTORNEY     :  
8   GENERAL OF SOUTH CAROLINA,    :  
9   ET AL.                         :  
10                  -X

11                  Washington, D.C.

12                  Wednesday, November 10, 1999

13                  The above-entitled matter came on for oral  
14                  argument before the Supreme Court of the United States at  
15                  10:02 a.m.

16                  APPEARANCES:

17                  SETH P. WAXMAN, ESQ., Solicitor General, Department of  
18                  Justice, Washington, D.C.; on behalf of the  
19                  Petitioners.

20                  CHARLES CONDON, ESQ., Attorney General, Columbia, South  
21                  Carolina; on behalf of the Respondent.

22

23

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P R O C E E D I N G S

2

(10:02 a.m.)

3

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in Number 98-1464, Janet Reno v. Charlie Condon,  
Attorney General of South Carolina.

6

General Waxman.

7

ORAL ARGUMENT OF SETH P. WAXMAN

8

ON BEHALF OF THE PETITIONERS

9

GENERAL WAXMAN: Mr. Chief Justice, and may it  
please the Court:

11

We live in an age in which data bases of  
personal information are widely used in the national  
economy. They are bought and sold, and they're critical  
to national marketing, yet their dissemination threatens  
personal privacy and sometimes safety.

16

The Driver's Privacy Protection Act is one of a  
series of laws in which Congress has balanced the benefits  
to commerce of disseminating personal information against  
the costs of that dissemination to personal security.

20

Beginning with the Privacy Act and the Fair Credit  
Reporting Act in the early 1970's, up until the Financial  
Services Act that was enacted just last week, Congress has  
acted on a sector by sector basis as new uses of personal  
data and new threats emerge.

25

In this case, Congress heard testimony that,

1 while motor vehicle data bases are of particular value in  
2 commerce, their dissemination poses unique risk to  
3 personal safety and privacy.

4                 Once disseminated, motor vehicle data bases are  
5 things in commerce, just as surely as are data bases that  
6 belong to financial institutions, cable operators, health  
7 care providers, and Congress may therefore regulate a  
8 State's discharge of data into the national economy just  
9 as it restricts a State discharge of pollutants or other  
10 State activities that have a substantial effect on  
11 interstate commerce, like operating airports, or issuing  
12 municipal bonds.

13                 QUESTION: As I understand it, General Waxman,  
14 the Government says it's the Commerce Clause authority  
15 here, not anything to do with the Fourteenth Amendment.

16                 GENERAL WAXMAN: That is correct. We have not  
17 sought this Court's review on the Fourteenth Amendment  
18 question.

19                 QUESTION: And what are the other examples of  
20 Congress' choice to regulate States alone, exclusively  
21 under the Commerce Clause power, rather than general  
22 legislation?

23                 GENERAL WAXMAN: I think Justice O'Connor, that  
24 there are few examples of Congress' attempt to regulate  
25 States alone directly, as actors as opposed to the

1 traditional preemption doctrine, because ordinarily what  
2 States do in interstate commerce is similar to what other  
3 people do, and in this case I think it's very important to  
4 recognize that this act, the Driver's Privacy Protection  
5 Act, is one of a series of laws that stretches from the  
6 1970's until last week, in which of necessity Congress has  
7 been dealing with this kind of evolving information age on  
8 a sector-by-sector basis.

9                   QUESTION: Well, that could be the case, but I  
10 still have my question, if there are other examples --

11                   GENERAL WAXMAN: Well --

12                   QUESTION: -- of Congress' choice under the  
13 Commerce Clause power to regulate exclusively the States.

14                   GENERAL WAXMAN: Well, I think the best example  
15 that I've come up with, and it's in our brief, is, for  
16 example, the regulation of the operation of commercial  
17 airports. All commercial airports are -- I believe they  
18 are all operated by State or municipal entities, and yet  
19 Congress has the authority and has given the FAA the  
20 authority to say --

21                   QUESTION: Are you sure of that, as factual  
22 predicate for that statement? I think there are a lot of  
23 private airports that are operated by private parties.

24                   GENERAL WAXMAN: No, I think commercial air --  
25 this was actually a subject of debate in the oral argument

1       in Travis, in the Seventh Circuit, and I believe we went  
2       back and checked.

3                  There are lots of private airports, but  
4       commercial airports that take commercial airliners are  
5       something that are specially regulated by Congress and the  
6       FAA. They're operated only by State and municipal  
7       entities, and Congress can say, you can't have a runway  
8       shorter than 7,000 feet. Similar --

9                  QUESTION: But Justice O'Connor's question  
10       points up a reaction I had in reading your brief. I  
11       thought, well, I'm going to find some cases that will show  
12       that the Federal Government can do this occasionally. I  
13       can't find them.

14                  And on page 35 you say, Congress may directly  
15       regulate stated activity affecting Congress, no cite, and  
16       I think the reason is, for 150 years or so the assumption  
17       has been that Congress cannot regulate States. It  
18       regulates persons.

19                  GENERAL WAXMAN: I --

20                  QUESTION: Under its preemption power,  
21       sometimes.

22                  GENERAL WAXMAN: Well, I think with respect --  
23       preemption, of course, we're not arguing that this is a  
24       preemption case. In our view, this is a case that is  
25       stronger for the Government than preemption, but the

1 principle that when States act in interstate commerce,  
2 when they attempt to regulate an instrumentality or a  
3 thing in commerce, or they engage in an activity that  
4 substantially affects interstate commerce, Congress has  
5 the authority to direct or limit their activities just as  
6 it does with respect to anyone else.

7                 If one or more States in this -- with the  
8 example of this statute decided to contract out their  
9 motor vehicle data base function to EDS or some other  
10 information services company, it can't make a  
11 constitutional difference if one commercial airport  
12 decide -- you know, becomes privately operated, and in  
13 this case, the act --

14                 QUESTION: Mr. Waxman, this case differs, it  
15 seems to me from the airport cases you're talking about  
16 and from the pollution emission example you alluded to  
17 earlier, in that the collection and retention of data  
18 regarding automobile licensing is distinctively a  
19 governmental function. You're talking about distinctively  
20 governmental records.

21                 It's not something that -- you know, any  
22 commercial actor can pollute. Any person could, although  
23 it may not be that they have, run an airport, but only  
24 States collect information, which is why the legislation  
25 in question applies only to States, because it's --

1                   GENERAL WAXMAN: Well --

2                   QUESTION: It's a purely governmental -- now,  
3 maybe this is a Garcia-type concern I'm raising, but I  
4 think that is really what is --

5                   GENERAL WAXMAN: I --

6                   QUESTION: -- troubling me about the case.

7                   GENERAL WAXMAN: I think it is, but let me  
8 address your concern, Justice Scalia, as best I can.

9                   First of all, the act applies not only to  
10 States, but also to contractors and people who receive the  
11 information from the State. It acts on the data base.

12                  And the critical point I want to make in  
13 response to your question is, the -- although I think  
14 Congress could take over licensing and motor vehicle  
15 permit issuances, Congress has not attempted to interfere  
16 in any way with the State's ability to issue licenses,  
17 issue motor vehicle registrations, to regulate how those  
18 laws are administered or enforced. It -- this act takes  
19 effect only when data is released into the national  
20 economy.

21                  QUESTION: But we answered that argument in the  
22 Printz case. In the Printz case, you made the same  
23 argument. You said, really, this is good to the States.  
24 This is allowing the States to regulate. It's much better  
25 than if the Federal Government just took over driver's

1 licensing, or took over weapons regulations.

2                 But in Printz we said, the point is, we want to  
3 make clear who is regulating, is it the Federal  
4 Government, or is it the States, and this blurs the line,  
5 and this you may not do.

6                 GENERAL WAXMAN: With all respect, Justice  
7 Kennedy, I don't -- I think this is Baker and Fry and not  
8 Printz, because the Federal legislation is not using State  
9 employees or State governments to regulate third parties,  
10 or to act on its behalf.

11                 In Printz, as this Court explained, as in New  
12 York -- and I think this is very -- it's certainly  
13 important to our case. What this Court said is, you  
14 cannot -- the Congress can't use its sovereignty to govern  
15 private conduct through another sovereign. It can't  
16 require States to legislate a solution to a problem that  
17 Congress has --

18                 QUESTION: But here -- here, the act certainly  
19 does in effect impose duties on people in the Motor  
20 Vehicle Division, where you get a request for information.  
21 I mean, it's not a categorical prohibition. The people in  
22 the Motor Vehicle Division have to be very familiar with  
23 this Federal statute to know whether to issue the thing or  
24 whether to deny it.

25                 GENERAL WAXMAN: Well, Chief Justice Rehnquist,

1       that is certainly true. It is just as true as it was in  
2       Fry with respect to wage controls, in Baker with respect  
3       to the issuance of bonds, in Garcia with respect to wage  
4       rates and employment laws, and in -- with respect to the  
5       pollution laws.

6                  There are a lot of things that Congress requires  
7       the States to do or prohibits them from doing with respect  
8       to interstate commerce that requires that they do things.  
9       In Baker, this Court said that a State wishing to engage  
10      in certain activity must take administrative and sometimes  
11      legislative action to comply with Federal standards  
12      regulating that activity is a commonplace that presents no  
13      constitutional defect.

14                 QUESTION: General Waxman, your -- the  
15      connection with commerce that you rely on here is, as you  
16      stated at the outset, simply the fact that information,  
17      these lists, once they are released, are an article of  
18      commerce, and I suppose that would apply to any  
19      information possessed by a State, so the Government could  
20      also -- the Federal Government could also regulate the  
21      State's use of its tax information and any other State  
22      records, I assume.

23                 GENERAL WAXMAN: Well, Justice Scalia, I think  
24      first of all there would have to be a showing with respect  
25      to the particular type of information that was being

1       regulated, that it did -- that its dissemination did, in  
2       fact, have what this Court has reiterated to be a  
3       substantial effect in interstate commerce, a point that's  
4       not contested here.

5                 And I think -- and I would concede to you that  
6       we would have a different case if the Federal Government  
7       were trying to do something that the principle articulated  
8       in Coyle, and recognized in Garcia and Baker, were to  
9       apply.

10               If the Federal Government prohibited the State  
11      from issuing to the public information about how it  
12      operates, if it interfered with the State's ability to  
13      structure its fundamental mechanisms of self-government,  
14      but this --

15               QUESTION: Well, suppose the Federal Government  
16      has a change of heart, and it -- which it does. I mean,  
17      10, 20 years from now, they say the problem is not  
18      excessive dissemination of information, the problem is,  
19      not enough dissemination of information, and we think all  
20      the States should have a Freedom of Information Act, just  
21      like the Federal Government.

22               GENERAL WAXMAN: Well, again --

23               QUESTION: Could it pass such a law, that any  
24      information in the States' records have to be released?

25               GENERAL WAXMAN: I don't -- I think that would

1       be very -- I mean, if it were truly anything, it would be  
2       very problematic, and it might not be defensible under  
3       Coyle.

4                   QUESTION: Wouldn't a closer case --

5                   GENERAL WAXMAN: It would also require, I think,  
6       either express findings, or it to be obvious to this  
7       Court's, quote, naked eye that that law had, or the  
8       release of that information had a substantial effect on  
9       interstate commerce, but here, it's conceded, there's no  
10      question that it does, and not only are these data  
11      bases --

12                  QUESTION: That's the only obstacle, effect on  
13      commerce. If there is a --

14                  GENERAL WAXMAN: No.

15                  QUESTION: -- substantial effect on commerce, to  
16      the extent there is, the Federal Government could require  
17      all of the States to make available whatever is in their  
18      files to the public?

19                  GENERAL WAXMAN: Justice Scalia, as we  
20      understand this Court's jurisprudence, the Tenth Amendment  
21      has three, if you will, independent heads of authority.  
22      The first is the principle expressed in Coyle and  
23      reiterated in Garcia and Baker that I just talked about.

24                  There is an area of the State's ability to  
25      structure its mechanisms of self-government that the

1       Federal Government simply is powerless to affect. That's  
2       number 1. You can't tell them they can't move their State  
3       capital, or they can't have a police force, or they have  
4       to have a commission that has 11 and not 12 people on it,  
5       or maybe even that they have to reveal information that it  
6       is essential to the State's function not to reveal.  
7       That's head number 1.

8                  Head number 2 is the principle that the Court  
9       articulated in -- well, in Garcia, in which the protection  
10      of the States is largely left to the national legislative  
11      process, but there may be procedural defects in which one  
12      or a few States are subject to an undue burden or  
13      discrimination by reason of some defect in the legislative  
14      process.

15                 And the third, of course, is reflected in the  
16      anticommandeering principle that this Court has  
17      articulated in the legislative context in New York, and in  
18      the executive context in Printz, and if any one of  
19      those --

20                 QUESTION: There was no doubt there that  
21      commerce was affected, I take it, so that it was not a  
22      question of Congress' commerce power, but a question of  
23      other limitations on that power.

24                 GENERAL WAXMAN: That's right, Chief Justice,  
25      and I think with respect to those three heads of authority

1       they all -- they wouldn't even come into play unless the  
2       Court were to find, or Congress were to find that it were  
3       acting under one of its enumerated powers.

4               I mean, if it's not acting under an enumerated  
5       power, the Tenth Circuit prohibits it by its very terms,  
6       because that power is reserved.

7               These three independent constraints that the  
8       Court has articulated over the years apply even if there  
9       is a finding that the Congress is exercising a legitimate  
10      authority in interstate commerce.

11              In this case, for example, Mr. Chief Justice, if  
12      this data base were being in fact a data base from a  
13      financial institution, or a health care provider, or a  
14      video store, all of which Congress has separately  
15      regulated, there would be no question that Congress would  
16      have authority to regulate or limit the dissemination so  
17      long as there was some substantial effect on interstate  
18      commerce.

19              So we get to the Tenth Amendment question in  
20      this case, because Congress is concededly operating to  
21      regulate something, an article in interstate commerce, and  
22      the question is whether this law, unlike the law in Printz  
23      or in Coyle, violates some independent prohibition of the  
24      Tenth Amendment, and Justice Kennedy --

25              QUESTION: Well, isn't it one of the fundamental

1 mechanisms of State government that State employees and  
2 State officers are accountable to their voters, to their  
3 citizens for what they do, and this completely blurs that  
4 line?

5 GENERAL WAXMAN: Well, I think I would --

6 QUESTION: In fact, suppose you have a State  
7 which is so insensitive that it's selling this information  
8 right and left, by the Federal statute you make it  
9 unnecessary to the State voters to control that conduct.

10 GENERAL WAXMAN: Well, Justice Kennedy --

11 QUESTION: It seems to me -- and just to finish  
12 the thought -- here the class affected, i.e., the people  
13 that have driver's licenses, is congruent almost precisely  
14 with those who vote and control their State officials.  
15 Federal intervention is (a) unneeded and (b) intrusive on  
16 this governmental mechanism.

17 GENERAL WAXMAN: Well, I'd like to make two  
18 points. Actually, I originally had three, but I've now  
19 forgotten the third.

20 (Laughter.)

21 GENERAL WAXMAN: I'd like to make two points  
22 with respect to this. First of all, the information that  
23 is being restricted here is not information about how the  
24 Government works, or how the Government structures its  
25 operations, the type of information that this Court was

1 concerned with in Reporter's Committee, and that would  
2 pose a different problem.

3                   But the second point I want to make is that the  
4 same point -- that is, well, you know, if the people of  
5 South Carolina want more protection for their privacy,  
6 they can vote, you know, they can elect, I don't know, a  
7 different Attorney -- they'd never find a better Attorney  
8 General --

9                   (Laughter.) .

10                  GENERAL WAXMAN: -- but they could elect a  
11 different Attorney General, or they can move. They could  
12 move to North Carolina, or some State that has a  
13 protection that's even stronger than the national  
14 legislature.

15                  But the same could be said with respect to the  
16 child labor laws, the surface mining laws that were at  
17 issue in Hodel -- the people of South Carolina are, of  
18 course, also citizens of the United States, and they have  
19 the right to call upon either Government for the  
20 protection of their liberties. That, after all, was the  
21 point I think that you made about the double protection of  
22 liberty in the compound republic.

23                  And what's particularly significant here is that  
24 Congress was asked, in testimony by the Association of  
25 State Motor Vehicle Operators, expressly to enact a law

1       that, quote, must apply uniformly on a national basis  
2       because of the ubiquity of this information and the ease  
3       of accessing this information on computer modems from  
4       anywhere in the world.

5                  The stalker who killed Rebecca Schaefer could  
6       just as easily have come from Nevada or Utah as from  
7       California, where she lived, and that's -- I'm not  
8       suggesting that when the States ask for something, that  
9       makes it constitutional. In New York, this Court made it  
10      clear that if all 50 States agree with the Federal  
11     Government that it can do something that violates an  
12     independent prohibition of the Constitution, it still adds  
13     up to nothing.

14                 But with respect to legislation that Congress is  
15       empowered to enact, the fact that Congress was responding  
16       to the State motor vehicle administrators who were asking  
17       for a national uniform law, it seems to me does have some  
18       significance with respect to the exercise of Congress'  
19       authority.

20                 QUESTION: I'm not sure that the -- what the  
21       State administrators desire is not always what the State  
22       government desires, or what the State voters, much less  
23       what the State voters desire. I mean, you have to assume  
24       that if the States do not have this restrictive policy  
25       that is imposed on them by the Federal Government, those

1 States that don't have it don't want it.

2 GENERAL WAXMAN: Well, I don't know that I would  
3 make that assumption at all. There's now a Federal law in  
4 which all -- I think every State except for four are fully  
5 complying with.

6 Some States have enacted laws that are even more  
7 restrictive of the transfer of information, and this act  
8 doesn't in any way preempt the operation of those laws,  
9 except with respect to the information that independent  
10 Federal statutes Congress has required the States to  
11 report, which is, of course, an issue that this Court  
12 reserved in Printz.

13 QUESTION: This discussion is a -- has a little  
14 bit of an academic quality in light of recent  
15 congressional action, I take it, which now is out there  
16 telling the States that if they don't have these privacy  
17 protections they will lose Federal transportation funding.

18 GENERAL WAXMAN: Well, actually, one of the --  
19 Justice O'Connor, we did the best we could in our  
20 supplemental brief to explain the operation of this  
21 provision of the Department of Transportation  
22 Appropriations Act.

23 One of the unusual things about it is that it  
24 includes a provision that if States don't comply they will  
25 not lose any funding, although it does also purport to

1 apply Congress' Spending Clause authority to the Driver's  
2 Privacy Protection Act.

3                   QUESTION: What is the sanction, then, in the  
4 appropriations --

5                   GENERAL WAXMAN: Well, there is -- I mean, there  
6 is no -- the appropriations law, which of course is  
7 1-year legislation in any event, doesn't include a  
8 sanction, but it incorporates all of the provisions of the  
9 Driver's Privacy Protection Act, which itself has  
10 sanctions.

11                  And presumably also we think, if a State took  
12 the money -- and the law does not even apply to the State  
13 of South Carolina until after this Court issues, quote, a  
14 final decision in Reno v. Condon -- we think that the  
15 Federal Government could, if, contrary to an assumption  
16 that we have to make, which is that the States would  
17 comply, it didn't, we could presumably seek injunctive or  
18 declaratory relief.

19                  But we did indicate to the Court in our  
20 supplemental brief that this intervening legislation does  
21 lend somewhat of an academic tone to this discussion, but  
22 it doesn't moot the case, and it doesn't really change any  
23 of the substantive issues in the case, because the law  
24 doesn't apply to South Carolina, presumably because the  
25 Court was attempting to respect, or the Congress was

1 attempting to respect this Court's decisional processes.

2                 But more to the point, when this legislation  
3 sunsets, there still will be a substantive law enacted  
4 under Congress' Commerce Clause authority, so -- well,  
5 it -- yes, it does have a somewhat academic --

6                 QUESTION: What also raises a question in my  
7 mind is, if there is this unwritten constitutional  
8 principle, the Federal Government may never pass a law  
9 that imposes burdens on States that don't also impose  
10 burdens on private parties. Why wouldn't that principle,  
11 if it is a valid principle, apply to spending legislation  
12 as well?

13                 GENERAL WAXMAN: Well, if the -- if -- it may  
14 very well apply.

15                 QUESTION: Surely you couldn't -- surely the  
16 Congress couldn't give the States money on condition that  
17 they close up all their newspapers, for example, or  
18 something like that. If there's an overriding Federal  
19 constitutional principle, it seems to me it must limit the  
20 spending authority as well as the Commerce Clause.

21                 GENERAL WAXMAN: I have been unable to discern  
22 anything in the constitutional structure that would  
23 require a result as bizarre as saying to Congress, if you  
24 want to regulate the dissemination in interstate commerce  
25 of the motor vehicle data base, you have to do so in the

1 same law and in the same way as all of the other data  
2 bases that are in interstate commerce that you've heard  
3 have different promise and pose different problems.

4 After all, Article I, it authorizes Congress  
5 within its enumerated powers to enact laws that are  
6 necessary and proper, which must include in it the  
7 prerogative that all legislatures have to tailor their  
8 laws to the problems at hand.

9 And the Tenth -- for purposes of the Tenth  
10 Amendment, if a particular State activity affecting  
11 commerce is within reach of the national legislature, if  
12 it also applies to some private parties, then it seems to  
13 me that the power to address that activity by the State  
14 necessarily does lie within the powers, quote, delegated  
15 to the United States within the meaning of the Tenth  
16 Amendment.

17 Congress' power doesn't depend on whether the  
18 act also applies to private parties.

19 QUESTION: General Waxman, may I just clarify  
20 one point? With respect to the liberty interest that's  
21 supposed to be protected by the dual sovereignty, as I  
22 understand the Federal legislation, it gives the choice to  
23 the driver, so the driver who wants his name available to  
24 solicitors or anyone can just say, yeah, okay, give my  
25 name.

1                   GENERAL WAXMAN: Well, it's even more solicitous  
2       of the State motor vehicle operators, because it allows  
3       them to disseminate it for any purpose, provided that they  
4       have in place a system -- and this is reflected in section  
5       (b) (11) of 2721, provided that they have a system that  
6       permits people to, quote, opt out of the legislation, so  
7       it is certainly true that the State, any State that puts  
8       in place a system that allows people to just check off if  
9       they want to opt out can otherwise sell this data base as  
10      they have before.

11                  QUESTION: General Waxman, you know, you  
12      mentioned the three separate heads that could overcome the  
13      Federal Government's authority to control activities,  
14      Printz and so forth. Why shouldn't there be a fourth, or  
15      maybe it's -- maybe it comes -- falls under one or the  
16      other, and that is, a State's records and what a State  
17      does with its records are very much its own business?

18                  I mean, you know, the issue of transparency of  
19      Government is a major concern, and each Government should  
20      know just -- should be able to determine just how  
21      transparent its own operations will be. These are State  
22      records, and some States have decided we want  
23      transparency.

24                  GENERAL WAXMAN: Justice --

25                  QUESTION: Anybody can look to see who's getting

1 licensed and who isn't getting licensed.

2 GENERAL WAXMAN: Well, Justice Scalia, I -- this  
3 may be repeating myself, but maybe I didn't make my point  
4 clear. I think that that, in certain contexts that  
5 exception, that instance would be covered by the Coyle  
6 head.

7 That is, if you -- if the Federal Government  
8 were purporting to restrict the State from making  
9 available information to tell its citizens about what it's  
10 doing, how it's operating, that would be a case that's  
11 very different than an act which comes in only at the  
12 point at which a State puts into interstate commerce  
13 information that private citizens, personal information  
14 that private citizens provide to it.

15 I mean, one of the things I think that was most  
16 striking in the testimony before Congress was the  
17 testimony about how vulnerable people become when this  
18 information is available, because the ability to tie your  
19 address and your photograph to a license plate is the  
20 equivalent, in terms of personal safety, to being required  
21 to walk around all day with a sign that says, my name is  
22 Seth Waxman, and I live at this address, and I'm this age,  
23 and I have these medical disabilities.

24 It's a unique aspect of information that says  
25 nothing about -- tells the Government, the people nothing

1 about how the States are operating.

2 May I reserve the balance of my time?

3 QUESTION: Very well, General Waxman.

4 GENERAL WAXMAN: Thank you.

5 QUESTION: General Condon, we'll hear from you.

6 ORAL ARGUMENT OF CHARLES CONDON

7 ON BEHALF OF THE RESPONDENTS

8 GENERAL CONDON: Mr. Chief Justice, and may it  
9 please the Court:

10 This case is not about protecting privacy. We  
11 are for protecting privacy, and this case is not about  
12 preventing the horrible crime of stalking. We're against  
13 stalking. The issue in this case is whether thousands of  
14 State officials across the country can be pressed into  
15 Federal service by the Congress to administer a Federal  
16 regulatory act.

17 I think if I could answer Justice Kennedy's  
18 question, which I think goes to the heart of this case,  
19 the Driver's Privacy Protection Act is complex, it's  
20 burdensome, it has all these exceptions, 14 exceptions,  
21 and it applies only to the States of the United States,  
22 and to follow this Federal mandate, which is unfunded, by  
23 the way, State officials must first look at it, interpret  
24 it, and then apply it to this --

25 QUESTION: Well, in one sense, though, the act

1 does regulate use of the information by both the States  
2 and private parties into whose hands the information  
3 comes.

4 GENERAL CONDON: The overall --

5 QUESTION: It is, to a degree, broader.

6 GENERAL CONDON: That's correct. The overall  
7 tenor, though, is to the State officials.

8 QUESTION: And it is also, in part, about  
9 privacy, because your State chooses to sell the  
10 information and make it public, and the Federal  
11 legislation would say to the State, you can't.

12 GENERAL CONDON: Well, if I can answer both of  
13 those questions, it is possible this act may be severable,  
14 because it does -- and we're saying that the Congress  
15 should directly regulate individuals. That's our  
16 position, and so we have no problem with the direct  
17 regulation of Congress by individual citizens.

18 But as to your comment or assertion that South  
19 Carolina sells this information, under the Driver's  
20 Privacy Protection Act, had it been in effect in South  
21 Carolina when South Carolina sold 3.5 million  
22 photographs -- this is my point about how the act is  
23 ineffective -- that selling was legal under the Driver's  
24 Privacy Protection Act, because the same sale occurred in  
25 Florida and Colorado, where the act had never been

1 challenged and was in effect.

2 So the Driver's Privacy Protection Act, number  
3 1, doesn't work. But that's really besides the point,  
4 because --

5 QUESTION: It sure is. I mean --

6 (Laughter.)

7 QUESTION: -- you're just saying it ought to be  
8 stronger.

9 GENERAL CONDON: No. We're saying the exact  
10 opposite.

11 (Laughter.)

12 GENERAL CONDON: Let South Carolina run its own  
13 business here.

14 QUESTION: General --

15 QUESTION: When you say pressed into service,  
16 that made sense to speak that way in Printz, because the  
17 State was being forced to act as a government in order to  
18 implement a Federal regulatory program.

19 Your State is no more being pressed into Federal  
20 service than any private organization which has records  
21 that comes under a similar prohibition from the Federal  
22 Government is, quote, pressed into Federal service and, of  
23 course, you can't press private individuals into Federal  
24 service any more than you can States. I mean, we do have  
25 a Thirteenth Amendment, after all.

1                   GENERAL CONDON: I would ask you to look at the  
2 practical effects of this law. First of all, a State DMV  
3 employee in Darlington, South Carolina who knowingly  
4 violates this act faces arrest, a criminal fine,  
5 presumably by the FBI.

6                   GENERAL CONDON: Well, it's onerous, but that  
7 doesn't mean that they're being pressed into service.  
8 They're not implementing any Federal program. They're  
9 just saying -- what it says is, you can't allow this  
10 information to be disseminated, just as it tells some  
11 private corporations that they can't do it.

12                  GENERAL CONDON: If I could use this very  
13 concrete analogy. When citizens want to come into this  
14 courtroom this morning, pursuant to directions from this  
15 Court, the Marshal's Services says, you can't come in.

16                  Now, the Government's position is that only the  
17 Marshal's Service is being regulated. Our position is  
18 that the citizen is being regulated. The citizen cannot  
19 come in here, and so a prohibition is, indeed, a  
20 regulation.

21                  QUESTION: But you said the citizen could be  
22 regulated, and really I misunderstood you. I thought what  
23 you said was, the Federal Government can act on the  
24 citizens, so it would be permissible for Congress to pass  
25 a law that says no person, no private person shall request

1       driver's license information. If any private person does,  
2       they commit a Federal offense.

3                   GENERAL CONDON: We would not object to that, to  
4       such a law. In fact, that's what the Congress should do.

5                   QUESTION: Well, your position as I understood  
6       it, General Condon, was that various State employees in  
7       the Motor Vehicle Division were being pressed into  
8       service, because the complicated Federal regulatory scheme  
9       required them to administer, in effect, that act, in order  
10      to decide whether to release particular information or  
11      not.

12                  GENERAL CONDON: That's precisely the point.

13                  QUESTION: But is the Government right when it  
14       says that is still different from Printz, because in  
15       Printz the government officials, State officials were  
16       being pressed into service to direct, regulate, control  
17       the activities of their own citizens, and that isn't the  
18       case here. Do you agree with that distinction?

19                  GENERAL CONDON: No. Look at Sheriff Printz of  
20       Montana, what he had to do in the Printz case. The Brady  
21       Act simply required Sheriff Printz to run, in effect, a  
22       records check, a rap sheet, so Sheriff Printz had to get  
23       the name and the social security number from the Brady  
24       form, period. There was no obligation to turn that back  
25       over to the gun dealer, no obligation to give it to the

1       Federal Government.

2                  Here, we've got to tell our State DMV employees  
3       that, listen, you've got this really complicated law, it's  
4       got these 14 exceptions, who knows what they mean --

5                  QUESTION: No, but I take it to be General  
6       Waxman's point that in Arizona, when the citizen couldn't  
7       buy the gun, he didn't know who to blame, the State or the  
8       Federal Government.

9                  Here, there is no operation, as I understand his  
10      argument -- and maybe this is -- maybe you'd disagree with  
11      it. Here, there is no operation of the law on State  
12      citizens by reason of anything State officials do.

13                 GENERAL CONDON: Well, I want to get back to my  
14      original point. Let's say you get your car towed this  
15      morning. The act provides that, pursuant to a car being  
16      towed, you're entitled -- there's an exception there, a  
17      permissible exception that the State records can then be  
18      released.

19                 But the citizen then comes in, and presumably  
20      the State official has to look at that exception and  
21      develop standards and develop forms. We have to verify  
22      if, indeed, this is the correct information here, you're  
23      not making this up to stalk someone, so the citizen is  
24      really being directly regulated by us. We're being  
25      puppets of the Federal Government.

1                   QUESTION: Isn't that true of every Federal  
2         prohibition on what a State government does? I mean,  
3         suppose you sell hot dogs at the State park. Don't you  
4         have to comply with the food and drug laws?

5                   I mean, and they may be complicated, and you may  
6         have to say what kind of a hot dog and what kind of a  
7         stand, and what about -- it's certainly a lot better than  
8         the minimum wage, or the -- isn't it? I mean, you have to  
9         do a lot less than that.

10                  And -- in other words, is your argument on this  
11      part just going to set aside all Federal regulatory  
12      programs that tell States what they can't do?

13                  GENERAL CONDON: Justice Breyer, that again is a  
14      good question, but that goes to the heart of this case.  
15      We aren't selling hot dogs here.

16                  QUESTION: Well, let me ask you another example.  
17      I think Congress passed the Internet Tax Freedom Act, and  
18      it told States they couldn't tax these Internet  
19      transactions for a period of time, can't do it. I suppose  
20      under your theory that's invalid, too. It only dealt with  
21      the States and governmental entities.

22                  GENERAL CONDON: That could raise --

23                  QUESTION: I suppose that's invalid, is that  
24      right?

25                  GENERAL CONDON: That could raise some concerns,

1 if the Congress is telling the States that pursuant to  
2 your taxing authority we take --

3                   QUESTION: And yet that's a far cry from the  
4 kind of commandeering of State personnel that concerned  
5 the Court in Printz, isn't it?

6                   GENERAL CONDON: Yes, but --

7                   QUESTION: Your theory is -- your answer to  
8 Justice O'Connor that because that statute that she  
9 mentioned tells only States what they can or can't do, it  
10 doesn't apply to private people, that for that reason --  
11 it says, State, you can't tax. For that reason, it would  
12 likely -- I'm not holding you to this, but I mean, your  
13 instant reaction is, that's just as unconstitutional.

14                  GENERAL CONDON: It would raise concerns.

15                  QUESTION: All right. If it raises concerns --  
16 I take it you're not attacking all of this Court's dormant  
17 Commerce Clause jurisprudence, are you?

18                  GENERAL CONDON: No.

19                  QUESTION: No, fine. If you're not, then I  
20 would think -- and think of all those cases. Each one of  
21 them, a judge has said to a State, you, as a State, cannot  
22 do something.

23                  Now, suppose Congress said exactly what courts  
24 have said, and they said it in statutes. In each of those  
25 statutes Congress would have said to a State, as a State,

1 you cannot, you cannot run your airport and keep Egypt Air  
2 out. You cannot sell natural gas and keep Algerian gas  
3 out. I mean, you can't regulate it. You can't regulate  
4 your electricity and keep Canadian electricity out. You  
5 can't, you can't, you can't.

6 And if you accept that jurisprudence, but you're  
7 also arguing you can't regulate the State as a State, how  
8 do you do that? How do I -- how would I possibly find for  
9 you on your theory you can't regulate a State as a State,  
10 and not set aside the entire dormant Commerce Clause and  
11 dozens of statutes, et cetera?

12 GENERAL CONDON: Well, national security  
13 implications may be different, but if I can get back to  
14 your hot dog --

15 QUESTION: It's not national security. I mean,  
16 is that the distinction?

17 GENERAL CONDON: No.

18 QUESTION: I'm talking about the entire Commerce  
19 Clause jurisprudence.

20 GENERAL CONDON: I understand.

21 QUESTION: The dormant Commerce Clause. I'm  
22 talking about any kind of a congressional statute aimed at  
23 a State which would say, State, you can't tax this, State,  
24 you can't tax that, and I have 10 examples if you want me  
25 to give them. State, you cannot keep out Algerian natural

1       gas. State, you cannot -- those don't apply to private  
2       people. They apply to States, and they to a State, State,  
3       you cannot.

4                 Now, are you asking us to set aside all that?

5                 GENERAL CONDON: Well, I think what's telling  
6       here is that when asked of the Solicitor General, is there  
7       one case that tells the States under the Commerce Clause,  
8       and only the States, you can't do X, Y or Z, you come up  
9       with this airport example that Justice Stevens pointed --

10                QUESTION: What about the answer to Justice  
11       Breyer's question?

12                GENERAL CONDON: Well, I'm trying to answer it,  
13       but to answer your question, if you look at the Garcia  
14       line of cases, and the --

15                QUESTION: Well, what about Justice Breyer's  
16       questions?

17                GENERAL CONDON: Well --

18                QUESTION: Commerce Clause regulation?

19                QUESTION: -- lots of examples. I mean, I can  
20       give you 10 statutes where Congress says to a State, you  
21       can't tax airplanes, you can't tax cars, you can't tax  
22       electricity, you can't tax this, you can't tax that. I'm  
23       familiar with the regulatory area, where maybe it isn't  
24       Congress, but it's Federal regulatory agencies that say,  
25       when you regulate natural gas distribution systems, you

1 cannot discriminate in your rules against Algerian LNG.

2 GENERAL CONDON: Yes, I heard --

3 QUESTION: You can't discriminate --

4 QUESTION: Is the answer that this is exactly

5 the way preemption and supremacy power should work?

6 Congress has the ultimate determination over which branch  
7 of Government regulates individual entities, but that's  
8 not this case, because here Congress is regulating a  
9 State?

10 QUESTION: That's what I don't understand. How  
11 does that --

12 GENERAL CONDON: Well --

13 QUESTION: How is it more of a regulation of the  
14 State here to say, State, you may not release this  
15 information to a private person than to say, State  
16 electricity regulator, you may not discriminate in your  
17 rules against electricity coming from Canada? What, in  
18 your view, is the difference? Why is one regulation --

19 GENERAL CONDON: Well --

20 QUESTION: -- State as a State, and the other  
21 not? I'm not saying there isn't one. I'm just saying I  
22 don't see it.

23 GENERAL CONDON: When you look at the  
24 jurisprudence in terms of preemption and other enumerated  
25 powers within the Constitution, admittedly it's different

1       in terms of where we are, but to get back to the decisions  
2       of this Court, which has breathed new life into our system  
3       of dual sovereignty, we simply --

4            QUESTION: I'll ask Justice Kennedy later.

5            (Laughter.)

6            GENERAL CONDON: Well, you know, to reference  
7       this point, directly regulating individuals is a different  
8       matter here, and when you've got the States here -- and  
9       again, if I could go back to the hot dog, because I like  
10      that one, if I could, we're not selling hot dogs here.

11           When the car first came through South Carolina,  
12      we took this over. This is what we do in terms of  
13      regulating automobiles, and for the Congress to come  
14      along, worried -- and we're responsive to our citizens.  
15      We have to run --

16           QUESTION: Well, of course, that's one of the  
17      problems with the case, is that we go from commandeering  
18      to exclusive State function, and nothing seems quite to  
19      work, as Justice Scalia pointed out earlier.

20           Now you're -- what you're doing is saying that  
21      this is an integral State function, it's an inherently  
22      governmental function. That's different from  
23      commandeering.

24           GENERAL CONDON: Yes. Well, I think it's --

25           QUESTION: Well, are you saying, then, that

1 Garcia was wrong, that we go back to Usery?

2 GENERAL CONDON: In this case we don't need to  
3 revisit those issues. That's a law general --

4 QUESTION: Well, you might need to.

5 QUESTION: Well, there's --

6 QUESTION: You might need to. That's the point.

7 I don't think that the commandeering rationale of Printz  
8 quite covers this, and yet the old law under Usery pre-  
9 Garcia, we might say this is a traditional State function,  
10 but what are you saying to us, that we ought to go back to  
11 that, or -- or what?

12 GENERAL CONDON: If you look at Printz, and just  
13 really keep it simple, and if you've got some questions  
14 about the commandeering, I would ask you to look at the  
15 practicality of what's going on here. This is much more  
16 commandeering than what the sheriff --

17 QUESTION: Well, but it's -- you say -- you keep  
18 emphasizing the burden and, as Justice Breyer suggested a  
19 moment ago, save for details, I don't see anything  
20 distinguishable between this burden and the burden of the  
21 wage and hour law, which can be nightmarish to administer.

22 And if the burden is in fact the -- going to be  
23 the criterion, then even without going back to Usery, the  
24 wage and hour law extension to the States, even though it  
25 covers private individuals, I presume is unconstitutional,

1 too. Is that your position?

2 GENERAL CONDON: No.

3 QUESTION: All right.

4 GENERAL CONDON: And of course, the balancing is  
5 not necessary. I -- as Printz makes clear --

6 QUESTION: So the burden, then, is -- the so-  
7 called burden argument I assume, then, takes you nowhere.  
8 That's not essential to your position.

9 GENERAL CONDON: I think it takes you to look at  
10 the aspect of administering, because in the abstract I  
11 think you can say, well, they're not -- this is merely a  
12 prohibition.

13 But to get back to my concrete example, when the  
14 officer --

15 QUESTION: So -- but I don't want to  
16 misunderstand you. The -- your point, I take it, is not  
17 whether the burden is heavy or the burden is light. The  
18 burden is -- the only relevant question is whether acts of  
19 administration are required on the part of the States in  
20 order to comply with a Federal statute. Is that the  
21 criterion?

22 GENERAL CONDON: That's the heart of this case.

23 QUESTION: Then the wage and hour law goes,  
24 because the States certainly have to take many, many steps  
25 to administer the wage and hour law to their employees.

1                   GENERAL CONDON: Well, as this Court has said --

2                   QUESTION: Do you agree that the wage and hour  
3 law, therefore, has got to be struck down in its  
4 application to the States?

5                   GENERAL CONDON: This Court has said that was a  
6 law of general applicability.

7                   QUESTION: But it has administrative burdens,  
8 so --

9                   GENERAL CONDON: And my point about  
10 administrative burdens is to get to the heart --

11                  QUESTION: -- they're okay if they're  
12 distributed to States and to private entities? No matter  
13 what the administrative burden, it's okay as long as  
14 private entities also have administrative burdens?

15                  GENERAL CONDON: Again, in terms of trying to  
16 answer your question directly --

17                  QUESTION: Well, that would be yes or no.

18                  (Laughter.)

19                  QUESTION: I mean, truly, if -- is it your  
20 position that the administrative burdens are okay if the  
21 same statute imposes administrative burdens on private  
22 entities? Is that your position?

23                  GENERAL CONDON: In this particular case?

24                  QUESTION: Well, in all cases.

25                  GENERAL CONDON: Well, there may be a case that

1       is so -- and I can't imagine this getting through the  
2       Congress, but it might, where it's so broad but so  
3       burdensome it would get to the core of our State  
4       functions. That -- it would depend upon the statute.

5            QUESTION: Well, if your core is State  
6       functions, then you're back in Usery, and you don't need  
7       the burden criteria.

8            GENERAL CONDON: Correct, but --

9            QUESTION: May I ask you a question about your  
10      central theory? As I understand it, your central theory  
11      is that unless the statute regulates both private conduct  
12      and State conduct, it's invalid under a Tenth Amendment  
13      concern.

14           And that's supported by the fact that as far as  
15      you can say, and I don't think the -- your opponents have  
16      found anything -- historically, it just hasn't been done,  
17      and so you say that we must assume that there is this  
18      constitutional limitation on the power of Congress to  
19      regulate States.

20           Now, does that principle mean, for example, that  
21      Congress could not pass a statute the obverse of this,  
22      requiring States to send their -- all of the information  
23      about criminal conduct, finger prints, missing children,  
24      and so forth, to a central bureau in Washington for review  
25      and use and for Federal purposes?

1                   GENERAL CONDON: Ministerial reporting, I know,  
2 Justice --

3                   QUESTION: Well, but my example is one -- I  
4 don't think the test is how burdensome it is. The test,  
5 as I understand your argument, and I want you to enlighten  
6 me if I'm wrong, is the absence of impact on private  
7 parties, and the statute just impacts on the States, and I  
8 give you an example and you say, well, that's all right  
9 because it's not very serious, or does the principle apply  
10 there?

11                  GENERAL CONDON: If the reporting involved a lot  
12 of cost and expense in gathering it, I think that would  
13 raise some concerns.

14                  QUESTION: It would routinely require the police  
15 to report all missing children, and finger prints, and  
16 something of that kind. It's -- it requires the  
17 information. It doesn't require it be kept quiet.

18                  GENERAL CONDON: Well, of course, that's not  
19 this case.

20                  QUESTION: Well, why isn't it this case? That's  
21 my question.

22                  GENERAL CONDON: Well, that's really my point.

23                  QUESTION: It is this case in part, because one  
24 part of this statute does require the States to provide  
25 certain information. All of the Federal statutes -- this

1       is not a hypothetical case that Justice Stevens has  
2       raised. Several Federal statutes require the States to  
3       supply information to various enforcement agencies.

4                   GENERAL CONDON: That also is a good question,  
5       Justice Ginsburg, and this statute does codify the  
6       existing statutes that require some reporting.

7                   We've not made that the core challenge of this  
8       case because of this administerial reporting aspect, but  
9       when you get back to what's going on, to the DMV employee  
10      in South Carolina, if I could, they are being commandeered  
11      by the Congress, Congress' --

12                  QUESTION: Would you -- I know you've been  
13      interrupted, and I hate to do it to you again. Would you  
14      answer my question?

15                  GENERAL CONDON: The administerial reporting?

16                  QUESTION: Does your principle apply to my  
17      hypothetical?

18                  GENERAL CONDON: I believe that in terms of the  
19      core of this case, it could.

20                  QUESTION: It -- I should think you'd have to  
21      say it must if there is really a principle and not just an  
22      accident of history. It may well be true that some things  
23      have never -- the Federal Government may have never done  
24      some things in the past, but that does not necessarily  
25      mean that the power isn't there, even though unexercised

1 for 200 years.

2 GENERAL CONDON: Well, could I rely on a little  
3 elbow grease at the joints there, in terms of a little  
4 play? I mean, the Governments have to function together,  
5 and reporting missing children to the Congress, I mean --  
6 but here, the Congress has decided that privacy is the  
7 issue de jour, that we're going to tell these horrible  
8 States --

9 QUESTION: But that's an argument about the  
10 wisdom of the legislation.

11 GENERAL CONDON: The commandeering. They've  
12 sent no money with this. It's very complex. It's  
13 complicated --

14 QUESTION: In Justice Stevens' hypothetical, it  
15 seems to me people are being commandeered perhaps even  
16 more so than in this situation.

17 GENERAL CONDON: Depending upon the nature of  
18 the reporting --

19 QUESTION: Yes.

20 GENERAL CONDON: -- that is true. I agree with  
21 that. If there's whole new aspects in terms of gathering  
22 and costs and things. But just sitting right there, and  
23 the Congress wants to require the States -- but the  
24 principle, I agree, might come into play, but again, here  
25 you've got the Attorney General of the United States that

1 can assess a \$5,000-a-day fine against the States for not  
2 complying, we have a --

3                   QUESTION: No, but if you beat up -- if a State  
4 official beats up a prisoner he can get fined under the  
5 Civil Rights Act. The fact that there's --

6                   GENERAL CONDON: Well --

7                   QUESTION: -- criminal penalties attached to  
8 State violation of Federal law doesn't really make it any  
9 different than a lot of other statutes.

10                  GENERAL CONDON: Again, the Fourteenth Amendment  
11 is not involved.

12                  QUESTION: I understand, but you could also have  
13 a speed limit that if they violate it, that -- you know,  
14 the fact that criminal penalties attach doesn't really  
15 reach the question of what Congress' power is, it doesn't  
16 seem to me, anyway.

17                  GENERAL CONDON: Well, in terms of -- again, the  
18 practical effects, in terms of the commandeering, and  
19 again, this isn't information that it's improper for us to  
20 have, or something new, or that the flow of information is  
21 new. People need to have this information. Insurance  
22 rates --

23                  QUESTION: Well, basically --

24                  QUESTION: I don't see how they're commandeered  
25 at all, come to think of it. I mean, all they've told you

1       is, don't give out information. Why is that hard to  
2       comply with? I mean, if a State didn't want to go through  
3       a hassle, all it would have to say is, nobody can get any  
4       information from our driver's records, period. What's to  
5       commandeer? What's the big burden?

6                 If you choose to give out some of it, that's  
7       your problem. In figuring out the details of what we're  
8       going to give out, make sure that whatever we do give out  
9       doesn't run afoul of Federal law, but Federal law doesn't  
10      require you affirmatively to do anything. All you have to  
11      do is sit on your hands and not give away any driver's  
12      information. Big deal. What's so hard about that?

13               GENERAL CONDON: The information has to flow.  
14      It's essential that --

15               QUESTION: That's your choice. That's your  
16      choice. That's not the Government commandeering you to  
17      make all these hard decisions. It's because you choose to  
18      make some of it available that as a matter of State  
19      function you say, well, if the State's going to do what it  
20      wants to do, we're going to have to make sure that it  
21      doesn't run afoul of the Federal act, but that's your  
22      choice.

23               GENERAL CONDON: Well, these are things we do.  
24      rate-setting with insurance companies, they have to know  
25      who's the good driver and the bad driver. Police, in

1       terms of solving crimes, they have to be able to look at  
2       these records and do things, and to simply say, well, you  
3       can just simply stop doing your business and doing your  
4       job, I think --

5                   QUESTION: General Condon, I find such  
6       difficulty with your commandeering burden argument when I  
7       think of the legislation you're not challenging, at least  
8       here, the Fair Labor Standards Act, the Surface Mining  
9       Act. Lots of environmental legislation poses very heavy  
10      burdens on the States.

11                  GENERAL CONDON: Well, Garcia and Baker, that's  
12      still good law, and again, that's not here before this  
13      Court, but that's not what's involved in this case.

14                  This statute only applies to the States, and it  
15      only applies to the officials in those States, and we have  
16      to comply with this statute or face these penalties,  
17      which -- you may make light of it, but I don't know how  
18      many Federal statutes that are out there that can have  
19      someone arrested for the FBI for knowing violation of  
20      simply doing their job day-in and day-out.

21                  And again, in terms of blurring the political  
22      accountability, getting back to that, these are records  
23      that South Carolina law requires to be produced, these are  
24      records that we pay tax dollars to produce, and we're just  
25      simply saying that, let South Carolina be run by South

1       Carolinians, and --

2                   QUESTION: But the wage and hour law provides  
3       the same confusion. When you go the employee and say, I'm  
4       sorry, you can't work more than 40 hours because you'd be  
5       subject to overtime and we're not going to pay it, the  
6       employee doesn't know whether that it's the State  
7       government that doesn't want them to work, or whether it's  
8       because the National Government requires time and a half.

9                   I don't see how you can draw any principle  
10      distinction between the statutes which you are disclaiming  
11      any effect upon, and the one that you are challenging,  
12      because in each of them there is going to be uncertainty  
13      in the minds of the citizen as to the source of the law.

14                  GENERAL CONDON: Well, when you've got a statute  
15      like the wage an hour that applies across the board, and  
16      is part of the national fabric, here, as to what's going  
17      on here -- and again, we're for protecting --

18                  QUESTION: Well, this is certainly -- this  
19      statute is certainly intended to be part of the national  
20      fabric. It applies to all the States. That's about as  
21      national as you can get.

22                  GENERAL CONDON: Except for the fact that the  
23      Federal Government has data bases that isn't covered by  
24      this. FAA has data bases on the Internet with people's  
25      personal information, the FCC, the ICC. It's at the State

1 level. It's us we have to implement. They're  
2 commandeering our officials in terms of how to apply this  
3 act, and again --

4                   QUESTION: Well, I suppose you could distinguish  
5 the wage and hour laws and a lot of other examples if you  
6 made the argument that there is something distinctive  
7 about State records, and that the Federal Government, this  
8 is just a category which the Federal Government can't  
9 control, that just as it can't tell a State where to have  
10 its Statehouse, it can't tell a State what to do with it's  
11 governmental records, how that -- you know, that's an  
12 argument.

13                  That may be right or wrong, but at least it  
14 would be compatible with your acknowledging the validity  
15 of these other statutes. They don't deal with State  
16 records. State records are -- I don't know, they're  
17 sacred, just as a Statehouse is. They belong to the  
18 State, and the Federal Government mucking around with them  
19 goes over the edge.

20                  I mean, I -- that's a conceivable argument.

21                  GENERAL CONDON: That may be a possibility, but  
22 there are other -- this is -- what should be done here as  
23 a last, last resort has been the first resort. The  
24 Congress could directly regulate individuals who get these  
25 records. The Congress could take our records, take this

1 burden over. We can do other things with our time.

2                 But what they've done, they've gone right after  
3 the States with an act that really doesn't work to begin  
4 with. It's very complex, and in terms of this Court's  
5 decision in terms of Printz and New York, it raises the  
6 exact same principles that are at stake, and we simply  
7 would ask, on behalf of the States, to continue to keep --  
8 breathe new life with your prior decisions into our dual  
9 sovereignty system, which protects us all.

10                QUESTION: Do you say that to the extent that  
11 the Federal Government requires you to turn over records,  
12 that that would fall under your principle, too, but as a  
13 matter of comity you're not objecting, or that that's  
14 distinguishable when the Federal Government says, South  
15 Carolina, you will give your driver's license information  
16 to certain Federal agencies for certain purposes?

17                GENERAL CONDON: I think in terms of the  
18 principles, we're at the comity level, especially when --

19                QUESTION: So that if you wanted to insist on  
20 that being unconstitutional, you can say they're our  
21 records, and we don't have to give them to anybody.

22                GENERAL CONDON: Again, that's not the case  
23 before here. There's time enough for that.

24                QUESTION: I assume that if anybody's hurt by  
25 South Carolina's being more liberal with its disposition

1 of its driver's records than other States are -- other  
2 States may indeed follow the Federal practice under their  
3 own State law, but I suppose if California is more  
4 liberal, if you call it liberal, it doesn't hurt anybody  
5 but South Carolinians, does it?

6 GENERAL CONDON: Democratic accountability. As  
7 a matter of --

8 QUESTION: There's nobody outside of South  
9 Carolinians who would have their driver's information  
10 coughed up by South Carolina.

11 GENERAL CONDON: That's correct.

12 QUESTION: So --

13 GENERAL CONDON: But as a matter of information,  
14 we've gone further in South Carolina than the Federal act.  
15 We protect privacy more now, and that's really the point.  
16 Let the States run their own records, let them make those  
17 individual choices, and we're accountable to --

18 QUESTION: Or the people of the State whose  
19 driver's license are at issue.

20 GENERAL CONDON: That's precisely our point, to  
21 let us run our records, and again, I understand that this  
22 case has broad implications for the future, but when you  
23 look at what's going on here in terms of the facts of this  
24 case, we feel that the prior holdings in New York and  
25 Printz dictate this result.

1                   Thank you, Mr. Chief Justice.

2                   QUESTION: Thank you, General Condon.

3                   General Waxman, you have 3 minutes remaining.

4                   REBUTTAL ARGUMENT OF SETH P. WAXMAN

5                   ON BEHALF OF THE PETITIONERS

6                   GENERAL WAXMAN: Thank you, Mr. Chief Justice.

7                   I'd like to make three points in my 3 minutes, if I may.

8                   First of all, with respect to the Usery-Garcia  
9                   point, Judge Easterbrook, writing the majority opinion in  
10                  Travis, which is the companion case in the Seventh  
11                  Circuit, found correctly, we think, and for the reasons we  
12                  articulate in our reply brief at page 8, footnote 6, that  
13                  this case, in any event, wouldn't be decided differently  
14                  even under the regime in Usery.

15                  And I commend the Court's attention to Judge  
16                  Easterbrook's majority opinion and our analysis, which  
17                  essentially takes off from the Chief Justice's concurrence  
18                  in South Carolina v. Baker, where the Chief Justice  
19                  emphasized that the more expansive conception of the Tenth  
20                  Amendment espoused in Usery recognized that congressional  
21                  action that, quote, operates to displace the State's  
22                  freedom to structure integral operations in areas of  
23                  traditional Government functions runs afoul of the  
24                  authority granted by Congress.

25                  Justice Scalia's hypothetical, where there was a

1 bar on releasing any information that is in a State  
2 record, probably would raise very serious concerns under  
3 Usery, but a release in commerce on information that is  
4 personal and private that is provided by citizens we think  
5 doesn't implicate Usery.

6                 With respect to the -- Justice Kennedy's point  
7 and Justice Stevens point about the category of one, I --  
8 if one looks at the environmental laws, for example, that  
9 Congress has regulated sludge and solid waste systems that  
10 are operated, if not exclusively, overwhelmingly by  
11 municipalities, and Congress -- and it has regulated in a  
12 way that is different than it regulates other types of  
13 environmental issues, and the fact that Congress  
14 distinguishes --

15                 QUESTION: I don't know that the Tenth Amendment  
16 applies with all its force to local governments as opposed  
17 to State governments. You're talking about the regulation  
18 applies to local governments.

19                 GENERAL WAXMAN: Well, if it doesn't, Mr. Chief  
20 Justice, I'd sure like to take another shot at United  
21 States v. Printz, which involved sheriffs and --

22                 (Laughter.)

23                 GENERAL WAXMAN: I don't mean to be facetious.  
24 We have understood that in contrast to this Court's  
25 Eleventh Amendment jurisdiction, the Court has always

1 construed its Tenth Amendment jurisdiction to include not  
2 only States but subordinate sovereign entities, or  
3 subordinate governmental entities.

4 I just want to point out, with respect to South  
5 Carolina v. Baker, which is always cited as a statute of  
6 general applicability, and perhaps in one sense correctly  
7 so, but only in the sense that this is, too, the section  
8 that -- the statute that was at issue in Baker, section  
9 310(b) (1) of the Tax Equity and Fiscal Responsibility Act  
10 applied only to State and local governments. It denied a  
11 tax exemption to unregistered bonds, a tax exemption that  
12 only applied to -- ever only applied to State and local  
13 governments.

14 The Court pointed out in its opinion that this  
15 was part of a general system of law, a general law that  
16 did away with -- it tried to address the problem of tax  
17 fraud through the use of unregistered bonds. It acted  
18 with respect to the Federal Government in a different way,  
19 and the same is true here.

20 CHIEF JUSTICE REHNQUIST: Thank you, General  
21 Waxman.

22 GENERAL WAXMAN: Thank you very much.

23 CHIEF JUSTICE REHNQUIST: The case is submitted.

24 (Whereupon, at 11:00 a.m., the case in the  
25 above-entitled matter was submitted.)

## 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:

JANET RENO, ATTORNEY GENERAL, ET AL. Petitioners v. CHARLIE CONDON, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL.

CASE NO: 98-1464

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

BY Ann Marie Federico -----  
(REPORTER)