

The Burger Court Opinion Writing Database

Massachusetts v. United States

435 U.S. 444 (1978)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

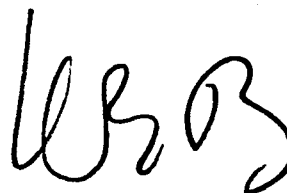
February 16, 1978

RE: 76-1500 - Massachusetts v. United States

Dear Bill:

A dissent will be around in this case in due
course.

Regards,

A handwritten signature in dark ink, appearing to be "WB", written in a cursive, stylized script.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 24, 1978

Dear Bill:

76-1500 Massachusetts v. United States

I join in your dissenting opinion.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 12, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 76-1500 Massachusetts v. United States

I gather that I am to assign this and I'll undertake myself to write the opinion for the Court.

W.J.B. Jr.

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Brennan
 Mr. Justice Rehnquist

From: Mr. Justice Brennan

Circulated: 2/15/78

Revised:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | | |
|--------------------------------|----------------------------|--------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to | |
| Petitioners, | | the United States Court |
| v. | | of Appeals for the First |
| United States. | } Circuit. | |

[February —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

As part of a comprehensive program to recoup the costs of federal aviation programs from those who use the airways and benefit from the programs, Congress, in 1970, imposed an annual registration tax on all civil aircraft that fly in the navigable airspace of the United States. Internal Revenue Code of 1954 (Code), § 4491.¹ The constitutional question

¹ In pertinent parts, it provides:

"(a) A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

"(1) \$25, plus

"(2) (A) in the case of an aircraft (other than a turbine powered aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine-engine-powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight."

Section 4492 (c)(2) of the Code defines "use" as flying an aircraft "in the navigable airspace of the United States." Section 4493 (a) defines "taxable civil aircraft" as including aircraft owned and operated by a State. See n. 6, *infra*.

Subsection (b) of § 4491 specifies who must pay the tax; subsection (c) provides for proration of the tax if the first use of the aircraft occurs after the first month of the tax year; subsection (d) provides that there is only one tax liability per aircraft per year, and subsection (e) specifies that the tax shall not apply after July 1, 1980.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 17, 1978

No. 76-1500--Massachusetts v. United States

Dear Lewis:

I am pleased that you can join most of my opinion, and write this to comment upon your suggestions that pp. 9-14 (which will be designated as Part II.A in the second draft that I am now preparing) 1) are unnecessary and 2) may not be compatible with National League of Cities.

Part II is my attempted answer to petitioner's argument that a "tax" that is imposed directly upon an essential state activity violates the implied state tax immunity even though the revenue measure operates as a user charge. See Petr. Brief, at 14-28. I think an answer must be made to that argument, particularly since petr's specific contentions concern the impact of various past cases. Part II was designed simply to establish that, contrary to petr's submissions, the state tax immunity doctrine is not an inflexible one requiring the invalidation of any "tax" whose legal incidence falls on a state and that revenue measures, like user fees, which cannot by their very nature unduly interfere with the delivery of essential services are necessarily valid.

STYLISTIC CHANGES throughout

See pp. 1, 6, 8-9, 11, 16, 23-25

Footnotes renumbered

To: The Chief Justice

Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 3/10/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | | |
|--------------------------------|----------------------------|--------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to | |
| Petitioners, | | the United States Court |
| v. | | of Appeals for the First |
| United States. | } Circuit. | |

[March —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

As part of a comprehensive program to recoup the costs of federal aviation programs from those who use the national airsystem, Congress in 1970 imposed an annual registration tax on all civil aircraft that fly in the navigable airspace of the United States. 26 U. S. C. § 4491.¹ The constitutional question presented in this case is whether this tax, as applied to an aircraft owned by a State and used by it exclusively for police functions, violates the implied immunity of a state government from federal taxation. We hold that it does not.

¹ In pertinent parts, it provides:

“(a) Imposition of Tax

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

“(1) \$25, plus

“(2) (A) in the case of an aircraft (other than a turbine powered aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.”

Section 4492 (c) (2) of Title 26 defines “use” as flying an aircraft “in the navigable airspace of the United States.” “[T]axable civil aircraft” include aircraft owned and operated by a State. *Id.*, § 4492 (a); see n. 6, *infra*.

omission

See

pp. 8-1, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

footnotes renumbered

Segments relettered

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Circulated: 3/17/78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | |
|--------------------------------|----------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to |
| Petitioners, | |
| v. | |
| United States. | |
| | the United States Court |
| | of Appeals for the First |
| | Circuit. |

[March —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

As part of a comprehensive program to recoup the costs of federal aviation programs from those who use the national airsystem, Congress in 1970 imposed an annual registration tax on all civil aircraft that fly in the navigable airspace of the United States. 26 U. S. C. § 4491.¹ The constitutional question presented in this case is whether this tax, as applied to an aircraft owned by a State and used by it exclusively for police functions, violates the implied immunity of a state government from federal taxation. We hold that it does not.

¹ In pertinent parts, it provides:

“(a) Imposition of Tax

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

“(1) \$25, plus

“(2) (A) in the case of an aircraft (other than a turbine powered aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.”

Section 4492 (c) (2) of Title 26 defines “use” as flying an aircraft “in the navigable airspace of the United States.” “[T]axable civil aircraft” include aircraft owned and operated by a State. *Id.*, § 4492 (a); see n. 6, *infra*.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

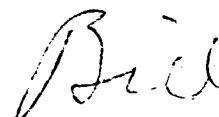
March 22, 1978

RE: No. 76-1500 Massachusetts v. United States

Dear John:

Thanks so much for your suggestions for the above.
I'm happy to accept all of them. They will be incorporated in the next circulation.

Sincerely,



Mr. Justice Stevens

cc: The Conference

✓ Stylistic changes ✓
 See Pages 10-11, 15-16, 18, 22 ✓ 25

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Brennan
 Mr. Justice Black
 Mr. Justice Douglas

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | |
|--------------------------------|----------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to |
| Petitioners, | |
| v. | |
| United States. | |

[March —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

As part of a comprehensive program to recoup the costs of federal aviation programs from those who use the national airsystem, Congress in 1970 imposed an annual registration tax on all civil aircraft that fly in the navigable airspace of the United States. 26 U. S. C. § 4491.¹ The constitutional question presented in this case is whether this tax, as applied to an aircraft owned by a State and used by it exclusively for police functions, violates the implied immunity of a state government from federal taxation. We hold that it does not.

¹ In pertinent parts, it provides:

"(a) Imposition of Tax

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

"(1) \$25, plus

"(2) (A) in the case of an aircraft (other than a turbine powered aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight."

Section 4492 (c) (2) of Title 26 defines "use" as flying an aircraft "in the navigable airspace of the United States." "[T]axable civil aircraft" include aircraft owned and operated by a State. *Id.*, § 4492 (a); see n. 6, *infra*.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

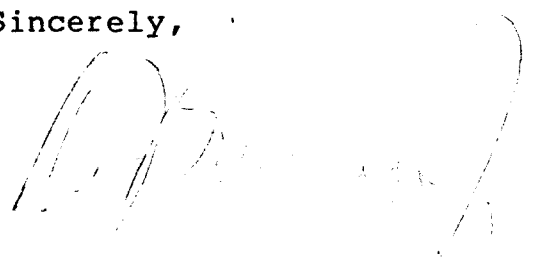
April 6, 1978

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 76-1500--Massachusetts v. United States

No. 77-16, United States v. Georgia Dept. of Transportation. This case, on appeal by the United States under 28 U.S.C. § 1252, also presents the question whether the annual aircraft registration tax imposed by 26 U.S.C. § 4491 may constitutionally be applied to an aircraft owned by a State and used by it for traditional sovereign functions. The District Court held the tax could not be so applied, relying on what it conceived to be the implications of National League of Cities. Mass v. US rejects both the District Court's reasoning and its conclusion. I will therefore vote to vacate and remand for reconsideration in light of Massachusetts v. United States. ✓

Sincerely,



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

CHAMBERS OF
JUSTICE POTTER STEWART

February 17, 1978

76-1500, Massachusetts v. United States

Dear Bill,

My concerns with your opinion exactly parallel those expressed by Lewis in his letter to you of February 16.

Sincerely yours,

P.S.
/

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 13, 1978

Re: 76-1500, Mass. v. U. S.

Dear Lewis,

Evidently Bill Brennan does not take a very hospitable view of our thoughts in this case. Accordingly, I have this morning sent to the printer a copy of the enclosed.

Sincerely yours,

P.S.
/

Mr. Justice Powell

*I'll join when
this is circulated.*

Mr. Justice Brennan
 Mr. Justice White
 ✓ Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 14 MAR 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | |
|--------------------------------|----------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to |
| Petitioners, | |
| v. | |
| United States. | |

[March —, 1978]

MR. JUSTICE STEWART, concurring in part and concurring in the judgment.

The petitioner has conceded that a nondiscriminatory user fee may constitutionally be imposed upon a State, and, for substantially the reasons stated in Part II-B of the Court's opinion, I agree. Moreover, I agree with the Court that the aircraft registration tax imposed by 26 U. S. C. § 4491 is such a user fee. I therefore see no need to discuss the general contours of state immunity from federal taxation, as the Court does in Part II of its opinion.

On this basis I join Parts I, III, and IV of the Court's opinion and concur in its judgment.

STRICTLY CONFIDENTIAL THROUGHOUT.

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

2nd DRAFT

Circulated: _____

Recirculated: 15 MAR 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | |
|--------------------------------|----------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to |
| Petitioners, | |
| v. | |
| United States. | |

[March —, 1978]

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

The petitioner has conceded that a nondiscriminatory user fee may constitutionally be imposed upon a State, and, for substantially the reasons stated in Part II-B of the Court's opinion, we agree. Moreover, we agree with the Court that the aircraft registration tax imposed by 26 U. S. C. § 4491 is such a user fee. We therefore see no need to discuss the general contours of state immunity from federal taxation, as the Court does in Part II of its opinion.

On this basis we join Parts I, III, and IV of the Court's opinion and concur in its judgment.

Mr. Justice Brennan
 Mr. Justice White
 ✓ Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From Mr. Justice Stewart

3rd DRAFT

Circulated. _____

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | |
|--------------------------------|----------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to |
| Petitioners, | |
| v. | |
| United States. | |

[March —, 1978]

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

The petitioner has conceded that a nondiscriminatory user
 fee may constitutionally be imposed upon a State, and, for
 substantially the reasons stated in Part II-B of the Court's
 opinion, we agree. Moreover, we agree with the Court that
 the aircraft registration tax imposed by 26 U. S. C. § 4491 is
 such a user fee. We therefore see no need to discuss the gen-
 eral contours of state immunity from federal taxation, as the
 Court does in Part II-A of its opinion.

On this basis we join Parts I, II-C, and III₆ of the Court's
 opinion and concur in its judgment.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1978

Re: 76-1500 - Massachusetts
v. United States

Dear Bill,

Please join me.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

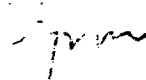
March 10, 1978

Re: 76-1500 - Commonwealth of Massa-
chusetts v. United States

Dear Bill,

I am still on your hook.

Sincerely,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 10, 1978

Re: 76-1500 - Commonwealth of Massa-
chusetts v. United States

Dear Bill,

Bill Rehnquist is a terrific
fisherman, but he did not even have his
hook in the water yet. Sorry about the
mistake. I am still with you.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 16, 1978

Re: No. 76-1500, Commonwealth of Massachusetts v. U.S.

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 16, 1978

Re: No. 76-1500 - Commonwealth of Massachusetts
v. United States

Dear Bill:

Will you please note at the end of your opinion that I
took no part in the consideration or decision of this case.

Sincerely,



Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 16, 1978

76-1500 Massachusetts v. United States

Dear Bill:

I am with you as to the result, but the extensive discussion of the scope of inter-governmental tax immunity (pp. 9-14) gives me some problems.

At the top of page 9 and again on page 17, you recognize that it is unnecessary to decide the present reach of that immunity since this case involves only a user charge. This was my view of the case, and the basis for my Conference vote. Although upon more careful study, I may well agree with your interesting review and summation of inter-governmental tax immunity doctrine, I am not prepared to do so in the present case.

I also have some concern as to whether your discussion (if I understand its thrust) is compatible with the rationale of National League of Cities.

If you prefer to leave this discussion in the opinion, I will join it except for Part II from page 9 through 14.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 13, 1978

File

No. 76-1500 Massachusetts v. United States

Dear Bill:

I will join Parts I, III, IV and the substance of II-B of your opinion for the Court.

For reasons previously stated to you, I do not think I can join II-A. My only problem with II-B is that it contains several references back to the II-A analysis.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

*As Justice Stewart's
opinion (that just
reached me) says the
same thing, I'll
join him.*

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 14, 1978

No. 76-1500 Massachusetts v. United States

Dear Potter:

. Please join me in your concurring opinion.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 2, 1978

Re: No. 76-1500 - Massachusetts v. United States

Dear Bill:

The Chief has asked me to undertake the preparation of
a dissent in this case, and I hope to do so as soon as possible.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Burger
Mr. Justice Black
Mr. Justice Douglas

1st DRAFT

MAR 14 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1500

| | |
|--------------------------------|----------------------------|
| Commonwealth of Massachusetts, | } On Writ of Certiorari to |
| Petitioners, | |
| v. | |
| United States. | |

[March —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

Petitioner, the Commonwealth of Massachusetts, brought suit against the United States to recover a charge of \$131.43 plus penalties and interest imposed upon it by reason of its use of a helicopter in connection with its state police force. The United States moved to dismiss petitioner's complaint, and its motion was granted by the District Court for the District of Massachusetts. The Court of Appeals for the First Circuit affirmed that judgment, but expressly chose to do so on a narrower ground than that relied upon by the District Court. 548 F. 2d 33, 34 (CA1 1977). The Court of Appeals found it unnecessary to examine the law of intergovernmental tax immunity, because it concluded that the charge imposed here "is, in reality, a user charge." *Id.*, at 35. While the Court of Appeals recognized that the labeling of an assessment as a user charge is not of itself conclusive, cf. *Packet Co. v. Keokuk*, 95 U. S. 80, 86 (1877), it quoted the following language in explaining its understanding of the distinction between a tax and a user charge:

"It is a tax or duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST


March 24, 1978

Re: No. 76-1500 - Massachusetts v. United States

Dear Bill:

When I first drafted my dissent in this case, it was not clear to me from the correspondence which circulated between you, Lewis, and Potter whether all parts of your opinion would become an opinion of the Court. It is my present understanding that your opinion is for the Court except for Parts II-A and II-B, which are joined only by Byron, Thurgood, and John in addition to you. I am therefore changing the sentence on page 2 of my dissent following the quotation from the brief for the United States to read as follows:

"It is therefore somewhat surprising to find Part II-A of today's opinion (which is joined only by four Justices) discussing at length the scope of intergovernmental tax immunity."

Sincerely,


Mr. Justice Brennan

Copies to the Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

Pg 1,2,3

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1500

Commonwealth of Massachusetts, } On Writ of Certiorari to
Petitioners, } the United States Court
v. } of Appeals for the First
United States. } Circuit.

[March —, 1978]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Petitioner, the Commonwealth of Massachusetts, brought suit against the United States to recover a charge of \$131.43 plus penalties and interest imposed upon it by reason of its use of a helicopter in connection with its state police force. The United States moved to dismiss petitioner's complaint, and its motion was granted by the District Court for the District of Massachusetts. The Court of Appeals for the First Circuit affirmed that judgment, but expressly chose to do so on a narrower ground than that relied upon by the District Court. 548 F. 2d 33, 34 (CA1 1977). The Court of Appeals found it unnecessary to examine the law of intergovernmental tax immunity, because it concluded that the charge imposed here "is, in reality, a user charge." *Id.*, at 35. While the Court of Appeals recognized that the labeling of an assessment as a user charge is not of itself conclusive, cf. *Packet Co. v. Keokuk*, 95 U. S. 80, 86 (1877), it quoted the following language in explaining its understanding of the distinction between a tax and a user charge:

"It is a tax or duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 14, 1978

Re: 76-1500 - Massachusetts v. United States

Dear Bill:

Because I am still not sure of my position,
I will wait for the dissent.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 21, 1978

Re: 76-1500 - Commonwealth of Massachusetts v.
United States

Dear Bill:

With these reservations, I am now prepared to join your opinion.

First, although I recognize that your language on pages 10-11 comes close to tracking a sentence in the Court's opinion in National Cable Television, 415 U.S., at 340, I cannot quite swallow the notion that "a legislature may disregard the benefits it bestows and act arbitrarily, assessing the tax solely on the basis of ability to pay." I am not sure a legislature could impose a tax if the government provided no benefit to the citizen, and I would like to avoid saying that it is proper for the legislature to "act arbitrarily." Would you consider revising the sentence, perhaps to read something like this?

"First, in imposing a tax to support the services the government provides to the public at large, a legislature need not consider the value of particular benefits to a taxpayer but may focus entirely on the taxpayers' ability to pay."

Second, I believe you should qualify the first full sentence on page 11. I do not believe the taxing power can properly be used for regulatory purposes unless the activity in question is otherwise a proper subject of congressional regulation. Perhaps you could insert a phrase modifying the word "activity," such as "subject to its regulatory jurisdiction," or something similar.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 24, 1978

Re: 76-1500 - Commonwealth of Massachusetts
v. United States

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Brennan

Copies to the Conference