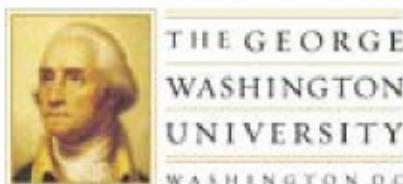


# The Burger Court Opinion Writing Database

*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

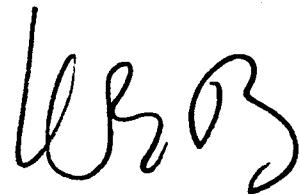
February 16, 1978

RE: 76-1500 - Massachusetts v. United States

Dear Bill:

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

Regards,



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 Rehnquist  
Mr. Justice O'Connor

## Section 1.1: The Nature of Mathematics

2/15/78

1000 JOURNAL OF CLIMATE

## 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1500

Commonwealth of Massachusetts, Petitioners,  
*v.*  
United States. } On Writ of Certiorari to  
the United States Court  
of Appeals for the First  
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.<sup>1</sup> The constitutional question

<sup>1</sup> 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 take-off weight in excess of 2,500 pounds, or (B) in the case of any turbine-engine-powered aircraft,  $3\frac{1}{2}$  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, Petitioners,  
 v.  
 United States. } On Writ of Certiorari to  
 } 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.<sup>1</sup> 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.

<sup>1</sup> 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, 15, 10, 11

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,<br>Petitioners,<br><i>v.</i><br>United States. | On Writ of Certiorari to<br>the United States Court<br>of Appeals for the First<br>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.<sup>1</sup> 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.

<sup>1</sup> 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 W. J. BRENNAN, JR.

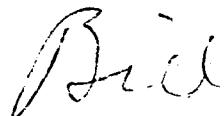
March 22, 1978

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 Black  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

## 4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1500

Commonwealth of Massachusetts, Petitioners,  
 v.  
 United States. On Writ of Certiorari to 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.<sup>1</sup> 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.

<sup>1</sup> 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.

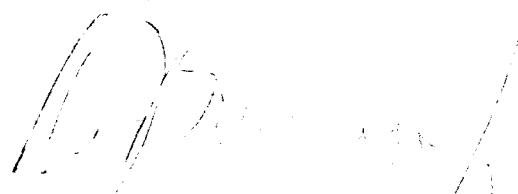
April 6, 1978

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.  
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 1976

## 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1500

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

[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.

CONFIDENTIAL PLAINTEXT 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

Circulated: \_\_\_\_\_

Recirculated: 15 MAR 1978

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 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, } the United States Court  
v. } of Appeals for the First  
United States. } Circuit.

[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-A of its opinion.

On this basis we join Parts I, II-C, and III<sub>b</sub> 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

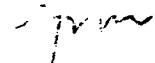
Re: 76-1500 - Commonwealth of Massachusetts v. United States

---

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 Massachusetts 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,

*L. 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.

*file*

March 13, 1978

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 well  
done him,  
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. 20542

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,

W.W.

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 Black  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

1st DRAFT

MAR 14 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-1500

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

[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,

W.W.

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 123

From: Mr. Justice Benjamin

Circulated:

Recirculated:

## 2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1500

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