

In the

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Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

No. 76-1500

Washington, D. C.
December 6, 1977

Pages 1 thru 35

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COMMONWEALTH OF MASSACHUSETTS, :
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Petitioner, :
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v. : No. 76-1500
 :
UNITED STATES OF AMERICA, :
 :
Respondent. :
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Washington, D. C.,

Tuesday, December 6, 1977.

The above-entitled matter came on for argument at
2:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

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APPEARANCES:

TERENCE P. O'MALLEY, ESQ., Assistant Attorney General
of Massachusetts, One Ashburton Place, Boston,
Massachusetts 02108; on behalf of the Petitioner.

ALLAN A. RYAN, JR., ESQ., Office of the Solicitor
General, Department of Justice, Washington, D. C.
20530; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1500, Massachusetts against the United States.

Mr. O'Malley, you may proceed whenever you're ready.

ORAL ARGUMENT OF TERENCE P. O'MALLEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. O'MALLEY: Mr. Chief Justice, and may it please the Court:

This Court has granted the petition of the Commonwealth of Massachusetts to issue a writ of certiorari to the United States Court of Appeals for the First Circuit.

The basic issue raised on review concerns the constitutionality of applying the federal excise tax on the use of civil aircraft to a State police helicopter owned by the Commonwealth of Massachusetts and used exclusively for public safety purposes.

The action was initiated by the Commonwealth of Massachusetts in the United States District Court for the District of Massachusetts on a petition for a refund of the tax. The tax is computed by \$25 flat fee plus a varying amount based on the weight of the aircraft. The tax was \$131.43 for the taxable year ended June 30, 1971. The total collected by a levy on funds of the Commonwealth was \$183.38.

The Commonwealth alleged in its complaint --

QUESTION: And that's what's before us, 180 bucks?

MR. O'MALLEY: For this taxable year, Your Honor. That's not an accurate indicator of how much money would be involved in the years between now and then.

QUESTION: How many aircraft does the State of Massachusetts have?

MR. O'MALLEY: The State police has one, the State Aeronautics Commission has three, and there's a large bill pending for those aircraft also.

QUESTION: Yes.

MR. O'MALLEY: But it hasn't been litigated. It's now in abeyance pending disposition of this case.

QUESTION: Also there's what?

MR. O'MALLEY: Other aircraft owned by the Massachusetts Aeronautics Commission. And there are tax bills in abeyance of a much larger figure than the \$180 we're talking about, which is strictly for this year 1971.

The Commonwealth alleged that the helicopter was used by the State Police only for public safety purposes, such as promoting highway safety and conducting searches for suspected criminals or escapees from correctional facilities.

The United States moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court allowed the motion, stating that the decisions of this Court talking about State immunity from federal taxation were essentially of historical interest only,

and the Court also stated that this is a classic case of a user fee.

That rationale was based on the fact that the revenue derived from these aircraft taxes is used to make grants to State-owned airports for airport expansion and development. On appeal, the United States Court of Appeals affirmed the judgment of the district court, but only discussed the user fee rationale. That rationale was based largely on an analogy between -- concerning cases of this Court which have held wharfage fees by municipalities as not in violation of the constitutional prohibition against duties on tonnage.

The Commonwealth petitioned this Court for certiorari. The Solicitor General agreed that the case should be resolved, because there is a decision by a federal court in Georgia, which has sustained the immunity of Georgia from this particular tax.

The essential position of the Commonwealth that this particular tax violates the constitutional principle of intergovernmental tax immunity. The basic defense of the United States is that this tax is also a user's fee and therefore exempt from the principle.

In the Commonwealth view, the argument will be broken down into three basic parts.

First of all, that there is no exception to the principle of intergovernmental tax immunity for taxes which are

also designated user fees.

Second, that even if we discuss the user fee rationale, the tax in question even fails on those terms.

And, third, I would briefly discuss the implications of the case of the National League of Cities vs. Usery, concerning the position of the Commonwealth here.

QUESTION: Did the Court of Appeals ever address itself to the question of whether the general language of this statute meant that the tax should be applicable to the State-owned vehicles?

MR. O'MALLEY: It was agreed by all that the Commonwealth does come within the definition, because the definition concerned all aircraft which are registered or must be registered with the FAA. This aircraft was registered, and, we believe, must be registered with the FAA.

QUESTION: There is some language in some of our cases which is treated in part in the Frey case, which came out the other way, I think. That even though you have general language, sometimes you require more than that in order to apply a particular regulation or tax to a State.

MR. O'MALLEY: There is also legislative history, Your Honor, which explains why the exemptions from the passenger tax that used to exist for government employees is no longer in effect, and the legislative history states that they think all aircraft should pay their way for the use of the

aircraft system, so that issue was never really raised, and we don't contest the applicability of the tax as a matter of statutory construction.

The tax is clearly a tax, irrespective of whether or not we also describe it as a user's fee. As such, it clearly comes within the scope of the principle, as historically stated. First of all, it is a direct imposition on the funds of the Commonwealth of Massachusetts; second of all, even though the amount of the tax is not excessive in direct terms, it's only \$131 for this year, in all decisions concerning the principle of tax immunity, whether it's federal immunity or State immunity, the Court has always stated that the amount is immaterial. The basic issue is whether or not there is an infringement of sovereignty, not whether or not the tax in question is excessive.

And it also is a --

QUESTION: Mr. O'Malley, what if 120 or 130 years ago, whenever it was a crucial national issue, the federal government had built a toll road over the Appalachians and charged everybody who was pulling a wagon over that toll road whatever, say a dollar; do you think a State could have claimed immunity from that sort of a charge?

MR. O'MALLEY: No, we do not, Your Honor. If a particular charge is not a tax, but strictly a fee, such as a toll, for the use of a particular road owned by the United

States, we would not claim free usage of the road, just as we do not claim, as the government says, that we think we should be able to use the mails for free, we have to buy the stamps like everyone else.

QUESTION: Even though you're performing a sovereign function in using them?

MR. O'MALLEY: Yes, Your Honor, the crux of the issue is that it's a direct imposition on the Commonwealth's funds for the general support of government, rather than the individual act of a proprietor trying to get compensation for the use of his facilities.

QUESTION: And you'd say this if the wagons were carrying ammunition to Valley Forge? A later Valley Forge.

MR. O'MALLEY: Well, Your Honor, if we proved as a factual matter it was a great infringement on the sovereignty because of a unique fact like that, I think maybe that would be a separate case. But as a general proposition, the proprietorship type fee, we do not challenge.

QUESTION: Then you leave me a little confused there. That for some purposes the State -- the federal government make a use charge, but for some purposes they could not. And on each of them, there are two sides.

MR. O'MALLEY: No, Your Honor, if I may backtrack a bit, Your Honor, our basic position is that if it's a tax and we don't think that the type of toll concerning the use of a

road is a tax. I think in your question you related to the imposition of a toll, somehow or another really threatened the existence of a State or of a governmental entity. That would raise separate issues, which we don't think are involved in this case.

QUESTION: Well, usually, tolls on toll roads are, if not always, are dedicated and earmarked to amortize the bond issue that was the basis of building it. You don't have, in this case, I take it, any impounding of these -- this use charge.

MR. O'MALLEY: The revenue derived from this charge does go into a trust fund in the Treasury, and that money is used to make grants to the States for airport expansion and development. Now, the facilities are still owned by the States, or their subdivisions, and the money is used, however, to further it.

The tax here, though, is a tax on the use of the navigable air space. It is not specifically geared to a particular use such as driving over a toll road and paying a one-time charge for it. At some point these charges may -- the lines of distinction become fine ones. But in this case it has never been contested that this is not really a tax; the only argument has been that it also has aspects of being a user fee.

QUESTION: Well, the federal government has spent hundreds of millions of dollars on river channels in order to

make river navigation feasible.

MR. O'MALLEY: Yes, Your Honor.

QUESTION: On your theory, could they charge State-owned barges for carrying gas for the State?

MR. O'MALLEY: I don't think they could make a direct tax of the States, because they happen to use, have designated this particular revenue for river improvements. However, if the, on a one-time basis, if there's an agency that has a particular expense and has a charge against a boat for the particular use, then it's clearly a user's fee, and it doesn't involve those sovereign issues, such as the levying on funds of a State or exerting the power to even seize facilities of a State, because they want to enforce this revenue contribution.

The different considerations --

QUESTION: Mr. O'Malley, wasn't it true that for years State official business did not pay taxes on their plane tickets?

MR. O'MALLEY: Yes, Your Honor.

QUESTION: And now they do.

MR. O'MALLEY: Now they do, Your Honor, the --

QUESTION: What was the reason for that change?

MR. O'MALLEY: The legislative history --

QUESTION: Was that done by the Legislature?

MR. O'MALLEY: The Legislature repealed the exemption

for the employees. And I think the tax here is quite different, because at least the users were oriented in that case, Your Honor.

QUESTION: I was just interested.

MR. O'MALLEY: There are a number of exceptions that are recognized in the immunity principle, so that there is no question about the federal power to raise revenue being unduly interfered with. In other words, the States have to be engaging in a sovereign function, and they cannot immunize contractors or the employees from incidental federal taxes.

These type of considerations have often been recognized, but the factor that no other exceptions has ever been recognized for taxes such as this where the government claims that they have a particular use that they want to make for this particular revenue.

The sole argument that the government seems to make is that this Court should analogize this tax with taxes that are enacted from interstate carriers using State highways. We consider the questions involved in an undue burden of interstate commerce issue quite different from the sovereignty issues raised in the tax immunity argument.

The interstate commerce burden question necessarily involves a question of degree. The relative judgments have to be made. But in terms of the constitutional principle involving the status of the States under the Constitution,

questions of degree do not illuminate whether or not there is actually an infringement in the constitutional sense.

But even when reference is made to the user fee argument, there are two aspects that the Commonwealth wishes to raise. First of all, this case was decided on a motion to dismiss in the first instance, whether or not there has been an approximate benefit relative to the amount of the tax would raise the factual question which probably would have to require a hearing.

More importantly, we think the failure of the user fee to even qualify as such in this case indicates that this type of innovation is unworthy in the tax immunity area, because even though difficult taxable issues will be raised, they do not illuminate the questions of sovereignty that are involved here that are not involved in cases where you have an interstate carrier claiming that their activities are being unduly burdened.

QUESTION: Mr. O'Malley, may I just -- just with regard to your first argument, is it your position that even if it were a user fee in which the charge was related to the amount of usage of the air system that the State aircraft did use, that it would still be invalid?

MR. O'MALLEY: Yes, when they use it in the form of a tax. If there is another way to exact an administrative charge and it's based on a voluntary participation in a

particular program or the use of a particular road, then --

QUESTION: Well, if that's your position, why don't you challenge -- apparently the State has not challenged the tax on airline tickets by State employees.

MR. O'MALLEY: We have not, Your Honor. There is a question there whether or not the incidence of a tax is actually on the Commonwealth or the State or on a particular employee who then may or may not get reimbursed by the government. While there's that separate issue there, there is no question here but that the Internal Revenue Agency in this case levied on funds of the Commonwealth quite directly.

QUESTION: But surely some of the Massachusetts travelers are reimbursed by the State.

MR. O'MALLEY: Yes, they are.

QUESTION: Are you suggesting that it was a de minimis thing?

MR. O'MALLEY: No, Your Honor. I think it's more analogous to the cases where the salaries of government employees that were once considered immune from federal taxation, but that particular aspect of the doctrine has since been discarded because -- just because the State has to perhaps make up the difference, in order to supply a wage and cover that tax.

The connection between the State and the imposition of the taxes was more remote and did not justify the protection

that they thought the Constitution required.

The formula in this case only involved weight. There is no formula which speaks of the amount of use of the system concerning the amount of the tax. But even when you get beyond the formula and you look to the result, the user fee has not proved to be a rough accommodation, approximation of the amount of use of the system.

The Secretary of Transportation was required by Congress in this Act to make a cost allocation study concerning whether or not these charges were actually geared to, in any way, the use of the system. The Secretary's findings are clear that the amount of the tax is not related to the use of the system.

Now, this is a report filed by the federal official charged with the regulation of the airways, and it should be given considerable weight by this Court and should also be an indication that getting into this type of problem in a sovereignty area is not a productive one, because it in no way illuminates what we consider to be the basic question of power rather than the question of degree.

Finally, the United States really doesn't address the failure of this particular tax to work out as a rough approximation of the use of the system. Rather, it makes the comparison that the Commonwealth in this particular year involved is due to receive \$1.5 million in grants for airport

expansion and development and then compares it with the amount of the tax. We think this is clearly indicative of why it would not be appropriate to use the user fee issue in a tax immunity area.

First of all, the amount awarded was pursuant to a matching grant program. This is the type of programs that are often used in federal-State areas, such as welfare and education. They are programs of cooperative federalism.

The United States does not mention -- first of all, they don't mention that this is a matching grant program; and, second of all, they don't mention the amount that the Commonwealth applied to programs of this nature. If necessary, the Commonwealth would prove that the Commonwealth supplied \$346,000 to meet the grants made by the federal government.

Now, if this figure or degree of matching grant is not satisfactory, then Congress would be free to change the formula so that the States had to supply money. But at least it would be done on a voluntary cooperative federal-State basis, and it would not require the unilateral and potentially coercive measures, such as the taxing measure in question here.

And finally, in the case involving the use of the highways and their requirement to pay their way in interstate commerce, the Court has always been satisfied that the highways were provided by the States and the States were really just demanding compensation for the use of the highways, and that

the State was really in a proprietary capacity for the most part in making the charge.

In this case, the taxes on the use of the navigable air space, the federal government does not own the air space, and even when reference is made to the airport facilities, they are still State-based facilities, that is, either owned by the State or by their political subdivisions. And in some cases these facilities may or may not receive federal funding.

This indicates how we have difficulty in approximating the amount of use with the amount of the tax; the difficulty also added in this case is that we're not even sure what the use is being -- the use of what facility is being compensated for by levying a tax on the use of this navigable air space.

QUESTION: Aren't the Air Controllers federal employees?

MR. O'MALLEY: Pardon me, Your Honor?

QUESTION: Aren't the Controllers at the airports federal employees?

MR. O'MALLEY: There are federal employees involved at airports, --

QUESTION: Yes.

MR. O'MALLEY: -- but the airport facilities themselves, apart from the National Airport and Dulles Airport, are not federally owned facilities.

QUESTION: There's a lot of federal money in them, though, I take it.

MR. O'MALLEY: Yes, Your Honor, generally they do participate in the program, but also to be noted, Your Honor, is that there are limitations as to what part of the facility these funds are available for. For example, they don't give money for the use of terminal facilities, it's mostly directed towards the actual airport side of the facility.

QUESTION: Who conducts the --- whose communication facilities are they? Between airport and aircraft.

MR. O'MALLEY: As I understand it, the grants here are made to the States to provide these facilities, Your Honor.

QUESTION: But there are federal funds, I think, on the communications.

MR. O'MALLEY: Yes, there are federal funds involved in the programs, and again they are matching funds to varying extents under the statute.

QUESTION: And federal regulation of the frequencies used?

MR. O'MALLEY: Oh, there's considerable federal regulation --

QUESTION: Management of the frequencies used.

MR. O'MALLEY: In terms of the rules enacted by the Federal Aviation Administration, with some Federal Aviation Administration personnel involved in implementing them; yes,

Your Honor.

QUESTION: The navigational aids that control the airways all across the country are federal, aren't they?

MR. O'MALLEY: Well, some of them -- I don't think so, Your Honor. I think some of the facilities and the equipment is provided by the grants of the nature involved here. But the States are involved in it. Maybe there's a --

QUESTION: Traffic is controlled on an interstate basis.

MR. O'MALLEY: There may be a subdivision of the various types of facilities that would only be --

QUESTION: Does the record in this case contain any information on that?

MR. O'MALLEY: No, Your Honor, this was decided strictly on the basis of the motion to dismiss, and the user fee rationale has actually evolved as this case has gone along, rather than something that was clearly understood at the beginning.

QUESTION: You don't want to convince me, do you, that the State controls traffic from one side of this country to the other?

MR. O'MALLEY: Certainly not, Your Honor. It's definitely manipulated by the federal government.

QUESTION: Yes, the federal government does. And if it's not the federal government it's the Air Force.

MR. O'MALLEY: Oh. The Air Force.

QUESTION: And if it's not the Air Force, it's NASA. It's everything as far away from State as you can get.

MR. O'MALLEY: We're talking about the commercial aircraft and general aviation.

QUESTION: Talking about all aviation. It's controlled by the federal government.

MR. O'MALLEY: In one form or another, yes, Your Honor.

QUESTION: Mr. O'Malley, it is true, though, isn't it, that -- this is a helicopter involved in this case?

MR. O'MALLEY: Yes, Your Honor.

QUESTION: A helicopter could take off from the roof of a hospital, say, fly around and land, never talk to anybody on the radio, never use any federal facility at all, and still have to pay the tax?

MR. O'MALLEY: Certainly, Your Honor. The tax is a sales tax --

QUESTION: A sales tax, as if it had spent 100,000 hours in the air during the year, using all the facilities, it would be precisely the same tax, wouldn't it?

MR. O'MALLEY: It would be based solely on the weight of the aircraft and has nothing to do with the use. A helicopter by chance would use these facilities less than an airplane would, because of its maneuverability. The costly

feature involved in making these grants is concerning the terminal air space, that really controls the --

QUESTION: But a helicopter could take off and land without talking to any federal employee, couldn't it?

MR. O'MALLEY: It certainly could, Your Honor, and very often does.

QUESTION: Is your submission limited to helicopters?

MR. O'MALLEY: I don't think this case should turn on helicopters, it's strictly a State aircraft used for public safety purposes, and if the aircraft did use the -- if it were an airplane, our argument would not differ, Your Honor.

QUESTION: So what are your arrangements on automobiles? Any of them subject to any tax?

MR. O'MALLEY: The fuel tax, there is an exemption in the fuel tax for the State cruisers, but I don't believe there is any other federal tax involved, and the State doesn't tax its own property in that fashion.

The final point is that while most of the discussion of tax immunity is contained in older cases and perhaps considered by many to be just an old historical doctrine, we believe that the Court's recent decision in National League of Cities vs. Usery dramatically shows that the concepts of a State sovereignty that are at the very core of the complaint raised in this case are still very much alive. In that case

the Court was concerned with the exercise of the commerce clause power, but I think the Court implicitly, if not explicitly, recognized the continuing vitality of this constitutional principle and was clear to state that they were not going to resolve a case on a particularized assessment of impact.

The particular federal statute was declared unconstitutional because it was found to infringe upon the essential role of the States in our Union, and we think this case requires similar treatment.

Therefore, we think the judgment of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ryan.

ORAL ARGUMENT OF ALLAN A. RYAN, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RYAN: Mr. Chief Justice and may it please the Court:

In 1970 Congress enacted a law entitled An Act to Provide for the Expansion and Improvement of the Nation's Airport and Airway System and for the Imposition of Airport and Airway User Charges. This Act was divided into two Titles: Title I, the Airport and Airway Development Act, authorized the Secretary of Transportation to spend a great deal of money to improve the nation's airports and the services

which make air travel safe; services such as Air Traffic Control, communication and navigation aids.

Title II, the Airport and Airway Revenue Act, imposed or increased charges on those who used the nation's airports and such supporting services. One of those charges is that at issue here, a charge or tax on the use of any taxable civil aircraft of \$25 per year plus a few cents per pound.

Title II also established a trust fund to insure that the funds raised by the charges in Title II would help pay for the improvements required by Title I.

The issue in this case is whether the Commonwealth of Massachusetts, which uses the services made possible by Title I every time its helicopter lifts off the pad, must pay its share of the cost imposed by Title II.

QUESTION: You say the helicopter uses the services made possible by Title I every time the helicopter lifts off the pad. Do you disagree with your opponent's response to Mr. Justice Stevens' question?

MR. RYAN: I do, although I think that, strictly speaking, is a factual matter that's not reflected by this record. I make that statement because I think that's something that can safely be presumed, and to that extent I do disagree.

I think it is physically possible, as Mr. Justice Stevens perhaps was suggesting, that a helicopter could take

off from a hospital --

QUESTION: It isn't unlawful. There is no legal limit on -- if you take off from an uncontrolled airport you don't have to talk to anyone.

MR. RYAN: Not in the taking-off process, I don't believe, Mr. Justice, but --

QUESTION: Nor in landing, nor in flying.

QUESTION: You're being interrogated by an expert.

MR. RYAN: Well, I am not an expert, and I --

QUESTION: Well, I can assure you, I've done it.

[Laughter.]

QUESTION: Let me ask you this. Does your legal position depend on, as a factual matter, the plane actually making use of any federal communication facility?

MR. RYAN: It -- no, it does not, not strictly speaking. And if you tell me that this helicopter can take off and fly over Logan Airport without --

QUESTION: Not at Logan Airport it can't, but there are many areas in the State of Massachusetts which are uncontrolled air space, in which an aircraft can fly without talking to anyone. It can take off from uncontrolled fields and land on uncontrolled fields. And your tax applies to those planes.

MR. RYAN: Yes, it does. And I would suggest this, Mr. Justice Stevens, that if it did so, if it took off and

landed at an uncontrolled airfield, and flipped off all its switches and talked to nobody, if it was involved in a mid-air collision, the private plane heading, say, from Connecticut to New Hampshire, and if it were found that that private plane had the right-of-way and the helicopter, had it been listening, would have been told to drop down a thousand feet, the Commonwealth would certainly be in no position to say that the collision was not its fault. In other words, if it disregards those federal services, it does so at its peril. And I think that --

QUESTION: That isn't in this case, is it?

QUESTION: No.

MR. RYAN: Beg pardon?

QUESTION: It's not in this case, is it?

MR. RYAN: Well, I think it --

QUESTION: I understood from the State of Massachusetts that they had to pay regardless of whether they took off from the hospital or Logan Airport or any place.

QUESTION: Or ever took off.

QUESTION: Or ever took off.

MR. RYAN: Well, I would agree with the former but not the latter. There is no tax on the possession of the aircraft. If it is simply possessed on the ground all year long, there's no tax. If it takes off once or if it takes off 365 times during the year, it is taxed.

QUESTION: In effect, the facilities are there for its use.

MR. RYAN: Absolutely. And I think, as a practical matter, although even if this helicopter may not use federal services on one trip or another one, over the course of a year I think it certainly is reasonable to expect that they will, almost day-to-day --

QUESTION: The point that I wish to make is that your legal position, as I understand it, does not depend on the aircraft actually making use of anything that the federal government spends money for.

MR. RYAN: That's correct. It does not.

QUESTION: But does it depend on the fact that the facilities are available?

MR. RYAN: The facilities are there.

QUESTION: Which it may use?

MR. RYAN: Which it may use. And which are provided at federal expense through the imposition of this tax in Title II.

QUESTION: Well, could the federal government open a store up in Boston, a kind of PX type store, with half-price items and tax the State of Massachusetts for the privilege of using the store, even though it decided never to use it?

MR. RYAN: In that situation, I think we're somewhat -- we're not in the same position we are here. I think -- let

me refer -- there's another tax that was passed as part of this Airway Development Act, which imposed an excise tax on aviation fuels, at so much per gallon. Now, Congress in its wisdom exempted the States from payment of that tax, but I think that is the corollary there that perhaps shows that this is closely tied to use. That the \$25, the \$130 charge is there on a one-time basis. And it is there to defray the cost of administering the Federal Aviation Act and maintaining the navigability of the air space.

The aviation fuels charge is there to precisely calibrate the payment of taxes by the amount of hours or miles flown.

QUESTION: Well, not that it matters, but wouldn't you get more money if you left the excise tax on gasoline?

MR. RYAN: I assume that the government would. I think that the reason --

QUESTION: That's up to them, I mean, it's up to the government.

MR. RYAN: That is up to the Congress responding to whatever political forces it feels.

QUESTION: That's not what Massachusetts says.

MR. RYAN: Well, --

QUESTION: Mr. Ryan, can I test your theory with another question. Supposing the situation were reversed. Say the State of Virginia puts money into its airports and

supposing it opposed the \$25 tax on every aircraft that landed at any one of the -- that was based at any one of the airfields in the State, as a user charge, just the same theory that you have here. And the FBI owned a plane that was flying out of one of those airfields, could the State of Virginia tax the United States for the ownership of that plane?

MR. RYAN: I believe so. I believe so.

We think that the theory of Packet Company vs. Keokuk and the Head Money cases, and Clyde Mallory Lines stand for the proposition that user charges are not taxes; or, more precisely, they are not subject to the same restraints that the Constitution puts on --

QUESTION: Would it do so if it didn't have a trust fund? As you just said --

MR. RYAN: If it were still -- if it still could be considered a user charge. We think the trust fund here is evidence or proof that this is truly a user charge. In the absence of a trust fund, I think you could still find a user charge, and in fact I think in the Montana Trucking case, which we cite in our brief, this Court did.

QUESTION: And a one-time annual tax measured -- supposing they measured it on the value of the aircraft instead of the weight of the aircraft, could they do that?

MR. RYAN: It makes no difference.

QUESTION: So, in other words, the State of Virginia

could impose a personal property tax on the United States?

MR. RYAN: Well, if it was a user charge. Regardless of what they call it, whether they call it a personal property tax or anything else. If the --

QUESTION: As explained in the legislative history, the reason is to help pay for airports and will only tax airplanes that are based at Virginia airports.

MR. RYAN: I think that that would be so. You run into a problem, of course, with the supremacy clause, the traditional genesis of intergovernmental immunity. It does not work both ways. The --

QUESTION: Well, why not? If it's true -- if you can call it a user charge, why wouldn't it work both ways? That's really what I was trying to figure out.

MR. RYAN: Well, if it is a user charge, --

QUESTION: And it can be a user charge if just the tax, based on the value of the aircraft, as long as it just lands at a State-owned facility in the one case, or use the federal facility in the other case?

MR. RYAN: I think that --

QUESTION: That's all it takes.

MR. RYAN: I think that would be a case of the State's power.

QUESTION: What would happen if a big military convoy, fully loaded and armed, was stopped to pay a toll,

what would happen?

You'd waive, wouldn't you? It happened several times during World War II.

MR. RYAN: If it was asked to pay a toll on the Massachusetts toll roads?

QUESTION: Yes. Along with the George Washington Bridge.

MR. RYAN: I am informed -- and we thought we might get an inquiry in this area -- that federal military convoys do pay State highway tolls.

QUESTION: Not all the time.

MR. RYAN: It's the policy.

QUESTION: I handled a court martial involving one, that's why I know.

[Laughter.]

MR. RYAN: Maybe that's why it's now the policy.

[Laughter.]

QUESTION: Do you think there is a difference because the toll fees are explicitly impounded for the purpose of discharging the bonds issued to build the road, and the situation presented by this case?

MR. RYAN: I think the question is, is it a user charge or is it not, Mr. Chief Justice. I think the --

QUESTION: Well, my question is broader than that.

MR. RYAN: Yes, I realize that. I think your question

goes to --

QUESTION: Are you going to make them pay the capital cost? That's what the toll roads do. The toll charged on a toll road is to pay the capital cost of building the road.

MR. RYAN: Yes, sir.

QUESTION: And you aren't dealing with the capital cost here precisely, are you?

MR. RYAN: Well, I think it's not entirely a capital cost, but it certainly -- to the extent that the Act finances the building of airports and air facilities, to that extent it's a capital cost. The Act is quite explicit, in that it says the expenses in the trust fund go to improving and operating and maintaining, as well as establishing.

QUESTION: What is it that the government owns that is being charged for the use of here?

MR. RYAN: It regulates the navigable air space of the United States.

QUESTION: I know that.

MR. RYAN: In terms of what it owns in a proprietary sense?

QUESTION: Yes.

MR. RYAN: Nothing.

QUESTION: Nothing.

MR. RYAN: I think, once you accept the proposition that this is a user charge, the doctrine of intergovernmental

immunity simply need not be faced. That was the rationale of the Court of Appeals, and we think this Court can affirm on the same rationale.

However, if the Court feels it necessary or desirable to face that question, we think that it need go no further than to reaffirm the case of New York vs. United States, and we believe that an affirmance on that ground would still result in an affirmance of the judgment of the Court of Appeals, it would still uphold the tax.

The case of New York vs. United States, as this Court is aware, was decided without a majority of the Court as such, although Chief Justice Stone's opinion can be read as the opinion of the Court.

QUESTION: Was that the mineral water case, Saratoga Springs?

MR. RYAN: Yes, it was. The tax involved there was a federal tax on mineral waters which New York sold from its springs at Saratoga. The State of New York contended that it was disposing of its natural resources, in a classic case of exercising its sovereign functions. And this Court did not disagree.

But the test that Chief Justice Stone formulated in that opinion was whether a tax, even though nondiscriminatory, "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the

State's performance of its sovereign functions of government."

And Chief Justice Stone, it should be added, voted to sustain the tax, and the tax was sustained.

As I understand the Commonwealth's case, they are essentially relying on this statement by Mr. Chief Justice Stone. But there is no evidence in this case, nor is there any claim as to what that evidence might be, as to how this tax unduly interferes with Massachusetts' performance of its sovereign function. We think the reason for that is that it does not interfere at all.

Massachusetts, in its complaint, which is taken as true for present purposes, simply made no allegation, nor do I understand the Commonwealth to make any allegation in their brief now that this tax interferes with the performance of their sovereign duties. So that --

QUESTION: Mr. Ryan, can I just ask one other -- two other questions? I suppose by analogy, if the United States decided to propose a tax on the use of the Interstate Highway System, it would charge a flat sum for all vehicles including State-owned vehicles; for the water system, all boats owned by the State -- I mean the same sort of thing could be done, couldn't it?

MR. RYAN: Yes, Mr. Justice Stevens, that follows.

QUESTION: Right.

MR. RYAN: I understood the Commonwealth, my brother

Mr. O'Malley, to take the position in his opening statement that legitimate user fees, such as for a toll road or river tolls, so forth, are not within the scope of governmental immunity, and the Commonwealth would not be immune from paying those tolls. But here he said it's different because it's a tax. And it is not something that is voluntarily paid by the Commonwealth of Massachusetts once, of course, they decide to buy a helicopter.

I would infer from what he said that a toll or a tax or a duty or a levy or whatever it's labeled of a dollar per hour would not be objectionable to the Commonwealth of Massachusetts, or, to take a more concrete example, that Massachusetts would see no problem with the fuel tax of so many cents per gallon being imposed on it, because that is a very closely correlated tax, correlating the amount paid to use.

So I think that, given that view of the facts by the Commonwealth, to then turn around and say, well, this is levied directly against the State, and therefore comes in under the intergovernmental immunities doctrine, whatever the present status of that doctrine may be, is an elevation of a form of niceties over the facts of the case. That the air space is there, the facilities are there. As a practical matter they are used, I think that can safely be said. And this is nothing more than a federal government's seeking to

fairly and equitably charge those users, whether they be an individual, a corporation, a national government or a State government, for the use of those facilities. And seeing it in that light, I think, requires that the judgment of the district court and the Court of Appeals be affirmed.

QUESTION: Does this record show, or do you know, what's the total amount of revenue that the federal government achieves out of this program over the whole country?

MR. RYAN: The record doesn't show it. I don't know it.

QUESTION: It isn't very much money, I suspect, is it? It is not a great sum of money in terms of today's fiscal arrangements between States and the federal government.

MR. RYAN: The amount of tax raised from imposing this tax on State governments?

QUESTION: Total revenue.

MR. RYAN: I assume it's small, Mr. Chief Justice.

The Act authorizes well over a billion dollars to be spent for the improvements in Title I, but that of course is gathered from all sources, and I don't know how that's broken down in terms of the State, what the different States pay.

QUESTION: Your brother, Mr. O'Malley mentioned National League of Cities, I think, have you?

MR. RYAN: I have not mentioned it, Mr. Justice

Stewart.

QUESTION: I suppose there was a reason why you didn't; you don't think it's relevant.

[Laughter.]

MR. RYAN: I didn't mention it, because I think it does not apply to this case.

QUESTION: Right.

MR. RYAN: I thank the Court.

MR. CHIEF JUSTICE BURGER: Anything further, Mr. O'Malley?

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:44 o'clock, p.m., the case in the above-entitled matter was submitted.]

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