

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. UNITED STATES SHOE
CORPORATION

CASE NO: 97-372 c.1

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1 PROCEEDINGS

2 (11:20 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-372, United States v. United States Shoe
5 Corporation.

6 Mr. Wallace, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF LAWRENCE G. WALLACE

9 ON BEHALF OF THE PETITIONER

10 MR. WALLACE: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 In this test case for thousands of cases being
13 held in abeyance, a five-judge panel of the Federal
14 Circuit held, with Judge Mayer dissenting, that, as
15 applied to exports, the harbor maintenance tax enacted by
16 Congress in 1986 is an invalid tax in violation of the
17 Constitution's export clause rather than, as we contend, a
18 permissible user fee.

19 The provision at issue was enacted as part of
20 the Water Resources Development Act of 1986, the first
21 legislation in more than a decade to authorize development
22 of new facilities in the Nation's harbors.

23 There was concern during this period that port
24 development projects in the United States had lagged
25 behind those of other developed countries and that this

1 was contributing to our severe trade imbalance.

2 At the same time, this was a period in which
3 there were large budget deficits and objections to using
4 Federal funding to address this problem, and it was one
5 that, as Judge Mayer pointed out in his dissenting
6 opinion, engaged the attention of Congress over an
7 extended period involving three Congresses and more than 4
8 years of numerous hearings and other activities, and one
9 of the solutions to the funding problem was to craft a
10 system of user fees that would avoid the need for funding
11 out of general revenues.

12 QUESTION: Sort of similar to the last case,
13 isn't it, trying -- finding someone else to pay.

14 (Laughter.)

15 MR. WALLACE: Well, in this instance there was a
16 practical problem to be addressed. Improvements were
17 needed and the beneficiaries of these facilities could,
18 under court precedent, be charged user fees to defray the
19 costs of providing these --

20 QUESTION: Can you tell us --

21 MR. WALLACE: -- facilities for their commercial
22 benefit.

23 QUESTION: Does the record show, or are there
24 statistics that we can examine to determine how much of
25 this tax is paid by people who are exporting in contrast

1 to those who are just shipping from point to point in the
2 United States?

3 MR. WALLACE: I don't -- off-hand, I'm not able
4 to point to a breakdown in the statistics in the record,
5 not -- certainly not in what we've reproduced in the joint
6 appendix. Perhaps my colleagues will be able to find
7 something on that.

8 I do want to say that the -- one of the most
9 difficult problems that was faced in this massive
10 legislative consideration was how to craft an equitable
11 and workable system of user fees in the context of the
12 multitude of difficulties that were brought to Congress'
13 attention by various industry and port representatives as
14 well as members of the executive branch.

15 QUESTION: Mr. Wallace, one would have thought
16 that if all this attention was devoted to user fees the
17 enactment wouldn't have been called a tax.

18 MR. WALLACE: Well, it perhaps was unfortunate
19 choice of nomenclature --

20 (Laughter.)

21 MR. WALLACE: -- but as the Court's decisions do
22 make it clear that nomenclature is not in itself
23 controlling.

24 Now --

25 QUESTION: Well, and also this thing is based on

1 the value of the goods exported, isn't it?

2 MR. WALLACE: That is correct.

3 QUESTION: So that you have a little package of
4 computer chips this big that takes no space in the ship at
5 all, and it's going to result in a huge tax, but a big
6 quantity of wheat, that actually does require a large ship
7 to convey it and so forth, might pay substantially less.

8 MR. WALLACE: That is --

9 QUESTION: The value might be less. It's kind
10 of an odd sort of a user fee, isn't it?

11 MR. WALLACE: That is exactly correct, and if I
12 may I would like to elaborate on this with reference to
13 the legislative consideration of this very issue, but
14 first I just want to interject in response to Justice
15 Kennedy's previous question that on page 63 of the joint
16 appendix there are some statistics that will shed some
17 light on the question that he asked.

18 Now, we have in our references isolated from the
19 massive record of legislative consideration portions which
20 are themselves quite hefty that dealt quite specifically
21 with the user fee problem and, with the Court's
22 permission, I would like to turn briefly to some brief
23 excerpts from a statement that Senator Hatfield made which
24 encapsulates the difficulties and the reasons for the
25 crafting of it. It's worth --

1 QUESTION: How would a statement like that bear
2 on whether or not this is a violation of the Export
3 Clause?

4 MR. WALLACE: Well, I think it bears on the
5 reasons why the particular kinds of objections that are
6 being raised to the way the fee was crafted may be not
7 aspects of the fee that actually disadvantage exports but
8 to some extent may be aspects that were designed to be
9 advantageous to exports, and also shows the sum of the
10 serious economic dislocations that were sought to be
11 avoided in trying to find an equitable manner of putting
12 this fee together, and I --

13 QUESTION: I think if you'd had 20 wizards
14 sitting down and coming up with the best possible solution
15 in their view to these sort of -- if it violated the
16 Export Clause it's still bad, isn't it?

17 MR. WALLACE: Of course, we do not contend that
18 the difficulties and the magnitude of the effort that
19 Congress put in would excuse a constitutional violation,
20 but we do contend that it is too facile for others to
21 contend that a court should ignore these aspects of the
22 legislative consideration and merely hypothesize whether
23 theoretically it could think of a system that might seem
24 more appropriate to the court, which is insulated from the
25 legislative concerns that were before the Congress.

1 QUESTION: No, but you're talking about a user
2 fee of harbors. You'd think that would have something to
3 do with the ships and the tonnage that's required and how
4 deep the harbor needs to be and how big the dock has to
5 be, and that turns on how large the ship needs to be, and
6 this doesn't bear any relation to that.

7 MR. WALLACE: Well, that is part of the reason
8 that it took that many years for the Congress to craft a
9 solution, because they started off with some of those same
10 assumptions, but found that they couldn't work it out that
11 way for very serious reasons.

12 QUESTION: Mr. Wallace, you've piqued my
13 curiosity. Why don't you read us that material you wanted
14 to tell us about.

15 (Laughter.)

16 MR. WALLACE: All right. These are brief --

17 QUESTION: Put it in for what it's worth, Mr.
18 Wallace.

19 (Laughter.)

20 MR. WALLACE: These are brief excerpts of what
21 Congress thought it was doing and why, and I might
22 interject a few comments as I go along here.

23 In Senator Hatfield's statement, and it's in
24 this hearing called User Fees for Ports and Waterways that
25 we cite at the bottom of page 4 of our brief, he starts

1 off pointing out we have not had a major authorization in
2 this area for 15 years.

3 There are many economic and political reasons
4 for this delay, but the resolution of the user fee
5 component is a key element in getting a bill to the floor
6 and passed. 5 years ago I convened a bipartisan group to
7 explore legislative proposals addressing the expectations
8 of the administration for user fees while taking into
9 account the economic realities of the navigation economy
10 and the users of the Nation's waterways.

11 Over that period I've introduced three separate
12 and distinct proposals, one of which he explains became
13 the bill that Congress later, shortly thereafter enacted.

14 He then explains, we reserved, meaning rejected
15 in context, user fees based on tonnage because they
16 disproportionately would effect bulk cargo marketability
17 when compared to their impact on containerized cargo.

18 QUESTION: What State was Senator Hatfield from?

19 MR. WALLACE: Oregon.

20 QUESTION: A lot of timber.

21 MR. WALLACE: He was talking about a bipartisan
22 group --

23 (Laughter.)

24 MR. WALLACE: -- that spent years of study on
25 this. He was not -- these are not views stated

1 individually.

2 QUESTION: No, but doesn't his statement boil
3 down to saying that a fee which is a real user fee is
4 going to have an economic impact that we don't want.
5 Isn't that what it boils down to?

6 MR. WALLACE: Well, it depends -- I mean, it's
7 not a real user fee -- tonnage is not the only measure of
8 economic value that someone secures from facilities in
9 these days of containerized --

10 QUESTION: It's a measure of use, isn't it?

11 MR. WALLACE: It is a measure --

12 QUESTION: Isn't it closer to being a measure of
13 use than value?

14 MR. WALLACE: It is a measure of use. If I may
15 just, in answering this, the very next sentence says that
16 a fee based on tonnage also would disadvantage export-
17 dependent ports in contrast to import-dependent ports.

18 One of their concerns was that our export trade
19 would be hurt by a user fee based on this. Much of our
20 export was and is bulk commodities, grains, iron ore,
21 which was having difficulty competing in international
22 trade from the Great Lakes ports, which were suffering
23 some depression at the time, lumber, as is pointed out,
24 and other wood products.

25 The bipartisan group also rejected a port-

1 specific approach to fees because it would have the effect
2 of disadvantaging ports with higher operation and
3 maintenance costs and could cause consolidation of port
4 facilities to a few super ports. This could have severe
5 economic implications for scores of communities across the
6 country.

7 So then he explains that the approach they
8 finally chose to adopt is a nationally uniform single-
9 tier fee based on a percentage of cargo value, and this ad
10 valorem concept, as he explains it, equitably balances
11 containerized versus bulk cargoes, places all ports on an
12 equal footing, and does not affect the marketability of
13 any product or commodity. It also treats all coastal
14 ranges of the continental U.S. in the same manner, East
15 and West Coast, Great Lakes, and Gulf Coasts.

16 QUESTION: Mr. Wallace, I guess --

17 QUESTION: And if they pay for it out of the --
18 suppose they pay for it out of the highway trust fund.
19 It's part of transportation. Is the gas tax now -- it's
20 really a user fee. Is that right?

21 MR. WALLACE: That is --

22 QUESTION: I mean, I guess -- all your arguments
23 would say, we don't even have a gas tax. We have a
24 highway user fee, is that right, even though they call it
25 a gas tax.

1 MR. WALLACE: It is very similar. In fact, the
2 trust fund --

3 QUESTION: So if we accept your argument there
4 is no gas tax. It's really a highway user fee and if, in
5 fact, they decided to pay for the ports out of the highway
6 trust fund, then the whole thing's a highway user fee.
7 Maybe it's an income user fee, a facilities user fee,
8 income tax is really a user fee for using the country's
9 facilities.

10 (Laughter.)

11 QUESTION: How do you draw the line?

12 MR. WALLACE: We wouldn't go this far, but the
13 particular concern that Congress was addressing here was
14 the disadvantage to the commercial use of our ports and to
15 commerce resulting from the outmoded nature of the
16 facilities.

17 QUESTION: We can get rid of all the
18 disadvantage to exports by putting the whole thing in the
19 income tax. That doesn't make the income tax a user fee.
20 Maybe it does.

21 MR. WALLACE: No, of course not, but it would
22 mean that it would become a matter of general funding. In
23 any event --

24 QUESTION: Mr. Wallace, I thought that when we
25 made an exception from the constitutional prohibition of

1 Federal taxes on exports, when we enunciated an exception
2 for user fees, I didn't think that meant any charge
3 imposed on users. I -- that would make it no limitation
4 at all. So long as you impose the tax through users, you
5 can tax exports as much as you like.

6 If that limitation is to have any bounds at all,
7 it seems to me we must mean by user fee a charge that is
8 based upon the degree of use of the port.

9 MR. WALLACE: Well, I think this Court's
10 jurisprudence in distinguishing taxes from user fees shows
11 that it is a more variegated distinction than that.

12 QUESTION: Not in the Export Clause field. In
13 other -- you're referring to cases that deal with other
14 provisions of the Constitution, not the Export Clause.

15 MR. WALLACE: Well, those cases all had their
16 root in a case called Pace v. Burgess, which was an Export
17 Clause case.

18 QUESTION: And in Pace the Court was at pains to
19 point out that the charge there was not an ad valorem
20 charge.

21 MR. WALLACE: That is true, but it also made
22 a -- but ad valorem charges have since been upheld as
23 permissible methods of user fees.

24 QUESTION: Not under the Export clause.

25 MR. WALLACE: But in other contexts where

1 constitutional objections were raised.

2 QUESTION: But constitutional objections may be
3 quite different in different cases. We have here a very
4 specific prohibition, and the -- you know, the Pace case,
5 the Fairbank case deal with those particular -- that
6 particular clause.

7 I'm surprised you -- perhaps it's our fault that
8 you haven't been able to get to those cases yet, but --

9 MR. WALLACE: Well, I --

10 QUESTION: -- we know the Congress --

11 MR. WALLACE: I'm trying to set this up in
12 context.

13 QUESTION: Yes. We know that Congress gave its
14 all on this thing, but now let's look at the law.

15 (Laughter.)

16 MR. WALLACE: Yes. Yes, and I have to add one
17 further consideration that inhibited the legislative
18 consideration, and that was it was all done against a
19 backdrop of awareness of our international trade relations
20 and international agreements with our trading partners,
21 which also do not supersede constitutional limitations,
22 but they're relevant to whether Congress was going to be
23 able to solve this user fee question.

24 Because those agreements -- it was GATT at that
25 time, and now WTO -- in which there have been reciprocal

1 reductions of tariffs, those -- there are expectations and
2 obligations that prevent members in those agreements from
3 discriminating against the foreign industry in favor of
4 the domestic industry.

5 And even though the measure adopted here was one
6 that generally would be favorable to exports as against
7 imports, the ad valorem method, for reasons that Senator
8 Hatfield explained, that could be defensible under these
9 agreements, but to charge user fees to imports and not to
10 exports in these same harbors could be a basis for
11 objections and retaliation by our trading partners as a
12 disguised form of raising our tariffs again, and --

13 QUESTION: Mr. Wallace, is that why you
14 suggested that maybe this -- if we ruled against you the
15 whole thing would fall? That sort of surprised me.

16 In page 18, footnote 8 of your brief you say
17 that if the decision of the court of appeals stands, that
18 would effectively abolish the trust fund. It would void
19 the harbor maintenance tax in its entirety, and I had been
20 thinking up till now, well, no, it would only excise the
21 export feature of it, and now you're suggesting well,
22 maybe the import would also fall?

23 MR. WALLACE: No, we really meant that in
24 context only for exporters, but there is -- I don't want
25 to suggest that this would not be severable, but the

1 concern about possible retaliation by our trading partners
2 in saying that we've in disguise raised our tariff rates
3 again and so they're going to raise theirs, that would not
4 only affect the public interest in our balance of trades,
5 but it would directly affect exporters from this country.
6 It would be something that would burden exports from this
7 country.

8 QUESTION: But it would be applied to them the
9 same way it would apply to shipping, say, from New York to
10 Texas?

11 MR. WALLACE: No. I'm talking about retaliation
12 by our trading partners. If they then raise their
13 tariffs, that makes it harder for industries in this
14 country that wish to export to be able to export.

15 QUESTION: Well, I take it it's more serious
16 than that. If we strike down the export provision and
17 require refunds, but the importers can't get any refunds,
18 then we're in violations of the agreement.

19 MR. WALLACE: Well, I wouldn't go so far as to
20 say we're necessarily in violations, although a foreign
21 country, one of our trading partners might make such a
22 claim before the World Trade Organization, but they also
23 could use this as a reason to impose retaliatory measures.

24 Congress was faced with a very complex problem
25 here. The Constitution is designed for modern commerce as

1 well as for the commerce that was known at the time that
2 these provisions were adopted, and we think that the court
3 of appeals was right in pointing to this Court's user fee
4 jurisprudence which has been developed in detail in fields
5 other than the Export Clause after *Pace v. Burgess*.

6 QUESTION: Well, if a provision is under
7 alternative 1 a tax on imports and exports, it doesn't
8 seem to me that that makes it any more or any less a user
9 fee under any other alternative.

10 MR. WALLACE: Well --

11 QUESTION: In other words, you're -- I
12 understand the problem the Congress was faced with. It
13 can't tax imports -- exports. That doesn't mean that if
14 it taxes imports and exports it's no longer an export tax.
15 It's still the same thing. It's still an export tax.

16 MR. WALLACE: Well, we understand that from the
17 IBM case if this were a tax, and that is why we are
18 arguing that this is a permissible user fee, which is one
19 of the arguments we had made right along in the case and,
20 indeed, had always been our principal argument, and it
21 satisfies the basic classic attribute of a user fee that
22 has been developed in many aspects of the Court's
23 jurisprudence. The funds are all impressed into a trust.

24 QUESTION: Well, if it were imposed, let's say,
25 on the ship -- the ships, the owners of the ships or the

1 vessels, and a charge for using the docks or the harbor,
2 which the vessel owners could then pass on in the form of
3 costs to the users of their vessels, I think you'd have a
4 good argument that it's a user fee, but the nature of this
5 makes it awfully hard to see it as a user fee.

6 MR. WALLACE: Well, the Court in the Evansville-
7 Vanderburgh case did say that it seemed to the Court in
8 that context to make no difference whether it was assessed
9 on the airline or on the passenger, because it came down
10 to the same thing. The costs were to be passed along to
11 the passenger.

12 There was a very practical reason for asking the
13 shippers to be the ones to make the payment, and that was
14 that the carrier would not be in a position -- once
15 Congress decided that the ad valorem measure was the only
16 equitable one that they could hope to impose, the carriers
17 would not be in a position to know the value of the cargo.

18 And one of the principles that this Court has
19 recognized repeatedly in giving legislative latitude in
20 the crafting of user fees is that you don't want to add
21 administrative expenses that will make the fee more
22 burdensome and more onerous for everybody, that there are
23 virtues in keeping it simple.

24 And the Customs Service is there, was a resource
25 that could be drawn upon that deals not with the carriers

1 but with the owners of the goods with the shippers one way
2 or the other, and Congress tried to craft this in a manner
3 that would impose the least burden and would avoid severe
4 economic dislocations in the country.

5 QUESTION: Mr. Wallace, can I ask you, do we
6 have a definition of user fee? It seems to me your
7 argument is that as long as the fee is paid by users and
8 the money is used for the purpose of improving ports,
9 that's enough.

10 MR. WALLACE: That is enough to make it a user
11 fee, and it's a permissible user fee.

12 QUESTION: But is that -- is -- do I correctly
13 state your position, and if that's true, could you impose
14 a 10-percent tax on the income of every user and then put
15 it in this fund?

16 MR. WALLACE: Well, if it -- that would have
17 much more difficulty meeting this Court's criteria for
18 what is a valid user fee.

19 QUESTION: Well --

20 MR. WALLACE: There are the three-part criteria,
21 including that it must not be excessive in relation to the
22 cost to the Government of providing the benefits that are
23 accorded --

24 QUESTION: Oh, but of course --

25 MR. WALLACE: -- to those contributors.

1 QUESTION: Then don't you bump into Justice
2 O'Connor's position that if some particularly valuable
3 shipment is sent the cost for that particular shipment is
4 really excessive in terms of the use that is gotten for
5 it?

6 MR. WALLACE: Well, you know, that is -- an ad
7 valorem system, any system is going to have some
8 applications that could be improved upon in a more Utopian
9 scheme, but Congress reasonably concluded that those whose
10 cargo in the aggregate was more valuable were getting
11 greater benefits in terms of enhancement of value from the
12 improvement in facilities that was being provided in order
13 to promote their commerce, the commerce of the users.

14 QUESTION: Mr. Wallace, tell me why it is not
15 true that any definition of user fee, which simply defines
16 it as a -- you know, a fee imposed on users, and which
17 does not limit it to the cost that is incurred by the
18 facilities in providing the use, any such definition will
19 be totally ineffective in preventing the taxation of
20 exports, because you could always -- I mean, it comes to
21 the same. You call it a user fee and impose an ad valorem
22 tax, which is what has happened here.

23 MR. WALLACE: The three-part test has to be met.

24 QUESTION: In fact, they didn't even call it a
25 user fee. They called it a tax.

1 MR. WALLACE: The three-part test does have to
2 be met that this Court specified in the Massachusetts
3 case.

4 QUESTION: Which wasn't an export tax.

5 MR. WALLACE: No.

6 QUESTION: In fact, none of your examples of
7 user fees which were upheld have come from the prohibition
8 against a tax on exports.

9 MR. WALLACE: We recognize that, except for the
10 route in Pace v. Burgess.

11 QUESTION: And Pace v. Burgess, as I say,
12 pointed out expressly in the Court's reasoning, one of the
13 reasons they upheld it, it was not an ad valorem tax.

14 MR. WALLACE: That is true, but ad valorem taxes
15 have been upheld as user fees --

16 QUESTION: -- export tax.

17 MR. WALLACE: -- in Sperry and in Capital
18 Greyhound Lines referred to in Evansville-Vanderburgh in
19 the discussion of Capital Greyhound Lines as one
20 permissible approach.

21 QUESTION: Mr. Wallace --

22 MR. WALLACE: So those are three decisions of
23 this Court that have recognized that as a basis for user
24 fees --

25 QUESTION: Mr. Wallace --

1 MR. WALLACE: -- in a proper context.

2 QUESTION: -- this was in the pipeline when IBM
3 was decided, so -- and my question is, is there anything
4 else in the wake of the IBM decision that's in the lower
5 courts now that we might want to take account of as we
6 decide this case?

7 MR. WALLACE: No. These have been the main
8 feature that awaited the decision in IBM, as we pointed
9 out in the IBM briefing itself, that these cases were
10 pending as one of the reasons why a decision was needed in
11 that case, and then the arguments were adjusted
12 accordingly.

13 But it is true that the Court has repeatedly
14 recognized that even exporters can be charged fees for
15 pilotage, for wharfage, for other facilities that are
16 provided, and the line has to be drawn somewhere.
17 Exporters are not exempt from paying their own way in
18 commerce the same as other users of the facilities of
19 commerce, and the best guidance for drawing the line has
20 been the test that the Court has developed in protecting
21 all constitutionally protected interests.

22 I'd like to reserve the balance of my time.

23 QUESTION: Very well, Mr. Wallace.

24 Mr. Atwood, we'll hear from you.

25 ORAL ARGUMENT OF JAMES R. ATWOOD

1 ON BEHALF OF THE RESPONDENT

2 MR. ATWOOD: Mr. Chief Justice, and may it
3 please the Court:

4 First, I'd like to supplement the answer to
5 Justice Kennedy's question about what data is in the
6 record. Also in the appendix at page 97 is some more
7 updated material about the relative charge on exports and
8 imports in domestic commerce, and in the amicus brief of
9 the Aluminum Company of America they had the most recent,
10 1997 data.

11 Basically it tells the same story, and that is
12 that exports have paid between 25 and 30 percent of this
13 tax over the years, and the amount that the exports now
14 pay is less than the annual surpluses accumulated, so you
15 could eliminate exports entirely from this tax and there
16 would still be more revenue coming in than the Government
17 is spending on harbor maintenance.

18 QUESTION: That would translate into a tax,
19 then, on imports only, and I think would raise serious
20 discrimination problems under trade agreements.

21 MR. ATWOOD: Well, this -- if there is an
22 international issue there, it can be solved in the same
23 way the export problems can be solved, which is to make
24 this a legitimate user fee.

25 I think the foreign Governments are concerned by

1 the fact that they thought they had negotiated ad valorem
2 duties of a certain level and now the United States is
3 imposing ad valorem charges on top of that, and that's the
4 problem internationally, if there is one, so a valid user
5 fee approach here I think would solve both the export
6 problem and the import problem.

7 QUESTION: In fact, I guess the fund has quite a
8 surplus in it.

9 MR. ATWOOD: It has more than a billion dollars
10 and is expected to hit \$3 billion in just a few more
11 fiscal years.

12 QUESTION: That money isn't -- it's just not
13 lying there. I assume the Government is using it for
14 other purposes, meanwhile.

15 MR. ATWOOD: Exactly. That is one of our --

16 QUESTION: The way it uses taxes -- the way it
17 generally uses tax money.

18 MR. ATWOOD: That is one of our objections to
19 this user fee classification. The harbor maintenance
20 trust fund is simply an accounting entry. Revenues under
21 this tax are treated as on-budget, so that every dollar
22 that comes in offsets obligations to raise taxes for
23 discretionary spending under the budget control process.

24 There is a transfer to the trust fund which is a
25 nonevent for budget purposes. It's simply an accounting

1 entry, and then any expenditures actually made for harbor
2 maintenance --

3 QUESTION: There's enough in there to pay for
4 the coal miners and their dependents?

5 (Laughter.)

6 MR. ATWOOD: Any appropriation for harbor
7 maintenance has to follow the same process as if there
8 were no trust fund. There has to be a bill from both
9 Houses of Congress signed by the President and Congress is
10 free to appropriate as much or as little money as it would
11 like for harbor maintenance, irrespective of what's in the
12 trust fund.

13 I'd like to address the Government's argument
14 that Mr. Wallace started with that the -- this tax -- and
15 I hope I can call it a tax, because that's what Congress
16 called it -- was a result of a very complex, delicate
17 legislative process and important compromises were made
18 and sophisticated judgments as to what was possible and
19 what wasn't possible.

20 QUESTION: Mr. Atwood, before you do that, may
21 I ask if you would tell us what you think are the
22 essential components of what one could legitimately call a
23 user fee, because I think you told us, you're not arguing
24 the export clause rules out user's fees, but it has to be
25 legitimate.

1 MR. ATWOOD: Right.

2 QUESTION: And Mr. Wallace, if I understood him
3 right, said, well, it's a tax on a user and it has to meet
4 those three standards.

5 MR. ATWOOD: We are not arguing that there is no
6 such thing as a legitimate user fee. In the context of
7 the Export Clause at least, because of history, because of
8 the unqualified nature of it, because of this Court's
9 precedents, we think the class of user fees has to be
10 defined strictly and narrowly.

11 There must be a demonstrable service provided to
12 the exporter on that export shipment, an identifiable
13 Government service that is being provided to the exporter,
14 and the charge must bear a very close relationship to that
15 service, particularly where a fee is compulsory in nature.

16 QUESTION: For the cost of that service.

17 MR. ATWOOD: For the cost of that service,
18 exactly.

19 QUESTION: Do the costs here include fixed costs
20 for dredging the harbor originally? Is it all
21 maintenance, or is it --

22 MR. ATWOOD: No. Capital costs --

23 QUESTION: Well, there is a tradition -- there
24 is a tradition of something called value of service
25 pricing, where you charge somebody for the fixed cost in

1 relationship to the value of the commodity that uses the
2 service. That's -- the ICC did that for years, and --

3 MR. ATWOOD: I think the --

4 QUESTION: -- I don't know whether that makes it
5 a great thing, but there is that tradition.

6 MR. ATWOOD: Once you're getting into value of
7 service I think that is crossing the line into a tax.

8 QUESTION: Well, nobody would have thought ICC
9 railroad freight car rates were taxes. They would have
10 said that those are -- that's simply a way of pricing the
11 railroad line and, indeed, they have it in the telephone
12 service business right now, where you pay lower cost of
13 residency, and -- I mean, there are all kinds of things
14 like that where fixed costs are divided in relationship to
15 the value of the service rather than the cost of the
16 service to the person who's using it.

17 MR. ATWOOD: Well, in deciding this case, this
18 Court need not anticipate every possible cost theory that
19 might be advanced, but an ad valorem tax based on a
20 Nation-wide program, an infrastructure program, is about
21 as far from costs as is possible, and it is feasible, I
22 think, for the -- for Congress to have come up with a much
23 more sophisticated targeted user fee, and that is proven
24 by, in the very same legislative package that included the
25 harbor maintenance tax, there was the harbor development

1 tax, which was the State analogue.

2 Under the Import-Export Clause Congress has
3 authority to, notwithstanding the Import-Export Clause
4 prohibition, has authority to authorize State charges of
5 various sorts, and the same legislation included the
6 harbor development tax, which is -- the key provisions are
7 in the appendix to our brief, where Congress said, okay,
8 States can impose harbor dues, notwithstanding the Import-
9 Export Clause, but they have to be on a project-specific
10 basis, they have to -- there has to be an identifiable
11 project, they may not impose the dues until the project is
12 up and running and providing services to the shippers,
13 exporters or importers, the costs have to be limited --
14 the fees have to be limited to the cost of the project,
15 and you have to discriminate between which vessels are
16 actually using the project and which are not. This is in
17 the same statute that included the harbor maintenance tax.

18 QUESTION: Is this imposed on vessels or goods?

19 MR. ATWOOD: That is not specified in the
20 statute. It says the local -- the States and
21 municipalities can consider either approach, but they may
22 not impose charges if the vessel is of a type that would
23 not have benefited from that project.

24 For example, a shallow draft vessel, regardless
25 of what it's carrying, may not be charged for deep

1 dredging when it did not need the deep dredging, so it's
2 an example of an approach that is obviously far closer to
3 a justifiable user fee, and it was in this very
4 legislative package. It can be done.

5 You know, also, as the quotations that Mr.
6 Wallace gave us indicate, this was a difficult political
7 process, to be sure. The Framers were worried about how
8 exports would survive in the political process. That's
9 why we have an Export Clause. This is clear from the
10 constitutional debates.

11 There was concern that, if you left these
12 matters to Congress, that in the give-and-take of the
13 political process exports would not come out favorably,
14 so, instead of waiting for Congress to include exemptions
15 in statutes, and there are a lot of exemptions in this
16 statute, Congress -- the Framers put the exemption in the
17 Constitution itself, and that exemption is not being
18 honored here.

19 There is a long tradition under the Export
20 clause of broad liberal construction. The Court has said
21 that in Fairbank, it said it most recently in IBM, it said
22 it in A. G. Spalding, and the broad construction to which
23 the Export Clause is supposed to be given would be
24 completely undermined here by an ad valorem tax.

25 QUESTION: I'm not sure what your answer was to

1 Justice Breyer's question. There are many ways of
2 allocating costs. In Justice O'Connor's example, I
3 suppose a valuable shipment needs some extra security
4 guards and a safe warehouse facility. Maybe that's
5 included in the act.

6 It seems to me that ad valorem is certainly the
7 simplest way to measure the benefit that the person is
8 getting. Now, maybe that's not a use tax. Are you saying
9 that a use tax can never be measured by the benefit that
10 the user derives?

11 MR. ATWOOD: I believe a proper user fee should
12 be framed in terms of the cost of the benefit and not the
13 benefit.

14 The examples you gave, first of all, don't
15 involve Federal services. The Federal Government does not
16 provide any marshalls at ports. That's separate
17 altogether.

18 And the lower courts, I think they both
19 considered this question of whether ad valorem is a
20 reasonable measure, even of benefit. They gave the
21 Government the benefit of the doubt and said, even if we
22 analyze this on the basis of benefits, ad valorem is
23 irrational, because benefits have to do with the
24 profitability of the shipment, not its total value or --

25 QUESTION: That argument runs into Justice

1 Breyer's point. I mean, we've considered it rational
2 enough for regulatory pricing. You know, value-of-service
3 pricing has been common, and we've never thought it was
4 irrational.

5 QUESTION: And even if you --

6 QUESTION: It's rational enough. I think your
7 point has to be that it's simply not compatible with any
8 limitation on the taxation of exports, because once you go
9 to ad -- it comes to the same.

10 QUESTION: Except that if you relate it to
11 costs -- say you're putting in a new lighthouse at the
12 harbor entrance, which would benefit everybody who uses
13 it, and if the total amount collected doesn't exceed the
14 cost of the lighthouse, doesn't that satisfy your cost
15 test?

16 MR. ATWOOD: A port-specific charge for a
17 lighthouse.

18 QUESTION: Correct.

19 MR. ATWOOD: That would -- sounds to me like a
20 proper user fee, although I still wonder --

21 QUESTION: And say -- and it's measured by those
22 who use it, by the value of the goods shipped.

23 MR. ATWOOD: I would think the proper approach
24 is not to measure it by value but to measure it by --

25 QUESTION: Well, your ceiling --

1 MR. ATWOOD: -- numbers of passages past the
2 lighthouse, or some --

3 QUESTION: Number of calls on the port.

4 MR. ATWOOD: Number of calls at the port,
5 exactly, and that's how State taxes are often allocated
6 between ports. You measure relative port days.

7 Ad valorem really just slides you right into
8 wealth transfers and taxing of value, and particularly so
9 when you do it on a Nation-wide basis, where the costs of
10 dredging in Oregon are paid for by shippers on the East
11 Coast.

12 So I -- and given the history of this clause and
13 the purpose for which it was intended to be there, which
14 is to protect exports from the vagaries of the political
15 process, I think it does require a broad construction.

16 If there are no --

17 QUESTION: There was a jurisdiction point. Do I
18 understand correctly, if it -- if the CIT is the right
19 place the cases that were started in -- what is the proper
20 title now, the CFC? -- could be transferred under 1631 and
21 that would take care of the statute of limitations?

22 MR. ATWOOD: That doesn't affect my client --

23 QUESTION: Because you started out on the CIT --

24 MR. ATWOOD: -- so we do not take a position on
25 the --

1 QUESTION: You don't take any position on that?

2 MR. ATWOOD: On the transferability of cases
3 from that other court, because in this case it's clear
4 that the CIT -- conceded by both sides the CIT and the
5 Federal Circuit had jurisdiction.

6 QUESTION: Thank you, Mr. Atwood.

7 Mr. Wallace, you have a minute remaining.

8 REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

9 ON BEHALF OF THE PETITIONER

10 MR. WALLACE: If itemization requirements are
11 carried too far, and you get into an example for -- where
12 wharfage capacity has been increased, does that mean that
13 only the users of the new wharves can be charged user
14 fees?

15 If the channel has been deepened and somebody
16 could have gotten along with a shallower vessel but
17 because of the deepening of the channel had to use the
18 larger vessel, does he have to bear part of the costs?

19 The Constitution may not prohibit Congress from
20 causing serious economic dislocations in exercising its
21 power, but the Court should be hesitant to require
22 Congress to cause serious economic dislocations by not
23 allowing it the latitude that it needs in fashioning an
24 equitable method of devising user fees.

25 Yes, Congress does have to address the surplus

1 that is accumulating in this fund, but all of the account
2 is impressed for operation and maintenance of the harbors
3 and for no other purpose, and that -- and those funds are
4 still available for that.

5 Congress has been reluctant to expand the
6 authorizations to NOAA, for example, or to the Coast
7 Guard, because the more aspects of navigation are brought
8 under this fund while litigation is pending, the more it's
9 argued that these are general expenditures.

10 CHIEF JUSTICE REHNQUIST: Thank you,
11 Mr. Wallace.

12 The case is submitted.

13 (Whereupon, at 11:49 a.m., the case in the
14 above-entitled matter was submitted.)
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CERTIFICATION

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UNITED STATES, Petitioner v. UNITED STATES SHOE CORPORATION
CASE NO: 97-372

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BY Donna Maria Fedele-----

(REPORTER)