BACKGROUND AND PRESENT LAW RELATING TO FUNDING MECHANISMS OF THE "E-RATE" TELECOMMUNICATIONS PROGRAM

Scheduled for a Public Hearing

Before the

SUBCOMMITTEE ON OVERSIGHT

of the

HOUSE COMMITTEE ON WAY AND MEANS

on August 4, 1998

Prepared by the Staff

of the

JOINT COMMITTEE ON TAXATION

July 31, 1998

JCX-59-98

CONTENTS

Page

INTRODUCTION 1

BACKGROUND AND PRESENT LAW 2

A. Overview of the Federal Communications Excise Tax 2

B. Overview of the "Universal Service" Provisions of the Telecommunications Act of 1996 5

C. Definitional Issues in the Distinction of Fees, Taxes and Revenue Measures 8

INTRODUCTION

The Oversight Subcommittee of the House Committee on Ways and Means has scheduled a public hearing on August 4, 1998, on the funding mechanisms adopted by the Federal Communications Commission (the "FCC") for the "E-rate" program which provides discounts on basic telecommunications service and advanced telecommunications services for schools and libraries under the Telecommunications Act of 1996 (the "Telecommunications Act"). To fund the E-rate program, the FCC has imposed mandatory charges ("contributions") on all telecommunications service providers. The Oversight Subcommittee will examine these mandatory contributions to determine whether they are in substance administratively imposed taxes.

This document,[1] prepared by the staff of the Joint Committee on Taxation, provides background information and an overview of present law relating to the Federal communications excise tax and the "universal service" provisions of the Telecommunications Act. Also, the document discusses definitional issues in the distinction of fees, taxes and revenue measures.

---

[1] This document may be cited as follows: Joint Committee on Taxation, *Background and Present Law Relating to Funding Mechanisms of the "E-Rate" Telecommunications Program* (JCX-59-98), July 31, 1998.

BACKGROUND AND PRESENT LAW

A. Overview of the Federal Communications Excise Tax

Present law

A 3-percent excise tax is imposed on amounts paid for local and toll (long-distance) telephone service and teletypewriter exchange service. In addition, amounts paid to communications service providers for the right to award or distribute telephone service via prepaid telephone cards or other arrangements are treated as amounts paid for taxable communications services, subject to the 3-percent *ad valorem* tax rate. Generally, the tax is collected by the provider of the service from the consumer (business and personal service). The service provider remits the tax to the Federal Government. Revenues from the tax go to the General Fund of the Treasury.

Tax is imposed only for local or toll service that provides a "telephonic quality communication" (Internal Revenue Code secs. 4252(a)(1) and (b)(1)). This standard generally has been interpreted to represent "voice quality" communication. Because electronic mail ("e-mail") communication does not provide the user with opportunity for voice-based communication, payments by users for e-mail service are not taxable as local or toll communications service. In a series of private letter rulings, the Internal Revenue Service has determined that e-mail services are not properly characterized as a teletypewriter exchange system as defined under Code section 4252(c).[2] Thus, e-mail service is subject to the communications excise tax only to the extent that the e-mail service uses taxable telephone service as a component of the e-mail service. For example, if the e-mail provider uses telephone lines to connect various subscribers, the use of the telephone lines may be taxable under present law, but charges for the e-mail service itself would not be taxable.

Exemptions from the telephone excise tax are provided for installation charges, certain coin-operated service, news services (except local service), international organizations, the American Red Cross, members of the Armed Forces in combat zones, nonprofit hospitals and educational organizations, State and local governments, and for certain toll telephone service (*e.g.*, WATS) paid by a common carrier, telephone or telegraph company or radio broadcasting company in the conduct of its business. In addition, an exemption is provided from the definition of local telephone service for private communications systems (e.g., certain dedicated lines leased to a single business user).

---

[2] *See, e.g.*, Priv. Ltr. Rul. 92-15-059 (Dec. 23, 1991).

Legislative history

An excise tax on telephone service has been in effect in every year since 1941.[3] In the Excise Tax Reduction Act of 1965, the 10-percent tax on local and long distance telephone service and teletypewriter exchange service was scheduled to be reduced from 10 percent to 3 percent after December 31, 1965, and by an additional 1 percentage point in each successive year until there would have been no tax effective on January 1, 1969. However, the scheduled reduction in tax rates was rescinded in the Tax Adjustment Act of 1966,[4] and a revised phaseout was scheduled to go into effect on January 1, 1970. This also was deferred, and a 1-percent-per year phaseout went into effect on January 1, 1973.

In 1973, the rate of tax declined from 10 percent to 9 percent as the first step in a schedule according to which the rate of tax was to decline by 1 percentage point per year and thus to expire as of January 1, 1982. However, the Omnibus Budget Reconciliation Act of 1980 delayed the repeal by one year until January 1, 1983; and the Economic Recovery Tax Act of 1981 further delayed repeal for two additional years, or until January 1, 1985. The Tax Equity and Fiscal Responsibility Act of 1982 increased the rate of tax to 3 percent and extended the termination date to January 1, 1986. The Deficit Reduction Act of 1984 delayed repeal for an additional two years, or until January 1, 1988. The Omnibus Budget Reconciliation Act of 1987 further delayed repeal until January 1, 1991. The Omnibus Budget Reconciliation Act of 1990 made the 3-percent tax rate permanent. The Taxpayer Relief Act of 1997 clarified that amounts paid for prepaid telephone cards and other similar arrangements constituted payments for communications services subject to the 3-percent *ad valorem* tax.

A 10-percent tax on telegraph service, a 10-percent tax on private communications (intercom) service, and an 8-percent tax on wire and equipment service (such as stock quotation and information services) were repealed in the Excise Tax Reduction Act of 1965.

---

[3] A tax on toll telephone service originated in 1898, with a tax of one cent for each call valued at fifteen cents or more. This tax was repealed in 1902. A tax on toll service was reenacted in 1914, with the tax on a per-message basis. This tax was repealed and reimposed several times until being changed to a 10-percent tax in 1941. The toll telephone tax rate was 20 percent for 1942-1943 and 25 percent from 1944-1954. The tax on other telephone service originated in 1941 at 10 percent, and was 15 percent from 1944-1954.

[4] Pub. L. No. 89-368, approved March 15, 1966.

Communications excise tax receipts, 1984-2008

Table 1 below reports receipts for the Federal communications excise tax from fiscal year 1984 through fiscal year 1997, and provides the Congressional Budget Office's projection of receipts for fiscal year 1998 through 2008.

Table 1.–Federal Communications Excise Tax Receipts and Projected Receipts, Fiscal Years 1984-2008[5]
[millions of dollars]

Year	Receipts	Year	Projections
1984	2,035	1998	5,164
1985	2,147	1999	5,551
1986	2,339	2000	5,946
1987	2,522	2001	6,326
1988	2,610	2002	6,730
1989	2,791	2003	7,175
1990	2,995	2004	7,642
1991	3,094	2005	8,148
1992	3,146	2006	8,654
1993	3,320	2007	9,192
1994	3,526	2008	9,742
1995	3,794		
1996	4,234		
1997	4,543		

[5] Data for 1984 through 1997 represent actual receipts as reported in *Budget of the United States Government, Fiscal Year 1999: Historical Tables*, Table 2.4. Data for 1998 through 2008 are Congressional Budget Office July 1998 baseline projections.

B. Overview of the "Universal Service" Provisions of the Telecommunications Act of 1996

The Telecommunications Act of 1996[6] provided a major rewrite of Federal telecommunications law in light of substantial industry restructuring that was and remains underway and the development of new technology not available when prior law was enacted. Beginning in 1985, the Federal Communications Commission (the "FCC") had implemented certain regulatory programs to promote "universal access" to telephone service. Primarily, these pre-1996 programs were designed to cross-subsidize service to low-income consumers, rural areas, and high-cost areas in a manner similar to private measures undertaken by AT&T before divestiture of local telephone service. Before 1996, only long distance companies paid charges to support universal service.

Section 254 of the Telecommunications Act codified and expanded the concept of universal service, to be implemented according to the following principles enunciated in the Act:

(1) Qualified services should be available at just, reasonable, and affordable rates;

(2) Access to advanced telecommunications and information services should be provided in all regions;

(3) Consumers in all regions, particularly those in rural, insular, and high-cost areas, should have access to telecommunications and information services on a basis (including rates) available in urban areas generally;

(4) All telecommunications providers should make "equitable and nondiscriminatory" contributions to the preservation and advancement of universal service;

(5) There should be specific and supportable Federal and State mechanisms to preserve and advance universal service; and

(6) Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services.

On May 7, 1997, the FCC adopted an order to implement the principles of section 254 of the Telecommunications Act. This order subsequently was modified on June 12, 1998. Under the order, charges are imposed on all telecommunications carriers that provide service between States, including long distance carriers, local service providers, cellular telephone companies, paging companies, and payphone companies.

---

[6] Pub. L. No. 104-104, approved Feb. 8, 1996 (hereinafter, the "Telecommunications Act"). The Telecommunications Act was enacted in S. 652, rather than as a House of Representatives-originated revenue bill.

The principal expansion of the universal service program was the provision of benefits for public and nonprofit elementary and secondary schools, public and certain other research libraries, and rural health care providers.[7] The directive of the Telecommunications Act is that telecommunications carriers shall provide services to schools and libraries at "rates less than the amounts charged for similar services to other parties."[8] For rural health care providers, rates are to be the same as rates charged in urban areas of the same States.[9] The Telecommunications Act further states that all of these parties are to have access to "advanced telecommunications services," and the FCC's order requires assistance on the provision of Internet access costs and internal connections in facilities (e.g., wiring, file servers, and routers) to implement this objective.

The Telecommunications Act is structured to require the provision of these discount services and to provide for reimbursement to the telecommunications carriers of the costs of providing the discount services. The source of the funds for reimbursements is the "equitable and nondiscriminatory contributions" by telecommunications carriers provided for as a "principle" in the Act. The FCC created a fund, capped at $2.25 billion per year, to support universal service discounts for schools and libraries. On June 12, 1998, this maximum funding amount was reduced to $1.925 billion over an 18-month period (January 1, 1998 to June 30, 1999). Required "contributions" were allocated among covered telecommunications carriers based on the carriers' receipts during prescribed prior periods.

In its initial order, the FCC provided that the expanded universal service program would be administered by two non-profit corporations: the Schools and Libraries Corporation and the Rural Health Care Corporation. In its June 12, 1998, revised order, the FCC proposed to merge these corporations into the Universal Service Administrative Company, which administers other portions of the universal service program.[10] In January 1998, the Congressional Budget Office issued a

---

[7] For more information, *see,* James B. Stedman, Congressional Research Service, *E-Rate for Schools: Background on Telecommunications Discounts Through the Universal Service Fund,* 98-604EPW (July 13, 1998).

[8] The discounts for schools are based on the percentage of a school's population eligible for free or reduced priced lunches under the National School Lunch program. When that percentage is less than 1 percent, urban schools receive a discount of 20 percent while rural schools receive a 25-percent discount. These discounts rise in stages as the percentage of low-income students increases. When the percentage of low-income students is between 75 percent and 100 percent, all schools receive 90-percent discounts. This discount structure also is used for libraries based on the percentages of students eligible for free or reduced price meals in the school district in which the library is located.

[9] Telecommunications Act, sec. 254(h).

[10] In a February 10, 1998, letter, the General Accounting Office (the "GAO") concluded that the FCC had exceeded its authority when it directed that the Schools and Libraries

determination that the "contributions" required to support the universal service program are Federal revenues.[11]

Telecommunications carriers have challenged the "contributions" required under the FCC orders, taking the position that the charges are in substance taxes, and that if they are authorized, the authorization represents an unconstitutional delegation of the taxing power by Congress.[12]

Corporation and the Rural Health Care Corporation be created. *See,* U.S. General Accounting Office, Letter to Senator Ted Stevens, February 10, 1998 (B-278820).

[11] *See,* Congressional Budget Office, *Federal Subsidies of Advanced Telecommunications for Schools, Libraries, and Health Care Providers,* January 1998.

[12] *See, Texas Office of Pub. Utility Counsel v. FCC,* Civ. No. 97-60421, currently pending in the United States Court of Appeals for the 5th Circuit.

C. Definitional Issues in the Distinction of Fees, Taxes, and Revenue Measures

In general

Article I, Section 8 of the United States Constitution includes among the enumerated powers of Congress the "... Power To lay and collect Taxes, Duties, Imposts, and Excises ...." Congress is limited in its ability to delegate legislative authority to the Executive Branch. When imposition of taxes and other "revenue measures" are considered by the Congress, the House Committee on Ways and Means and the Senate Committee on Finance have exclusive jurisdiction. (*See,* Rule X(s)(3) of the Rules of the House of Representatives and Rule XXV. 1(i)(8) of the Standing Rules of the Senate.) The term revenue measure includes both taxes and those fees that are structured in a manner that is not precisely linked to the cost of Government services for which the charge is made. For example, charges that are not based solely on the cost of providing the service with respect to which they are imposed, generally are viewed as fees constituting revenue measures that are within the exclusive jurisdiction of the Congressional tax committees.[13]

---

[13] *See*, 137 *Cong. Rec.* H501 (Jan. 15, 1991) (statement of the Speaker of the House providing guidance for the application of House Rule X, regarding the referral of bills, and clause 5(b) of House Rule XXI, regarding tax and tariff measures), stating the following:

> Standing committees of the House (other than the Committees on Appropriations and Budget) have jurisdiction to consider user, regulatory and other fees, charges, and assessments levied on a class directly availing itself of, or directly subject to, a governmental service, program, or activity, but not on the general public, as measures to be utilized solely to support, subject to annual appropriations, the service, program, or activity (including agency functions associated therewith) for which such fees, charges, and assessments are established and collected and not to finance the costs of Government generally. The fee must be paid by a class benefiting from the service, program or activity, or being regulated by the agency; in short, there must be a reasonable connection between the payors and the agency or function receiving the fee. The fund that receives the amounts collected is not itself determinative of the existence of a fee or a tax. The Committee on Ways and Means has jurisdiction over "revenue measures generally" under rule X. That committee is entitled to an appropriate referral of broad-based fees and could choose to recast such fees as excise taxes. A provision only reauthorizing or amending an existing fee without fundamental change, or creating a new fee generating only a *de minimis* aggregate amount of revenues, does not necessarily require a sequential referral to the Committee on Ways and Means. The Chair intends to coordinate these principles with the Committee on the Budget and the Congressional Budget Office, especially in the reconciliation process, so that budget scorekeeping does not determine, and reconciliation directives and their implementation will not be inconsistent with,

All legislation raising revenues (*e.g.,* imposing taxes) must originate in the House of Representatives.[14] The prerogatives of the House of Representatives limit Senate origination of revenue-raising measures to provisions that are incorporated into House-passed revenue bills. The House of Representatives determines when its prerogatives are violated, and generally has viewed this prerogative as being broader than its rules governing jurisdiction of the Committee on Ways and Means. A determination by the House of Representatives that a bill violates the Origination Clause is not subject to judicial review because it relates to what measures the House will legislatively consider. However, the Supreme Court has ruled that when the House of Representatives does not assert its prerogative, the question of whether the Origination Clause has been violated nonetheless may be judicially reviewed, and in appropriate cases result in a law being held to be unconstitutional.[15]

The *Munoz-Flores* case reviewed the question of whether legislation imposing "special assessments" on persons convicted of certain Federal crimes was passed in violation of the Origination Clause. Authorization for the assessments had been enacted as part of legislation originating in the Senate; the House of Representatives had not objected to enactment of the assessments as part of a Senate-originated bill. The Court upheld imposition of the assessments. The Court set forth relatively narrow circumstances in which it would invalidate Federal assessments or charges under the Origination Clause when the House of Representatives has permitted their enactment. "[R]evenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Id.* at 397, *citing Twin City Bank v. Nebeker,* 167 U.S. 198 (1897). In *Munoz-Flores,* the Court noted that while the legislation

---

committee jurisdiction.

> Further, it should be emphasized that the constitutional prerogative of the House to originate revenue measures will continue to be viewed broadly to include any meaningful revenue proposal that the Senate may attempt to originate.

This interpretation of the position of the House of Representatives had been adopted in succeeding Congresses, including the 105th Congress. *See,* 143 *Cong. Rec.* H32 (Jan. 7, 1997).

[14] Article I, Section 7 of the U.S. Constitution (commonly referred to as the "Origination Clause") provides that "[a]ll Bills for raising Revenue [must] originate in the House of Representatives . . . . " This prerogative of the House is enforced by a privileged motion available to any Member, commonly referred to as a "blue slip" motion.

[15] *See, United States v. Munoz-Flores,* 495 U.S. 385 (1990) (hereinafter "*Munoz-Flores*"),

authorizing the special assessments provided that if revenues beyond those required for programs established by the bill were produced by the assessments, the excess would be deposited in the General Fund of the Treasury, there was no evidence that Congress anticipated that such an excess would ever be produced.

Unlike the taxing power, the power to impose non-tax, or true user fees may be delegated to executive agencies. True user fees are not viewed as revenue measures for purposes of Congressional jurisdiction; therefore, the rules of both Houses of Congress permit non-tax committees to authorize such fees. In general, a true user fee is a charge levied on a class that directly avails itself of a governmental program, and is used solely to finance that program rather than to finance the costs of the Government generally. The amount of the fee charged to any payor generally may not exceed the direct costs of providing the services with respect to which the fee is charged. There must be a reasonable connection between the payors of the fee and the agency or function receiving the fee. Those paying a fee have the choice of not utilizing the governmental service or avoiding the regulated activity and thereby avoiding the charge. In other words, the fee can be viewed as a payment for a special privilege or service, as opposed to a mandatory charge (or tax) imposed on the public at large for general or specified (e.g., Trust Fund) governmental purposes.

There often are disagreements as to whether certain charges constitute "fees" or "taxes" and, in the case of fees, whether the fees constitute revenue measures. These disagreements generally arise in one or more of three contexts: (1) determining whether there has been an unconstitutional delegation of the taxing power; (2) determining whether legislation constitutes a revenue measure that must originate in the House of Representatives,[16] or (3) determining the committee assignment (including sequential committee referral) for a particular bill. The distinction between taxes and revenue measures generally, and non-tax fees also has proven to be an important factor in some Court cases evaluating the validity of charges under different provisions of the Constitution, i.e., fees that would be considered revenue measures for purposes of Congressional jurisdiction and prerogatives may be Constitutionally permissible in cases where an outright tax would not be because the fee is at least imprecisely linked to the cost of Government services provided.

---

[16] *See, e.g.,* the Statement of Managers on the Federal Aviation Reauthorization Act of 1996, clarifying that certain fees which the Federal Aviation Administration (the "FAA") is authorized to charge for overflight services provided to aircraft that neither take-off nor land within the United States may "not exceed the aggregate annual direct costs incurred by the FAA in providing air traffic services to such flights." (H.R. Rep. No. 848, 104th Cong. 2nd Sess., 110 (1996)) Also, the report of the House Committee on Transportation and Infrastructure on that same legislation, to the effect that these user fees may not be based on "any non-cost based determination of the 'value' of the service provided. For example, assuming similar costs of serving different carrier and aircraft types, the FAA user fees should not vary based on factors such as aircraft seating capacity or revenues derived from passenger fares." (H.R. Rept. No. 714, 104th Cong., 2nd Sess., pt. 1, 50 (1996))

Judicial interpretations related to the determination of whether a charge is a "fee" or a "tax"

In general.--Numerous Federal Courts, including the United States Supreme Court, have been called upon to determine whether taxes and other charges were permissible under provisions of the Constitution such as the Export Clause, the Commerce Clause, the Due Process Clause, or the Takings Clause. In certain cases, this determination depended on whether the charges constituted user fees or were in substance taxes. In cases in which user fees were permissible, but taxes were not, the Courts have applied the standards described above in making this determination, although the specific aspects of those standards which have been relied upon in evaluating Federally imposed charges have varied across the cases.[17] For example, many cases have looked primarily to whether a charge is imposed as payment for a voluntary act that goes to defray the cost of regulating that act as opposed to being imposed as an arbitrary charge for some public purpose.[18] Other charges have been evaluated primarily based on the benefits conferred in exchange for the charge, with the courts holding that a charge is a tax if it confers no special benefit on the payee as opposed to defraying

---

[17] For a more detailed discussion of these cases, *see, Thomas v. Network Solutions, Inc.*, Civ. No. 97-2412(TFH) (D.D.C., Apr. 3, 1998) (*"Network Solutions"*). *Network Solutions* addressed the question of whether registration "fees" charged under a cooperative agreement between the National Science Foundation ("NSF") and Network Solutions, Inc. ("NSI") were in substance an unconstitutional tax because they were not imposed by Congress. The facts of *Network Solutions* were that the NSF contracted with NSI to operate a domain name registration system for the Internet and NSI established a fee schedule, both for initial registrations and for annual renewal registrations. Under the cooperative agreement between NSF and NSI, 30 percent of the receipts from the "fees" were denominated as a "Preservation Assessment" and deposited into an Intellectual Infrastructure Fund. Amounts in the Intellectual Infrastructure Fund were treated as Government receipts, available for appropriation, and had been appropriated, for *inter alia,* Internet access programs. The plaintiffs contended that the "fees, " exclusive of the Preservation Assessment exceeded costs of maintaining the registration system, and therefore, the Preservation Assessment constituted a tax. Because the alleged taxes were not imposed by Congress, but rather were imposed pursuant to the action of a Federal agency, they were unconstitutional.

In holding the Preservation Assessment to be an unconstitutional tax, the District Court cited Supreme Court and other precedent on the distinction between user fees and taxes to the effect that in general, a tax is a payment which is arbitrarily imposed for some public purpose while a fee is a payment for a voluntary act, such as obtaining a permit, that defrays the expenses of regulating that act.

[18] *See, e.g., National Cable Television Ass'n.. v. United States,* 415 U.S. 336 (1974)

costs of services provided to the payors.[19] Other courts have measured benefits in terms of the value and cost of services provided to payors, holding that a charge is a tax if not fairly tied to both value and cost of services.[20] The three Supreme Court cases summarized below illustrate the ways in which the Court has distinguished fees (including fees that constitute revenue measures) from taxes.

Harbor maintenance excise tax.--On March 31, 1998, the United States Supreme Court addressed the circumstances which determine whether a Federally imposed charge is a tax or a user fee. *United States v. United States Shoe Corp.*, ___ U.S. ___, 118 S. Ct. 1290 (1998).[21] The *U.S. Shoe* case concerned the constitutionality of the harbor maintenance excise tax under the Export Clause of the U.S. Constitution.[22] The Export Clause states, "No Tax or Duty shall be laid on Articles exported from any State." In ruling that the harbor maintenance excise tax was unconstitutional as applied to exports, the Court noted that although the Export Clause categorically bars Congress from imposing any tax on exports, it does not rule out imposition of "user fees" that lack the attributes of a generally applicable tax or duty and that are charges designed as compensation for the costs for government-supplied services, facilities, or benefits.

In *U.S. Shoe*, the Government argued that the harbor maintenance excise tax was in substance a permissible user fee. The harbor maintenance tax is imposed at a rate of 0.125 percent of the value of cargo loaded or unloaded at United States ports. Revenues from the tax are deposited into the Harbor Maintenance Trust Fund, which is established to provide a financing source for certain Army Corps of Engineers harbor improvement projects. The Court held that the connection between the harbor maintenance tax and the cost of any services provided to port users was too indirect to support

---

[19] *See, e.g., Cumberland Farms, Inc. v. Tax Assessor,* 116 F. 3d 943 (1st Cir. 1997); *United States v. River Coal Co.,* 748 F. 2d 1103 (6th Cir. 1984); and *Butler v. State of Maine Supreme Judicial Court,* 767 F. Supp. 17 (D. Me. 1991).

[20] *See, e.g., Massachusetts v. United States,* 435 U.S. 444 (1978).

[21] Hereinafter cited as *U.S. Shoe.*

[22] Article I, Section 9, clause 5 of the U.S. Constitution.

classification of the charge as a user fee.[23] Thus, the charge was a tax imposed in violation of the prohibition of the Export Clause.

Federal Communications Commission "fee" on cable television subscribers.--In *National Cable Television Ass'n. v. United States,* 415 U.S. 336 (1974), the Supreme Court held that a 30-cents-per-subscriber "fee" imposed on cable television subscribers pursuant to 1952 appropriations legislation authorizing Federal agencies to impose fees on persons regulated by them to recover costs and value bestowed on the regulated parties to be an unconstitutional tax. Justice Douglas, writing for the majority, stated:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. . . . A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation. The addition of "public policy and interest served, and other pertinent facts," if read literally, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

Id. at 340.

Prior-law civil aircraft excise tax.--In *Massachusetts v. United States,* 435 U.S. 444 (1970), the Supreme Court addressed the question of whether a fixed-dollar annual aircraft excise tax violated the doctrine of State immunity from Federal tax when applied to State-owned aircraft. Revenues from the tax were dedicated to the Airport and Airway Trust Fund. The Court first affirmed lower court rulings that user fees do not implicate the tax immunity doctrine, and then held that State immunity from taxation does not extend to comparable measures such as "a nondiscriminatory revenue measure . . . which operates to ensure that each member of a class of

---

[23] The Export Clause's prohibition of taxes is absolute. In the case of other provisions of the Constitution, taxes and fees are restricted, but are permitted, and the Supreme Court has adopted a less rigid standard for evaluating their legality. *See., e.g., United States v. Sperry Corp.,* 493 U.S. 52 (1989) upholding an *ad valorem* charge applied to awards certified by the Iran-United States Claims Tribunal as not violating the Takings Clause of the Constitution, and , *Massachusetts v. United States,* 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines,* 405 U.S. 707 (1972), upholding flat charges on civil aircraft or enplaning passengers as not violating the doctrine of State immunity from Federal taxation and the Commerce Clause, respectively.

special beneficiaries of a federal program pay a reasonable approximation of its fair share of the cost of the program to the National Government." *Id.* at 453. More generally, the Court stated that the doctrine of State immunity from Federal taxation was not offended by charges that "do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied . . . . " *Id.* at 466-467. In other words, user fees in broad sense, even when denominated as taxes, do not violate the doctrine of State immunity from Federal taxation.