

# The Burger Court Opinion Writing Database

*ASARCO Inc. v. Idaho Tax Commission*

458 U.S. 307 (1982)

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



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

CHAMBERS OF  
THE CHIEF JUSTICE

Personal

June 16, 1982

Re: No. 80-2015 - Asarco, Inc. v. Idaho State Tax Comm.

Dear Lewis:

Sandra's dissent does give me pause. The pervasive economic impact of the holding leads me to take it home to review the whole story again. As to the idea of reargument, there is only one "rule" I know of: FIVE VOTES!

Regards,



Justice Powell

P.S. The "June crunch" can produce some "bad" results, e.g. U.S. v. Johnson. Sandra's tart comment at the close of her Asarco dissent really applies to Harry's opinion in Johnson!

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

CHAMBERS OF  
THE CHIEF JUSTICE

June 25, 1982

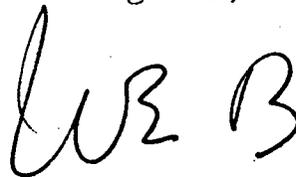
Re: No. 80-2015 - ASARCO, Inc. v. Idaho Tax Comm'n  
No. 80-1745 - F.W. Woolworth v. Tax Dept. of N.M.

Dear Lewis:

Having written several very learned, scholarly (?) separate opinions in this case, I now conclude that the Eighth Amendment would be violated by adding to the "paper chase" at this time of the year. I have reduced my position to the following:

"I join the Court's opinion in these cases in reliance on the Court's express statement that the Court's holding does not preclude future Congressional action in this area. Ante, at 20, n. 24."

Regards,

A handwritten signature in black ink, appearing to read 'WPB', written in a cursive style.

Justice Powell

Copies to the Conference

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

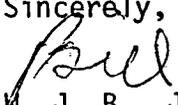
CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 28, 1982.

No. 80-2015 -- Asarco, Incorporated  
v. Idaho State Tax Commission.

Dear Lewis,

I join.

Sincerely,  
  
W. J. B., Jr.

Justice Powell.  
Copies to the Conference.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 1, 1982

Re: 80-2015 - Asarco, Inc. v.  
Idaho State Tax Comm'n

Dear Lewis,

I agree.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 1, 1982

No. 80-2015 - Asarco Incorporated v. Idaho State  
Tax Commission

---

Dear Lewis:

Please join me.

Sincerely,

*Jm.*

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 27, 1982

Re: No. 80-2015 - Asarco, Inc. v. Idaho State Tax Commission  
No. 80-1745 - F.W. Woolworth Co. v. Taxation and Revenue Dept.

Dear Bill:

Sandra has agreed to try her hand at the dissent in these cases.

Sincerely,



Justice Rehnquist

cc: Justice O'Connor

Reproduced from the Collections of the Manuscript Division, Library of Congress

HAB

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 18, 1982

Re: No. 80-2015 - Asarco, Inc. v. Idaho State Tax Comm.

Dear Sandra:

Please join me in your dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice O'Connor

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Powell**

Circulated: **MAY 28 1982**

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-2015

ASARCO INCORPORATED, ETC., APPELLANT *v.*  
IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary parent corporation doing some business in Idaho a portion of intangible income—such as dividend and interest payments, as well as capital gains from the sale of stock—that the parent receives from subsidiary corporations having no other connection with the State.

I

This case involves corporate income taxes that appellee Idaho sought to levy on appellant ASARCO Inc. for the years 1968, 1969, and 1970. ASARCO is a corporation that mines, smelts, and refines in various states nonferrous metals such as copper, gold, silver, lead, and zinc. It is incorporated in New Jersey and maintains its headquarters and commercial domicile in New York. ASARCO's primary Idaho business is the operation of a silver mine. It also mines and sells other metals and operates the administrative office of its northwest mining division in Idaho. According to the State's tax calculations, approximately 2.5% of ASARCO's total business activities take place in Idaho. App. 59, 67, and 75.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

8  
12-13  
16  
19

Style changes  
footnotes renumbered

From: Justice Powell

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

Recirculated: JUN 8 1982

2nd DRAFT

### SUPREME COURT OF THE UNITED STATES

No. 80-2015

ASARCO INCORPORATED, ETC., APPELLANT v.  
IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary parent corporation doing some business in Idaho a portion of intangible income—such as dividend and interest payments, as well as capital gains from the sale of stock—that the parent receives from subsidiary corporations having no other connection with the State.

#### I

This case involves corporate income taxes that appellee Idaho sought to levy on appellant ASARCO Inc. for the years 1968, 1969, and 1970. ASARCO is a corporation that mines, smelts, and refines in various states nonferrous metals such as copper, gold, silver, lead, and zinc. It is incorporated in New Jersey and maintains its headquarters and commercial domicile in New York. ASARCO's primary Idaho business is the operation of a silver mine. It also mines and sells other metals and operates the administrative office of its northwest mining division in Idaho. According to the State's tax calculations, approximately 2.5% of ASARCO's total business activities take place in Idaho. App. 59, 67, and 75.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

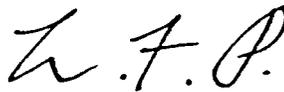
June 17, 1982

80-2015 Asarco v. Idaho State

MEMORANDUM TO THE CONFERENCE:

I propose to add the notes, drafts of which are enclosed, to my opinion for the Court.

For the most part these are in response to Sandra's dissent.



L.F.P., Jr.

SS

lfp/ss 06/17/82

Rider A, p. 8 (Asarco)

Add second paragraph to note, 11 page 8:

The dissent seems to think this decision may be read as bearing upon the power of the Federal Government to levy taxes. Post, at 15. But "[t]he States, of course, are subject to limitations on their taxation powers that do not apply to the Federal Government." F.W. Woolworth Co. v. Taxation and Revenue Dept., post, at 8.

lfp/ss 6/17/82

Rider A, p. 17 (Asarco)

The dissent's perception of some of the facts differs substantially from the record. It maintains that -- "[f]or all we know" -- ASARCO's stock investments were interim uses of idle funds "accumulated for the future operation of [ASARCO's] own primary business." Post, at 7. The trial court, however, found that ASARCO "has never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues." App. to Juris. Statement 41. Moreover, ASARCO was found to have "sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from . . . income from intangibles." Id.

The dissent also describes the five companies as "captive suppliers and customers . . . ." Post, at 12. This description is wholly at odds with the undisputed facts. See supra, at 13-17.

lfp/ss 06/17/82      Rider A, Asarco, fn , p. 25

The dissenting opinion reflects profound - though unexpressed - dissatisfaction with the unitary business principle, even though it was firmly established by more than a half a dozen decisions of this Court prior to Mobil and Exxon. See n. 14. The dissent purports to rely on these recent cases, and yet its basic arguments - in practical effect - would seriously undermine their force as precedents. It relies primarily on considerations quite different from those identified as controlling in Mobil and Exxon. The dissent does not deny that Asarco's subsidiaries were discrete business enterprises; rather it submits that they were engaged "in the same line of business". Post, 5. It notes - though the relevance is not obvious - that the management of Asarco had special knowledge of the types of business engaged in by these subsidiaries. Post, 6. The dissent also perceives a relationship between Idaho and the investment income simply because Asarco has the use in its business of income from whatever source it may be derived. Post, 7-10. Finally, it emphasizes the limited amount of open market buying and selling of products between Asarco

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

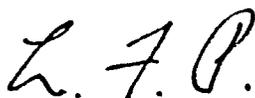
June 18, 1982

80-2015 Asarco v. Idaho State

MEMORANDUM TO THE CONFERENCE:

An additional paragraph has been added to the new note for page 8, circulated in Atex form on yesterday.

I enclose a copy, and have sent it to the print shop.



L.F.P., Jr.

SS

lfp/ss 06/18/82

Rider A, p. 8 (Asarco)

Add second paragraph to note, ll page 8:

The dissent views the Court's decision as "prohibiting apportioned taxation of investment income by non-domiciliary states". Post, at 15, et seq. This reflects a serious misunderstanding of our decision today and the cases on which we rely. The case we follow primarily is Mobil. It sustained the taxation of investment income after applying enunciated principles carefully to the facts of the case. In this case we have applied the same enunciated principles but have reached a different result because the facts differ in critical respects. As we have said elsewhere, see n. \_\_\_\_\_, the application of the unitary-business principle requires in each case a careful examination both of the way in which the corporate enterprise is structured and operates, and of the relationship with the taxing state.

The dissent also seems to think this decision may be read as bearing upon the power of the Federal Government to levy taxes. Post, at 15. But "[t]he States, of course, are subject to limitations on their taxation powers that do not apply to the Federal Government." F.W. Woolworth Co. v. Taxation and Revenue Dept., post, at 8.

B  
12  
17-22  
footnotes renumbered

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

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

Recirculated: JUN 21 1982

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-2015

**ASARCO INCORPORATED, ETC., APPELLANT v.  
IDAHO STATE TAX COMMISSION**

APPEAL FROM THE SUPREME COURT OF IDAHO

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary parent corporation doing some business in Idaho a portion of intangible income—such as dividend and interest payments, as well as capital gains from the sale of stock—that the parent receives from subsidiary corporations having no other connection with the State.

I

This case involves corporate income taxes that appellee Idaho sought to levy on appellant ASARCO Inc. for the years 1968, 1969, and 1970. ASARCO is a corporation that mines, smelts, and refines in various states nonferrous metals such as copper, gold, silver, lead, and zinc. It is incorporated in New Jersey and maintains its headquarters and commercial domicile in New York. ASARCO's primary Idaho business is the operation of a silver mine. It also mines and sells other metals and operates the administrative office of its northwest mining division in Idaho. According to the State's tax calculations, approximately 2.5% of ASARCO's total business activities take place in Idaho. App. 59, 67, and 75.

June 22, 1982

80-2015 Asarco v. Idaho

Dear Chief:

Referring to our conversation earlier today about this case, I enclose a copy of my letter to you of May 5.

For the special reasons stated therein, I expressed my regret that these particular tax cases had been assigned to me. You were kind enough to explore the possibility of a reassignment, but without success.

Accordingly, I have written the cases in accordance with the "five firm votes to reverse", even though at the time of Conference I had been somewhat uncertain. Your vote was one of the five, and my notes at the time quote you as saying: "Idaho and New Mexico do not constitute unitary businesses as defined in Mobil". After quite careful study, particularly of Mobil and Exxon, I concluded that you were right, and I wrote the cases accordingly.

In your note of June 16 you said that Sandra's dissent "gives you pause", and you referred to the "pervasive economic impact of the holding".

Sandra's dissent, on its face, would give pause. But, as the notes I have added in response make clear, she has substantially misunderstood the rationale of the opinions, and exaggerated the result of the holding. The notes I have added, since your letter of the 16th, demonstrate that there will be no "pervasive economic impact" of the Court's holding. In both cases the principles of Mobil and Exxon are faithfully applied to entirely different fact situations.

The large corporate enterprises, particularly those with foreign investments, operate in many different ways. Each case therefore must be decided on its facts. Mobil operated a truly unitary business, as did Exxon. Neither Asarco nor Woolworth comes close to conducting unitary operations, and the states undertaking to tax their investment income are - as you observed - simply reaching out to grab revenues for which they have performed no services and provided no protection.

Sincerely,

The Chief Justice

lfp/ss

Enc.

8, 17, 18

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Powell**

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

Recirculated: JUN 22 1980

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-2015

ASARCO INCORPORATED, ETC., APPELLANT *v.*  
 IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary parent corporation doing some business in Idaho a portion of intangible income—such as dividend and interest payments, as well as capital gains from the sale of stock—that the parent receives from subsidiary corporations having no other connection with the State.

I

This case involves corporate income taxes that appellee Idaho sought to levy on appellant ASARCO Inc. for the years 1968, 1969, and 1970. ASARCO is a corporation that mines, smelts, and refines in various states nonferrous metals such as copper, gold, silver, lead, and zinc. It is incorporated in New Jersey and maintains its headquarters and commercial domicile in New York. ASARCO's primary Idaho business is the operation of a silver mine. It also mines and sells other metals and operates the administrative office of its northwest mining division in Idaho. According to the State's tax calculations, approximately 2.5% of ASARCO's total business activities take place in Idaho. App. 59, 67, and 75.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 17, 1982

Re: No. 80-2015 ASARCO, Inc. v. Idaho State Tax Comm.

Dear Sandra:

Please join me.

Sincerely,

WHR/jb

Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 1, 1982

Re: 80-2015 - Asarco Inc. v. Idaho State  
Tax Commission

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 25, 1982

Re: 80-2015 - Asarco v. Idaho  
80-1745 - Woolworth v. Tax & Rev. Dept.

Dear Sandra:

For two reasons I would prefer not to have these cases reargued: (1) it is very often true that further light could be shed on issues in a case by waiting for another somewhat related case to be decided, but I think it would be unsound practice to hold cases over from one term to another for that reason; (2) although I am now free to participate in these two cases, since I am disqualified in Chicago Bridge & Iron, putting them over and making them therefore dependent on whatever is decided in Chicago Bridge & Iron, might require me to disqualify myself in all three. Having reached a conclusion as to how these cases should be decided on their own merits, I would hate to find it necessary to recuse myself next term.

Respectfully,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 28, 1982

No. 80-2015 Asarco Inc. v. Idaho State Tax  
Commission

Dear Lewis,

Barring the unforeseen, I plan to  
circulate a dissent in this case.

Sincerely,



Justice Powell

Copies to the Conference

83 17 88

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 16 1982

Recirculated: \_\_\_\_\_

1st Printed DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-2015

ASARCO INCORPORATED, ETC., APPELLANT *v.*  
 IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

[June —, 1982]

JUSTICE O'CONNOR, dissenting.

The Court today declares that the Due Process Clause of the Constitution forbids a State from taxing a proportionate share of the investment income of a nondomiciliary corporation doing business within its borders. In so doing, the Court groundlessly strikes down the eminently reasonable assertion of Idaho's taxing power at issue in this case. Far more dismaying, however, is that the Court's reliance on the Due Process Clause deprives Congress of the authority necessary to rationalize the joint taxation of interstate commerce by the fifty States.

Today, the taxpayer wins. Yet in the end, today's decision may prove to be a loss for all concerned—interstate businesses themselves, which the Commerce Clause guarantees the opportunity to serve the country's needs unimpeded by a parochial hodge-podge of overlapping and conflicting tax levies; the Nation, which demands a prosperous interstate market; and the States, which deserve fair return for the advantages they afford interstate enterprise. For while this Court has the authority to invalidate a specific state tax, only Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that would guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens. Unfortu-

104  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

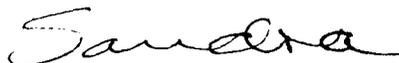
June 25, 1982

Re: No. 80-2015 -- ASARCO, Inc. v. Idaho State Tax Comm.  
No. 80-1745 -- F. W. Woolworth Co. v. Taxation and  
Revenue Dept.

MEMORANDUM TO THE CONFERENCE

As I worked on these cases I was struck both by how important our decisions will be and by how ill-served we have been by the briefs of the parties, which scarcely mention important issues that must be addressed if these cases are to be resolved properly. These cases, of course, are intimately related to the Chicago Bridge & Iron case, which we have held over for reargument next Term, and the Container Corp. case. Because our consideration of the issues presented in Chicago Bridge & Iron and Container Corp. could influence our view of the proper resolution of the above-referenced cases, I suggest that we consider holding them over for reargument at the same time that Container Corp. is argued. If we did so, we could request the parties to address the issues that were inadequately briefed and argued this Term. Even if the final result did not change, it could be that some of the reasoning would be modified in light of the problems not yet addressed in the related cases.

Sincerely,



Sandra D. O'Connor

.85  
JUN 25 1982

PP. 1, 2, 14, 17, 20, 21  
Footnotes ReNumbered

Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

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

Recirculated: JUN 25 1982

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-2015

ASARCO INCORPORATED, ETC., APPELLANT *v.*  
IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

[June —, 1982]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

The Court today declares that the Due Process Clause of the Constitution forbids a State from taxing a proportionate share of the investment income of a nondomiciliary corporation doing business within its borders. In so doing, the Court groundlessly strikes down the eminently reasonable assertion of Idaho's taxing power at issue in this case. Far more dismaying, however, is that the Court's reliance on the Due Process Clause/deprives/Congress of the authority necessary to rationalize the joint taxation of interstate commerce by the fifty States.

Today, the taxpayer wins. Yet in the end, today's decision may prove to be a loss for all concerned—interstate businesses themselves, which the Commerce Clause guarantees the opportunity to serve the country's needs unimpeded by a parochial hodge-podge of overlapping and conflicting tax levies; the Nation, which demands a prosperous interstate market; and the States, which deserve fair return for the advantages they afford interstate enterprise. For while this Court has the authority to invalidate a specific state tax, only Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that would guarantee the States fair revenues and offer interstate businesses freedom from stran-