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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

AMERADA HESS CORPORATION, ET AL.,

Appellants v.

DIRECTOR, DIVISION OF TAXATION, NEW JERSEY

DEPARTMENT OF THE TREASURY; and

TEXACO, INC., AND TENNECO OIL COMPANY,

Appellants v.

DIRECTOR, DIVISION OF TAXATION, NEW JERSEY

DEPARTMENT OF THE TREASURY

**CAPTION:**

**CASE NO:**

87-453 and 87-464

**PLACE:**

WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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AMERADA HESS CORPORATION, :  
ET AL., :  
Appellants :

v. : No. 87-453

DIRECTOR, DIVISION OF TAXATION, :  
NEW JERSEY DEPARTMENT OF THE :  
TREASURY; and :

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TEXACO, INC., AND TENNECO :  
OIL COMPANY, :  
Appellants :

v. : No. 87-464

DIRECTOR, DIVISION OF TAXATION, :  
NEW JERSEY DEPARTMENT OF THE :  
TREASURY :

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Washington, D.C.

Tuesday, November 29, 1988

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:55 o'clock p.m.

1 APPEARANCES:

2 MARK L. EVANS, ESQ., Washington, D.C.; on behalf of the  
3 Appellants.

4 MRS. MARY R. HAMILL, ESQ., Deputy Attorney General of  
5 New Jersey, Trenton, New Jersey; on behalf of the  
6 Appellee.

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P R O C E E D I N G S

(1:55 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear  
argument next in No. 87-453, Amerada Hess v. the  
Director of the Division of Taxation; and No. 87-464  
Texaco v. the Director.

Mr. Evans, you may proceed whenever you're  
ready.

ORAL ARGUMENT OF MARK L. EVANS

ON BEHALF OF THE APPELLANTS

MR. EVANS: Thank you, Mr. Chief Justice, and  
may it please the Court:

These appeals are about New Jersey's novel  
attempt to raise its own state tax revenues at the  
expense of only out-of-state economic interests. Most  
of the paths to that tempting goal have been shut off  
over the years by this Court's decisions which have made  
it crystal clear that while interstate business must  
bear its fair share of local tax burdens, it must be  
made to bear no more than its fair share.

But New Jersey seems to feel it has found a  
loophole. Under the formula apportionment method of  
taxation, a state first determines the total income from  
the entire enterprise from sources both inside and  
outside the state and then takes a slice of that income

1 for itself by using a fair apportionment formula. The  
2 Court's decisions have insisted that the formula be  
3 geographically neutral so that the state does not impute  
4 to itself a greater portion of total net income than can  
5 be reasonably attributed to the company's activities  
6 within the state.

7 what New Jersey has done is used a perfectly  
8 reasonable apportionment formula, but it has applied it  
9 to a geographically skewed base. It has not skewed the  
10 base by adding out-of-state revenues to it in an  
11 inappropriate way or overstating out-of-state revenues;  
12 what it has done is found a cost that is incurred only  
13 outside the state, only by crude oil producers, and has  
14 disallowed it. The result of that has been to  
15 drastically raise the income that New Jersey taxes from  
16 the oil companies.

17 And the question that is raised, in our view,  
18 by this is whether a state can sidestep the usual  
19 apportionment mechanisms on the theory that income tax  
20 deductions are purely a matter of legislative grace.

21 I'd like, if I may, to start with describing a  
22 little bit of the context in which this case arises.  
23 The Appellants are all integrated interstate petroleum  
24 companies. They do business in New Jersey, but they  
25 produce crude oil only outside New Jersey. There is no

1 crude oil produced at all in New Jersey.

2 During the years at issue each of the  
3 companies incurred very substantial windfall profit tax  
4 liabilities. That tax operates much as a severance tax  
5 does: It is imposed on the removal of each barrel of  
6 crude oil from the producing premises, and it is  
7 measured by a portion of the barrel's wellhead value.  
8 Under New Jersey's formula apportionment method, it  
9 requires the Appellants to include in their  
10 preapportionment base all of their income from all  
11 sources. That means that the base includes the income  
12 from, derived from the production activities outside the  
13 state.

14 At the same time, New Jersey law, as construed  
15 by the state Supreme Court, disallows a deduction for  
16 these billions of dollars of windfall profit taxes that  
17 Appellants incurred solely in the course of those  
18 out-of-state production activities.

19 QUESTION: The New Jersey allow the Appellants  
20 to deduct their federal income tax?

21 MR. EVANS: No, it does not.

22 QUESTION: Do you claim that is a violation of  
23 any constitutional principle?

24 MR. EVANS: No, we do not, Mr. Chief Justice.  
25 The distinction, as I hope to develop a little bit

1 further in a moment, is that the activities that give  
2 rise to the federal income tax liability are activities  
3 that take place everywhere, including New Jersey, and as  
4 a consequence, the cost of federal income taxes is not  
5 site-specific and geographically localized to any  
6 specific activity.

7 QUESTION: May I ask you a question, too, Mr.  
8 Evans?

9 MR. EVANS: Sure.

10 QUESTION: Before you get -- what is the  
11 allocation factor that New Jersey applies after they use  
12 their three factor formula to your company?

13 MR. EVANS: Well, there actually are, there  
14 are 13 companies involved.

15 QUESTION: Well, roughly what is the factor?

16 MR. EVANS: They vary quite a lot, Justice  
17 Stevens. There is a chart in the back of our brief, on  
18 the second -- well, it says page 3a of the Appendix to  
19 our blue brief, which reflects the allocation factor for  
20 each of the companies in the left-hand column for 1980,  
21 and then there are slightly different ones for the  
22 companies who have 1981 year as an issue.

23 QUESTION: Well, taking Chevron, for example,  
24 it is a little over 4 percent.

25 MR. EVANS: That is correct.



1 QUESTION: Now would you tell me, supporting  
2 Chevron had 4 percent of its producing wells in New  
3 Jersey, would they have -- would you be able to make the  
4 claim you're making here?

5 MR. EVANS: I think the issues would be  
6 altogether different, Justice Stevens.

7 QUESTION: Would you have any constitutional  
8 objection to this scheme if that were the fact?

9 MR. EVANS: We would not have the objection  
10 that we're raising here. There may be other objections,  
11 but they're not what we're arguing about.

12 QUESTION: But you are based entirely on the  
13 geographic factor.

14 MR. EVANS: Exactly, exactly.

15 QUESTION: But if they did have 4 percent of  
16 their wells in New Jersey, you'd still have the same  
17 rather dramatic distortion by this bank by not allowing  
18 this particular deduction.

19 MR. EVANS: Well, there might be --

20 QUESTION: It wouldn't be quite as dramatic.

21 MR. EVANS: Right. There might be some  
22 element of disproportion, but the Court has never  
23 insisted on and we don't ask for mathematically precise  
24 apportionment mechanisms. It has always recognized that  
25 states need a margin of error, and it has used phrases

1 like rough approximation, and we have no objection to  
2 that. What we do think is that the Court can reasonably  
3 expect that before a state disallows a large deduction,  
4 that it have some substantial in-state effect, some  
5 impact on the in-state economy that serves as some kind  
6 of a check against the imposition of burdensome taxation.

7 That is not the case here, and in fact, it has  
8 zero impact because there's absolutely not a drop of oil  
9 being produced in New Jersey.

10 QUESTION: Do you think 4 percent would be a  
11 substantial, substantial enough impact? I'm not sure  
12 that's fair. What about .001 percent?

13 MR. EVANS: I don't --

14 QUESTION: I mean, we would have to draw some  
15 line, wouldn't we? We'd have to figure out what percent  
16 is substantial enough for New Jersey for this particular  
17 exclusion, and there are all sorts of other exclusions.  
18 We will have to figure out some percentage of  
19 substantial enough in-state impact.

20 MR. EVANS: I think that there are some  
21 techniques that the Court, this Court and the state  
22 courts can use to make that process a bit more  
23 manageable. Certainly one can look at the proportion or  
24 the ratio of in-state production to nationwide average  
25 production by state or per capita. One could look at

1 the proportion or the ratio of oil production and its  
2 related industries to the state's total economy or could  
3 look at the employees who are involved in oil production  
4 activities or in related service industries as a  
5 proportion of total work force.

6 And in the end, there may have to be some line.

7 QUESTION: And what -- you mean if the  
8 proportion in New Jersey is not the same as the -- it  
9 has to match what? It has to be one-fiftieth, or it has  
10 to be one what?

11 MR. EVANS: Well, I don't, I don't know that  
12 this is the case in which to draw the line, Justice  
13 Scalia. I think that --

14 QUESTION: I want to know what kind of a line  
15 you're asking me to draw. That's what I want to know  
16 before I even decide that I want to draw a line.

17 MR. EVANS: Right. Well, in this case -- and  
18 I'll try to answer that question, but in this case I  
19 want to make sure that we start from the same foundation.

20 No matter where you draw the line, this case  
21 falls on the other side of it, that is, on the side of  
22 unconstitutionality because there is zero.

23 QUESTION: If you draw a line.

24 MR. EVANS: If we draw a line.

25 QUESTION: Right, but whether I draw a line

1 depends on, to some extent, on whether I can draw a line.

2 Now, you tell me what a line would look like.

3 MR. EVANS: Well, let me suggest that I can't  
4 stand here today and tell you what percentage is the  
5 cutoff. I think that the Court has always used and has  
6 drawn comfort from concepts that are based in questions  
7 of substantiality. It has used burdens of proof and  
8 presumptions to help it make these kinds of judgments.

9 But in the end, there may come a day when a  
10 line has to be drawn at a difficult spot.

11 QUESTION: But a judgment of what? I don't  
12 even know what you're asking me to judge. What is the  
13 criteria? What am I looking for?

14 MR. EVANS: The disproportion, the --

15 QUESTION: But some disproportion --

16 MR. EVANS: Whether there is a substantial  
17 in-state effect that is reasonably proportional in the  
18 circumstances that would give the Court confidence that  
19 the in-state economy and the political forces within  
20 that state will be a check on the burdensome imposition  
21 of taxes.

22 QUESTION: Proportional to what? You say  
23 proportional, sufficiently proportional. Proportional  
24 to what?

25 MR. EVANS: Well, I started to talk about some



1 possibilities. You could use proportional to the  
2 national average or the statewide national average. Two  
3 percent of the average production, for example, which  
4 would, which would give you a number something like 65  
5 million barrels a year would be the average state crude  
6 oil production.

7 If you did it on a per capita basis, it might  
8 come out a little bit differently.

9 I think that there are ways you can find a  
10 base on which to use a denominator in making the  
11 proportionality.

12 QUESTION: It's not just this court that's  
13 going to be handling this sort of a doctrine; it's court  
14 all over the country.

15 MR. EVANS: That's right.

16 QUESTION: And it sounds like they're going to  
17 be casting about pretty much.

18 MR. EVANS: Well, these things may develop,  
19 Mr. Chief Justice, but let me suggest that I think  
20 there's a self-regulating mechanism here. To the extent  
21 that there are truly substantial in-state effects, they  
22 are less likely to be, to arise. The only states that  
23 have thus far taken the position that windfall profit  
24 taxes are not deductible for purposes of state income  
25 taxes are six. Five of them have no production at all.

1 Some of them have done this by way of statutory  
2 provisions, some have done it by way of interpretation.  
3 One has negligible production, New York, which has  
4 something like .03 percent of the nation's crude oil  
5 production.

6 It may be that the issue won't have to really  
7 come up because when you start moving up the percentage  
8 line, when you start getting substantial in-state  
9 economic ties to the industry, that it is unlikely that  
10 it will be viewed as a target for this kind of taxation.

11 Now, I think it's important to emphasize that  
12 no one has produced, or certainly the state hasn't  
13 produced, and we haven't either, an example of any other  
14 disallowed deduction that affects in a disproportionate,  
15 geographically disproportionate way the activities that  
16 are subject to the disallowance.

17 QUESTION: Is it your submission that the  
18 severance taxes from other, imposed by other states  
19 should be deducted from gross income by New Jersey?

20 MR. EVANS: Yes, and they are.

21 QUESTION: And are they, all the time?

22 MR. EVANS: They are.

23 QUESTION: And is that theory that it is a  
24 cost of production?

25 MR. EVANS: Correct.

1 QUESTION: Just like the windfall profits tax  
2 is?

3 MR. EVANS: That's correct.

4 It is a theory that it is a cost of  
5 production, it is geographically site-specific in the  
6 sense that the liability arises on account of activities  
7 that occur in a specific place at a specific time, and  
8 it is --

9 QUESTION: But it isn't the kind of a cost  
10 that's associated with producing the gas out of the  
11 ground, is it?

12 MR. EVANS: Well, what, severance taxes?

13 QUESTION: Well, it's just a tax, it's just a  
14 tax, but it isn't how much does it cost me to drill down  
15 to 20,000 feet?

16 MR. EVANS: Well, but it functions the same  
17 way. It's going to cost me, those dollars that I have  
18 to pay in severance taxes and windfall profit taxes I  
19 have to pay to get that oil out of the ground and taken  
20 off the premises. It's a liability -- as a crude oil  
21 producer, there is like a toll gate that surrounds the  
22 producing premises, and every barrel that I move off  
23 those premises I have to pay the toll right there. And  
24 you can say that it's not like putting money into the  
25 ground, but what's the point of putting the money in the

1 ground?

2 QUESTION: What did the -- did the United  
3 States file some amicus brief here?

4 MR. EVANS: Yes, it did. The Solicitor  
5 General filed a brief at the Court's invitation at the  
6 jurisdictional stage.

7 QUESTION: And what -- how do you read that?

8 MR. EVANS: I read it as quite favorable. The  
9 Solicitor General's position -- I'm going to be careful  
10 not to overstate it because the Solicitor General did  
11 not reach a bottom line conclusion with respect to the  
12 correctness or incorrectness of the New Jersey Supreme  
13 Court's decision, but the Solicitor General did set up a  
14 framework for analysis which we think is very much  
15 consistent with our own view of the case, and he had no  
16 trouble with what I think is the starting point for the  
17 analysis, which is whether this windfall profit tax is  
18 or isn't a site-specific cost of oil production. He  
19 agreed that it was. He didn't think that was a hard  
20 question.

21 He thought that the real question in the case,  
22 the dispositive one, was whether the windfall profit tax  
23 was more like a severance tax or more like an income  
24 tax, on the theory that if it was more like an income  
25 tax, there were similar in-state outlays that were being



1 disallowed by the state.

2           The state operates this disallowance under  
3 what it calls its -- what the state Supreme Court  
4 referred to as an add-back provision. Like most states,  
5 New Jersey starts with a federal taxable income as the  
6 starting point for computing local taxation, and then it  
7 makes adjustments up and down, and one of them is an  
8 add-back which provides that the taxpayers must add back  
9 taxes paid or accrued to the United States on or  
10 measured by profits or income.

11           The issue, statutory issue in the court below  
12 was is this that kind of case. The court ultimately  
13 held it was, although it recognized, and recognized that  
14 the base on which the windfall profit tax is assessed is  
15 quite different from the base on which the federal  
16 income taxes is assessed. In fact, it specifically said  
17 something that the state's brief on the merits at least  
18 quite clearly repudiates, that the tax, windfall profit  
19 tax is imposed on production at the wellhead and is  
20 based on values measured at the time of removal.

21           So the state, the state court ultimately  
22 concluded that for statutory interpretation purposes  
23 this was a tax of the sort described in that add-back  
24 provision. What is significant, though, is that this is  
25 the only tax affected by that add-back provision.

1 There's no reason, there's no necessity for adding back  
2 federal income taxes because they're not deducted in the  
3 first place. So the adjustment, although the provision  
4 has been read for purposes of, I suppose, comfort by the  
5 tax administrator in New Jersey as being confirmation  
6 that the federal income tax is not in fact deductible by  
7 taxpayers in New Jersey, nothing has to be done  
8 mechanically the way the statute is set up.

9 This is the only tax that is in fact covered  
10 by the add-back provision in a practical way. It is  
11 also the only tax in the category of taxes on profits or  
12 income within the New Jersey designation that is in fact  
13 based on transaction oriented tax liability rather than  
14 tax liability incurred on account of transactions  
15 throughout the country.

16 QUESTION: Mr. Evans, if I sat down and wanted  
17 to draw up a list of those disallowed deductions that we  
18 wouldn't have to worry about for purposes of policing  
19 commerce clause activity, I really think number one on  
20 that list would be disallowance of federal income taxes,  
21 for the simple reason that if the federal government  
22 doesn't think that that should be disallowed, it could  
23 say so when it imposes the tax, if it really thinks that  
24 that's what the commerce clause requires.

25 Isn't this the least worrisome of them that we

1 would have to worry about?

2 MR. EVANS: For federal income tax, I would  
3 agree with you.

4 QUESTION: Well, any federal tax, federal  
5 income or other tax.

6 MR. EVANS: I think --

7 QUESTION: All the federal government had to  
8 do was to say when it imposed this tax it shall not be  
9 -- It shall be deducted from income for purposes of any  
10 state income tax.

11 MR. EVANS: What it did say, Justice Scalia is  
12 -- It anticipated that states would permit this tax to  
13 be deducted for state tax purposes. That was an  
14 expectation.

15 QUESTION: That's in the statute?

16 MR. EVANS: No, it's not in the statute. The  
17 statute --

18 QUESTION: It's in the legislative history,  
19 which is just as good.

20 MR. EVANS: Well, it's, I'm not -- I think  
21 it's relevant. If you are looking for what Congress  
22 thought about, the conference report usually is some  
23 guide to that, and the conference report made clear that  
24 the windfall profit tax not only was going to be  
25 deducted for purposes of federal income taxation, but it

1 expected, the Congress expected --

2 QUESTION: It could have said that in the  
3 statute, though, very easily.

4 MR. EVANS: It's rare to find those kinds of  
5 -- rare to --

6 QUESTION: A lot of our other problems we  
7 wouldn't be able to say that. A lot of our other ones  
8 we'd have to say, gee, if we didn't police it, you know,  
9 the Congress wouldn't get to it, why would it ever come  
10 to Congress's attention.

11 This can come to Congress's attention every  
12 time it passes a tax.

13 MR. EVANS: Well, I think Congress was  
14 operating, Justice Scalia, on an assumption. Maybe it  
15 was an unwise assumption, but the assumption was that  
16 states, like the federal government, treat excise taxes  
17 quite differently than they do income taxes.

18 QUESTION: Well, the New Jersey statute was on  
19 the books when the excess profits tax was passed, was it  
20 not?

21 MR. EVANS: That's correct, it was on the  
22 books and, as I say, this language disallowing federal,  
23 federal taxes on or measured by profits or income is  
24 inoffensive and unremarkable on its face because no one  
25 would argue, certainly we wouldn't argue that a state



1 could not disallow general federal income tax.

2 QUESTION: Well, do you have authority which  
3 requires us to invalidate state laws even though they  
4 were valid when enacted because the economy changes and  
5 the law is then seen to -- is viewed as discriminatory  
6 in effect?

7 MR. EVANS: Well, there certainly have been,  
8 Justice Kennedy, cases in which the Court has struck  
9 down interpretations by state tax administrators of  
10 inoffensive on their face state tax laws. An example is  
11 the Halliburton case which is cited in our briefs that  
12 involved a use tax that, as interpreted by or as  
13 applied, I should say, by the tax administrator, worked  
14 a disadvantage to products that were manufactured out of  
15 the state rather than manufactured in the state, and the  
16 Court said --

17 QUESTION: Well, but I would suggest that here  
18 the New Jersey statute was clear at all times.

19 MR. EVANS: Well, it was clear, but what I'm  
20 suggesting is that the interpretation it is being given,  
21 whether it is right or not under state law, the Supreme  
22 Court of New Jersey imputed to the legislature of New  
23 Jersey an intention to reach this tax or to disallow  
24 this tax under that provision.

25 I don't think for constitutional purposes that

1 the rule should be any different for a state like New  
2 Jersey that reaches the result by interpretation of  
3 administrators or by courts than for the state like Iowa  
4 or Minnesota that does it by virtue of a specific  
5 statutory provision.

6 QUESTION: Well, it certainly writes out of  
7 the equation any intent to discriminate.

8 MR. EVANS: Well, I think that's, I think  
9 that's right. Certainly you can't impute an intent to a  
10 1958 legislature to discriminate against a tax incurred  
11 during -- against those who incur a tax enacted later.

12 QUESTION: So under your theory, all states  
13 have the obligation to constantly revise their state tax  
14 laws in order to take account of new economic conditions?

15 MR. EVANS: Well, I think that's, I think  
16 that's -- I wouldn't put it quite that way. I think  
17 there may be situations arise --

18 QUESTION: But that's the principle you're  
19 arguing for, isn't it?

20 MR. EVANS: I don't think so because I don't  
21 think this happens frequently. This is the first time a  
22 case like this has ever arisen, and I can't think of and  
23 the state hasn't offered any other examples. This is a  
24 unique situation. It was a pot of honey, and the bees  
25 started to be attracted to it. It was a large pot of

1 \$78 billion of federal windfall profit taxes that were  
2 paid during the life of that statute, which,  
3 incidentally, I should mention has been repealed as of  
4 last August, and some --

5 QUESTION: Well, tax authorities find a  
6 universe of honey that they are attracted to.

7 MR. EVANS: I know, but this one is an  
8 out-of-state pot. It costs nothing in terms of in-state  
9 impact to disallow that cost. It raises tax revenues by  
10 enormous amounts.

11 Let me just, just to give you a sense of the  
12 magnitude, I mean, this is really an extraordinary  
13 situation. We have in the first page of our appendix to  
14 our brief a fold-out chart that gives you a sense of  
15 what the impact has been on the companies involved.  
16 There are two years at issue here, 1980 and 1981. 1980  
17 was the phaseout of controls, and during that, during  
18 that year there was still a substantial amount of  
19 federal price control in effect; as a consequence, the  
20 amount of windfall profit taxes was quite a bit smaller.

21 But even during that year, look at the  
22 amounts, the percentages by which New Jersey was able to  
23 increase the total tax burden of these taxpayers by  
24 simply denying that deduction. And then look at the  
25 next year --

1 QUESTION: That's which column, the second  
2 from the right?

3 MR. EVANS: I'm sorry, one, two, three, the  
4 fourth column over shows the percentage increase in the  
5 tax burden on account of this disallowance.

6 QUESTION: And for Amerada it's 15 percent.

7 MR. EVANS: That's correct.

8 QUESTION: And they actually paid New Jersey  
9 what that year, \$12 million?

10 MR. EVANS: Well, they had reported on their  
11 return \$10 million.

12 QUESTION: What was Amerada's gross income in  
13 that year?

14 MR. EVANS: That is in the record, Mr. Chief  
15 Justice. I don't have that accessible.

16 QUESTION: Can you give me an order of  
17 magnitude?

18 MR. EVANS: Well, we could probably figure it  
19 out. Well, no, I don't know that I could even figure it  
20 out from the chart here.

21 QUESTION: Well, was it billions or --

22 MR. EVANS: Yes, I'm sure it was billions.

23 QUESTION: New Jersey --

24 MR. EVANS: It might have been millions.

25 QUESTION: In terms of money, New Jersey --



1 MR. EVANS: Pardon me. I'm sorry.

2 QUESTION: New Jersey collected how much more  
3 money from --

4 MR. EVANS: New Jersey for that year from  
5 Amerada Hess, if you just look across these columns, the  
6 first column shows what New Jersey's -- what Amerada  
7 Hess's reported tax liability is.

8 QUESTION: Right.

9 MR. EVANS: The second column shows what the  
10 tax administrator assessed after denying the disallow --  
11 the deduction for windfall profit tax.

12 The third column shows the difference, that  
13 is, the additional tax liability. And the fourth column  
14 is the percentage.

15 Does that answer your question?

16 QUESTION: Seven times as much tax, seven  
17 times as much tax.

18 MR. EVANS: No, not -- oh, I'm sorry, for 1981  
19 it is, yes, almost eight times as much.

20 QUESTION: Yes, exactly.

21 MR. EVANS: And I mean, this is, if you look  
22 on the next page -- well, let me just look at this  
23 fourth column for 1981. 1981 was the year when the  
24 windfall profit tax really was at its height, and you  
25 can see what this does to a company. For example, look

1 at, look at Citiles Service which had reported no net  
2 income at all for 1981 and it suddenly winds up owing  
3 \$912,000 after disallowance. You can't even compute the  
4 impact on there, on that company in terms of percentages.

5 And for Gulf it was more than ten times as  
6 much. I mean, it's not -- this is not -- we're not  
7 working around the edges here. This goes right to the  
8 heart of tax liability.

9 If you look at the next page --

10 QUESTION: It is very important for New Jersey  
11 to get that money, I would guess.

12 MR. EVANS: I'm sure it is.

13 QUESTION: I mean, it's important on both  
14 sides.

15 MR. EVANS: It's important --

16 QUESTION: So long as it legitimately can,  
17 right?

18 MR. EVANS: It's important for New Jersey to  
19 get it, but it is important for New Jersey to get it in  
20 a balanced, geographically balanced fashion so that the  
21 people burdened by that, in effect, that additional tax  
22 burden, are not exclusively out-of-state actors.

23 The next page is I think worth just looking at  
24 quickly because it shows what New Jersey would have had  
25 to do to its allocation factor to achieve the same

1 result that it achieved by virtue of disallowing the  
2 windfall profit tax deduction. What it shows that for  
3 Amerada Hess, it would have had to increase the  
4 allocation factor from 23 percent, which is already  
5 pretty substantial, to 204 percent.

6 So if you accept the premise that the  
7 deduction of the windfall profit tax is a proper thing,  
8 what New Jersey has done is to tax Amerada Hess on twice  
9 of its total -- twice its total income nationwide.

10 These are the kinds of distortions that occur  
11 when a state goes after this huge pot of out-of-state  
12 cost and disallows it.

13 QUESTION: May I interrupt with another  
14 question?

15 If -- we've already talked about the  
16 possibility that they had the same percentage of their  
17 wells in the state that the allocation factor --  
18 supposing they just had one well, so it was a trivial  
19 amount? How -- this is kind of the line drawing problem  
20 that Justice Scalia asked about, I guess.

21 MR. EVANS: Right.

22 QUESTION: But what is your position? Does  
23 your claim just apply to factors that are totally  
24 outside the state or whenever there's a substantial  
25 distortion?

1           MR. EVANS: Let me answer that this way. I  
2 think in a way that New York presents that issue because  
3 New York's level of production is really quite, quite  
4 small, and I'm not prepared to stand here and say that  
5 our principle will not reach New York. I thin it  
6 probably does reach New York.

7           But I think one could draw the line at New  
8 Jersey if one chose to do so. I don't think it would  
9 really hold up to scrutiny but the difference is that in  
10 New Jersey, every single taxpayer who is affected by  
11 this disallowance has his base dramatically skewed.  
12 There may be in a state like New York or Pennsylvania or  
13 Michigan, as the state suggests, there may be  
14 substantial enough production that some producers are  
15 entirely in-state producers, and as to them, maybe the  
16 skewing doesn't work that way. Maybe they have more  
17 in-state costs that are disallowed than out-of-state  
18 costs.

19           Maybe that's a basis for drawing the line  
20 right there. I don't know. I don't think it is,  
21 probably, and I've thought about that a great deal, and  
22 I'm not comfortable with a line that I can defend at  
23 that point. That's why I think a better approach is to  
24 assure oneself that the impact of a disallowance does  
25 have some significant effect on the in-state economy.



1 If it has that, then there's some protection, some -  
2 reason to hope at least that the political forces will  
3 operate in a way to make sure these kinds of things  
4 don't happen the way they have here.

5 QUESTION: One of the troublesome things about  
6 the case is just the fact that they disallowed this cost  
7 is itself, it seems somewhat unfair because it is such a  
8 large item, but that we can't really -- that really is  
9 constitutionally irrelevant, I guess.

10 MR. EVANS: Well, I don't think it's totally  
11 irrelevant. I suppose as a matter of principle it is,  
12 but it certainly would make a difference if we are  
13 talking about \$1000 here.

14 QUESTION: Yes.

15 MR. EVANS: I mean, it might have the same  
16 principle, but first of all, the market wouldn't  
17 probably justify bring the case to the Court, but I  
18 think --

19 QUESTION: You say they could still do this,  
20 as outrageous as it seems, so long as they did it to  
21 in-state companies.

22 MR. EVANS: That's right, that's right. If we  
23 -- If there were in-state producers of a substantial  
24 number so that the economy was tied to it, and if New  
25 Jersey disallowed the production, on our geographic

1 skewing theory we would not be able to make our  
2 argument, and there may be other arguments, but that  
3 wouldn't be -- this wouldn't be one of them.

4 QUESTION: [Inaudible] -- add back from  
5 out-of-staters.

6 MR. EVANS: Well, then for sure we would make  
7 the case.

8 QUESTION: So that's --

9 MR. EVANS: Then it would be, then it would be  
10 facially discriminatory.

11 QUESTION: Yes. Well, that's really what  
12 you're saying here. It's the same kind of an argument.

13 MR. EVANS: That's right.

14 QUESTION: Thank you, Mr. Evans.

15 Mrs. Hamill, we will hear now from you.

16 ORAL ARGUMENT OF MRS. MARY R. HAMILL

17 ON BEHALF OF APPELLEES

18 MRS. HAMILL: Mr. Chief Justice, and may it  
19 please the Court;

20 I'd really like to make just two points on  
21 behalf of New Jersey today. The first is that New  
22 Jersey is not discriminating against interstate commerce  
23 nor skewing the income base of the corporation tax by  
24 denying a deduction for the windfall profit tax. All  
25 New Jersey is doing is applying a longstanding statutory

1 provision which denies a deduction for all federal  
2 income or profits-based taxes, regardless of where the  
3 taxed activity takes place.

4 And I think the Chief Justice picked up on  
5 this point in his first question to Mr. Evans. We deny  
6 a deduction for all federal income-based taxes, and the  
7 New Jersey Supreme Court concluded that this was an  
8 income-based tax.

9 The second point I'd like to make is that the  
10 company's proposed constitutional rule would be  
11 difficult to apply, as I think Justice Scalia pointed  
12 out, and would severely restrict the state's ability to  
13 define net income, and the Court has made clear that  
14 there is a very large leeway that the states have in  
15 defining net income. The case where the Court indicated  
16 that was Atlantic Coastline Railway v. Daughton.

17 To to back now to my point that all we're  
18 doing is applying a longstanding statutory provision,  
19 since 1958 New Jersey has had a corporate franchise tax  
20 measured by income that taxes unitary net income  
21 apportioned to New Jersey, and included in that unitary  
22 net income, as this Court has held is permissible, is  
23 income attributable to the production of crude oil in  
24 other states.

25 Since 1958, more than 20 years before the

1 enactment of the windfall profit tax, New Jersey has had  
2 a statutory provision that denies a deduction for taxes  
3 paid or accrued to the United States on or measured by  
4 profits or income. That provision applies to all  
5 federal income or profits-based taxes, including the  
6 federal income tax, the federal minimum tax. It would  
7 apply to federal excess profits taxes, and we believe it  
8 applies to the windfall profit tax, and the New Jersey  
9 Supreme Court so held because it concluded that the  
10 windfall profit tax is an income-based tax.

11 I don't understand the Appellants --

12 QUESTION: May I interrupt with a question,  
13 Ms. Hamill?

14 MRS. HAMILL: Yes.

15 QUESTION: Supposing that the federal  
16 government recast this tax a little bit, a little  
17 different, and made it definitely a severance tax so  
18 that it unquestionably and as a matter of federal law  
19 was a severance tax?

20 Or perhaps I should ask the question, do you  
21 think New Jersey could constitutionally treat severance  
22 taxes imposed by states in the same way it has treated  
23 this tax?

24 MRS. HAMILL: I think it could under its  
25 present taxing scheme because New Jersey, while it



1 allows a deduction currently -- are you speaking of the  
2 windfall profit tax specifically or any --

3 QUESTION: No, my question really is if --  
4 there are really two parts to it. One, is there a  
5 constitutional objection to treating severance taxes the  
6 way New Jersey treats this tax, and if so, could you  
7 overcome the objection by just calling it an income  
8 tax? Because arguably, what you have -- what we have  
9 before us is something that at least the Solicitor  
10 General suggests could be treated as a site-specific tax  
11 and therefore comparable to a severance tax, even though  
12 in construing your statute your Court has called it an  
13 income tax.

14 MRS. HAMILL: Well, I think New Jersey could  
15 deny a deduction for severance taxes. It in fact does  
16 not because it follows the federal income tax treatment  
17 of severance taxes, and they are deductible. New Jersey  
18 has no severance tax, so that even if the windfall  
19 profit tax, under the Solicitor General's theory, is  
20 akin to a severance tax, I don't see the in-state  
21 favoritism. How can there be any favoritism if we don't  
22 have that tax? We don't have severance taxes. So it  
23 wouldn't make any difference if the windfall profit tax  
24 is characterized as a severance tax, it seems to me.

25 QUESTION: Well, there's an argument the other

1 way, I suppose, on that.

2 QUESTION: I think it's just the reverse. If  
3 you had a severance tax, it wouldn't be a problem  
4 because then you'd be affecting yourself, you'd be  
5 denying deductions to people in your state as well as  
6 deductions to people elsewhere.

7 It precisely becomes a problem when you do not  
8 allow a deduction for severance tax which is cost free  
9 to you because you don't have any severance taxes.

10 MRS. HAMILL: Well, again, though, but the  
11 question is whether you are really doing something that  
12 is advantaging the in-state economy, at least as I read  
13 the Court's commerce clause cases, and I can't see that  
14 you're forcing out-of-state activity into the state if  
15 you deny a deduction for a cost that can't be performed  
16 in the state.

17 QUESTION: You may be keeping it out.

18 MRS. HAMILL: If you don't have it, if you  
19 simply don't have a particular --

20 QUESTION: Or you may be keeping it out.

21 QUESTION: Well, is that --

22 QUESTION: Do you suppose, could New Jersey  
23 say to these oil, the oil company, we are not going to  
24 allow you to deduct from gross income any of your labor  
25 costs associated with producing oil?

1 MRS. HAMILL: No, I don't think it could.

2 QUESTION: Why not?

3 MRS. HAMILL: Because I think there would be  
4 labor costs incurred by these oil companies in state.  
5 They wouldn't be in producing oil --

6 QUESTION: No, I just said in connection with  
7 producing oil.

8 MRS. HAMILL: No, we couldn't -- I don't think  
9 we could deny that deduction.

10 QUESTION: Well, there wouldn't be anybody in  
11 New Jersey who would be denied the deduction because  
12 there's no oil produced in New Jersey.

13 MRS. HAMILL: But we would have other costs  
14 incurred by these oil companies that would be labor  
15 costs.

16 I think the comparison --

17 QUESTION: Well, all I'm talking about are --  
18 If we define labor any way you want to, it's the kind of  
19 labor that is spent at the point of -- labor costs at  
20 the point of producing the oil and gas.

21 Could you deny that deduction?

22 MRS. HAMILL: I don't think we could. I don't  
23 think we could.

24 QUESTION: Why not? Why not?

25 MRS. HAMILL: Well, because what I -- I do

1 think that the difference would be that we clearly have  
2 labor costs, they're not on oil and as, that's true,  
3 production of oil and gas, but we have labor costs that  
4 are costs in state, and we would be allowing those  
5 deductions.

6 QUESTION: Well I --

7 MRS. HAMILL: So there would be a disparity.

8 QUESTION: Well, if you call a windfall profit  
9 tax a cost of production like you do severance taxes,  
10 you would have the same objection because you, certainly  
11 you allow your own citizens all the costs that they  
12 incur in the production of income.

13 MRS. HAMILL: But there's no distinction,  
14 Justice White, based here on the citizenship of the  
15 companies. We are taxing -- we deny this deduction to  
16 all companies that do business in New Jersey that pay  
17 the windfall profit tax. We are not even singling out  
18 integrated producers. We deny the deduction to a wholly  
19 intrastate real estate development company, for instance  
20 that might have a partnership investment in a drilling,  
21 oil drilling venture.. That company would pay the  
22 windfall profit tax, and we would deny it just the way  
23 we would deny that company a deduction for the federal  
24 income tax.

25 You see, we are treating this windfall profit



1 tax as an income-based tax. The New Jersey Supreme  
2 Court held it was an income-based tax. In that respect  
3 it is similar under our law to the federal income tax.  
4 The federal income tax could clearly be imposed really  
5 almost exclusively with respect to out-of-state  
6 activities; we would deny the deduction. It could be  
7 imposed exclusively with respect to in-state activities;  
8 we would deny the deduction.

9 So in our view, the so-called site-specific  
10 nature of the windfall profit tax is just irrelevant.  
11 It's another federal income-based tax.

12 QUESTION: Ms. Hamill, is there any reason why  
13 the -- why New Jersey or any other state could not  
14 impose a gross income tax, duly apportioned, on a  
15 company like Amerada or one of the other oil companies,  
16 allowing no deductions for anything? Really, it would  
17 be in effect a form of sales tax, I suppose.

18 MRS. HAMILL: Your Honor, if New Jersey -- on  
19 New Jersey receipts?

20 QUESTION: Yes.

21 MRS. HAMILL: Yes, it certainly could, and in  
22 fact, in Appendix I think it is C to our brief, we show  
23 that a gross receipts tax of 1 percent or less on these  
24 companies' New Jersey receipts would have yielded a  
25 greater tax liability than their liability under the

1 apportioned net income tax without a deduction for the  
2 windfall profit tax.

3 So there is -- this talk we've heard about the  
4 excessiveness of the tax effect is really not supported  
5 by what's going on. They had very, very large New  
6 Jersey receipts. Moreover, for all we know, their  
7 incomes in those years may have increased enormously  
8 from the pre-decontrolled period, so that the simple  
9 increase in their liability in New Jersey is not,  
10 standing alone, something that should be taken to be  
11 suggestive that the windfall profit tax treatment,  
12 denial of the deduction, is unconstitutional.

13 QUESTION: Ms. Hamill, what about a gross,  
14 gross receipts tax on nationwide receipts, apportioned,  
15 that is, not just on sales in New Jersey, but the state  
16 uses the theory that some difficult-to-ascertain  
17 proportion of all the money this company makes  
18 nationwide is attributable to its New Jersey activities  
19 on the basis of salary or whatever, uses some formula,  
20 and it applies that formula to nationwide gross  
21 receipts, and the tax is on nationwide gross receipts.

22 Would that be constitutional?

23 MRS. HAMILL: Well, I think in conceptually,  
24 theoretically, one could possibly do that, but in fact  
25 the problem is that the Court has held that gross

1 receipts may be taxed by the state where the receipt is  
2 realized, so that if you had that taxing scheme that's  
3 fairly well accepted, and then some states started to  
4 apportion gross receipts, you might very well have  
5 double taxation of those receipts.

6 So in practice, I think it would be hard to do  
7 that.

8 QUESTION: In one of your earlier answers you  
9 indicated that the sole or controlling rationale for our  
10 cases requiring apportionment is so that a state does  
11 not try to encourage industry to move to New Jersey, and  
12 of course, that fits very well here because there's no  
13 oil in New Jersey, but is that the sole rationale of  
14 those cases? Don't they go beyond that and say that a  
15 state simply may not reach beyond its borders and tax a  
16 transaction that doesn't occur there?

17 MRS. HAMILL: Well, that's certainly --

18 QUESTION: It's a jurisdictional concept,  
19 almost, although it's within the interstate commerce  
20 clause.

21 MRS. HAMILL: Well, that's certainly part of  
22 the commerce clause analysis. I was focusing more on  
23 just pure discrimination, but that's certainly true.

24 I don't think in this case there's the  
25 slightest tenable argument that we are reaching out and

1 taxing a transaction that's outside of New Jersey. We  
2 are denying a deduction against the unitary net income  
3 which is then apportioned to New Jersey. The amount of  
4 the deduction is equal to the windfall profit tax, but  
5 there's no reaching out and imposing a windfall profit  
6 tax on transactions elsewhere.

7           There really is no discrimination against  
8 interstate commerce here, I really believe, for the same  
9 reason that I made in the very beginning, that we are  
10 simply treating the windfall profit tax as an  
11 income-based tax, and in that respect, like the federal  
12 income tax. If we deny a deduction for the federal  
13 income tax with respect to activities incurred in New  
14 Jersey, it seems to me there's no discrimination in  
15 denying a deduction for the federal windfall profit tax  
16 that's incurred outside New Jersey.

17           I'd like to go back to, a minute to the  
18 question that Justice White raised of whether the  
19 windfall profit tax is a production cost similar to a  
20 severance tax because I really think that we don't have  
21 to reach that question of whether we would deny a  
22 deduction for severance taxes here because this is not  
23 akin to a severance tax. This tax is always a net  
24 amount. It is an income computation. The company is  
25 allowed to deduct at least its actual costs at the



1 wellhead.

2 QUESTION: [Inaudible] figured at the  
3 wellhead, isn't it?

4 MRS. HAMILL: At the wellhead, that's  
5 absolutely true, but there are, there are many, many  
6 definitions of income, and many states treat production  
7 income at the wellhead as -- producing states, as the  
8 basis for imposing a state income tax. Percentage  
9 depletion under the federal Internal Revenue Code is  
10 computed based on income at the wellhead. There's no  
11 magic in the fact that we are taxing a segment of income  
12 and not overall income.

13 We also believe that the windfall profit tax  
14 really is not site-specific, if we get to that point at  
15 all. We first believe it is just irrelevant, but even  
16 if the windfall profit tax, if we get to the question of  
17 whether it's site-specific, it seems to us that when you  
18 start computing the windfall profit tax with the removal  
19 price, which for an integrated company like these is the  
20 posted price of oil in the field, and the posted price  
21 is the price that a refiner would pay for that oil in  
22 the field but taking into account the value of the oil  
23 at the refinery, it seems to us that you're measuring  
24 that windfall profit tax by offsite factors, and thus,  
25 while the activity may take place at a certain place,

1 the measurement of that activity is not site-specific.  
2 It relates to factors elsewhere.

3 And the prime example of that which we discuss  
4 in our brief is the case of Alaska North Slope Oil.  
5 Since there are no markets on the North Slope, these  
6 companies value their crude oil for windfall profit tax  
7 purposes by determining the market value of that crude  
8 in the lower 48 states, based on what the oil would  
9 bring in those markets. The price may vary from the  
10 Gulf coast to the east coast to the west coast, and then  
11 they net back from that figure to reach the wellhead  
12 price. But since they start with a figure that's in the  
13 lower 48 states, and for Exxon that figure is the value  
14 of the oil for Exxon's oil sent to the east coast, it's  
15 the value of that oil at Exxon's refinery in Linden, New  
16 Jersey, I don't see how that can be called a  
17 site-specific cost when that's the basis for the  
18 computation of the windfall profit tax.

19 Justice Kennedy had a question about whether  
20 there was any authority for the Court striking down a  
21 state law which was unobjectionable when enacted, but  
22 the economic facts have changed, and that therefore it  
23 becomes objectionable, and the case that came to my mind  
24 when that question was raised was the very recent case  
25 of Shell Oil v. Iowa. Iowa, like New Jersey, has a

1 unitary net income tax. The tax statute was enacted  
2 before development on the outer continental shelf began,  
3 before the outer continental shelf Lands Act was  
4 enacted, but the Court held that since Congress had not  
5 preempted the states from taxing income earned in part  
6 on the outer continental shelf, Iowa could tax this  
7 outer continental shelf income, or it could tax the  
8 income derived from that outer continental shelf income,  
9 and so the Iowa tax continued to be valid despite the  
10 change in circumstances, despite the fact that you had  
11 development of oil and gas somewhere else.

12 QUESTION: Yes, but if one of the changed  
13 circumstances had been a congressional statute saying  
14 you can't impose any tax on this oil, it would have been  
15 unconstitutional to apply it to it.

16 MRS. HAMILL: That's right, but that would  
17 have been a changed federal law --

18 QUESTION: And that would have been a  
19 subsequent event.

20 MRS. HAMILL: -- Your Honor, and that could  
21 very well have happened here. Congress could very well  
22 have preempted New Jersey from denying a deduction for  
23 the windfall profit tax.

24 QUESTION: Or if Iowa had started to tax,  
25 interpreted its law in a way that suddenly taxed

1 out-of-state transactions at double the rate that local  
2 transactions, I suppose it would be invalid even though  
3 it was an old law.

4 MRS. HAMILL: That's true, but --

5 QUESTION: And here's we've got a brand new  
6 interpretation of this statute because this problem just  
7 hadn't arisen.

8 MRS. HAMILL: Well, that's true, too. We have  
9 a -- that's absolutely true, Your Honor.

10 QUESTION: In other words, I don't think the  
11 fact it was constitutional when it was passed makes it  
12 immune from constitutional attack forever.

13 MRS. HAMILL: I understand.

14 We tend to think that that colors the  
15 situation, that there's clearly no discriminatory intent  
16 here. We just are applying our statutory provision  
17 that's been on the books for a long time to a newly  
18 enacted federal statute, and we analogize that to the  
19 federal income tax for which we deny a deduction.

20 The final point that I would like to make is  
21 just to reiterate the point that was made in questions  
22 to my opponent. This constitutional rule that the  
23 Appellants propose would be very difficult to apply.  
24 New York, which is an amicus in this case, had 853,000  
25 barrels of crude oil production in 1986 and denies a



1 deduction for the windfall profit tax. Kansas denies a  
2 deduction for the windfall profit tax, and in 1986 had  
3 67 million barrels of crude oil production.

4 So despite Mr. Evans' point that the in-state  
5 political forces would operate to prevent a state  
6 legislature from denying a deduction for the windfall  
7 profit tax if there was crude oil production in the  
8 state, that seems not to have been the case in the case  
9 of Kansas.

10 But anyway, going back to these figures, the  
11 question is does New York have too little crude oil to  
12 deny a deduction for the windfall profit tax? Does  
13 Kansas have enough? Where would the line be drawn?

14 The rule would also severely restrict the  
15 states' ability to define net income, and --

16 QUESTION: I presume Texas does not deny the  
17 deduction.

18 MRS. HAMILL: Texas doesn't have a corporate  
19 income tax, Your Honor.

20 (Laughter.)

21 MRS. HAMILL: Even better.

22 QUESTION: Better still, right.

23 MRS. HAMILL: Yes.

24 As shown in Appendix B to New Jersey's brief,  
25 over 30 states follow the federal income tax treatment

1 of depletion. Some of these states, including New  
2 Jersey, have no crude oil but do have hard minerals.  
3 Those states which have hard minerals and no crude oil  
4 are currently in violation of the companies' proposed  
5 constitutional rule because the depletion, the federal  
6 income tax depletion deduction for oil and gas is  
7 generally less favorable than the depletion deduction  
8 for hard minerals.

9 So they are doing -- and that's a great many  
10 states that would be in violation of this rule.

11 This example shows the difficulty that the  
12 states would be put in if the companies' rule were  
13 accepted. Before following the federal income tax  
14 treatment of a particular cost, the states would have to  
15 survey the domestic economy, determine if a particular  
16 activity occurred in state and how much of it occurred  
17 in state, and then take action in the state legislature.

18 We believe that the Court to date has not  
19 construed the commerce clause in such a rigid fashion.  
20 There seems to us to be no need to change that rule now  
21 and adopt a more rigid one when there's really no  
22 singling out of out-of-state crude oil production; we  
23 are simply applying our unitary tax. We are including  
24 oil production values in the net income base just the  
25 way the Court has said we could. In fact, all we're

1 doing really is preserving the net income base in an  
2 amount which was equal to what it was before Congress  
3 enacted the windfall profit tax.

4 It's simply -- the windfall profit tax is  
5 simply a segment of the windfall profit. The windfall  
6 profit is that crude oil production income or value. It  
7 may not be included dollar for dollar in the unitary net  
8 income base, but that net profit, that windfall profit  
9 flows through to the bottom line, and it is simply  
10 unitary net income, the same amount of unitary net  
11 income that we always taxed, that we believe we should  
12 be able to continue to tax.

13 QUESTION: May I ask one question before you  
14 sit down?

15 In the appendix to their brief they have a  
16 table -- it's Appendix B that was called to my attention  
17 earlier -- which compares the actual allocation factor  
18 with the effective allocation factor and shows the  
19 percentage increase by reason of the denial of this  
20 deduction.

21 I am never sure whether these things are in  
22 the record or just prepared in the briefs.

23 Do you disagree at all with the figures there,  
24 or just --

25 MRS. HAMILL: No, I don't, Your Honor.

1 QUESTION: Okay. I just wanted to be sure.

2 MRS. HAMILL: I think they are all right, but  
3 I just would point out that what this table doesn't  
4 show, and I believe it's in the record but I'm not  
5 sure. You'd have to look back at the annual reports of  
6 these companies for the years at issue and compare those  
7 years to '78 and '79, but these companies, perhaps with  
8 the exception of Cities Service, were vastly more  
9 profitable in these years, so that while these  
10 percentage increases may appear large, you can't take  
11 those numbers in a vacuum and assume that they are --

12 QUESTION: In other words, they made a lot of  
13 money during the windfall profits years.

14 MRS. HAMILL: Yes.

15 QUESTION: That's not surprising.

16 MRS. HAMILL: If the Court has no further  
17 questions, that's all I have to say.

18 QUESTION: Thank you, Ms. Hamill.

19 Mr. Evans, you have four minutes remaining.

20 REBUTTAL ARGUMENT OF MARK L. EVANS

21 ON BEHALF OF APPELLANTS

22 MR. EVANS: Just a couple of things I'd like  
23 to, I'd like to say.

24 First of all, we agree that the Constitution  
25 does not prescribe any set of tax deductions. It does



1 not say which particular ones must be granted or may be  
2 denied. It may even be that a state could disallow all  
3 deductions, tax gross receipts or gross income on some  
4 kind of apportionment mechanism, for purposes of our  
5 argument, although I should say that the Solicitor  
6 General has a footnote in his brief in which he  
7 expresses some reservation about whether the theory of  
8 apportionment really applies to gross rather than net  
9 income.

10 But in any event, the key there is that if  
11 that was what a state decided to do, it would burden  
12 everybody equally, out-of-staters and in-staters would  
13 suffer the same tax consequences and we would not have  
14 the kind of skewing problem that we have here.

15 I think one thing I did not mention earlier  
16 but I think is a counterpoint, Justice Scalia, to the  
17 concerns that we discussed earlier about where to draw  
18 the line, if you decide that no line is to be drawn,  
19 what it does is it opens up to the states an open  
20 field. There's just no way to stop a state once it's  
21 been told it can find and burden purely out-of-state  
22 costs from just spending a good deal of their tax  
23 energies looking for such things because they are just  
24 natural targets.

25 Now, there aren't any that happen right now,

1 but there are even in New Jersey some things that you  
2 can't find everywhere. There are casinos in New Jersey,  
3 and in fact, there's a casino control tax imposed on  
4 casinos. There are ports in New Jersey, and there's a  
5 federal harbor use tax that's based on the value of the  
6 cargo loaded or unloaded.

7 Well, if New Jersey can do this to Louisiana  
8 or Texas producers, Louisiana or -- Texas is not a good  
9 example, but Louisiana or Oklahoma legislatures can just  
10 start disallowing from any unitary business that is  
11 affected by ports or by casinos, the deduction for those  
12 taxes.

13 So it just opens up exactly the kind of  
14 succession of retaliatory measures that the commerce  
15 clause was designed to prevent.

16 QUESTION: Maybe if they had a general tax, a  
17 general disallowance of deduction that happened to  
18 embrace casino taxes it would be okay.

19 MR. EVANS: well, it could have the same  
20 type --

21 QUESTION: If they enacted a special tax that  
22 says we are going to disallow casino taxes, that might  
23 be a different question.

24 MR. EVANS: Justice Scalia, the same thing  
25 could happen in Louisiana and Oklahoma that happened

1 here. You could look at a general disallowance, call it  
2 an add-back or whatever, that deals with income taxes or  
3 something similar, or gift taxes. As one of our amici  
4 says, you could call it a gift tax for purposes of  
5 statutory interpretation; it makes no constitutional  
6 difference. But the administrator could simply construe  
7 income taxes to embrace value-based excise taxes, which  
8 is essentially what New Jersey has done here.

9 I'd like to just get back to one of the --  
10 what I think is ultimately one of the key questions  
11 here, which is whether this is or isn't like a severance  
12 tax. Well, this Court has done some work on severance  
13 taxes. In Commonwealth Edison it discussed a coal  
14 severance tax in Montana, and the guidance from that  
15 decision is that there are two things to look at. You  
16 look at the operating incidence of the tax -- in this  
17 case it's the removal of each barrel of crude oil -- and  
18 you look at the measure -- in this case it's wellhead  
19 values -- identical in significant, in all significant  
20 respects to the kind of tax that was at issue in  
21 Commonwealth Edison. And what the Court found there was  
22 that only Montana could tax that event and that measure  
23 because it is purely site-specific to Montana.

24 And I think the same principle applies here.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Evans.

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The case is submitted.

(Whereupon, at 2:50 o'clock p.m., the case in  
the above-entitled matter was submitted.)



# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 87-453 & 87-464

Amerada Hess Corporation, et. al., Appellants v. Director, Division of Taxation,  
New Jersey Department of the Treasury; and Texaco, Inc., and Tenneco Oil Company,  
Appellants v. Director, Division of Taxation, New Jersey Department of the Treasury

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher  
(REPORTER)

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