

ORIGINAL

**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE**

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2159

TITLE BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF
KAREN G. SILKWOOD, DECEASED, Appellant v.
KERR-McGEE CORPORATION ET AL.

PLACE Washington, D. C.

DATE October 4, 1983

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WASHINGTON, D.C. 20001

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IN THE SUPREME COURT OF THE UNITED STATES

BILL M. SILKWOOD, ADMINISTRATOR
OF THE ESTATE OF KAREN G.
SILKWOOD, DECEASED,

Appellant

v.

KERR-McGEE CORPORATION ET AL.

No. 81-2159

Washington, D.C.

October 4, 1983

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:03 a.m.

APPEARANCES:

MICHAEL H. GOTTESMAN, ESQ., Washington, D.C.; on behalf
of the Appellant.

C. LEE COOK, JR., ESQ., Chicago, Illinois; on behalf of
the Appellees.

JOHN H. GARVEY, ESQ., Office of the Solicitor General,
Washington, D.C.; as amicus curiae.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Gottesman, I think
3 you may proceed whenever you're ready.

4 ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.,
5 ON BEHALF OF THE APPELLANT

6 MR. GOTTESMAN: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 This is a tort action arising under state
9 law. It was in the federal court because of diversity
10 of citizenship. The occasion for this tort action is
11 that plutonium escaped from a manufacturing plant of the
12 defendant and that plutonium contaminated Karen Silkwood
13 and her apartment. And the complaint in this action,
14 resembling complaints that have been filed, I suppose,
15 for time immemorial in the courts of this -- of the
16 states of this nation, sought compensatory damages for
17 both the injury to person and to property and punitive
18 damages for this state law tort.

19 The jury awarded both compensatory and
20 punitive damages. The court of appeals, the court
21 below, affirmed in part the compensatory damage award
22 and reversed it in part. For all purposes here that --
23 the rulings on the compensatory damages are not
24 important except that the court rejected an argument of
25 the defendant that compensatory damages were preempted

1 by the Atomic Energy Act, and in fact held that
2 compensatory damages could be awarded, and in fact
3 affirmed an award of compensatory damages for property
4 damage.

5 QUESTION: Now, the only compensatory damage
6 award that remains in the case, as I understand it, is
7 the \$5,000 property damage award.

8 MR. GOTTESMAN: That is the only award that
9 remains in the case. There is a debate between the --

10 QUESTION: And the entire \$10 million punitive
11 damages has to hang then on the \$5,000 property damage,
12 is that correct?

13 MR. GOTTESMAN: Well, at the present -- in the
14 present posture of the case --

15 QUESTION: At present?

16 MR. GOTTESMAN: Yes. In the present posture
17 of the case, the punitive damage award, if it were not
18 preempted, the court of appeals would have to address,
19 number one, whether that size award can properly be
20 predicated on the property damage award; and number two,
21 if not, whether there should be a remittitor or whether
22 there should be a retrial on the amount of punitive
23 damages.

24 QUESTION: Does Oklahoma law, so far as you
25 know, as to punitive damages draw any distinction

1 between a property damage award and a personal injury
2 award?

3 MR. GOTTESMAN: None, Your Honor. The courts
4 have squarely held that punitive damages may be awarded
5 for property damage alone, or for personal injury alone,
6 or for both. The standards are identical in both
7 cases. And the measure of punitive damages in Oklahoma
8 relates to the gravity of the harm threatened by the
9 defendant's reckless or malicious conduct. So that
10 there have been a number of Oklahoma decisions which
11 have set aside in part a compensatory damage award and
12 yet still affirmed in full the punitive damage award.

13 But in any event, that issue is not here.
14 That issue is the next one for the Tenth Circuit to
15 address once it's established that punitive damages are
16 not preempted.

17 QUESTION: Yeah. Even if you won, it would be
18 remanded then to determine whether that damages award is
19 adequate as premised or -- or excessive -- excuse me --
20 excessive as premised on only a \$5,000 property --

21 MR. GOTTESMAN: Well, that issue would be
22 before the Tenth Circuit. There is a question whether
23 Kerr-McGee has waived the right to make that claim
24 because it didn't advance it, but certainly the question
25 of whether it has been waived or not, and if not, the

1 question of whether the award will sustain the punitive
2 damage award are both for the Tenth Circuit award.

3 But, of course, the Tenth Circuit never got to
4 those questions because it ruled that punitive damages
5 are absolutely preempted by the Atomic Energy Act in any
6 suit against a nuclear operator relating to exposure to
7 radiation. And that, of course, is the issue that has
8 been brought to this Court by us, and there is a
9 question at the threshold.

10 The issue was brought to this Court on an
11 appeal alleging that the Tenth Circuit by ruling as it
12 did had held invalid the Oklahoma punitive damage
13 statute. This Court has postponed the determination of
14 jurisdiction, and I do want to spent just a moment
15 explaining why we think that this in fact is a proper
16 appeal under 1254.2.

17 In Oklahoma punitive damages exist only by
18 statute. There has been a punitive damage statute since
19 the first territorial legislature of the state. There
20 has never been a common law of punitive damages. And
21 that punitive damage statute makes punitive damages
22 available, if, of course, the culpable conduct is
23 present, in any action except a contract action. And
24 the Supreme Court of Oklahoma has read those words
25 literally and in authoritative decisions has said that

1 except for contract actions, punitive damages are
2 available in any action. We will not entertain
3 arguments as to whether it's a good idea or a bad idea.
4 This is the legislative policy of this state.

5 Now, because that is the law of Oklahoma, the
6 district court, upon finding that there was evidence to
7 support a verdict, was required to submit the punitive
8 damage issue to the jury and said that it was required
9 to do so. It submitted it in the words of the statute,
10 and the jury found a violation in reliance on that
11 charge.

12 Both parties told the court of appeals that
13 punitive damages in Oklahoma are governed exclusively by
14 this statute. And the court below, given those
15 arguments and given an argument by Kerr-McGee that there
16 was preemption, began its conclusive paragraph, the
17 paragraph where it found preemption, saying, "Arguably,
18 there should be a strong presumption against preemption
19 of state laws affecting such vital interests of its
20 citizens as those involved here."

21 Now, in Oklahoma the only state law that the
22 court could have been referring to was 23 Oklahoma
23 Statute Section 9. And though the court did not cite
24 that section by name, having begun that conclusive
25 paragraph saying "Arguably, there are strong arguments

1 against preemption of state laws, but nevertheless, we
2 find preemption," we submit that the court has held
3 invalid Section 9 as applied to nuclear operators in
4 radiation cases in the full substance and import of its
5 opinion.

6 We think, indeed, that's what it said, but
7 whether it said it or not, that is certainly the effect
8 of what it did. And as the Solicitor General
9 acknowledges, appellate jurisdiction exists if the
10 invalidity of the state statute was a necessary
11 predicate for the court of appeals decision, and we
12 think it was.

13 Now, turning to the issue on the merits, the
14 preemption issue, we're dealing here with a state's
15 right to punish, to punish conduct that injures people
16 and that injures people and is accompanied by a
17 particularly reprehensible state of mind -- either the
18 deliberate infliction of injury or the infliction of
19 injury with a reckless disregard for the safety of the
20 state's citizens.

21 Now, this kind of punishment, this civil
22 punishment, if you will, punitive damages, has been a
23 traditional element of the tort law in 46 states of this
24 country and is still in the tort law of 46 states. And
25 what it is designed to do lies at the core of the

1 state's interest, that the police power is designed to
2 protect people against reprehensible conduct, very much
3 as the criminal law is.

4 And the question we have here is whether
5 Congress in enacting the Atomic Energy Act intended to
6 deprive the states of this traditional piece of a tort
7 action. This is not a separate action. It is a remedy
8 available in the traditional tort action. And, of
9 course, the answer is wholly one of congressional intent.

10 We approach that question with certain
11 assumptions that this Court has stated are always the
12 starting point for analysis. First, an attempt to
13 preempt a traditional state right is never lightly
14 presumed. That is especially so when the state right is
15 exercised in the form of tort actions. This court has
16 said that. And it is, we would suggest, uniquely so in
17 this case.

18 Never in the jurisprudence of this nation, not
19 in this Court, not in any other court, has there ever
20 before been a holding that Congress left compensatory
21 damages unpreemptive and yet preempted the punitive
22 damages in that very same cause of action.

23 QUESTION: Yet, Mr. Gottesman, the position
24 you take that punitive damages are primarily to punish
25 suggests, at least in your view, that the punitive

1 damages serve a much different purpose than compensatory
2 damages, which I suppose are just to make whole.

3 MR. GOTTESMAN: That's correct. They serve a
4 different purpose, but the reason that you don't find
5 that kind of selective preemption is that the purpose
6 that they serve, punitive damages, lie absolutely at the
7 core of the state's interest and much more at the
8 periphery of the federal interest. So that as I'll
9 indicate, as we do in our brief -- and if we have time,
10 I'll get to -- it would be much less likely that
11 Congress would make a judgment to preempt punitive
12 damages than compensatory.

13 QUESTION: Are you suggesting it would be more
14 likely if they had to choose that they would have
15 preempted compensatory damages?

16 MR. GOTTESMAN: Well, I think it's not likely
17 they would choose to select between them, and indeed,
18 there's never been a ruling by this Court that found one
19 and not the other. Congress either leaves tort actions
20 alone or it doesn't. And indeed, the burden of what I'm
21 about to come to is that Congress has made rather
22 remarkably clear here an intention to leave state tort
23 actions alone, one that encompasses. --

24 QUESTION: Of course, logically, though,
25 punitive damages are in a sense regulatory, and it was

1 Congress' intent to leave in place -- to leave the
2 regulatory aspects to the NRC for safety purposes.

3 MR. GOTTESMAN: Well, I think logically,
4 Justice O'Connor, both compensatory and punitive damages
5 are regulatory, and this Court has repeatedly so said.
6 Both have regulatory effects. Both have regulatory
7 purposes. For example, the state court, by determining
8 what is the standard of care that it will hold
9 Kerr-McGee to and hold it responsible, therefore, for
10 compensatory damages, regulates. If it says the
11 standard of care is simple, reasonable care, it imposes
12 one burden on Kerr-McGee. If it says the standard is
13 absolute, strict liability, it holds Kerr-McGee to a
14 much stricter standard of performance. So that both
15 compensatory and punitive damages are regulatory; they
16 regulate different things.

17 Compensatory damages regulate what the Nuclear
18 Regulatory Commission regulates: the standard of care
19 with which you operate your plant. Punitive damages
20 regulate something that the NRC does not regulate: your
21 state of mind in the operation of that plant, whether
22 you are the kind of person who behaves with a
23 reprehensible state of mind.

24 Now --

25 QUESTION: Mr. Gottesman, are you conceding,

1 in effect, that the radioisotopes involved here are
2 subject to the same preemption doctrine as perhaps the
3 operation of a nuclear reactor would have been?

4 MR. GOTTESMAN: Well, there are some
5 differences in this case. I'm not sure that we
6 necessarily have to. I think the answer would be the
7 same. But I think it's important to note that this
8 plant was not covered by the Price-Anderson Act. As to
9 this plant Congress made the judgment we have no
10 interest in impeding the operation of state tort law at
11 all, as contrasted with a nuclear power plant where
12 Congress has made certain selective judgments to
13 override the state tort law.

14 Now, it's

15 QUESTION: Do you think then that, for
16 instance, damages to the public arising out of a
17 terrorist attack on a nuclear facility would be
18 preempted?

19 MR. GOTTESMAN: Oh, absolutely not. I would
20 assume that, assuming states can otherwise prosecute
21 terrorists criminally for invading any other plant, they
22 could likewise prosecute them for invading a nuclear
23 power plant. I shouldn't think that there would be a
24 question about that. Indeed, I think even the Solicitor
25 General's brief concedes you can prosecute everybody but

1 the corporation itself.

2 Now, however we might derive answers to this
3 logically, the fact is that the determinative question
4 here is what Congress intended and what logic Congress
5 was applying. And we have the benefit here of a much
6 more extensive insight into Congress' views about
7 preemption than we ordinarily have in a preemption case,
8 because Congress spoke a lot more about this.

9 To be sure, as this Court held last term in
10 Pacific Gas and Electric, Congress in enacting the 1954
11 Atomic Energy Act and opening up this industry to the
12 private sector reserved to federal exclusive control
13 regulation, at least in the strictest sense: licensing,
14 inspections, that sort of thing. There's no question
15 that Congress occupied that field. And, indeed, those
16 on the other side of this case embrace the statement
17 that this Court made in PG&E that Congress has occupied
18 the field of regulation, and seek to evolve their entire
19 solution out of that sentence of the opinion. But it
20 can't be done, because were that proposition right, it
21 would follow that Congress had preempted compensatory
22 damage remedies as well, which this Court has repeatedly
23 said are regulatory.

24 And yet, everybody understands, and this Court
25 has said in Duke Power and PG&E, that when Congress

1 enacted the 1954 Act, it did not preempt the state's
2 existing rights to entertain tort actions by those who
3 were the victims of radiation injuries. And, indeed,
4 it's precisely because the '54 Act did not preempt those
5 tort actions that we got the Price-Anderson Act, because
6 people said we're not going to enter this field; we are
7 afraid of our potential tort liability. And so Congress
8 addressed that question of tort liability in the
9 Price-Anderson Act.

10 Now, Congress in that act did not cede to the
11 states the right to entertain tort actions. That's what
12 our adversaries here say. They say Congress ceded to
13 the states the right to have tort actions. That's not
14 what Price-Anderson did. Congress said the states have
15 these tort actions. They have them already. The
16 question here is whether we should put any limitations
17 on them. And in that context Congress spoke at length
18 about its view about the state tort action.

19 We have a window to congressional
20 understanding here that is quite unique, and I want to
21 refer just to a few of the statements, and to read them
22 very briefly, that Congress made expressing its views.

23 The other side says well, never mind what
24 Congress said here; they really only meant compensatory
25 damages. But that wasn't the congressional mind-set.

1 For example, the Joint Committee report in 1956 -- and
2 this is when the only interference with state tort law
3 that Congress made was to put a \$560 million limit of
4 liability for certain operators, not for Kerr-McGee.

5 The Joint Committee report stated the two
6 basic principles underlying the bill, and the first of
7 those was, "Since the rights of third parties who are
8 injured are established by state law, there is no
9 interference with the state law except for the \$560
10 million limit of liability."

11 Senator Pastore, who was the chairman of the
12 Joint Committee when the '66 -- or the floor manager,
13 I'm sorry -- when the '66 amendments were made said,
14 "This bill follows the approach of the original
15 Price-Anderson Act; that is, making a minimum
16 interference with the laws of the several states insofar
17 as legal liability for nuclear incidents is concerned.
18 Our committee continues to endorse this general
19 approach."

20 Finally, the Joint Committee in 1966: "The
21 bill has been drafted so that minor claims involving
22 nuclear facilities or materials" -- and what we have
23 here is a minor claim -- "may remain subject to the
24 traditional rules of tort law."

25 Now, there are no qualifications, and this

1 isn't a semantic thing. Congress had a mind-set, and it
2 approached this problem with several concerns. The
3 first of those concerns was that Congress or the
4 sponsors of Price-Anderson felt that if they tried to
5 overly interfere with state tort, well, they couldn't
6 get a bill through Congress. And so there are a number
7 of statements quoted in our brief of the principal
8 sponsors of this legislation saying we are going to
9 proceed by selective limitation on the state tort law.
10 We will identify with precision what it is about state
11 tort law that we think we need to modify, because that's
12 the only way we're going to get a bill through
13 Congress. If we try to reach out in an overly broad way
14 in a field that is so sensitively one of state's rights,
15 we're not going to get this bill through. So that was
16 number one.

17 Number two, they thought this to be an area
18 that was big and mysterious and had lots of elements,
19 and it was different in every state. And they said
20 there's -- the chairman of the Joint Committee said
21 there's a jungle of 50 states' tort laws out there. We
22 don't know where to begin to tackle those, and we don't
23 want to. We are simply going to identify what the
24 problems are that we think we need to address and
25 address them explicitly.

1 And finally and most importantly, Congress
2 said that except for extraordinary nuclear occurrences
3 -- the meltdown of a power plant -- there is no reason
4 why a nuclear plant should be treated any differently
5 than any other business entity in this country in terms
6 of its amenability to the tort law.

7 QUESTION: Would a state tort action lie in
8 the nature of a nuisance suit against a power plant, a
9 nuclear power plant?

10 MR. GOTTESMAN: I would think that it would
11 like for damages -- if we're talking about radiation
12 emissions, then I would think that the message of this
13 -- it isn't a necessary message, because that's not what
14 Congress was thinking about when they made these
15 statements; what they were thinking about were people
16 being injured.

17 But if we're dealing with radiation emissions,
18 then however the state may put the label, if my property
19 or my person is injured by the emission of radiation and
20 I suffer an injury, I have one of these lawsuits. So
21 that I think the answer would be yes.

22 But certainly in this category, in the
23 Kerr-McGee --

24 QUESTION: And you don't -- you're not
25 troubled by the language of this Court in the PG&E case

1 about the preemption?

2 MR. GOTTESMAN: Well, I think if -- I think
3 the question of whether a state court could enjoin a
4 nuisance would be much more troubling, because there you
5 would be doing not that which Congress so clearly had in
6 mind, which is conferring damages, but there you would
7 be, in effect, revoking the license of the plant to
8 operate.

9 I think there's a very serious question
10 whether in light of PG&E that could be done.

11 QUESTION: What you're saying is that PG&E
12 dealt with safety regulation by the states as such, by a
13 commission or perhaps by a nuisance action, but it
14 didn't go so far as to say that perhaps things that are
15 tangentially concerned with safety but primarily devoted
16 to compensation or punishment were also to be swept
17 under the rug with safety concerns.

18 MR. GOTTESMAN: That is our submission, Your
19 Honor. Yes, that's right.

20 Now -- now, I do want to note we have in our
21 brief noted that there -- it is unmistakable that the
22 Atomic Energy Commission in 1966 after this bill
23 believed -- and it was the agency administering the
24 statute -- believed that punitive damages were available.

25 In the limited time I have remaining I don't

1 want to focus on that. But the point that I do want to
2 focus on and close with is that Congress made a judgment
3 repeatedly articulated in this legislative history that
4 except where we're dealing with an ENO, there is no
5 reason why these plants should be treated under the tort
6 law any differently than any other plant. And
7 Kerr-McGee is here saying ah, but because we're a
8 nuclear operator, we ought to be exempted from the rules
9 that are applicable in tort suits against every other
10 plant.

11 Whatever the logic that they could spin out
12 for that, that is not the decision that Congress made,
13 and the legislative evidence is overwhelming that
14 Congress made the opposite decision.

15 QUESTION: Well, Mr. -- Mr. -- Mr. Gottesman,
16 if the -- if the plant is complying in all respects
17 safetywise with federal standards and federal
18 regulations but the state nevertheless and by virtue of
19 its tort standards says that you must conduct your plant
20 differently, you must run your plant differently or
21 you're going to be subject to a damage suit, and it
22 doesn't make any difference to us whether you're
23 complying with the federal law or not; you have to
24 comply with this safety standard or you're going to be
25 held to be negligent.

1 That's essentially your submission, that the
2 state may do that.

3 MR. GOTTESMAN: Everyone on the other side .
4 concedes the state may do that.

5 QUESTION: I don't think that concessions can
6 find the Court very easily.

7 MR. GOTTESMAN: Okay. But then --

8 QUESTION: I mean people frequently try to
9 concede that --

10 MR. GOTTESMAN: -- Then I take it is our
11 submission -- it is our submission and their submission
12 that the state can say notwithstanding your compliance
13 with the federal standards, which the federal government
14 says are no guarantee of safety -- this is cost-benefit;
15 this is what we say we want -- notwithstanding full
16 compliance with that, you can still do incredible damage
17 to people. And if a state chooses to --

18 QUESTION: So the states can say you just
19 didn't run your plant safely, so you're subject to
20 damages.

21 MR. GOTTESMAN: Absolutely. A state can have
22 a negligence standard, and a jury will sit there and
23 decide did you run your plant safely; and Congress said
24 that's exactly what we want.

25 CHIEF JUSTICE BURGER: Mr. Cook.

1 ORAL ARGUMENT OF C. LEE COOK, JR., ESQ.,
2 ON BEHALF OF THE APPELLEES

3 MR. COOK: Mr. Chief Justice, and may it
4 please the Court:

5 As has been noted, this case comes to the
6 Court as a \$5,000 property damage case, the personal
7 injury aspects of the case having been disposed of by
8 the court of appeals below and not the subject of appeal
9 here.

10 The liability for that \$5,000 in property
11 damages resulted from a -- on the basis of a liability
12 without fault under the doctrine of strict liability.
13 The plaintiff conceded that he did not and could not
14 prove how the contamination to Karen Silkwood's property
15 occurred.

16 Now, the question, the principal question
17 raised by this case is whether an award of punitive
18 damages with respect to a claim based on radiation
19 hazards resulting from the operation of a federally
20 licensed and regulated plutonium plant is preempted by
21 the Atomic Energy Act.

22 As has been noted, the question of
23 jurisdiction has been reserved. Just a brief comment on
24 that.

25 The plaintiff seeks to make jurisdiction in

1 this Court for mandatory appeal under Section 1254.2 of
2 the Judicial Code. That section is to be strictly and
3 narrowly construed. It permits mandatory appeal only
4 when the court of appeals invalidates a state statute as
5 being repugnant to the Constitution or the laws of the
6 United States.

7 In this case, the state statute which the
8 plaintiff seeks to invoke was not even mentioned by the
9 court of appeals, much less held invalid either facially
10 or as applied. All the court did here was hold punitive
11 damages under the circumstances of this case cannot be
12 awarded; and thus we urge that there is no jurisdiction
13 in this Court.

14 Also, we suggest to you that this is not an
15 appropriate case to take on certiorari. Its unique
16 facts make it very unlikely that it will have any
17 precedential value, and the basic principle upon which
18 it relies -- namely, that stated in Pacific Gas and
19 Electric -- does not involve any conflict in the
20 circuits but is now well settled in light of your
21 decision last term.

22 Now, turning to the merits, in your decision
23 in Pacific Gas and Electric you described two forms of
24 preemption, both of which are applicable here. First,
25 you said there is preemption if the Congress has fully

1 occupied a field. You also said there is preemption
2 even if Congress does not fully occupy a field if the
3 state action stands as an obstacle to the accomplishment
4 of the federal purpose. Both those preemptions exist in
5 this case and require affirmance of the decision below.

6 Let's talk about the first one first. In PG&E
7 --

8 QUESTION: Which one did the court of appeals
9 use, both or just one?

10 MR. COOK: Your Honor, I think they used the
11 -- the preemption on the basis of entire occupation of
12 field, but I cannot tell you whether they also had in
13 mind that in this particular case there is an obstacle
14 to the accomplishment of a purpose.

15 In your decision in PG&E you removed any doubt
16 that Congress has fully occupied the field of the
17 regulation of nuclear hazards and the safety in the
18 operation of a radiation facility. And that applies
19 whether it's a nuclear reactor or whether it's a
20 plutonium plant. This is a licensed facility --

21 QUESTION: Mr. Cook, if you're right in that,
22 I suppose -- and although the California case involved
23 state regulation licensing requirements -- if you're
24 going to carry that over en bloc to state tort law,
25 which I don't think that statement from PG&E at all

1 requires, I take it compensatory damages would also be
2 preempted.

3 MR. COOK: No, Your Honor, I do not think so.
4 Let me deal with that -- that point right now.

5 The fact of the matter is that the suggestion
6 here, the argument here that there is -- that
7 compensatory damages are also preempted and that somehow
8 the Court was inconsistent in holding that punitive
9 damages were preempted and compensatories were not I
10 believe is wrong for at least two reasons.

11 First of all, Congress in the Price-Anderson
12 Act and in the legislative history related to the
13 Price-Anderson Act indicated an intention that with
14 respect to the compensation of injured victims, making
15 them whole, it was the intention of Congress that they
16 should have available state tort law remedies. No such
17 intention with respect to punitive damage was ever
18 expressed.

19 Secondly, and probably more important, the
20 argument of the plaintiff here ignores the distinction
21 between punitive damages and compensatory damages.
22 Punitive damages have as their sole function controlling
23 of conduct, conduct that the jury believes does not meet
24 the safety standard that should be applied.

25 Compensatory damages, on the other hand, have

1 as their primary function the recompensing of the
2 injured plaintiff; in other words, making the plaintiff
3 whole.

4 QUESTION: Well, but surely you don't suggest
5 that when the state court said charges on negligence
6 sufficient to support a recovery of compensatory damages
7 it isn't laying down a standard of care directed to
8 safety?

9 MR. COOK: I don't suggest that at all. What
10 I do suggest is that there is a nonsafety rationale as
11 well, and that is the making whole of the innocent
12 injured victim of a nuclear incident.

13 QUESTION: Well, but isn't there also a
14 nonsafety rationale to punitive damages in the sense of
15 punishing someone who is regarded as having deliberately
16 done wrong?

17 MR. COOK: No, Your Honor, I do not believe
18 so. I believe, particularly in Oklahoma, the law is
19 that punitive damages are to punish and deter conduct.
20 As a matter of fact, this Court reaffirmed that
21 principle just last term in Smith v. Wade where it said
22 the purposes of punitive damage is to punish
23 reprehensible conduct and deter the defendant and others
24 from engaging in that conduct in the future.

25 In fact, under Oklahoma law if punitive

1 damages do not have the effect of punishing and
2 deterring conduct, they will not be permitted to stand.
3 The case cited in our brief, the Nixon case, stands for
4 that proposition.

5 And in the most recent brief filed last week
6 by the plaintiff, its reply brief, there's cited a new
7 Oklahoma punitive damage case. It's the most recent
8 statement by the Oklahoma Supreme Court on the subject
9 of punitive damages. That case not only restates all
10 the principles that we expressed in our brief concerning
11 the role of punitive damages, but it has this additional
12 statement. It said, "Unlike the purpose of compensatory
13 damages, which are to benefit the individual plaintiff,
14 punitive damages are imposed to benefit society. The
15 plaintiff acts as a private attorney general to punish
16 the culpable wrongdoer, thereby encouraging adherence to
17 safety standards that benefit consumers generally."

18 So what the court in the Theory v. Armstrong
19 case at 661 Pacific Second and cited in the second
20 footnote to the plaintiff's reply brief, has made it
21 clear is that punitive damages in Oklahoma are for the
22 purpose of imposing a safety standard and then enforcing
23 it.

24 QUESTION: Well, has the Oklahoma court said
25 that compensatory damages are not for that purpose?

1 MR. COOK: What the Oklahoma court I think has
2 said is that compensatory damages have -- and the -- as
3 their basis the intention to benefit the plaintiff, to
4 make him whole for the wrong he has suffered.

5 QUESTION: What wrong, though. Isn't it as --
6 as -- as the Justice has said, you have to show that
7 some standard of conduct has been violated before you're
8 going to get --

9 MR. COOK: Actually, in Oklahoma you do not
10 because there's -- it's strict liability in Oklahoma.
11 So irrespective of the conduct you engage in, if it's
12 your plutonium, you're liable.

13 QUESTION: Is that -- and the jury was
14 instructed both on negligence and strict liability,
15 wasn't it?

16 MR. COOK: Not with respect to the property
17 damage. The property damage --

18 QUESTION: Well, that may be so, but now let's
19 talk about personal injury. You -- you would say that
20 -- you would say that compensatory damages for personal
21 injuries are not preempted.

22 MR. COOK: Your Honor, I don't think that --

23 QUESTION: Is that right or not?

24 MR. COOK: Well, let me -- let me --

25 QUESTION: I thought that's what you had

1 conceded.

2 MR. COOK: Let me respond this way. That
3 question is not before you. That's the decision of the
4 court of appeals.

5 QUESTION: Well, it's before you right now.

6 (Laughter.)

7 MR. COOK: I understand it is before me right
8 now.

9 QUESTION: Well, how about an answer.

10 MR. COOK: And my response -- my response is
11 on the state of the present law under -- I would say the
12 compensatory damages are not preempted.

13 QUESTION: Even though -- even though in the
14 process of awarding them you find that the plaintiff or
15 the defendant has not lived up to some state-imposed
16 standard of safety?

17 MR. COOK: If -- if indeed -- if indeed the
18 state-imposed standard of safety is a negligence
19 standard.

20 QUESTION: Well, even though -- even though
21 the plant is in complete conformity with federal law as
22 far as safety is concerned.

23 MR. COOK: Your Honor, I would argue that if
24 indeed the plant is in complete conformity with federal
25 law, there is no way of finding, there's no basis for

1 finding that it was not operated reasonably and --

2 QUESTION: Well, there is -- there is the
3 state has a different standard or purports to impose a
4 standard that's inconsistent with federal law. But you
5 don't purport in this case, as far as I can tell, to
6 point -- to rely for your preemption analysis on any
7 conflict of federal law. It's more general preemption.

8 MR. COOK: We rely on that because that is the
9 basis of the decision below, that's true.

10 QUESTION: Yes.

11 MR. COOK: There is a conflict, however, that
12 I want to deal with.

13 QUESTION: Well, then, if there is, I don't
14 know how you could concede on compensatory damages.

15 MR. COOK: Well, Your Honor, the reason I'm
16 conceding on compensatory damages is because while
17 compensatory damages may have a regulatory effect and
18 they may produce a safety benefit, they have as well a
19 nonsafety rationale, and that is, making whole the
20 plaintiff who has been injured, who has suffered a loss.

21 This Court said -- as a matter of fact, in
22 your opinion you said the ration -- the question we must
23 ask --

24 QUESTION: That was the Court's opinion.

25 (Laughter.)

1 MR. COOK: That was the -- excuse me, Your
2 Honor.

3 The question we must ask in Pacific Gas and
4 Electric was is there a nonsafety rationale for the
5 state action, for the state statute involved there.

6 Now, if we apply that same question here, we
7 can see a difference between punitive damages and
8 compensatory damages, because if we ask that question
9 with respect to compensatory damages, we have to say
10 that there is a nonsafety rationale, and that rationale
11 is to make whole, to recompense the injured plaintiff
12 who has suffered damage because of a nuclear incident.

13 QUESTION: But under --

14 MR. COOK: Whether it be because of a standard
15 of care or not.

16 QUESTION: Under your analysis then it would
17 depend solely on the Oklahoma law. If the Supreme Court
18 of Arkansas had said that our punitive damages are just
19 to make sure a plaintiff is really compensated -- it may
20 have nothing to do with safety -- presumably the
21 punitive damages would go the same way as compensatory
22 damages under Arkansas law, even though it's a federal
23 inquiry.

24 MR. COOK: It may very well turn on that
25 point, Your Honor. I think, however, generally speaking

1 the law of this country is that compensatory damages by
2 definition are not -- I mean punitive damages by
3 definition are not compensatory but indeed are for the
4 purpose of punishing alleged wrongdoing and establishing
5 a safety standard.

6 After all, what we are dealing with here is
7 whether under Oklahoma law and the purposes of Oklahoma
8 -- of punitive damages in Oklahoma we have preemption.
9 If we ask that same question -- is there a nonsafety
10 rationale for the state action in the case of punitive
11 damages -- we can only reach one answer. There is no
12 rationale other than safety with respect to punitives.
13 And that is particularly so in Oklahoma.

14 QUESTION: Well, punishment of the offender.

15 MR. COOK: Punishment of the offender still
16 has as its purpose, I submit, safety. It has no other
17 purpose.

18 QUESTION: Well, compensatory has the same
19 element.

20 MR. COOK: Compensatory has that element plus
21 the element of making the injured plaintiff whole, which
22 is not present with respect to punitive damages.

23 QUESTION: Well, but punitive has the element
24 of punishing plus safety. I mean you can say one --
25 each one of them has two components if you want to break

1 it down that way.

2 MR. COOK: Well, I submit, Your Honor, that
3 punishment has a safety rationale and a safety rationale
4 only. Why -- we only punish because this particular
5 defendant has not lived up to the safety standard that
6 the jury has been convinced is the appropriate safety
7 standard to apply.

8 QUESTION: But, Mr. Cook, what about criminal
9 laws? Say the criminal statute provided for punishment
10 for precisely the conduct that was involved here. I
11 think you've conceded that would not be preempted.

12 MR. COOK: Your Honor, I would concede that a
13 criminal statute is different. I -- if -- obviously if
14 someone takes -- chooses plutonium as the means by which
15 to commit a crime as opposed to using a knife or some
16 other --

17 QUESTION: Say the statute -- say they had a
18 statute -- I can't recite these rather complicated facts
19 -- the facts as we disclose by this record if done
20 maliciously and so forth and so on shall constitute a
21 crime under the laws of Oklahoma punishable by a fine of
22 \$10 million, would that be preempted?

23 MR. COOK: Your Honor, I -- I don't mean to
24 dodge your question. I have trouble under -- I have
25 trouble conceding a circumstance because all we're

1 talking about here is the general operations of this
2 plant and how there could be a statute that --

3 QUESTION: Well, the briefs indicate there are
4 unusual facts here.

5 MR. COOK: Oh, well, Your Honor --

6 QUESTION: And we -- so I think we have to
7 take the facts as your opponent describes them in view
8 of the fact that the jury ruled against you.

9 MR. COOK: If you -- if you -- if you examine
10 those facts in -- unfortunately, many of those facts
11 were contained in a series of footnotes in the reply
12 brief.

13 QUESTION: Right.

14 MR. COOK: And we didn't have a chance to
15 respond to those. Had they been in the opening brief,
16 we would have. Suffice it to say, and the bottom line,
17 I think, on this is the testimony of the regional
18 director of the Nuclear Regulatory Commission who had
19 responsibility for this plant. He testified that it was
20 the view of his agency that the plant was safely
21 operated.

22 QUESTION: Yes, I know, but they had some kind
23 of a safety report that said there were about 18 or 20
24 safety problems, none of which violated the federal
25 regulations.

1 MR. COOK: Oh, well, Your Honor, if I could
2 just talk briefly about those. Those are matters which
3 were -- were, I submit, not the basis of the punitive
4 damage award in this case. Let me just give you an
5 illustration of one of them.

6 One of them said, for example, that there was
7 a period of -- a contamination incident or contamination
8 was permitted to exist for 14 days. It sounds like
9 there's some contamination out there that creates a
10 danger, a risk. If you read the backup materials on
11 that what you'll see is we had a vacuum cleaner that we
12 had trouble cleaning, and so that they couldn't get it
13 clean, so they decided to put it in a bag and put it
14 aside and decide whether they could find a way to clean
15 that or whether they had to throw the vacuum cleaner
16 away. It took 14 days to make that decision.

17 There was no exposure of the public or workers
18 or anybody to health. The reason that was rejected by
19 the Nuclear Regulatory Commission is that it created no
20 health or safety problem.

21 The whole argument on that point -- I'm kind
22 of getting out of order here -- but the whole argument
23 on that point, I submit, misses the point of what the
24 Nuclear Regulatory Commission does. The Nuclear
25 Regulatory Commission has broad discretion in the

1 regulation of plants such as this and does indeed
2 control them.

3 QUESTION: Well, let me ask you this general
4 question. Do you contend that the state could not make
5 it a crime to do anything that is authorized by the
6 federal agency? If a federal agency authorizes it, then
7 the company is immune from criminal liability? That the
8 federal agency has not prohibited it, I should say?

9 MR. COOK: No. I --

10 QUESTION: You can't say that.

11 MR. COOK: Obviously, I do not submit that,
12 Your Honor.

13 Let me turn -- let me turn to the --

14 QUESTION: Just before you turn --

15 MR. COOK: Sure.

16 QUESTION: Suppose that there is a safety
17 standard issued by the NRC which is -- which the plant
18 and the company is supposed to live up to. Suppose that
19 they did not, and it's plain. Plainly they did not, and
20 it created -- it hurt somebody, like Silkwood. And it
21 hurt somebody, and it's -- the -- it's shown that the
22 company negligently, if not recklessly, disregarded the
23 federal safety standard.

24 State tort suit. I would suppose that
25 consistent with your theory you would say that punitive

1 damages would not be authorized then.

2 MR. COOK: That's right. Compensatory, yes,
3 but not --

4 QUESTION: Well, I know. But even though --
5 even if -- even if the purpose of imposing the punitive
6 damages was regulatory in the sense we want you to make
7 sure to live up to federal standards.

8 MR. COOK: Yes, but you see, it's the --

9 QUESTION: What's wrong with that? What's
10 wrong with that?

11 MR. COOK: Well, what's wrong with it is it
12 conflicts with the intention of Congress.

13 QUESTION: Why?

14 MR. COOK: Because what Congress has done is
15 said we're going to have a -- not a -- we don't want a
16 dual regulatory system. We want a single regulatory
17 system --

18 QUESTION: Well, Congress certainly didn't --
19 didn't reserve for itself the awarding of damages for
20 injuries caused by violations of federal standards.
21 They certainly left that to the states, didn't they?

22 MR. COOK: Injuries, no, Your Honor. They
23 gave to -- to the agency the power to impose sanctions
24 and to --

25 QUESTION: I said the -- the -- the power to

1 award damages to people who are hurt by the violation of
2 federal standards.

3 MR. COOK: Oh, that's true, Your Honor. I --

4 QUESTION: They left that to the states.

5 MR. COOK: Yes.

6 QUESTION: And you say that a state could not
7 when a violation of a federal standard is found impose
8 punitive damages.

9 MR. COOK: That's right, Your Honor.

10 QUESTION: Even though the purpose of it was
11 to live up to federal law.

12 MR. COOK: And because that -- the function
13 there is regulatory, and that's the function that has
14 been delegated to the Nuclear Regulatory Commission.

15 Now, in addition to the fact that Congress has
16 occupied this field, the -- the imposition of punitive
17 damages stands as an obstacle to the accomplishment of
18 the federal purposes, specifically the purpose to
19 encourage widespread participation in the development of
20 atomic energy for peaceful purposes, and the express
21 desire and intention of Congress to have dual regulation
22 of radiation hazard -- to not have dual regulation of
23 radiation hazards.

24 If a state passed a law or an administrative
25 agency adopted a rule which imposed a standard upon a

1 nuclear facility, even the plaintiff would concede
2 that's preempted. But he argues somehow punitive
3 damages are different. But what is the saving
4 difference? Giving the jury the power to devise the
5 safety standard is no different than having it done by a
6 state agency except that it varies from case to case,
7 and it's subject to all the whims and vagaries of juries
8 and the ability of counsel to inflame them.

9 But the result is the same. It's the state
10 standard of safety which controls the plant and not the
11 Nuclear Regulatory Commission's standard of safety which
12 this Court has already held has exclusive jurisdiction
13 over that subject.

14 QUESTION: Would you say that the injuries in
15 this case were caused by conduct that was perfectly
16 proper under federal law?

17 MR. COOK: Your Honor, the fact of the matter
18 is there is no evidence here of what caused this
19 damage. The plaintiff conceded that he could not prove
20 what caused this damage. And that brings me to this
21 point with respect to the property damage award. And if
22 I could just close for a minute on that point.

23 When this case is reduced to a \$5,000 property
24 damage case, as it is, there is no predicate for the
25 punitive damages because there is no showing of the

1 cause of that property damage award. And under Oklahoma
2 law if it wasn't caused by an act which was reckless or
3 accompanied by malice, it cannot be the basis of
4 punitive damages.

5 QUESTION: Well, that question's still open,
6 isn't it, in the -- even -- even if -- even if we
7 reversed, wouldn't that -- would that issue still be
8 open in the court of appeals?

9 MR. COOK: It would be, but, Your Honor, I
10 think that is a basis for your affirming also, because
11 there is no evidence of the cause of the damage to the
12 property.

13 Thank you.

14 CHIEF JUSTICE BURGER: Mr. Garvey.

15 ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,

16 AS AMICUS CURIAE

17 MR. GARVEY: Mr. Chief Justice, and may it
18 please the Court:

19 I would like to make just two points. The
20 first of them is that the federal regulations in this
21 case do exactly what the state of Oklahoma was trying to
22 do through the imposition of punitive damages. And the
23 second point is that there is indeed a difference
24 between compensatory and punitive damages which
25 demonstrates that Congress intended to prohibit punitive

1 damages and intended to encourage compensatory damages.

2 Let me just say a few words about my first
3 point, which is that federal regulation is not only
4 adequate to cover this case but also does exactly what
5 Oklahoma did.

6 The Atomic Energy Act in Section 2077A and the
7 regulations promulgated by the NRC in Section 70.3 say
8 that you can't possess plutonium without a license.
9 They also say that you can't transfer plutonium except
10 to a licensee. There is no limit on the amount of
11 plutonium that they're speaking about. That means that
12 with respect to the 300 micrograms that were found in
13 Silkwood's apartment in this case that if either party
14 had been responsible for the transfer or the possession
15 of that plutonium in the apartment, it would have -- it
16 would have violated both the statute and the regulations.

17 QUESTION: Is this a radioisotope, Mr. Garvey?

18 MR. GARVEY: I wish I knew. I don't think
19 so. I think when Congress used the words radioisotope
20 in 1959 they meant maybe things like cobalt 60 and --
21 and --

22 QUESTION: Certainly it's fairly important to
23 determine in deciding whether this has been preempted or
24 not, under the government's theory, isn't it, when the
25 Joint Committee Report in '59 says we're leading --

1 leaving radioisotopes --

2 MR. GARVEY: Oh, there is -- there is
3 absolutely no doubt but that Congress attempted to
4 preempt the operation of plutonium fuel fabrication
5 facilities in all their respects. In the '59 report the
6 -- the -- well, what Congress said was --

7 QUESTION: Well, one thing Congress said was
8 that we're leaving radioisotopes to the states.

9 MR. GARVEY: Yes. There is no question but
10 that this is not radioisotope within the meaning of that
11 discussion.

12 QUESTION: And what's your authority for that?

13 MR. GARVEY: Well, I think if you look at the
14 AEC analysis of the bill, which appears in 105
15 Congressional Record '83-'84, and if you read the House
16 and Senate reports that accompany the 1959 amendments,
17 it's clear that Congress made a distinction between
18 facilities that possess special nuclear material in
19 quantities sufficient to form a critical mass, and this
20 was such a facility, on the one hand. And radioisotopes
21 that are used for medical purposes or related uses, on
22 the other hand.

23 There is no doubt but that Congress intended
24 to cover this facility. There is no doubt but that the
25 -- that the amount of plutonium found in her apartment,

1 had Kerr-McGee been responsible for its presence there,
2 would have violated both the statute and the regulations.

3 I might go on to say that the regulations also
4 provide in great detail for the -- for the protection of
5 workers in plutonium and processing facilities like this
6 one. They talk about what sort of precautionary
7 procedures have to be taken in handling plutonium. They
8 also set exposure limitations which -- which -- which
9 apply to this case.

10 The baseline exposure limitation is that
11 operators of these kinds of facilities have to keep
12 exposures as low as reasonably achievable. Now, any
13 willful exposure to plutonium almost by definition
14 violates the as low as reasonably achievable standard,
15 but it might also say that the amount of plutonium that
16 the NRC discovered on its investigation in this case --
17 that was discovered at the autopsy, had it been received
18 in the course of a week or even in the course of a
19 quarter would also have violated the numerical
20 limitations that are found at the end of Part 20 of 10
21 CFR.

22 In addition to that statutory and regulatory
23 scheme, the NRC imposes on licensees specifically
24 tailored license conditions to make sure that these
25 plants are operated safely. In this case the license

1 was about that thick. It was introduced as Exhibits --

2 QUESTION: So your -- your point is -- is --

3 is that if -- that if had been shown that Kerr-McGee was
4 responsible for the presence of that plutonium, there
5 would have been a violation of federal law.

6 MR. GARVEY: Yes. I want to go farther than
7 that, because the NRC conducted an investigation, and
8 its report is reproduced as an appendix to the motion to
9 dismiss in this case. The NRC concluded that the
10 appellees had not violated the federal regulations. If
11 they had concluded that there had been a violation, the
12 current procedures, which you will find in Appendix C to
13 Part 2 of 10 CFR, say, for example, that the NRC can
14 impose civil fines for any significant failure to
15 control licensed material. That would include this case.

16 QUESTION: Well, that wouldn't -- there
17 wouldn't be any intention to -- there wouldn't be any
18 bar, though, to a -- to a state court action for
19 compensatory damages --

20 MR. GARVEY: No, it would not.

21 QUESTION: -- For the violation of the federal
22 law.

23 MR. GARVEY: No, it would not. In fact,
24 Congress intended to encourage awards of punitive -- of
25 compensatory damages. The NRC has no authority to award

1 compensatory damages.

2 QUESTION: Right, right. So there was no
3 intent to preempt the state damage action.

4 MR. GARVEY: Indeed not. In fact, the
5 Price-Anderson Act rests on the assumption that state
6 compensatory damages actions are permissible. On the
7 other hand, Congress enacted Section 2282 for the
8 specific purpose of allowing the NRC itself to impose
9 civil fines. And as this Court noted in Gertz against
10 Robert Welch, punitive damages are nothing other than
11 private fines levied by civil juries.

12 There are a number of differences between
13 compensatory and punitive damages which make clear
14 Congress' intent. That first is that the statute treats
15 them differently. It leaves to the states the award of
16 compensatory damages. It gives to the NRC the authority
17 to impose civil fines.

18 The second point I'd like to make is that
19 appellant suggests that in some way reading the --

20 QUESTION: But, Mr. Garvey, the civil fines
21 imposed by the NRC, do they go to a person who's
22 claiming injury or do they go to the government?

23 MR. GARVEY: Well, they go to the government.

24 QUESTION: So that isn't exactly analogous
25 then to punitive damages.

1 MR. GARVEY: No, it's not exactly analogous,
2 although Oklahoma law recognizes that -- that the
3 collection of punitive damages isn't a right of the
4 private party. It's really a private party acting as a
5 private attorney general on behalf of the public. So I
6 think where they go is really a matter of insignificance.

7 Appellant suggests that in some way it's
8 strange that Congress might --

9 QUESTION: Excuse me there. The impact on the
10 wrongdoer, if he is a wrongdoer, is the same whether the
11 money goes to the government or whether it goes to the
12 private claimant.

13 MR. GARVEY: That's correct.

14 QUESTION: It has a deterrent effect.

15 MR. GARVEY: That's correct. That's correct.

16 Appellant suggests that in some way it's
17 strange that Congress should have drawn this line
18 between compensatory and punitive damages, but it's done
19 in any number of other statutes as this Court has
20 recognized. If this had been -- if this facility had
21 been a federal facility, the Federal Tort Claims Act
22 would have subjected the government to state standards
23 for negligence in suits for compensation but would not
24 have permitted suits for punitive damages. This Court
25 has recognized that the Railway Labor Act, suits brought

1 under that act permit compensation but not punitive
2 damages. Section 303 of the Labor-Management Relations
3 Act permits compensation but not punitive damages
4 precisely because of the effect that they have on future
5 conduct.

6 That's, I might add, a sensible reason for
7 drawing a line between compensatory and punitive damages
8 in this case. In Pacific Gas and Electric this Court
9 said that states were free to reject nuclear power if it
10 cost too much, but not because it was unsafe.

11 I might add the Court's opinion said that
12 states were free to reject nuclear power if it cost too
13 much, even though the decision about cost entailed some
14 thinking about safety.

15 In the same way, Congress intended that the
16 states should be allowed to assure that nuclear power
17 pay all its costs -- the cost of injury, the cost of
18 harm -- but that they not be allowed to go further and
19 punish nuclear licensees for operating unsafely.

20 QUESTION: Well, I suppose that in the process
21 of awarding compensatory damages if in a particular case
22 the state was attempting to impose a standard of
23 performance inconsistent with federal law, that would
24 pose a different problem.

25 MR. GARVEY: I don't believe so. I think that

1 Congress intended that the states should be allowed to
2 award compensation under standards of strict liability.
3 Indeed, in the Price-Anderson Act they wanted to
4 encourage that in the case of extraordinary nuclear
5 occurrence.

6 QUESTION: Well, you aren't answering my
7 question.

8 MR. GARVEY: Well, I think I -- I think I am,
9 because in awarding damages under standards of strict
10 liability, the state makes no decision about standards
11 of care.

12 QUESTION: Well, I asked you if the state was
13 awarding damages in accordance with some standard of
14 care that was inconsistent with the federal law. They
15 didn't work -- suppose the state isn't -- doesn't
16 purport to award damages on a strict liability basis.
17 They are awarding damages because you failed to run your
18 plant this particular way, and it just happens to be
19 inconsistent with the federal law.

20 MR. GARVEY: I find it curious that appellants
21 have turned that argument to their own advantage. What
22 they're really saying is if the state, in order to
23 protect a licensee, decides to award compensatory
24 damages in less than all cases by using a negligence
25 barrier to collection that that somehow justifies the

1 state in awarding punitive damages in situations where
2 the NRC would not permit them.

3 CHIEF JUSTICE BURGER: We'll resume there at
4 1:00.

5 (Whereupon, at 11:59 a.m., the case was
6 recessed for lunch, to be resumed at 1:00 p.m., the same
7 day.)

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AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: Mr. Gottesman, you may proceed.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.,
ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. GOTTESMAN: Thank you, Mr. Chief Justice.

QUESTION: Mr. Gottesman, may I ask you a question before you commence?

If there were a nuclear disaster and hundreds of people were injured or killed and their claims exceeded the \$560 million, I assume that each of the claimants would be entitled to a pro rata part of that sum.

MR. GOTTESMAN: That's correct, Your Honor.

QUESTION: And would they then be entitled to bring punitive action suits?

MR. GOTTESMAN: Well, punitive damages would be part of the very cause of action, but the statute has in it, Price-Anderson has in it a provision that where the total recoveries of all elements of damage exceed the \$560 limit of liability, the court will make apportionments based on which elements of recovery are the most deserving. And we would certainly assume that compensatory would come before --

1 QUESTION: Does the statute make that clear,
2 drawing a distinction between the two?

3 MR. GOTTESMAN: No. The statute simply says
4 that the district court shall make such allocations or
5 priorities of allocation as in its judgment it deems
6 just.

7 QUESTION: And there's nothing in the
8 legislative history that sheds any light on that?

9 MR. GOTTESMAN: There is some discussion in
10 the legislative history that personal should come before
11 property. That discussion does not have a reference one
12 way or the other to punitive. And that, I believe -- I
13 don't know if it was in a report. I think it was during
14 the hearings somebody asked that question; they had that
15 discussion.

16 This is, as we stated at the outset, solely a
17 question of legislative intent. And I think it's worth
18 noting that throughout the arguments on the other side
19 no one is prepared to crack the binder and look at what
20 Congress said. All of the arguments on the other side
21 flow from a logic, it would make sense for Congress to
22 do this or it would make sense for Congress to do that.
23 As we've indicated, Congress told us what it did, and
24 that is the answer here.

25 But the logic wouldn't work, and I want to

1 focus on the government's argument about the scope of
2 NRC regulations and how since the NRC is punishing, why
3 do we need juries punishing as well -- an argument that
4 I assume would extend as well to the state criminal law,
5 that anything --

6 QUESTION: Why?

7 MR. GOTTESMAN: I'm sorry.

8 QUESTION: Why? You said it would extend --

9 MR. GOTTESMAN: Why would it extend? Because
10 I don't know how one could attribute to Congress, at
11 least from the legislative history we've got, a dividing
12 line that says the state can take the same malicious
13 conduct or reckless conduct and if it calls it a crime,
14 then it is free to punish it, but if it calls it
15 punitive damages, then it is not free to do it.

16 I'm not saying Congress couldn't make that
17 distinction. What I'm saying is there is absolutely
18 nothing in this statute or in the logic of the
19 legislative history that could allow one to conclude
20 that that was the line that Congress actually drew here.

21 But the point I want to make is that it isn't
22 true that two punishments are the same. The federal
23 government is punishing violations of its regulations.
24 The deterrent purpose is that so people won't violate
25 the regulations again.

1 The state, through punitive damages, is
2 punishing outrage, outrageous conduct motivated
3 outrageously that inflicts injury on its citizens. Its
4 deterrent purpose is to get this wrongdoer to stop
5 hurting people.

6 Now, that isn't limited. In this case it
7 happens that the outrage was perpetrated with plutonium,
8 but the deterrent purpose of the state extends to
9 everything that Kerr-McGee does. Kerr-McGee doesn't
10 just handle plutonium. And even this plant has other
11 ways that people can be hurt.

12 The state's concern is that it has found a
13 defendant that proceeds with a reckless disregard for
14 the safety of its citizens, and the function of punitive
15 damages is to make that defendant stop doing what it
16 does with reckless disregard. It isn't in any way
17 confined to plutonium or limited to.

18 QUESTION: That does divide the regulation of
19 the production of atomic energy, does not it not,
20 between the state and the federal?

21 MR. GOTTESMAN: The act defines the -- that it
22 assigns certain functions to the Atomic Energy --

23 QUESTION: Your response, your analysis puts
24 the jurisdiction in two places at the same time.

25 MR. GOTTESMAN: We don't think so, Your

1 Honor. The regulation that we understand Congress to
2 have given to the federal government is the federal
3 government's alone. That regulation -- and we
4 acknowledge that it is in at least some sense regulation
5 -- this Court said so in the Garman case -- that flows
6 both from compensatory and from punitive damages. There
7 is no evidence that Congress passed in the federal
8 government alone.

9 Now, I want to end by pointing out one other
10 thing, and that is, if you read Mr. Kepler's testimony
11 -- he's the AEC man -- the description of their role is
12 not as indicated here.

13 CHIEF JUSTICE BURGER: Thank you, gentlemen,
14 The case is submitted.

15 We'll hear arguments next in Southland
16 Corporation against Keating.

17 (Whereupon, at 1:05 p.m., the case in the
18 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD,
DECEASED, APPELLANT v. KERR-McGEE CORPORATION ET AL # 81-2159

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

BY

A handwritten signature in dark ink, appearing to read "Dine Hammond", is written over a horizontal line.

(REPORTER)

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