OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TXO PRODUCTION CORP., Petitioner v. ALLIANCE

RESOURCES CORP., ET AL.

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CASE NO: 92-479

PLACE: Washington, D.C.

DATE: Wednesday, March 31, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TXO PRODUCTION CORP., :

4 Petitioner :

5 v. : No. 92-479

6 ALLIANCE RESOURCES CORP., :

7 ET AL. :

8 - X

9 Washington, D.C.

10 Wednesday, March 31, 1993

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:02 a.m.

14 APPEARANCES:

15 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of

16 the Petitioner.

17 LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on

18 behalf of the Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 92-479, TXO Production
5 Corporation v. Alliance Resources Corporation.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS
8 ON BEHALF OF THE PETITIONER

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

11 Well, the Court may begin its opinion in this
12 case in much the same way that it began its opinion in
13 Haslip, that is, that this case is yet another challenge
14 to a punitive damages award. To be sure, this case does
15 not involve just any old punitive damages award.

16 The award here of $10 million for the tort of
17 slander of title is beyond rational explanation by
18 reference to any legitimate interests asserted by the
19 State of West Virginia and is the product of a procedural
20 scheme that bore no discernable relationship to the
21 procedural scheme that this Court reviewed and approved in
22 Haslip.

23 Indeed, the West Virginia Supreme Court's
24 judgment ultimately rests on a wholly arbitrary, really
25 mean versus really stupid, classification of defendants

1 that even the respondents do not defend in this Court.
2 Accordingly, that judgment should be reversed.
3 TXO was an oil and gas exploration company based
4 in Texas that opened an office in West Virginia in the
5 early 1980's. In 1984, it first became interested in the
6 Blevins tract in McDowell County, West Virginia, and
7 sought to obtain the oil and gas development rights to
8 that tract. Those rights were held by Respondent Tug Fork
9 -- or excuse me. The title to the oil and gas was held by
10 Respondent Tug Fork, and the development rights were held
11 by Respondent Alliance Resources.
12 An agreement was reached between Alliance and
13 TXO that granted the latter the rights to the development.
14 TXO received a title opinion that indicated that there was
15 question as to whether or not a 1958 deed had, in fact,
16 conveyed Tug Fork's interest to a third party.
17 The question then was how to resolve that
18 problem, and TXO obtained a quitclaim deed from the
19 recipient of the rights in order to be in a position to
20 ensure that if it began to drill well -- drill a well on
21 that property and, in fact, successfully uncovered oil or
22 gas, that it would be able to take that oil and gas free
23 of any claims by this third party. So, TXO filed its
24 quitclaim deed, and then filed a declaratory judgment
25 action seeking to have the respective rights of the

1 parties resolved.

2 Respondents counterclaimed in that lawsuit for

3 slander of title based solely on TXO's action in recording

4 the quitclaim deed and sought both compensatory damages

5 and the punitive award.

6 The case was tried exclusively on respondents'

7 claim of slander of title. Respondents did not seek

8 compensatory relief on any other theory of the case, and

9 they did not submit an instruction to the jury with

10 respect to any claim other than the straight slander of

11 title claim.

12 The jury was instructed with respect to the

13 punitive award that it could enter an award for three

14 purposes: to punish the wrongdoer, to serve as an example

15 to others not to engage in such conduct, and to provide

16 unspecified, quote, additional compensation. And then in

17 arriving at a punitive amount, the jury should consider

18 the nature of the wrongdoing, the extent of the harm

19 inflicted, the intent of the defendant, the wealth of the

20 perpetrator, as well as any mitigating factors, which were

21 unspecified by the court.

22 QUESTION: Mr. Phillips, the respondent has come

23 back with a proposal that suggests that the evidence in

24 this case meets all those standards. Are you going to

25 address that argument?

1 MR. PHILLIPS: Meets all -- well, actually what
2 they argue is that it meets the standards that the Court
3 sort of noted in Haslip as the Green, Alabama factors.
4 In truth, I think if you were to look at the
5 four factors that the jury was asked to look at, it would
6 be very difficult to reach the conclusion that the jury
7 could have come to a $10 million verdict based on these
8 factors. If you consider the nature of the wrongdoing,
9 what we are talking about here is slander of title,
10 nothing more. No physical injury was a possibility. We
11 are talking about a pure economic tort. The entire extent
12 of the injury that was actually caused to the plaintiffs
13 as a consequence of this particular economic activity was
14 $19,000.
15 QUESTION: Well, the Supreme Court of West
16 Virginia gave the impression I thought in its opinion not
17 that there was any physical -- but that your client acted
18 with malice in the really nasty sense of the word.
19 MR. PHILLIPS: The West Virginia Supreme Court
20 certainly seemed to indicate that, although it is a little
21 difficult to understand on this record on what basis you
22 would reach that conclusion in light of the slander of
23 title claim. You will recall that in the trial of this
24 case, there was --
25 QUESTION: Yes, but if the case comes to us, we

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1 should -- I suppose we would not quarrel with that
2 judgment of the -- that there was malice.
3 MR. PHILLIPS: Well, there is no basis in the
4 jury's verdict necessarily to find malice because the jury
5 was told that it could award punitive damages simply for
6 reckless disregard and without malice. So, that -- it's
7 not clear to me that as it comes to this Court, that there
8 is necessarily a jury finding of malice. There is an
9 appellate finding.
10 QUESTION: Yes, but do you lose the case if we
11 assume there's malice?
12 MR. PHILLIPS: Oh, no, of course not. We don't
13 lose the case on that basis.
14 QUESTION: Well, that's what I thought. So --
15 MR. PHILLIPS: My basic point --
16 (Laughter.)
17 MR. PHILLIPS: We're in agreement on that,
18 Justice White.
19 But my basic point is that as you evaluate the
20 relationship of the $10 million award, which is really
21 where I think you have to start the legal analysis against
22 what is going on here, in truth there isn't all that much
23 that is going on here.
24 QUESTION: Well --
25 MR. PHILLIPS: And even if you accept that it

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1 gets you over the threshold of some punitive award, it
2 certainly doesn't take you into the $10 million range for
3 this kind of tort.
4 QUESTION: But certainly if you're looking for
5 reasons why the jury might have found $10 million, it's
6 more likely that they found malice than that they simply
7 found reckless disregard. Wouldn't you agree with that?
8 MR. PHILLIPS: I would agree with that, Mr.
9 Chief Justice.
10 I would also, however, conclude that if you are
11 looking to how the jury got to a $10 million award in this
12 case, it is quite clear. The question -- the jury was
13 provided with evidence of the wealth of the defendant in
14 the case, TXO, and was asked by counsel in closing
15 argument to award some percentage of that wealth over as a
16 punitive award, that that would be the fair way to
17 proceed. And that is the only numerical evidence in this
18 record, frankly, that can you get anywhere near $10
19 million.
20 QUESTION: Mr. Phillips, on that point, if the
21 State of West Virginia had had, prior to your client's
22 conduct here, a clear rule, whether it be a rule of
23 statute or previously announced common law, to the effect
24 that punitive damages may be awarded by reference not
25 merely to the verdict in the tort action, but by reference

1 to the extent -- the economic extent of the harm either
2 intended or potentially threatened by the tort, even
3 though not realized, would you say that there was either a
4 procedural or a substantive due process violation in
5 applying that rule?
6 MR. PHILLIPS: The -- if that rule, which is
7 obviously the rule that respondents in a sense urge the
8 Court to adopt --
9 QUESTION: That's how you get a basis for $10
10 million, if there is one, yes.
11 MR. PHILLIPS: Right, and their -- and that is
12 part of their quest to come up with a number of $5 to $8
13 million because that is the potential gain. We would
14 still have a problem with that because you still have an
15 extraordinary award that is difficult to justify by
16 reference to the underlying conduct involved here, and --
17
18 QUESTION: Well, but let me start just with the
19 general proposition, which is what I was trying to get at
20 with my question. Would there be as a general judgment -
21 -would there be a procedural or substantive due process
22 defect in that rule?
23 MR. PHILLIPS: It is hard to evaluate it in the
24 abstract. I think there would be a substantive problem
25 that could arise with that rule because in a situation

1 like this where you have a plaintiff, defendant dealing in
2 a particular transaction, the economic theory that tells
3 you that you are going to deter this conduct says you look
4 at the transaction and the actual profit, and you take
5 away all of the actual profit and then some multiple for
6 any instances in which engaging in this same conduct might
7 not actually be uncovered. If you do that, as we
8 explained in the reply brief, you take away all possible
9 incentive for providing -- for going forward with that
10 kind of conduct, and you should, thereby, completely
11 deter.
12 Our position is whenever you get to the point
13 where you have put in all that retribution permits and you
14 put in all that deterrence will permit and you go beyond
15 that, that then you are, in effect, punishing the
16 innocent. So, there is a substantive problem even at that
17 level.
18 The difficulty, obviously, is where you draw the
19 line, and if you had a situation, like you pose, where a
20 legislature has come in and tried to make some kind of an
21 assessment, I suspect the court ought quite rightly to be
22 somewhat deferential in how it evaluates whether or not
23 you've still crossed that line. But I think there is
24 still an excessiveness problem.
25 QUESTION: Well, if you had complete -- if you

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1 had adequate knowledge of the rule in advance, why would
2 it make any difference even if it were a common law rule?
3 MR. PHILLIPS: Oh, I don't think it would make
4 any difference if it were a common law rule. I'm not --
5 this is not a notice problem. I still think you have a
6 problem of excessiveness.
7 QUESTION: So, your quarrel here is not with the
8 general proposition that the other side advances, that in
9 fact, it's the risk of harm threatened that should be the
10 basis for engaging in a proportionality analysis, if
11 that's what we're going to call it, but your objection is
12 to its application here. And is it your objection that
13 you did not have adequate notice that such was your
14 exposure?
15 MR. PHILLIPS: Well, we clearly wouldn't have
16 had any notice of it because this is an argument that
17 didn't arise until the briefs in this Court. We were
18 never tried on that basis in the courts below.
19 QUESTION: Of course, did you have any -- were
20 you on notice that there was, in fact, a different and
21 more favorable theory of punitive damages in West
22 Virginia?
23 MR. PHILLIPS: At the time of the trial?
24 QUESTION: Yes.
25 MR. PHILLIPS: Or at the time of the conduct at

1 issue?

2 QUESTION: Well, actually I suppose it ought to

3 be at the time of the conduct.

4 MR. PHILLIPS: It's sort of difficult -- at that

5 stage in the process, to be sure, the procedures were less

6 well formulated than they have since become, but to the

7 extent that Garnes, the decision of the West Virginia

8 Supreme Court subsequent to this Court's decision in

9 Haslip, reflects basically the West Virginia Supreme

10 Court's analysis of the appropriate inquiry that ought to

11 be undertaken, the rules presumably would have been quite

12 favorable as they ultimately played out. We just weren't

13 the beneficiary of any of those rules in this particular

14 case.

15 QUESTION: Of course, on that theory, you can

16 never develop a common law of punitive damages because the

17 first case would be unconstitutional, there being no

18 notice of it. I mean --

19 MR. PHILLIPS: Well, you could clearly have --

20 there's no quarrel about whether or not a punitive award

21 could be imposed in a particular circumstance. The

22 question is --

23 QUESTION: Without notice. You're dealing with

24 a bad actor who has committed an intentional tort, and a

25 common law court says for the first time, we are going to

1 adopt within this jurisdiction a theory of punitive
2 damages. That would be okay, wouldn't it?
3 MR. PHILLIPS: I think that would be fine.
4 My problem with the notice issue -- there's a
5 different notice issue involved with respect to the
6 potential gain theory that the respondents put forward
7 here, which is that wasn't the theory in the State of West
8 Virginia at the time of the conduct. That wasn't the
9 theory put forward by the trial court in the instructions
10 to the jury. The instructions to jury say harm inflicted,
11 not potential gain to the defendant. That was not the
12 theory on which the matter was defended in the trial court
13 and post-judgment. That was not the theory on which the
14 decision was defended in the West Virginia Supreme Court,
15 and now it comes here.
16 The other part of the problem with this
17 argument, as it comes to this Court is, there is no
18 evidence that would support an expected gain analysis in
19 this case.
20 QUESTION: Why is the new adoption of a theory
21 any worse than the new adoption of the whole doctrine?
22 Suppose there had been -- never been a punitive damages
23 case in West Virginia before, although there had been in
24 other jurisdictions. And it comes before the West
25 Virginia Supreme Court and the West Virginia Supreme Court

1 says, yes, we adopt the theory of punitive damages.

2 MR. PHILLIPS: But what you don't do --

3 QUESTION: Why is it -- why is adopting a theory

4 of punitive damages any worse than adopting the whole

5 thing?

6 MR. PHILLIPS: It's the timing of adopting the

7 theory of punitive damages. You don't -- after the jury,

8 which is supposedly the sentencer in this context, you say

9 to the jury this is the basis on which you should decide

10 how much money to take from the defendant, okay. And they

11 make a $10 million award on a set of facts. You don't

12 then come back in and say if we took those facts, as it

13 comes to us, if we take it on its own terms, we could not

14 conceive of getting to $10 million. But even though the

15 jury never had this in front of it, even though it could

16 not conceivably have based the award on this, we will now

17 come in and urge you to affirm that verdict on that basis.

18 If this had been the issue in front of the jury, we would

19 have tried that issue and the expected gain would not have

20 been anywhere near the fabricated number that respondents'

21 counsel put forward.

22 QUESTION: It's not a notice problem. It's not

23 notice at the time of your conduct. It's a jury

24 instruction problem.

25 MR. PHILLIPS: Yes, and a procedural trial

1 problem.

2 QUESTION: Does the case boil down then to the

3 fact that you really do not dispute the position as a

4 general matter put forward by the other side that the

5 expected or anticipated harm, even though not realized,

6 can be the base for -- the baseline, as it will, for the

7 award, that we are really here to review the question

8 whether, in fact, there was adequate evidence to support

9 the instructions as given?

10 MR. PHILLIPS: Exactly, Your Honor.

11 QUESTION: That's it.

12 MR. PHILLIPS: Yes.

13 QUESTION: It's a fairly narrow case then.

14 MR. PHILLIPS: Well, we brought this case on the

15 theory that the West Virginia courts imposed the verdict

16 on us, and we defended it and presented it to the Court

17 under those terms because it may be a narrow theory, but

18 it's an important one. The question here is, is there a

19 limit based on excessiveness? And if this Court holds

20 that as tried before the West Virginia courts --

21 QUESTION: Yes, but that isn't what you would

22 have us decide. You would not have us decide whether

23 there's a limit based on excessiveness. You would have us

24 decide whether there was an adequate evidentiary

25 foundation for the jury to return the verdict it did given

1 the instructions it had.

2 MR. PHILLIPS: Right. But that still requires
3 you to make an analysis of whether there's a reasonable
4 means-ends fit in this case, as the case was tried, as the
5 jury had the evidence.

6 QUESTION: Well, I think you're telling us that
7 we're supposed to decide whether there is an evidentiary
8 instruction-verdict fit, which is a different concept of
9 fit.

10 MR. PHILLIPS: Well --

11 QUESTION: And it may well be a -- for $10
12 million, it may well be a very worthy exercise, but I
13 think it's a little bit narrower than what you were saying
14 a minute ago.

15 MR. PHILLIPS: But see, I think the reason for
16 the way we view this I suppose in somewhat different terms
17 is we came to the case with what was in front of us in
18 West Virginia and brought that to the Court's attention as
19 an important issue on its own terms. The respondents,
20 because they cannot defend the issue as it comes on its
21 own terms, have now tried significantly to shift the
22 Court's focus from the way it was decided below.

23 In responding to that point, what I am
24 suggesting to you is that there are procedural obstacles
25 to taking into account that argument. I'm not saying --

1 and we have never argued categorically that you cannot
2 have a $10 million punitive damage award. There's
3 certainly going to be a lot of instances in which that
4 would be an appropriate award in a particular case. But
5 what I'm saying is that for slander of title with no
6 potential harm, with gross over-deterrence as the ultimate
7 effect of the $10 million verdict, this Court ought to
8 declare that, under these circumstances, that award is
9 excessive, and therefore violates substantive due process.
10 QUESTION: Mr. Phillips, why do you say no
11 potential harm? The West Virginia Supreme Court referred
12 -- of course, they were talking about Garnes and so forth,
13 but it could potentially cause millions of dollars in
14 damages to other victims.
15 MR. PHILLIPS: To other victims.
16 QUESTION: Well, but is that part of the
17 calculus or not?
18 MR. PHILLIPS: Well, I think that -- to my mind
19 that reflects more the passion and prejudice problem
20 that's inherent in the bad acts evidence that was put into
21 this case because if you read that language carefully, it
22 cannot possibly be that he reaches that conclusion based
23 on the slander of title claim in West Virginia alone
24 because he's talking about a pattern of fraud.
25 Well, a slander of title case, even if done

1 maliciously, doesn't constitute a pattern of fraud. It's
2 a single point. So, in order to get to a pattern of
3 fraud, you have to go to all the bad acts evidence that
4 was brought in and say that somehow all of that can be
5 used to upgrade the quantity of the punitive award. And
6 our position is that all is way beyond the jurisdiction of
7 the West Virginia Supreme Court to take into account --
8 QUESTION: You don't --
9 MR. PHILLIPS: -- and could not have been the
10 basis for the jury's verdict.
11 QUESTION: You don't think there's any basis in
12 this record for figuring out how much harm might have been
13 caused to this particular litigant if the program had been
14 successful.
15 MR. PHILLIPS: I think it would be perfectly
16 acceptable for that inquiry to be undertaken on remand
17 after this verdict is set aside. Go back to the jury,
18 start over again, if they wish to, see whether or not --
19 see, one of the problems you've got, if you go back to a
20 new jury, is Garnes -- in the Garnes case, the West
21 Virginia Supreme Court exhaustively analyzed what factors
22 ought to go into the determination of an appropriate jury
23 award. And you will look in vain in that opinion for an
24 expected gain theory like the one put forward by the
25 respondents in this case.

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1 And there's good reason, for the reasons I was
2 trying to explain to Justice Souter. It is a grossly
3 over-deterring method of imposing a punitive award, and so
4 there's no reason in the world to assume at this point
5 that West Virginia would adopt that kind of an approach in
6 this kind of a case.
7 So, it may be -- you know, I have no quarrel.
8 If they want to go back on retrial, try to put in that
9 evidence, it will show that the expected gain is nowhere
10 near what they project in their briefs.
11 QUESTION: What do you think the expected gain
12 might have been? What do you think the record indicates
13 on that?
14 MR. PHILLIPS: This record doesn't indicate
15 anything about what the expected gain would have been
16 because it wasn't an issue in the case. There are some
17 snippets of exhibit numbers that --
18 QUESTION: They couldn't tell how valuable the
19 property was.
20 MR. PHILLIPS: We couldn't even begin to know
21 whether or not those are wild projections, whether they
22 really went into anybody's calculations on any of this
23 stuff.
24 QUESTION: Mr. Phillips, did I gather from a
25 remark you made a moment ago that you think that West

1 Virginia could not punish a -- in the sense of inflict
2 punitive damages on a defendant who had committed one bad
3 act in West Virginia and had committed a series of similar
4 bad acts in other States?
5 MR. PHILLIPS: I don't think you could punish
6 them for the potential injury to the others in other
7 States. I think you could derive from the facts something
8 about the nature of the entity, and you might even be able
9 to figure out something about what would be necessary as a
10 deterrence matter in West Virginia if you can come up with
11 some kind of a nexus between the two.
12 QUESTION: What if it were shown that no
13 lawsuits had ever been brought against the defendant for
14 these bad -- similar bad acts in other States? So, this
15 would be presumably the only opportunity to punish him for
16 those.
17 MR. PHILLIPS: Well, but I mean, it's clearly
18 not the only opportunity. There's always the opportunity
19 for those who are down in those States to bring those
20 kinds of actions. I mean, I don't think West Virginia --
21 simply because West Virginia saw bad acts in Texas, I
22 don't see that it can reach down and exercise jurisdiction
23 over those bad acts even if it has a case --
24 QUESTION: You don't think a career offender
25 could be punished for a career of crime in another State?

1 MR. PHILLIPS: Well, the difference in that is
2 that when you get in the criminal sentencing process, you
3 have some set guidelines and you have --
4 QUESTION: Well, I know, but you're arguing it's
5 not a permissible factor, as I understand you. You're
6 arguing that out-of-jurisdiction wrongdoing --
7 MR. PHILLIPS: In a civil proceeding.
8 QUESTION: -- is not a permissible factor in the
9 calculation --
10 MR. PHILLIPS: I think in civil proceeding --
11 QUESTION: -- in this proceeding, but it would
12 be in a criminal proceeding, obviously.
13 MR. PHILLIPS: It would be in a criminal
14 proceeding, but in a civil proceeding, what you're talking
15 about -- and remember what he says. The language is harm
16 to victims as a monetary amount in other States based on
17 other acts, frankly.
18 QUESTION: In a civil proceeding, usually the
19 standards are more lax than in a criminal proceeding.
20 MR. PHILLIPS: But see, my problem with this is
21 that when you're in a situation where we are orders of
22 magnitude beyond anything that anyone else has ever
23 permitted with a particular punitive award -- and as we
24 explain in the -- in our brief, we've already demonstrated
25 that we are orders of magnitude outside -- one of the

1 genuine fears you have to have is this a product of
2 passion and prejudice, and that bad acts evidence, as used
3 in this context does create passion and prejudice. And
4 the best evidence of it is the West Virginia Supreme
5 Court's own opinion.
6 QUESTION: Then it never can be used again. As
7 a theoretical matter, it cannot be used in a civil
8 punitive damages award?
9 MR. PHILLIPS: No. It clearly plays a role in
10 the sense --
11 QUESTION: Well, how do we -- how would you
12 articulate the permissible role?
13 MR. PHILLIPS: Well, because you can demonstrate
14 the malice. You can demonstrate a certain amount of
15 knowledge and, therefore, demonstrate two things I think
16 from it. One is that some greater amount will be required
17 to deter this actor in the future because of what we know
18 from other acts, and two, that this actor -- it's not just
19 a mistake here, that this really is a bad actor, and
20 therefore some additional amount would be required as a
21 consequence of that. What I had --
22 QUESTION: May I interrupt you just with one
23 question?
24 MR. PHILLIPS: Oh, of course.
25 QUESTION: Can that additional amount, in

1 effect, be the -- be calculated as the additional amount
2 to deter the additional or the further economic harm,
3 let's say, outside of the State itself if this conduct
4 were to continue?
5 In other words, you said it may be used for
6 determining malice. Well, maybe this -- I don't know how
7 you articulate the add-on for malice, but I suppose that
8 malice's add-on would be something less than a calculation
9 of a deterrence amount if we considered the fact that
10 there had been 10 other attempts to do what was done here
11 with the same objective in mind, so that if the potential
12 gain here was $5 million, the jury could consider that
13 there had been attempts to gain $50 million. That I
14 suppose would take you beyond a mere malice add-on. Would
15 that be impermissible?
16 MR. PHILLIPS: I don't think it probably would
17 be impermissible under those circumstances, but the -- you
18 know, of course, the problem is, is that what you're
19 talking about there is an undertaking that we clearly
20 embrace, which is that you initially have to examine sort
21 of what the nature of the award is. Is it off the charts?
22 Has it fallen beyond what is by all objective measures
23 impermissible? If it is, then you have to justify it.
24 QUESTION: But my example wouldn't be off the
25 charts.

1 MR. PHILLIPS: Well, it would be if I --

2 QUESTION: This one you say -- pardon me?

3 MR. PHILLIPS: It would be probably. If you end

4 up with a number that's way off for the slander of title

5 and you looked and tried to compare it, you'd say, geez,

6 this number is nowhere near what we would have expected

7 for this kind of an offense anywhere. And then you can

8 look in the record, if there is such a record, for what is

9 unique about this case that might justify that award. And

10 that way you do permit the common law to continue to

11 develop without being completely constrained by the

12 Constitution.

13 But we're nowhere near that because we --

14 there's nothing specific to TXO that would allow you to

15 get from what would be the ordinary kinds of multiples

16 that ought to be applied here.

17 QUESTION: Is it permissible, Mr. Phillips, to

18 enter a punitive damages award not only to deter this

19 actor, but other actors similarly situated?

20 MR. PHILLIPS: Yes, Justice Kennedy, it is

21 permissible.

22 QUESTION: Well, it seems to me that if it's the

23 marginal cost of wrongdoing that's the limit on the award,

24 that that might not have sufficient notoriety or publicity

25 to accomplish that effect.

1 MR. PHILLIPS: Well, I think you've still got to
2 be limited by the nature of what is it that you're trying
3 to deter here, and what we're trying to deter here is the
4 reckless recordation of quitclaim deeds, which is hardly
5 something that requires a huge amount of notoriety for the
6 purpose of trying to get others not to do it. You don't
7 need a $10 million award to tell a land man and his title
8 counsel, the next time he's got a problem with title, to
9 act cautiously in trying to resolve that title. And,
10 indeed, a $10 million award in a case like this is going
11 to place the fear of God into those people and thereby
12 create way over-deterrence and cause even more trouble --
13
14 QUESTION: Well, I suppose that's --
15 MR. PHILLIPS: -- in terms of oil and gas
16 development.
17 QUESTION: That's for the jury, isn't it?
18 MR. PHILLIPS: At some point, I think it isn't
19 for the jury. At some point, if the State's reason for
20 having a punitive damages system is to deter and to punish
21 and what you've done is effectively grossly over-deterred,
22 then you'll have, in effect, gone way beyond the ends
23 permissible by the State and therefore the means are
24 invalid.
25 QUESTION: Mr. Phillips, are you going to

1 suggest some kind of a test that courts could employ in
2 knowing when there is a likelihood of bias or
3 arbitrariness in these cases?
4 MR. PHILLIPS: I think what you --
5 QUESTION: Or do we -- is it just we know it
6 when we see it? I mean, what is it?
7 MR. PHILLIPS: Well, I knew it when I saw it
8 here, but I don't think that's the right test, Justice
9 O'Connor.
10 (Laughter.)
11 MR. PHILLIPS: The test is that you look first
12 at the gravity of the offense, and you look at the nature
13 of what kind of deterrence would be necessary. You
14 compare it to the objective criteria in sort of Solem
15 versus Helm's like analysis to see is this objectively
16 unreasonable.
17 At that point, that should trigger two separate
18 inquiries. One is is there a basis for believing that
19 this was the product of passion and prejudice. The use of
20 wealth in this case clearly caused passion and prejudice.
21 The use of other bad acts clearly caused passion and
22 prejudice, and the repeated references to out-of-State
23 defendants, compared to in-State plaintiffs created
24 passion and prejudice in this case.
25 The other thing you can look for then is what

1 State justifications exist specific to this defendant that
2 would justify the award in this case. In this case, no
3 such exists. Respondents have tried to bring some in, but
4 they weren't adjudicated below.
5 If there are no further questions, I'll reserve
6 the balance of my time.
7 QUESTION: Thank you, Mr. Phillips.
8 Mr. Tribe, we'll hear from you.
9 ORAL ARGUMENT OF LAURENCE H. TRIBE
10 ON BEHALF OF THE RESPONDENTS
11 MR. TRIBE: Thank you, Mr. Chief Justice, and
12 may it please the Court:
13 This case, rather like the gas in the wells in
14 the thousand acre tract, seems to be vanishing before our
15 very eyes. Mr. Phillips says in response to Justice
16 O'Connor's, I think, very important question, what
17 standard after all does he ask this Court to promulgate,
18 says he knew it when he saw it. But he doesn't really
19 offer a test different from that in the instructions in
20 this case, as I'll show in a moment.
21 And I do think that perhaps TXO, which has been
22 adjudicated guilty of a number of land frauds, has sold
23 this Court something of a dry hole because the case was
24 originally presented as though the relevant ratio was 526
25 to 1. But I think we now see that's apples to oranges.

1 That is, the numerator of that fraction came from a $10
2 million figure which, as I will show, was well grounded in
3 this record in terms of expected gain, what did they hope
4 to gain not simply by recording fraudulently a phony
5 quitclaim deed, but by doing it as part of this particular
6 century old pattern of land fraud.
7 The numerator was then upped somewhat in light
8 of the fact that there is a real chance that someone will
9 get away undetected. In this case, they didn't. They
10 were caught. The denominator, the $19,000 -- that's where
11 this fancy 526 to 1 ratio comes from -- had nothing to do
12 with what they expected to gain. It just happened to be
13 how much it cost to get attorneys to stand up to TXO and
14 to stop them dead in their tracks in this declaratory
15 judgment action.
16 QUESTION: Mr. Tribe, where in this record do
17 you find that the jury was told there was some $5 to $8
18 million gain at stake, and where in the record does it
19 show the courts below had those figures?
20 MR. TRIBE: Justice O'Connor --
21 QUESTION: I haven't been able to find it.
22 MR. TRIBE: Justice O'Connor, there is no
23 reference below in the courts to the $5 to $8 million
24 figure. There is reference through simple multiplication
25 that would give it to us.

1 QUESTION: It just doesn't seem to be the basis
2 on which this was tried or --
3 MR. TRIBE: That I -- let --
4 QUESTION: -- presented to the jury.
5 MR. TRIBE: Let me address --
6 QUESTION: It looks to me like you're trying to
7 concoct something that might have served, if it had all
8 been presented, but I don't find it.
9 MR. TRIBE: Let me address that directly. I
10 don't think that's true. That is the center of their
11 claim, somehow that this case was tried on a different
12 theory. The fact is it was tried on this very theory.
13 Let me turn to, for example, our closing
14 argument to the jury in this case. After the dollar
15 figures had been put in on how many wells could be dug, on
16 how much gas per well, on how many dollars per thousand
17 cubic feet, in the closing argument -- and if you want the
18 citations, it's pages 746 to 58 and 779 to 83 of the
19 transcript. Let me read a characteristic sentence. It
20 was full of these. TXO thought this was going to be a
21 huge money-making lease. That's why it was worth the
22 scheme, and the punishment should fit it so we can stop
23 people from stealing people's land with fraudulent
24 quitclaim deeds.
25 And then in the brief in the West Virginia

1 Supreme Court, our brief -- I don't know why they think
2 this argument was one --
3 QUESTION: Now, wait. That's all that the jury
4 was told with reference to these figures?
5 MR. TRIBE: No. The jury was told, with
6 reference to the figures, that they would add up to, I
7 believe, millions of dollars, but it was never quantified
8 as 5 to 8.3. That is, that arithmetic is something the
9 jury would have had to do for itself.
10 QUESTION: Well, and it was never -- I didn't
11 find anything in the record demonstrating dollar amounts
12 of projected loss to your client.
13 MR. TRIBE: Well, Justice O'Connor, as Mr.
14 Phillips' brief says, in this case, the expected gain to
15 TXO, if they had gotten away with it -- that is, if they
16 had successfully gotten Mr. Signaigo to sign the false
17 affidavit, and if they had managed to get their
18 declaratory judgment so that they made it look as though
19 they didn't have to pay the 22 percent to the respondents,
20 the expected gain to them was exactly equal to the
21 expected loss. That's their point in their reply brief -
22 -expected loss of --
23 QUESTION: But as I understand the way you have
24 calculated the $8.3 million that you want us to focus upon
25 at the high end, it assumes 25 wells, all of which are

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1 successful, 0 failure rate. It assumes that there's
2 maximum recovery. It gives no discount for present value
3 of money, which is routine in, say, wage earner cases.
4 And I think this is a highly exaggerated figure that
5 you're asking us to rely upon.
6 MR. TRIBE: Justice Kennedy, let me address
7 those points.
8 QUESTION: Plus the fact, as Justice O'Connor
9 put it, it was never pointed out to the jury or the
10 Supreme Court anyway.
11 MR. TRIBE: Justice Kennedy, with respect to the
12 discount rate, we were projecting figures using the $3
13 that was the price in 1985. TXO's own experts in defense
14 exhibit 14 indicated that they expected the price of gas,
15 over the 20-year life of the wells, to go up by a factor
16 of 4 or 5. That would more than offset any rational
17 discount rate.
18 The most important point, however, isn't that.
19 It is that the time to litigate the amount of expected
20 gain is surely not in this Court reviewing this case under
21 the Fourteenth Amendment's Due Process Clause. That is,
22 we did introduce before the jury dollar figures and a
23 range of estimates about the number of wells. Even if you
24 take the lower estimate of 15 wells, you come up not with
25 $8.3 million, but $5 million as to what they hoped. And

1 it would only take a multiplier of 2 then to get punitive
2 damages of $10 million.
3 But the time to contest those numbers was at
4 trial. You see, if it were true that no one was thinking
5 about expected gain in the State of West Virginia in a
6 case of this kind, so that they were basically bamboozled
7 -- they didn't know that that was the focus -- that might
8 be, though not necessarily for constitutional purposes,
9 enough of an explanation for why they didn't do it at
10 trial.
11 But at trial, when we introduced these numbers,
12 we didn't get any counter-figures from TXO. On the
13 contrary, when they put on Ken Walty and Mike Good as key
14 witnesses, it was on cross-examination of those witnesses
15 at pages 544 to 553 and 672 to 677 of the transcript that
16 we clearly established that they expected a multi-million
17 dollar income stream.
18 Their whole strategy was don't think about that.
19 We're innocent. We relied on advice of counsel, arguments
20 that have been demolished below and rejected by this jury.
21 When I get to the jury instructions, I think that will be
22 clear.
23 They also ended up saying, as they said here,
24 don't punish the innocent. We, after all, didn't make all
25 this money. But, of course, the theory of deterrence in

1 West Virginia and a number of other States is that you
2 punish in accord with what they hoped and intended to
3 gain, not what they happened to gain. That's why --
4 QUESTION: Well, Mr. Tribe, is there -- where in
5 the instructions is this theory expounded?
6 MR. TRIBE: If you --
7 QUESTION: And were they told anything except
8 consider the actual damages, which here were $19,000, and
9 the wealth of TXO?
10 MR. TRIBE: Yes, they were, Justice O'Connor.
11 If you look at plaintiffs' instruction number --
12 defendants' instruction number 6A in the joint appendix -
13 - QUESTION: Joint appendix where?
14 MR. TRIBE: Joint appendix, page 34, an
15 instruction which is, of course, considerably more
16 detailed than the one this Court held sufficient in the
17 Haslip case. The last paragraph --
18 QUESTION: Well, could you read it? Yes.
19 MR. TRIBE: Yes. The critical thing is you're
20 supposed to look at the intent of the party committing the
21 act, as well as the extent committed, and the purpose,
22 it's explained at the end, is to deter TXO and others from
23 committing like offenses in the future. And then it says
24 to in fact deter it, may require a larger fine and one of
25 larger means.

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1 Now, this instruction in these respects was not
2 objected to. There was no suggestion on their part at
3 trial that they were entitled to something more precise.
4 And West Virginia put them on notice in a case
5 called Wells against Smith in 1982 of this entire theory,
6 which is standard in West Virginia. That is, in Wells,
7 the court had said that where the defendant's conduct has
8 been egregious, but the plaintiff has suffered
9 indeterminate or nominal damages, one needs to award a
10 high multiple. And, indeed, in that case they said the
11 sky is the limit. No ratio is relevant.
12 QUESTION: A high multiple of what did they say?
13 MR. TRIBE: They don't address what the
14 denominator is, but the theory --
15 QUESTION: Well, I would think it would be very
16 difficult to put anybody on notice if they don't even
17 discuss what the denominator is.
18 MR. TRIBE: Well, I would suggest if we were in
19 an arithmetic class, that might be true, but common sense
20 out in West Virginia I think tells people when the law was
21 that we're going to punish you in terms of the
22 outrageousness of what you tried to do, that you're not
23 supposed to be doing arithmetic. In other words, there
24 was no numerator, there was no denominator. The
25 suggestion was that looking at ratios isn't relevant.

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1 What you look at is what did they hope to get away with,
2 and then you add a kicker for the chance that they would
3 never have been caught.
4 QUESTION: Well, I suppose that's why I have
5 trouble with the extrapolations in your brief. Here in
6 this Court is the first time anybody has heard about $8.3
7 million, which is a very high end figure in any event.
8 MR. TRIBE: Not quite. Page 8 of the brief in
9 the Supreme Court of West Virginia used these numbers to
10 calculate this figure, $13,676,252, was -- and I'm reading
11 -- the price -- the prize TXO hoped to grab by
12 fraudulently disparaging appellee's title. That $13
13 million figure was a bit lower than some of the other
14 numbers because it was based on some later projections
15 after one well had proved disappointing. But you notice
16 they do not deny --
17 QUESTION: But that was a gross production
18 figure.
19 MR. TRIBE: That was a total revenue figure.
20 That's right.
21 QUESTION: We're talking here about lost
22 royalties, and --
23 MR. TRIBE: Well, no. That's right. The 22
24 percent of that --
25 QUESTION: There are other issues here you want

1 to discuss.

2 MR. TRIBE: Yes.

3 QUESTION: But it would seem to me that those

4 persons who have been punished for being overzealous on

5 the behalf of their clients would find it rather difficult

6 to understand why there's some puffing in the figures

7 before this Court which is used to justify that

8 punishment.

9 MR. TRIBE: Justice Kennedy, I had thought that

10 the relevant standard in substantive due process attack on

11 a judgment such as this is whether there is any rational

12 basis that can be offered. In Nordlinger v. Hahn, it was

13 stressed that what matters is not how the State's decision

14 makers articulate that, but whether one can find a

15 rational basis.

16 More recently than Nordlinger, in Growe v.

17 Emison this Court said that one defers to judicial, as

18 well as legislative decision making. It was for that

19 reason that we felt free and that I would fully defend

20 taking the numbers that were before this jury, and which

21 TXO did not undertake to attack at trial, to show how very

22 easily from them one could understand the conclusion of

23 the West Virginia Supreme Court that a judgment of this

24 magnitude was needed to deter this kind of harm.

25 And, indeed, the instruction -- to go to the

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1 questions that were asked with respect to the instructions
2 by the Chief Justice and Justice White, if you look not
3 just at 6A, Justice O'Connor, but if you also look at
4 plaintiffs' instruction 2 on page 26 of the joint
5 appendix, look at what this jury had to find in order to
6 find TXO liable. They had to find -- second paragraph of
7 instruction 2 -- TXO filed the quitclaim deed with the
8 intent to hurt the interests of the defendants, in other
9 words, ill will.
10 They also had to find that TXO acted
11 maliciously. They had to find malice and without good
12 faith and recorded the quitclaim deed with an intent to
13 hurt the defendants rather than clear up the title. So
14 that when, on that basis, the jury returned this award,
15 it's not so surprising to me, given that the case was
16 litigated below on this very theory, that that was the
17 closing argument, that that was the brief in the State
18 Supreme Court, that that was what the instructions called
19 the jury's attention to. What did they intend to get away
20 with, not how much did it cost to catch them.
21 Given all of that, it's not so surprising that
22 the West Virginia Supreme Court, finding this attempted
23 fraud -- and I now quote from that court -- no isolated
24 incident, but part of TXO's pattern and practice to
25 defraud and coerce those in positions of unequal

1 bargaining power, a pattern that the court said
2 threatened, quote, millions of dollars in damages to other
3 victims, unquote. That's not just other victims in
4 Oklahoma or Texas. The millions of dollars in damage from
5 numbers they didn't undertake to refute at trial would
6 have been to us because those are royalties that we would
7 have expected to gain. It's no surprise that the West
8 Virginia Supreme Court found on that basis that, quote, an
9 award of this magnitude is necessary to discourage TXO
10 from continuing this pattern and practice of fraud,
11 trickery, and deceit, unquote.
12 Now, if the theory is constitutional -- and I
13 see no conceivable basis as a matter of substantive due
14 process for saying the State cannot use this as a way of
15 deciding how much is needed to deter and punish, no basis
16 for saying that you can't look at how much they hoped to
17 gain, even optimistically that you can't look at that, but
18 must instead look at some multiple of what it costs to
19 prevent them from succeeding.
20 Given that there's no basis in substantive due
21 process for that, it seems to me that all they're left
22 with is the idea that somehow there wasn't sufficient
23 evidence here. And I agree that the evidence that was in
24 the record wasn't added up in precisely the way our brief
25 does, but surely, that is a burden that would have fallen

1 on TXO at trial. And it's not a proper question for this
2 Court to second guess the reasonableness of the West
3 Virginia judiciary in saying that $10 million was needed.
4 It seems to me that all they're left with is some
5 theoretical arguments that one might debate, arguments
6 about what's the best way to deter.
7 Do you go after people, whether they succeed or
8 fail, as West Virginia does? In fact, in its
9 constitution, article 3, section 5, it says that the
10 penalty should be proportionate to the nature of the
11 offense. In fact, with respect to aggravated -- attempted
12 aggravated robbery, West Virginia says we'll punish you
13 the same way whether you succeed or fail.
14 Is that the best way, or is it best to only add
15 a very high kicker when the wrongdoer succeeds? Well,
16 that's an interesting question. Most States, the 27 amici
17 who have filed a brief in support of our position, take
18 the view that it's for them to decide and that they think
19 it is more just, as well as more effective, to use this
20 theory and to use a theory which, by the way, West
21 Virginia has officially endorsed.
22 The West Virginia Attorney General, at pages 6
23 to 7 of the amicus brief filed by the 27 States, endorses
24 this very theory quoting from the Garnes case, and Garnes
25 really expresses the view that the reason it is improper

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1 to play with numbers and look at these proportions is
2 precisely that it's perverse in terms of incentives and in
3 terms of fairness. What it means is that when a victim is
4 smart enough and tough enough to stand up to an
5 extortionate scheme, as the respondents did here, then the
6 wrongdoer is going to be, in effect, rewarded, rewarded
7 because the most that can be charged against it is the
8 attorney's fees or some reasonably low multiple thereof.
9 Because the West Virginia Supreme Court has
10 quite clearly rejected that approach and has said instead
11 you look to the expected gain, it seems to me that all
12 that's left is some possible procedural due process
13 arguments, and perhaps I should turn to those.
14 I don't think, by the way, that the Court ought
15 to reach the merits of some of the fancier procedural due
16 process arguments that we have here because TXO's only
17 argument at trial was about the First Amendment. They
18 said that slander of title violates the First Amendment,
19 but nowhere at trial did they argue that under the Due
20 Process Clause of the Fourteenth Amendment, one is
21 entitled to some different or more precise jury
22 instructions or some further kind of explanation by a
23 trial judge.
24 QUESTION: Did the Supreme Court of West
25 Virginia pass on that point?

1 MR. TRIBE: I think not, Mr. Chief Justice.
2 That is, the West Virginia Supreme Court said these
3 damages are not excessive. They also said that their new
4 rules, which are rather like what I gather TXO would like
5 this Court to promulgate somehow for all 50 States --
6 their new rules about jury instructions and post-verdict
7 explanation in the Garnes case should not be applied
8 retroactively. The West Virginia Supreme Court ruled
9 that.
10 But it was never asked to rule that the Due
11 Process Clause of the Fourteenth Amendment requires of its
12 own force special instructions beyond those that were used
13 in Haslip. It was never asked to rule for the first time
14 that Fourteenth Amendment due process requires States to
15 assign some special role to the trial judge post-verdict.
16 And when we made that argument, the response of
17 TXO at footnote 33 of their brief was that it's frivolous.
18 It's frivolous to say they waived it, and to prove that,
19 they give you a 23-word snippet from their brief below. I
20 would invite you to look at the relevant parts of that
21 brief when there is time. In their reply in support of
22 certiorari in their appendix, they reproduced the entire
23 relevant portion of their brief below. I think a fair
24 reading of that whole argument is simply West Virginia law
25 under Garnes should entitle us retroactively to these

1 special procedures.

2 If the Court, however, were to reach the merits

3 of the procedural attack, I think it's quite clear that

4 TXO ought to lose. The State Supreme Court's post-verdict

5 review, which was critical in Haslip, was at least as

6 thorough here as in the Alabama Supreme Court.

7 Now, the petitioners make some mileage out of

8 Justice Neely's rhetoric; that is, they make something of

9 the fact that he used some homespun shorthand to

10 categorize wrongdoers as really mean or really stupid, but

11 I think that's a pretty irrelevant distraction. His

12 colleagues called him to task for what they thought was

13 unduly colorful. In any event, he explained in good old-

14 fashioned legalese, very traditional, exactly what those

15 terms meant, and lo and behold, they meant exactly what we

16 would expect, intentional, malicious, deliberate

17 wrongdoing was the kind that really mean was supposed to

18 cover. So, one can't make a federal case out of that.

19 As far as the trial judge's review post-verdict,

20 they make the rather astonishing argument now -- they

21 didn't make it below, but they make the argument now,

22 supported by at least some of their amici, that the

23 Federal Constitution guarantees them a right to, quote,

24 several layers, unquote, of judicial review -- that's at

25 footnote 38 of their reply -- and, therefore, to a fuller

1 post-verdict explanation by the trial judge than they got
2 here.
3 I would submit that that's untenable. Even in
4 criminal cases, this Court has held ever since McCain v.
5 Durston, that the Fourteenth Amendment entitles you to
6 only one level of judicial review. It's entirely up to
7 the States how to allocate post-verdict assessments as
8 between their trial and appellate judiciaries.
9 And, anyway, TXO could have received, had they
10 only asked, a much fuller explanation from the trial judge
11 of just why he thought $10 million was reasonable.
12 And that does go back to the questions that both
13 you, Justice O'Connor, and you, Justice Kennedy, asked.
14 That is, if one is nervous about the attempt in hindsight
15 to figure out just exactly where the $10 million could
16 have come from, it seems to me that the fault for that
17 difficulty should be placed squarely at the feet of TXO.
18 They had, after all, a bifurcated trial. Under West
19 Virginia Rule of Civil Procedure 42(c), they could have
20 had a trifurcated trial with a separate proceeding on
21 punitive damages. West Virginia would have fully entitled
22 them to put special interrogatories to the jury. If they
23 wanted to know exactly how these numbers were derived,
24 they could have asked, but it was too obvious to anyone I
25 think for them to make quite a fuss about it.

1 Their whole strategy was, and it seems here to
2 be, simply to emphasize, look, we may have done terrible
3 things, but that was in other States, and here we were
4 innocent, although the jury evidently found that they were
5 guilty of the most scurrilous, deliberate, fraudulent
6 behavior.
7 As far as the jury's role is concerned, not only
8 were the instructions given in this case considerably more
9 constraining than those that the Court found sufficient in
10 the Haslip case, not only did they require a showing of
11 indifference to the rights of others, something very much
12 like the utter disregard phrase that the Court thought
13 sufficient when given a further gloss in your opinion
14 yesterday in Creech, Justice O'Connor, not only that, but
15 they didn't ask for any further instructions, as we show
16 in some detail in our brief.
17 Beyond that they waived any requests for
18 including proportionality in the instructions. We
19 explained that. They were satisfied to have the jury have
20 even less guidance. As a matter of strategy, their whole
21 game was we're innocent. They didn't want to focus the
22 jury on punitive, and so, they can surely not complain now
23 even if the Court were to reach that issue on the merits
24 of a violation of procedural due process in terms of the
25 jury's role.

1 Well, there being no violation of procedural due
2 process, and it being quite clear that the judgment below
3 meets the standard for substantive due process, it really
4 does seem to me that this case is not an opportunity for
5 the Court to give further guidance to the lower courts.
6 And let me just add a word about that issue of
7 further guidance because one of the recurring themes in
8 the petitioner's submissions is somehow to recur to
9 passion and prejudice, prejudice against out-of-staters.
10 Well, that's a red herring here. TXO and Alliance are
11 both Texas corporations. There's not a scintilla of
12 evidence about that. Passion and prejudice, but no real
13 standards, nothing that would really offer guidance to the
14 lower courts.
15 And I think I know why. Because that's a
16 fundamentally legislative task. As the 27 amicus States
17 have made clear, in the last few years, the vast majority
18 of the States have responded to the perceived problems of
19 punitive damages. 10 of them have set dollar caps. 12 of
20 them have required bifurcation of the punitive phase. 25
21 of them have required heightened standards of proof.
22 Unless this Court were to undertake the extraordinary task
23 of under -- sort of doing that legislative business in an
24 even more complicated replication of the labyrinthine
25 jurisprudence of the death penalty cases, to really

1 structure the trials in these cases --

2 QUESTION: Don't tempt us, Mr. Tribe.

3 (Laughter.)

4 MR. TRIBE: Well, I hope not. I gather some of

5 you are less happy than others with that labyrinth. I

6 would hope that you're not tempted by this case to do

7 anything very much because I don't think that this case is

8 what it was cracked up to be.

9 Thank you.

10 QUESTION: Thank you, Mr. Tribe.

11 QUESTION: Mr. Tribe, may I just ask? These are

12 State law issues that we don't have to examine, but just

13 for me to understand the quiet title litigation here.

14 Suppose that the deed that they found had been

15 given to the individual and then his successor in title

16 was I think the Crews Company. Suppose that deed had, in

17 fact, granted the mineral rights so that Alliance didn't

18 have them. Would, under your theory of the case, TXO have

19 a duty to then encourage Crews to deed the property back

20 to Alliance, or could TXO legitimately take it for itself?

21 MR. TRIBE: Well, one of their own experts

22 suggested that in those circumstances, the standard

23 practice would be to unify the title and deed it back to

24 Alliance, but I think it might be harder to show, under

25 the body of West Virginia law that was in place at the

1 time, that it would have been a violation of any duty if
2 they had acted in a more self-interested way. But as you
3 say, clearly that's a State law question.
4 And what happened here is really unmistakable.
5 They went around trying to find people who would say that
6 they owned the oil and gas, and they didn't succeed. And
7 when Mr. Signaigo said I won't sign that affidavit, we
8 really know that they were willing even to suborn perjury.
9 QUESTION: Well, but aren't they supposed to do
10 that in order to investigate their title?
11 MR. TRIBE: Well, there's no question that in
12 general you're supposed to ask questions, but when the
13 answer is no, then paying somebody $6,000 to say yes,
14 which is what they did to Virginia Crews, that's not my
15 understanding of ordinary business practice.
16 QUESTION: There's a letter from a title
17 attorney in the last exhibit to the yellow brief, who
18 indicates that this deed -- Mr. Wallace's letter -- that
19 this deed was ambiguous so far as he's concerned as
20 written to Mr. Skeen. Was that written so that Mr. Skeen
21 could introduce it at trial?
22 MR. TRIBE: Well, it was written in December.
23 It was written just before the declaratory judgment
24 action. It looks like it was written with litigation in
25 mind. And you notice that the courts of West Virginia

1 said there's no ambiguity. Paragraph 6 of the original
2 1958 deed, which these other opinion letters studiously
3 avoided discussing, eliminated any ambiguity. It was a
4 ridiculous theory. I find it hard to take these legal
5 opinions seriously. I don't mean to impugn the ethics of
6 these lawyers, but it doesn't sound to me as though this
7 was a genuine search for truth.
8 Thank you.
9 QUESTION: Thank you, Mr. Tribe.
10 Mr. Phillips, you have 4 minutes remaining.
11 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
12 ON BEHALF OF THE PETITIONER
13 MR. PHILLIPS: Thank you, Mr. Chief Justice.
14 Let me just address a couple of points here.
15 First of all, you will notice that again, there
16 is no defense of the punitive award on the terms that it
17 was imposed by the jury and upheld by the West Virginia
18 Supreme Court in this case. Indeed, I think Mr. Tribe
19 revealed quite plainly that he cannot defend it on that
20 ground, that he has to find some other ground by which to
21 justify this award and then invokes Nordlinger v. Hahn to
22 justify it.
23 QUESTION: But he -- but he's responding to your
24 substantive due process argument. If -- your procedural
25 due process argument would, indeed, say, well, it has to

1 be upheld on the same ground that was proposed. But for
2 substantive due process, isn't he right that so long as it
3 is sustainable on some rational basis? That's what we do
4 for legislatures. Why is it any different for courts?
5 MR. PHILLIPS: It is a huge difference for
6 courts because the punishment was imposed by the jury, and
7 what trying to sustain the jury's verdict on a ground not
8 in front of the jury does is ignore the potential of
9 passion and prejudice that undergirds the jury's --
10 QUESTION: Procedural due process it seems to
11 me, not substantive due process.
12 MR. PHILLIPS: I think procedural and
13 substantive due process merge here, Justice Scalia. I'm
14 not -- I am not here to defend across the board the
15 possibility that $10 million verdicts can never be entered
16 in any kind of case. What I am here to say is that the
17 $10 million verdict in this case is grossly excessive, and
18 if this Court has meant what it said in the past, that
19 grossly -- that a State is no more permitted to assess a
20 grossly excessive damage award than it is to impose a
21 grossly excessive fine, this is the case that tests the
22 limits of that.
23 And if you go back and examine with care the
24 precise items that Mr. Tribe has gone through and look at
25 the jury instructions, if they thought they had tried this

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1 case on a potential gain theory throughout the entire
2 proceedings, wouldn't it have been reasonable to expect
3 that when they proposed a jury instruction that it would
4 have said you must measure this by the potential gain
5 rather than by the harm actually inflicted? It's clear
6 that this was not tried on that particular theory.
7 QUESTION: Well, they did refer, didn't they, in
8 the -- or the instruction referred to deterring other
9 conduct in other circumstances. So, I suppose that
10 carries with it the implication of potential gain in these
11 other circumstances. I can't seem to find the instruction
12 now. What was it? 6?
13 MR. PHILLIPS: But even -- but that -- I don't
14 think you can reincorporate into other -- into the
15 deterrence rationale, which is the rationale that you're
16 supposed to follow, these elements which decide the amount
17 of the award. This is what describes how you get to $10
18 million.
19 QUESTION: Well, it may assume a degree of
20 analytical sophistication on the part of the jury, which
21 is a little bit generous, but when you start talking about
22 deterrence, what you're really talking about is deterrence
23 in relation to the temptation. And the temptation is what
24 you're referring to by potential gain, isn't it?
25 MR. PHILLIPS: If you defined it in those terms

1 for the jury, that might be, but there is simply nothing
2 in what the jury was asked to do to look at potential
3 gain. All it was asked to do was look at actual profit
4 and actual harm, and on that basis, there is no way that
5 you can get to $10 million. The only way you get to $10
6 million is because of the wealth of TXO and the decision
7 to impose a 1 percent penalty.
8 QUESTION: What was the purpose, Mr. Phillips,
9 of all this evidence about potential gain?
10 MR. PHILLIPS: It was originally put into the
11 case because there was at one stage a claim that they were
12 going to make that there was a bad faith dealing here in
13 that when we capped the well, we actually deprived them of
14 a significant amount of money. That was a separate
15 element. It wasn't a separate cause of action, but it was
16 a separate element of the case. That evidence was brought
17 in for that purpose to give some measure to that because
18 they didn't have access to the specific numbers.
19 QUESTION: This would be relevant to actual
20 damages.
21 MR. PHILLIPS: Right, and it was abandoned.
22 That claim was specifically abandoned in the middle of
23 trial, Mr. Justice White.
24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 Phillips.

1 The case is submitted.

2 (Whereupon, at 11:00 a.m., the case in the

3 above-entitled matter was submitted.)

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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: No. 92-479

TXO Production Corp., Petitioner v. Alliance Resources Corp., et al.

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

BY Leona M. May

(REPORTER)