



PUNITIVE DAMAGES IMPOSED TO PUNISH OVERSEAS CONDUCT ARE CONSTITUTIONALLY SUSPECT

by Eric Boorstin

U.S. Supreme Court precedents dictate that courts generally cannot impose punitive damages for extraterritorial conduct.¹ However, courts applying state law can award *compensatory* damages for harms that that state's citizens suffer outside the state, because those damages are intended to compensate the plaintiff for harm suffered wherever that harm occurred. Punitive damages, however, advance a *state's* interest in deterrence and retribution. States do not have a legitimate interest in regulating conduct outside their borders.

Despite the Supreme Court's guidance, not all courts have recognized the limits of state power to regulate extraterritorial conduct. A matter pending before the U.S. Court of Appeals for the Ninth Circuit provides a striking example. In *Bixby v. KBR, Inc.*, a group of Oregon National Guardsmen sued a defense contractor that worked in Iraq to help the U.S. Army restore Iraq's oil infrastructure. The guardsmen, who were responsible for protecting the contractor during its work, alleged that the contractor failed to protect them from hazardous chemicals at one of the Iraqi facilities. A federal jury in Oregon, applying Oregon law, awarded \$75 million in punitive damages against the contractor.²

The Ninth Circuit should recognize the limitations on states' power to impose punitive damages and reverse the district court. Those limitations are rooted in both the Due Process Clause and the Commerce Clause.

The Due Process Clause of the Fourteenth Amendment prohibits any state from depriving a person of property without due process of law. Punitive damages pose an inherent danger of arbitrary deprivation of property, given the wide discretion usually afforded to juries in choosing the amount of punitive damages. To guard against the imposition of damages so arbitrary as to violate the Fourteenth Amendment, the Supreme Court has held that a defendant must receive fair notice not only of what is unlawful, but also of the severity of the penalty he risks.³ That requirement of fair notice cannot be satisfied when state law is used to punish conduct that occurred solely in a foreign country and allegedly caused harm solely in a foreign country. In

¹ See *BMW of No. Am., Inc. v. Gore*, 517 U.S. 559, 572-573 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003).

² *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224 (D. Or. 2010), appeal docketed, Nos. 13-35513, 13-35518 (9th Cir. June 11, 2013). Over a hundred more guardsmen from Oregon and other states await trial on their claims. See, e.g., *McManaway v. KBR, Inc.*, 906 F. Supp. 2d 654 (S.D. Tex. 2012).

³ *Campbell*, 538 U.S. at 417.

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the case of the defense contractor in *Bixby*, the contractor had no reason to believe that its conduct, which took place entirely in Iraq, would be subject to punishment under Oregon law.

The Commerce Clause of Article I, Section 8 of the Constitution reserves to Congress, not the states, the power to regulate foreign and interstate commerce. A state cannot be permitted to usurp Congress's authority by imposing punitive damages to regulate conduct outside the state's borders. The Supreme Court has explained in the domestic context: "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."⁴

This logic should also apply to *foreign* commerce, although the Supreme Court has yet to directly address that issue. When a jury awards significant punitive damages under state law based on foreign conduct, the jury imposes the state's policy choice abroad.⁵ However, states are generally barred from intruding on the exclusive federal authority in foreign affairs.⁶ The Commerce Clause further constrains a state's power to project its laws internationally because of the special need for federal uniformity in the unique context of foreign commerce.⁷ Thus, a party engaging in international commercial conduct would have good reason to believe that its conduct would not be punished under the laws of a state thousands of miles away.

Finally, the interests of a sovereign foreign nation may also preclude a state from applying its own law abroad. International comity encourages U.S. courts to limit domestic jurisdiction to respect the sovereignty of foreign states. Punitive damages in particular implicate international comity because most civil law countries do not allow for such damages in private actions. Some countries even consider the prohibition on punitive damages to be a matter of fundamental public policy, and for that reason refuse to recognize foreign awards of punitive damages. To award punitive damages based solely on foreign conduct risks impeding a sovereign nation's ability to set the permissible means to punish conduct within its own borders.

Although a plaintiff may attempt to justify punitive damages because the defendant's foreign conduct affected the state's citizens abroad, the Supreme Court foreclosed that line of reasoning in *Gore* and *Campbell*. Aside from the plain language of those opinions prohibiting extraterritorial punishment, both opinions rely on the observation in *Bigelow v. Virginia*⁸ that a state does not acquire the power to regulate the affairs of another state merely because the welfare of its own citizens may be affected when they travel.⁹

In sum, courts should not hesitate to apply the Due Process Clause and Commerce Clause to preclude punitive damages based on foreign conduct with foreign effects. The district court in *Bixby* neglected its chance. It remains to be seen whether the Ninth Circuit will correct that error.

⁴ *Id.* at 422.

⁵ *Philip Morris USA v. Williams*, 549 U.S. 346, 352-53 (2007).

⁶ *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

⁷ *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 8 (1986).

⁸ 421 U.S. 809, 824 (1975).

⁹ *Gore*, 517 U.S. at 571 n. 16; *Campbell*, 538 U.S. at 421.