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Compelled Self-Incrimination and the Federal Water Pollution Control Act

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COMPELLED SELF-INCRIMINATION AND THE FEDERAL WATER POLLUTION CONTROL ACT

CONSTITUTIONAL LAW–FEDERAL WATER POLLUTION CONTROL ACT:

The United States Supreme Court held the proceeding for assessment of a civil penalty under the Federal Water Pollution Control Act was not a criminal proceeding or a quasi-criminal proceeding invoking the Fifth Amendment privilege against self-incrimination. *United States v. Ward,* 100 S.Ct. 2636 (1980).

Ward, lessor of a drilling facility in Oklahoma, notified a regional office of the Environmental Protection Agency that a discharge of his oil from a retention pit had run into Boggie Creek, a distant tributary of the Arkansas River.[1] This notification was required by § 1321(b)(5) of the Federal Water Pollution Control Act (act),[2] which imposes upon "any person in charge of a vessel or of an offshore facility" a duty to report discharges of oil into navigable waters in violation of § 1321(b)(3) of the act. A person failing to report such discharges is subject to a fine of not more than $10,000 or imprisonment for not more than one year, or both; but the act established a "use immunity" by specifying that the required notification cannot be used against the person who makes a report "in any criminal case, except a prosecution for perjury or for giving a false statement."[3] Ward's notification was forwarded to the Coast Guard, which administers the civil penalty provision of the act. That provision, § 1321(b)(6), provides for the imposition of a civil penalty of not more than $5,000 against the person in charge of a facility from which oil is discharged in violation of other sections of the act. The Coast Guard assessed a civil penalty in the amount of five hundred dollars against Ward. Ward appealed this action on the grounds that the reporting requirement of the act, as used to support a civil penalty under the act, violated his privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution.[4] The Tenth Circuit Court of Appeals agreed.[5]

1. 100 S. Ct. 2636 (1980).
2. 33 U.S.C. § § 1251-1376 (1976 & Supp. III 1979).
3. 33 U.S.C. § 1321(b)(5) (Supp. III 1979).
4. U.S. CONST. amend. V.
5. Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979).

On review by writ of certiorari, the United States Supreme Court, in a decision written by Justice Rehnquist, found that the proceeding for an assessment of a civil penalty under the act was not a criminal proceeding invoking the protections of the Fifth Amendment, nor was the penalty a "quasi-criminal" proceeding calling for application of the Fifth Amendment's privilege against self-incrimination. In a concurring opinion, Justice Blackmun, joined by Justice Marshall, found that the behavior to which the sanction applied was already a crime and supported Ward's contention, but that this factor alone did not mandate characterizing the proceeding as criminal when counterbalanced by other factors.[6] Justice Stevens wrote a dissenting opinion in which he found the statutory penalty in this case was criminal because it was clearly aimed at exacting retribution for the spill. The automatic and mandatory nature of the statutory penalty convinced him that the reporting requirement was a form of compelled self-incrimination.

Background

The Fifth Amendment guarantees "no person . . . shall be compelled in any criminal case to be a witness against himself."[7] Generally, the privilege against self-incrimination is liberally construed.[8] The privilege only applies to testimonial or communicative acts,[9] but it is not limited to cases involving direct compulsion to testify and the protection applies to written as well as oral testimony.[10] It is available not only against direct disclosure of guilt on the part of the witness, but also against disclosure of the circumstances of his offense.[11] The Fifth Amendment establishes the privilege for criminal cases, but courts have also held it to apply to forfeiture proceedings[12] and to civil penalties[13] that were determined to be so criminal in their nature that the respondent could not be compelled to testify against himself.

The distinction between a civil and criminal penalty is of constitu-

6. United States v. Ward, 100 S. Ct. 2636, 2644 (1980).

7. U.S. CONST. amend. V.

8. Spevack v. Klein, 385 U.S. 511 (1967); Schmerber v. California, 384 U.S. 757 (1966); Miranda v. Arizona, 384 U.S. 436 (1966); Quinn v. United States, 349 U.S. 155 (1955); De Luna v. United States, 308 F.2d 140 (5th Cir. 1962).

9. Schmerber v. California, 384 U.S. 757 (1966).

10. Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

11. Counselman v. Hitchcock, 142 U.S. 547 (1892).

12. United States Coin and Currency, 401 U.S. 715 (1971); Boyd v. United States, 116 U.S. 616 (1886).

13. Lees v. United States, 150 U.S. 476 (1893); Boyd v. United States, 116 U.S. 616 (1886).

tional significance.[14] The self-incrimination clause of the Fifth Amendment is expressly limited to "any criminal case."[15] The Sixth Amendment, which guarantees an accused the rights to a speedy and public trial, to a jury, to be informed of the nature of the accusation, to confront witnesses against him, and to have the assistance of counsel is also expressly limited to "criminal prosecutions."[16] Courts have limited application of other constitutional protections only against two criminal punishments,[17] and proof beyond a reasonable doubt is required only in criminal cases.[18]

The question of whether a penalty is civil or criminal is a matter of statutory construction.[19] The court must determine what kind of penalty Congress intended to create.[20] If the court finds that Congress intended the penalty to be civil, the court must then determine whether the scheme is nonetheless so punitive in either purpose or effect as to negate that intention.[21] Finally, the court will look to the seven standards set forth in *Kennedy v. Mendoza-Martinez*[22] for testing a statutory scheme to determine its civil or penal nature.

The Majority Opinion

In *United States v. Ward*,[23] the Supreme Court was presented with the question of whether the automatic penalty provision was either criminal or quasi-criminal in nature, implicating the Fifth Amendment. To answer this question, the Court first looked for the intent of Congress and found it was clear that Congress intended the notification requirement of § 1321(b)(5) to provide a civil penalty.[24] Congress labeled the sanction authorized in § 1321(b)(6) a civil penalty, "a label that takes on added significance given its juxtaposition with the criminal penalties set forth in the immediately preceding subparagraph."[25] The Court concluded that Congress no doubt intended to allow the imposition of the penalty under § 1321(b)(6) without

14. United States v. Ward, 100 S. Ct. 2636, 2640 (1980).
15. U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."
16. U.S. CONST. amend. VI.
17. Helvering v. Mitchell, 303 U.S. 391, 399 (1938).
18. United States v. Regan, 232 U.S. 37, 47-48 (1914).
19. One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 237 (1972); Helvering v. Mitchell, 303 U.S. 392, 399 (1938).
20. One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 237 (1972).
21. Flemming v. Nestor, 363 U.S. 603, 617-21 (1960).
22. 372 U.S. 144, 168-69 (1963).
23. 100 S.Ct. 2636 (1980).
24. *Id.* at 2641.
25. *Id.*

regard to both the procedural protections and restrictions available to a defendant in a prosecution.[26]

Next, to determine whether the sanctions in § 1321(b)(6) were so punitive as to transform the civil penalties into criminal penalties, the Court considered the seven factors listed in *Kennedy v. Mendoza-Martinez:*[27] (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has been historically regarded as punishment, (3) whether it requires a finding of scienter, (4) whether its operation will promote the traditional aims of punishment (retribution and deterrence), (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.[28] The Court found that only the fifth consideration (whether the behavior to which the penalty applies is already a crime) aided Ward.[29]

Ward argued that section thirteen of the Rivers and Harbors Act of 1899[30] makes criminal the precise conduct penalized in the present case and that it is a strict liability crime requiring no showing of mens rea.[31] Ward argued that this confirms the lower court's decision that the fifth factor falls clearly in favor of finding the penalty provision criminal in nature. The Court however, noted that Congress can impose both a civil and criminal sanction in respect to the same act or omission.[32] In *Helvering v. Mitchell,*[33] the Court found it significant that the Revenue Act of 1928 contained two separate and distinct provisions, one imposing a civil sanction and the other a criminal sanction, both appearing in different parts of the statute. The Court explained, "to the extent we found significant the separation of civil and criminal penalties within the same statute, we believe the placement of criminal penalties in one statute and the placement of civil penalties in another statute enacted 70 years later tends to dilute the force of the fifth *Mendoza-Martinez* criterion in this case. In sum, we believe that the factors set forth in Mendoza-Martinez, . . . are in no way sufficient to render unconstitutional the congressional classification of the penalty established in § 311(b)(6) [§ 1321 (b)(6)] as civil."[34]

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26. *Id.*
27. 372 U.S. 144 (1963).
28. *Id.* at 168-69.
29. 100 S.Ct. at 2641.
30. 33 U.S.C. § 407 (1976).
31. United States v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974).
32. 100 S.Ct. at 2642.
33. 303 U.S. 391, 399 (1938).
34. 100 S.Ct. at 2642.

The Court then considered whether § 1321(b)(6) was "quasi-criminal" and would therefore invoke the Fifth Amendment's protection against compulsory self-incrimination. The Court discussed *Boyd v. United States*,[35] in which Boyd was indicted for fraudulently attempting to deprive the United States of lawful customs duties payable on certain imported items. A person found in violation of the statute was to be fined any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not to exceed two years, or both. In addition to such a fine, the merchandise imported would be forfeited. Boyd filed a claim for the goods he attempted to import which were held by the United States. In response, the prosecution obtained an order from the district court requiring Boyd to produce the invoice covering the goods at issue. Boyd objected that the order subjected him to an unreasonable search and seizure and required him to act as a witness against himself. The Supreme Court found that the Fifth Amendment was applicable because the proceedings to declare the forfeiture of a man's goods by reason of offenses committed by him, though civil in form, were criminal in nature.[36] The Court also stated that, "As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ."[37]

The Court in *United States v. Ward*[38] acknowledged that, read broadly, *Boyd* might control the present case, but the Court declined to give full scope to the reasoning and dicta in *Boyd*. *Boyd* was distinguished as dealing with forfeiture of property, a penalty that had no correlation to any damage sustained by society or to the cost of enforcing the law and that "here the penalty is much more analogous to traditional civil damages."[39] The Court also distinguished *Boyd* on the basis that the statute in question in that case listed forfeiture along with fine and imprisonment as possible punishment for customs fraud, while the statute in this case lists the civil and criminal remedies in separate provisions. The proceedings in *Boyd* also posed a danger that Boyd would prejudice himself in respect to later criminal proceedings while in this case, Ward is protected by § 1321(b)

35. 116 U.S. 616 (1866).
36. *Id.* at 634.
37. *Id.*
38. 100 S.Ct. 2636 (1980).
39. *Id.* at 2643.

(5)[40] which provides that "notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for prosecution for perjury or for giving a false statement."[41] In conclusion, the Court stated that "in light of what we have found to be overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect it would be quite anomalous to hold that § 311(b)(6) [§ 1321(b)(6)] created a criminal penalty for purposes of the Self-Incrimination Clause but a civil penalty for all other purposes."[42]

The Concurring Opinion

In a concurring opinion, Justice Blackmun, joined by Justice Marshall, agreed that the proceeding for assessment of a monetary penalty under § 1321(b)(6) is not a criminal case within the meaning of the Fifth Amendment, but for a number of other reasons in addition to those discussed in the majority opinion.[43]

Justice Blackmun analyzed the *Mendoza-Martinez* considerations and found, contrary to the tenth circuit opinion, that none of the factors supported a civil designation, the imposition of a monetary penalty under this statute did not result in an affirmative disability or restraint, that monetary assessments are traditionally a form of civil penalty, and that as the court of appeals conceded, § 1321(b)(6) serves remedial purposes disassociated from punishment.[44] Justice Blackmun assigned less weight to the role of scienter, the promotion of penal objectives, and the potential excessiveness of fines which indicate that the fine is criminal. He conceded that the fifth Mendoza-Martinez criteria supported Ward, but "that this factor alone does not mandate characterization of the proceeding as 'criminal' for purposes of the Fifth Amendment, particularly when other factors weigh in the opposite direction. . . ."[45]

The Dissent

In a dissenting opinion, Justice Stevens found that the reporting requirement is a form of compelled self-incrimination.[46] He exam-

40. *Id.* at 2644.
41. 33 U.S.C. § 1321(b)(5) (Supp. III 1979).
42. 100 S.Ct. at 2644.
43. *Id.*
44. *Id.*
45. *Id.* at 2645.
46. *Id.* at 2646.

ined two factors: whether the liability imposed on the citizen is properly characterized as criminal, and whether the information obtained was designed to assist the government in imposing a penalty rather than furthering some other valid regulatory purpose.[47] Justice Stevens found that the monetary penalty imposed on Ward was actually a criminal sanction for purposes of the Fifth Amendment. It was clearly aimed at exacting retribution for causing the spill.[48] The penalty is based on such factors as the gravity of the violation, degree of culpability, and the prior record of the party. He then determined whether the primary purpose of requiring citizens to report the spill was to simplify the assessment and collection of penalties from those responsible or whether it was to assist the government in its cleanup responsibilities and its efforts to monitor the conditions of the nation's waterways.[49] Justice Stevens determined the question was a close one, but the automatic nature of the statutory penalty which must be assessed in each and every case convinced him that the reporting requirement is a form of compelled self-incrimination.[50]

Conclusion

In examining the monetary penalty imposed upon Ward pursuant to § 1321(b)(6) of the Federal Water Pollution Control Act, the Supreme Court focused upon the overall and pervasive remedial purpose of the act. The Court noted that funds collected from penalties were to be paid into a revolving fund to be used to finance the removal, containment, or dispersal of oil and hazardous substances and to defray the costs of administering the act.[51] Justice Stevens, in his dissent, acknowledged that some of the provisions were regulatory in nature.[52] He and the tenth circuit, however, focused upon the penalty provision and the factors in Commandant Instruction 5922.11 A[53] issued to the Coast Guard which deal with the assessment of civil penalties under § 1321(b)(6).[54] These factors include the gravity of the violation, degree of culpability, the prior record of the responsible party, and the amount of oil discharged. Both Justice Stevens and the Tenth Circuit Court of Appeals noted that liability for the

47. *Id.* at 2645.
48. *Id.*
49. *Id.* at 2646.
50. *Id.*
51. *Id.* at 2639.
52. *Id.* at 2646.
53. The Coast Guard issued Commandant Instruction 5922.11 A dealing with the assessment of civil penalties under § 1321(b)(6). Commandant Instruction 5922.11 A is reprinted in the Appendix to United States v. Le Beouf Bros. Towing Co., Inc., 377 F. Supp. 558, 568-70 (D. La. 1974).
54. 100 S.Ct. at 2645; 598 F.2d at 1192.

civil penalty attaches at the time of the discharge and it is entirely unrelated to subsequent removal efforts.[55] "Penalties under § 311(b)(6) [§ 1321(b)(6)] are not calculated to reimburse the Government for the cost of cleaning up an oil spill. Rather, this part of the statute is clearly aimed at exacting retribution for causing the spill."[56] The Supreme Court recognized that courts should be reluctant to set aside a statutory scheme created by an act of Congress,[57] but the Court failed to recognize and follow the maxim that the privilege against self-incrimination should be liberally construed. As noted by the Court in *United States v. Regan*,[58] the *Boyd* classification of the penalties as criminal in that case was limited in scope to the Fifth Amendment's guarantee against compulsory self-incrimination, which "is of broader scope than are the guarantees in Article III and the Sixth Amendment governing trials in criminal prosecutions."[59]

The Federal Water Pollution Control Act was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[60] It provides for the assessment of damages under sections which are clearly regulatory in nature. The environmental effect of the law can be advanced without use of the required report to assess an automatic penalty. The goal is important, but should not be advanced by depriving an individual of his constitutional rights.

The majority of the Supreme Court failed to analyze the penalty provision as thoroughly as the Tenth Circuit Court of Appeals and Justice Stevens. Instead, the Court focused upon the overall regulatory nature of the act. A detailed examination of the penalty provision, the administrative enforcement scheme and the indicators of congressional intent lead to the conclusion that the civil penalty is criminal in nature. The reporting requirement as used to assess an automatic penalty should be ruled unconstitutional, for as Justice Stevens concluded, "the reporting requirement is a form of compelled self-incrimination."[61]

JOHN McVEY

55. 100 S.Ct. at 2645; 598 F.2d at 1192.
56. 100 S.Ct. at 2645.
57. *Id.* at 2641.
58. 232 U.S. 37 (1914).
59. *Id.*
60. 33 U.S.C. § 1251(a) (1976).
61. 100 S.Ct. at 2646.