BYU Law Review

Volume 1981 | Issue 4 Article 7

11-1-1981

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D. Gary Beck

The Federal Water Pollution Control Act's Self-Reporting Requirement and the Privilege Against Self-Incrimination: Civil or Criminal Proceedings and Penalties? *United States v. Ward*

In 1972 Congress passed the Federal Water Pollution Control Act (FWPCA).[1] This comprehensive law revised and recodified prior water pollution control statutes.[2] Its objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] Additionally, the FWPCA established two primary national goals: (1) To eliminate the "discharge of pollutants into . . . navigable waters" by 1985; and (2) to achieve an interim 1983 "goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[4]

As part of the statutory plan to accomplish these important goals, Congress expressly prohibited discharges of harmful quantities of oil or hazardous substances into the navigable waters of the United States.[5] To enforce this prohibition, the Act required that "[a]ny person in charge of a . . . facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such . . . [violating facility,] immediately notify the appropriate agency of the United States Government."[6] Failure to

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1. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976).
2. *Id.*
3. *Id.* § 1251.
4. *Id.*
5. *Id.* § 1321(b)(3).
6. *Id.* § 1321(b)(5).

> Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person . . . who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. 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 a prosecution for perjury or for giving a false statement.

Id.

This provision was in effect at the time of the *Ward* case. In 1978 the provision was amended with inserted language not relevant here. *See* 33 U.S.C. § 1321(b)(5) (Supp.

comply with this "self-reporting requirement" would subject violators, upon conviction, to criminal penalties. However, specific provision was made for a form of "use immunity" to the effect that notifications received through the self-reporting requirement could not be used against the reporting person in any criminal action, except for perjury and for giving a false statement.[7] After complying with this self-reporting requirement, reporting owners, operators, or persons in charge of facilities violating the prohibition against oil discharges would be liable for a "civil penalty" assessed by the United States Coast Guard. Notice and opportunity to be heard were required for imposition of the penalty; and mitigating factors were to be considered in determining the amount of the penalty.[8]

This Note will analyze a recent United States Supreme Court case, *United States v. Ward*,[9] which held that the "civil penalty" assessment proceeding by the Coast Guard under the FWPCA was not a "criminal case" and that the self-reporting requirement was therefore not violative of the fifth amendment

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1980).

7. *Id.*

8. *Id.* § 1321(b)(6).

> Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. . . . No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary.

Id.

This provision was in effect at the time of the *Ward* case. In 1978 the provision was amended with inserted language not relevant here. *See* 33 U.S.C. § 1321(b)(6) (Supp. 1980).

Moreover, the Act made owners or operators of violating facilities liable for "clean-up costs" except where the pollution discharge could be proven to have been caused by an act of God, war, negligence by the United States, or omission by another party. *Id.* § 1321(f)(1). Additional penalties could also be imposed by the Environmental Protection Agency (EPA) on violators where their oil pollution is "not removable." *Id.* § 1321(b)(2)(B). Finally, provision was made so that collected penalties would be deposited into a "revolving fund" to be maintained and used by the government to carry out the administration of the Act and to finance non-recoverable oil spill "containment, dispersal, and removal" costs. *Id.* §§ 1321(c), 1321(d), 1321(i), 1321(l), 1321(k).

9. 448 U.S. 242 (1980).

privilege against self-incrimination.[10] The significance of this holding is that if the constitutionally approved FWPCA self-reporting requirement and resulting civil penalty prove to be valuable tools for the control of pollution in the navigable-waters environment, then such tools may eventually be used effectively in other kinds of environmental pollution control statutes. The tests applied in *Ward* would then be important in determining whether future self-reporting requirements and civil penalty schemes could withstand fifth amendment self-incrimination challenges.

I. INSTANT CASE

In March 1975 oil was discharged from a retention pit at respondent L. O. Ward's drilling facility located near Enid, Oklahoma. The oil eventually flowed into Boggie Creek, a tributary of the Arkansas River and navigable water of the United States.[11] Upon discovering the spill, Ward immediately began cleanup operations; and in accordance with 33 U.S.C. section 1321(b)(5), Ward notified the EPA, who in turn forwarded the information to the Coast Guard and requested that a civil penalty be assessed against Ward pursuant to 33 U.S.C. section 1321(b)(6). On December 19, 1975, following notice and an opportunity for a hearing, the Commander of the Second Coast Guard District assessed a $500 civil penalty against Ward for discharging oil into the navigable waters of the United States in violation of the Federal Water Pollution Control Act. Ward refused to pay the assessed penalty and filed an administrative appeal, contending that the self-reporting requirement violated his fifth amendment privilege against self-incrimination. The Commandant of the Coast Guard denied this appeal. Thereafter, Ward brought a federal suit to enjoin the U.S. Department of Transportation, the Coast Guard, and the EPA from enforcing the FWPCA self-reporting requirement and from collecting the assessed penalty. The United States followed by bringing a separate action to collect the unpaid penalty. The District Court for the Western District of Oklahoma consolidated both suits for trial.[12]

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10. *Id.* at 244-55.

11. *Id.* at 246 n.6; Ward v. Coleman, 598 F.2d 1187, 1188 n.1 (10th Cir. 1979).

12. 448 U.S. at 246-47; Ward v. Coleman, 598 F.2d 1187, 1188-89 (10th Cir. 1979); Ward v. Coleman, 423 F. Supp. 1352, 1354 (W.D. Okla. 1976).

Prior to trial, Ward sought summary judgment, again contending that the FWPCA "self-reporting requirement" violated his fifth amendment privilege against self-incrimination. The district court rejected this contention because the privilege against self-incrimination applies only to "criminal" cases and penalties, and the court had characterized the Coast Guard assessed penalty as "civil."[13] The judge used the seven criteria set forth in *Kennedy v. Mendoza-Martinez*[14] to determine whether a proceeding or penalty is criminal or civil (in purpose or effect):

> (1) Whether the sanction involves an affirmative disability or restraint;
>
> (2) whether it has historically been regarded as a punishment;
>
> (3) whether it comes into play only on 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.[15]

Based on these considerations, the judge decided that the Coast Guard penalty and assessment proceeding were properly designated "civil"; therefore, the fifth amendment privilege against self-incrimination could not be invoked The case was then tried to a jury, which rendered a verdict in favor of the government. Thereafter the district court reduced the penalty to $250 "because of its belief that Ward had been diligent in his attempt to clean up the discharge after it had been discovered."[16]

On Ward's appeal, the Tenth Circuit held that, even though the penalty was labeled "civil" and had a remedial purpose, the assessed civil penalty was sufficiently punitive in its effect to make it a "criminal" penalty arising out of a criminal proceeding. The court of appeals disagreed almost entirely with the district court's analysis of the *Mendoza-Martinez* factors and re-

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13. Ward v. Coleman, 423 F. Supp. 1352, 1354-57 (W.D. Okla. 1976).

14. 372 U.S. 144, 168-69 (1963).

15. Ward v. Coleman, 423 F. Supp. at 1356 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

16. 448 U.S. at 247.

versed in favor of Ward.[17]

On appeal by the government, the Supreme Court reviewed the Tenth Circuit decision and reversed. Justice Rehnquist, writing for the Court, observed that the self-incrimination clause of the fifth amendment is expressly limited to criminal actions and that "the question whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction."[18] He noted that congressional intent had been statutorily expressed by labeling Coast Guard assessed penalties as "civil" and that such "civil penalties" had been placed in the statute alongside of and in contrast to certain "criminal penalties." Next, Justice Rehnquist stated that it was unnecessary to consider each of the seven *Mendoza-Martinez* standards relied on by the lower federal courts. He concluded that they were "helpful," but "neither exhaustive nor dispositive" of the issue of whether statutory sanctions were "so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' "[19] Finding that only one *Mendoza-Martinez* factor aided Ward, and without discussing any other factor,[20] the Court was not persuaded that the assessed penalty was "punitive in either purpose or effect."[21] Thus, the FWPCA assessment proceeding was not a criminal proceeding; and therefore, the fifth amendment proscription against self-incrimination was held not to apply.[22]

Justices Blackmun and Marshall concurred in the judgment but believed that all of the *Mendoza-Martinez* factors deserved discussion and that these factors cumulatively weighed heavily in favor of a "civil" designation.[23]

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17. Ward v. Coleman, 598 F.2d 1187, 1192-95 (10th Cir. 1979).

18. 448 U.S. at 248.

19. *Id.* at 249 (citation omitted).

20. *Id.* at 249-50. Finding that only the fifth *Mendoza-Martinez* factor of "whether the behavior to which the penalty applies is already a crime" aided Ward, the Court rejected the argument that the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976), made Ward's conduct criminal so as to weigh heavily against the FWPCA penalty properly being designated as "civil." The Court "believe[d] that the placement of civil penalties [for similar conduct] in another statute enacted 70 years later tends to dilute the force of . . . [this] *Mendoza-Martinez* criterion." 448 U.S. at 250.

21. 448 U.S. at 250-51.

22. *Id.* The Court also rejected Ward's contention that the Coast Guard FWPCA penalty assessment proceeding was "quasi-criminal," thereby invoking application of the self-incrimination clause under Boyd v. United States, 116 U.S. 616 (1886). *See* 448 U.S. at 251-55.

23. 448 U.S. at 255-57 (Blackmun, J., concurring).

Justice Stevens dissented, agreeing with the Tenth Circuit that the section 1321(b)(6) penalty was a criminal sanction. He concluded that "[a]lthough the question is a close one, the automatic nature of the statutory penalty, which must be assessed in each and every case, convinces me that the reporting requirement is a form of compelled self-incrimination."[24]

II. Analysis

The fifth amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself."[25] "[T]his provision was 'originally intended only to prevent return to the hated practice of compelling a person, in a criminal proceeding . . . to swear against himself.' "[26] Fifth amendment protection has been extended to defendants who are required to respond in governmental administrative proceedings that are criminal in purpose or effect.[27] The sole issue presented by *Ward* was whether the Coast Guard "civil penalty" assessment proceeding authorized by the FWPCA was actually a "criminal case" and thus subject to the fifth amendment rule against self-incrimination.[28]

The Supreme Court's decision in *Ward* is sound, but leaves unresolved the appropriate analysis for distinguishing between "civil" and "criminal" cases in close situations. In deciding the case the Court reaffirmed its traditional test, which proceeds upon two tiers of inquiry: first, determining whether there exists an express or implied congressional preference for labeling a proceeding or penalty "civil" or "criminal"; and second, determining whether there is clear proof that a "statutory scheme [is] so punitive . . . in purpose or effect" as to transform a congressionally intended civil proceeding or penalty into a criminal proceeding or penalty.[29]

In *Ward* the majority gave great weight to the "civil" label Congress attached to the penalty assessable by the Coast Guard under the FWPCA. The Court noted that the juxtaposition of the section 1321(b)(6) "civil penalty" with section 1321(b)(5)

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24. *Id.* at 257-60 (Stevens, J., dissenting).

25. U.S. Const. amend. V.

26. R. Perkins, Criminal Law and Procedure 966 (4th ed. 1972) (footnote omitted).

27. *Id. See* 448 U.S. at 248-49.

28. 448 U.S. at 244-51.

29. *Id.* at 248-49.

"criminal penalties" indicated a clear congressional preference for designating the Coast Guard penalty proceeding as "civil."[30] However, there is danger in placing too much trust in any label, because lurking behind the labels of Congress there may well be significant adverse effects upon guaranteed constitutional rights. Justice Oliver Wendell Holmes has stated, "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[31] Fortunately, the Supreme Court's traditional test for deciding the civil-criminal issue in close cases provides for further analysis. Hence, the test's second-tier determination becomes all important.

The majority properly looked beyond the FWPCA's "label" to determine whether there was clear proof that the congressionally intended "civil" proceeding was so punitive in purpose or effect as to become a "criminal" proceeding. However, in doing so the Court clouded its second-tier inquiry and failed to disclose the appropriate analysis for distinguishing between "civil" and "criminal" cases in close situations. Although admitting that the seven *Mendoza-Martinez* considerations are "helpful" in distinguishing between civil and criminal cases, the majority concluded that such considerations are "neither exhaustive nor dispositive." The Court then addressed the second-tier test by relying on its own *Mendoza-Martinez* analysis without setting forth its assessment of each factor.[32]

Both the district court and court of appeals fully discussed the seven factors and arrived at opposite conclusions based on those factors.[33] This sharp disagreement between the lower courts illustrates the need for the Supreme Court to resolve the confusion by clarifying the proper analysis of the *Mendoza-*

30. *Id.* at 249.

31. Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

32. 448 U.S. at 249-51.

33. Ward v. Coleman, 598 F.2d 1187, 1192-95 (10th Cir. 1979); Ward v. Coleman, 423 F. Supp. 1352, 1356-57 (W.D. Okla. 1976).

Martinez factors. The following chart illustrates the conflicting *Mendoza-Martinez* treatment in the three courts:

MENDOZA-MARTINEZ CONSIDERATIONS as appl. in *Ward*	(1) Affirmative disability or restraint	(2) Historically regarded as punishment	(3) Scienter Require-ment	(4) Retribution Deterrence	(5) Behavior Already A Crime	(6) Alternative Purposes	(7) Excessive Penalty	RESULT
DISTRICT COURT	Civil	Neutral	Civil	Civil	Neutral	Civil	Civil	Civil
COURT OF APPEALS	Neutral	Neutral	Criminal	Criminal	Criminal	Neutral	Criminal	Criminal
SUPREME COURT	?	?	?	?	Criminal (diluted weight)	?	?	Civil

The Supreme Court majority's only discussion of these factors was to note that only the fifth factor, whether the behavior to which the penalty applies is already a crime, favored a finding of a criminal sanction. The Court believed that the placement of civil penalties in a pollution control statute seventy years after the placement of criminal penalties in a similar statute tended to dilute the force of this *Mendoza-Martinez* criterion.[34] Even though the Court did not state its assessment of each of the seven factors, it implicitly found sufficient criteria to conclude that the section 1321(b)(6) penalty was correctly identified as "civil."[35] However, in view of the lower courts' contrasting analysis of the seven factors and because of the potential for continued confusion by other lower courts on how to interpret and apply these factors, the Supreme Court should have presented a definitive analysis of the *Mendoza-Martinez* criteria. Moreover, if these seven factors are not truly dispositive of the civil-criminal issue in close cases, then the Court should have fully identified what criteria are dispositive. The need for such Supreme Court expression may well be important to future environmental laws that combine the use of criminal and civil penalties. Indeed, if the FWPCA "self-reporting requirement" and "civil penalty" prove to be effective pollution control tools in the protection of the navigable-waters environment, they may eventually be used in air or land pollution control statutes.

III. Conclusion

The *Ward* holding that the assessment of a civil penalty by the Coast Guard under the FWPCA was not a "criminal case"

34. 448 U.S. at 249-51.
35. *See id.*

and that the self-reporting requirement was therefore not violative of the fifth amendment privilege against self-incrimination is sound. The Court applied its traditional two-tier test to decide the "close question" civil-criminal case issue. It found a clear congressional preference for labeling the FWPCA penalty "civil." Additionally, when the Court looked beyond the label to determine whether the assessment proceeding was in purpose or effect a "criminal case" so as to invoke fifth amendment protections, it found only one diluted factor to indicate that it was a criminal case. Moreover, the Court found that Ward, the proponent of the "criminal case" argument, failed to offer the "clearest proof" required to show that the civil sanction was in purpose or effect a criminal sanction.

Until the Court defines "clearest proof," the *Mendoza-Martinez* analysis of the second-tier test should not be relied on as truly dispositive of the issue. Rather, the seven factor analysis should continue to be used only as a helpful indicator of the "clearest proof" that is necessary to establish that a congressionally labeled penalty is in purpose or effect proper.

Whether the "self-reporting" and "civil penalty" tools of the FWPCA can constitutionally be used in other pollution control statutes was not decided by the Supreme Court. However, the impression left by the Court is that such tools may congressionally be employed without infringing on the privilege against self-incrimination.

D. Gary Beck