ORIGINAL

In the

Supreme Court of the United States

UNITED STATES

PETITIONER

V.

L. O. WARDDBA L. O. WARD OIL AND GAS OPERATIONS

No. 79-394

Washington, D. C.
February 26, 1980

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Washington, D. C.

Wednesday, February 26, 1980

The above-entitled matter came on for oral argument at 2:11 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner

STEPHEN JONES, ESQ., P.O. Box 3339, Enid, Oklahoma; on behalf of the Respondent

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in the United States v. Ward and others.

Mr. Kneedler, you may proceed when you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

This case is before the Court on a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

The question presented is whether a proceeding to recover a civil penalty under the Federal Water Pollution Control Act for an oil spill is a criminal case within the meaning of the Self-Incrimination Clause of the Fifth Amendment.

The issue arises because of the interplay in this case between the reporting and penalty provisions of Section 311 of the Act, which I shall briefly describe.

The Federal Water Pollution Control Act which is now commonly known as the Clean Water Act establishes a comprehensive program for restoring and maintaining the integrity of the Nation's waters. Section 311 is specifically directed to the problem of oil spills and discharges of hazardous substances. This provision was first enacted in roughly its present form in 1970, principally in response to the widely publicized oil spill in the Santa Barbara Channel and the break-up of the

tanker Torrey Canyon which caused extensive damage to the coast of England and cost better than $8 million to clean up.

Section 311(b)(3) states the basic prohibition which is against the discharge of harmful quantities of oil and hazardous substances into navigable waters of the United States, adjoining shorelines or into the seas contiguous to the United States.

The Act provides for a national contingency plan to deal with oil spills and hazardous substance discharges when they occur and it also authorizes the President to provide for the clean up of those discharges unless the President is satisfied that the owner/operator of the vessel or facility where the discharge occurs will adequately clean it up.

In order that the Federal Government can insure that these clean up and mitigation measures are taken promptly and thereby limit the ensuing damage, Section 311(b)(5), one of the sections in which the issue in this case centers, requires the person in charge of the vessel or facility to notify the appropriate agency of the Federal Government immediately when a prohibitive discharge occurs. The failure to do so is a criminal offense. Congress was sensitive to the Fifth Amendment concerns of this reporting requirement, however, and expressly provided in it that the notification to the appropriate agency of the Government and information derived

from exploitation of that notice may not be used in any criminal case except in a prosecution for perjury or for submitting a false statement.

While the Government does clean up the discharge rather than leaving it to the individual owner/operator to do the Government can in return recover the cost of the clean-up from the responsible owner/operator, except that the owner/operator has statutory defense as to liability in certain cases such as where the discharge was caused by God or an act of war, it was the responsibility of the United States or the third party.

Moneys recovered from the owners/operators for the Government's clean-up costs are then in turn paid into a special statutory revolving fund established under the Act and this revolving fund is then used to clean up other oil spills and is in turn replenished when the owners and operators pay back in.

The owner/operator may also be liable under State or other provisions of Federal law for damages to private property resulting from an oil spill, quite aside from the question of clean up.

QUESTION: $500 doesn't go very far in cleaning up oil spills. Is there much in it?

MR. KNEEDLER: I do not know the present balance. I do know that when the Act was initially passed appropriated

funds were placed into it and the authorization at the original time was $35 million.

I would also point out that based on the 1978 statistics that we put in the petition for certiorari it appeared that there were 14,000 oil spills that the Government was aware of under this Act and something like 8,000 of those cases the Government was able to trace the spill to a particular source. So while the penalty in a particular case, in this case for example $250, might be small in an individual case those penalties would accumulate and make up a substantial portion of the funds in this statutory fund.

In addition to the liability to the United States for clean-up and possible liability to third parties for damages to property Section 311(b)(6), the other provision that is specifically involved here, provides that the owner or operator or the person in charge of the facility -- anyone of those -- shall be assessed a civil penalty in an amount not exceeding $5,000 whenever a prohibited discharge occurs. The Coast Guard has construed this statute to require that at least some penalty be assessed in every case but the statute itself requires that the amount of the penalty within that $5,000 range be tailored according to the gravity of the particular violation, the size of the business concerned and the effect of the penalty on the ability of the owner/operator to remain in business.

The civil penalty case now before the Court resulted from an oil spill at Respondent's property near Enid, Oklahoma on March 23, 1975. At that time about 20 barrels of combination oil and mud apparently escaped from the retention pit at the drilling facility. On March 25 the sanitarian with the State Health Department was conducting a routine inspection for other purposes nearby and noticed that oil had seeped out of the retention pit, had run down a gully and into a stream by the name of Boggie Creek.

Respondent does not contest in this Court that Boggie Creek is a navigable water within the meaning of the Act or that the amount of oil discharged in this case is harmful for purposes of the Act.

On the same day that the State sanitarian observed the spill the State Health Department notified Respondent of the spill. Respondent notified EPA of the spill eight days later as he was required to do under Section 311(b)(5). On June 25 Respondent submitted a more complete report pursuant to an EPA request under another provision of the Clean Water Act administered by EPA.

EPA then forwarded these reports to the Coast Guard which relied upon them in assessing a civil penalty against Respondent in the amount of $500.

Respondent filed an administrative appeal from this assessment, contending that the use of the required

reports to assess the civil penalty constituted a violation of the Fifth Amendment privilege against compelled self-incrimination but this appeal was denied.

Respondent then filed an action in District Court seeking to enjoin enforcement of these provisions and enjoin collection of the civil penalty.

The Government soon thereafter filed a collection action to recover the unpaid civil penalty.

The District Court consolidated these two cases and denied Respondent's motion for summary judgment, again raising the Fifth Amendment issue. The court then determined that Respondent -- that the oil spill at Respondent's property had violated the Act but reduced the civil penalty that had been assessed in the amount of $500 by the Coast Guard to $250, for two reasons:

One, what the court believed to be the relatively insubstantial amount of oil that had been spilled, although it was still a violation of the Act.

And, secondly, taking into account what the court believed was Respondent's diligence in cleaning up the discharge.

The Court of Appeals reversed the award of the civil penalty to the United States. Despite Congress' expressed designation of the penalty as civil the Court of Appeals perceived certain punitive aspects to it and therefore determined

that it was criminal. The court did not enjoin enforcement of the civil penalty provision or the required notice provision of the Act but simply applied immunity providing that the required notice and information derived from that notice could not be used in assessing either the liability for or the amount of the civil penalty.

QUESTION: Did the Court of Appeals make any effort to distinguish Helvering v. Mitchell, the Justice Brandeis opinion?

MR. KNEEDLER: Right. It did not -- I do not recall if it was mentioned.

QUESTION: I was just looking through it and it seemed to me it did not really mention it.

MR. KNEEDLER: I frankly do not recall if it was specifically mentioned. It did mention several of the prior decisions of this Court and of course in Helvering the Court was dealing with a civil penalty of 50 percent for fraud against the United States.

QUESTION: But it was also dealing with the self-reporting requirement of income tax.

MR. KNEEDLER: That is right.

Well, no, I am sorry, the Helvering -- right -- I suppose that could have been indirectly implicated. But in Helvering the question was whether that was a violation of the double jeopardy clause, because the defendant in Helvering

had been acquitted of criminal fraud against the United States and then the question came whether the Government was barred by double jeopardy from -- by the double jeopardy clause from recovering the penalty.

QUESTION: Well, let me read you this language from Helvering v. Mitchell on page 309 of 303 U.S.:

"In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure requires him to make in his annual return to insure full and honest disclosure to discourage fraudulent attempts to evade the Act Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil."

Doesn't that strike you as somewhat resembling the scheme here?

MR. KNEEDLER: Yes, in that sense it does. I guess I was focusing on the particular constitutional right that was involved there. But to that extent it certainly does, that the liability was based on the information in the tax return that was fraudulent. And in fact I think one of the implications of the Court's decision here, although it does not precisely explain what the scope of the decision was, is that it could have a disturbing impact on the vide number of both Federal and State statutes that are now moving more and more toward the use of civil penalties as an integral part

of the regulatory scheme. And of course the provision for assessment of civil penalties under the tax statutes is one of the longstanding examples of that. And it is being used more frequently in regulatory statutes, for instance the Occupational Safety and Health Act with safety provisions.

QUESTION: The tax statute that Mr. Justice Rehnquist referred to, of course the disclosure of information is required in order to decide the tax liability and the tax consequences.

Do you know of any cases like this in which the disclosure requirement is simply for the purpose of assisting enforcement of the statute?

MR. KNEEDLER: Not specifically. The case of California v. Byers comes to mind as being somewhat on point. In that case the purpose of the reporting requirement was to identify persons involved in automobile accidents and that was seen primarily in aid of adjusting private liability. It was not for instance a reporting requirement that was intended solely in order to bring an action against someone.

QUESTION: Did the Court of Appeals cite California v. Byers? I don't find it in their opinion.

MR. KNEEDLER: Not to my recollection.

QUESTION: They also said that that is primarily related to -- that that statute in California v. Byers is related to the civil aspects. Isn't it something more than

that; isn't it related to the State's overall responsibility for safety on the highways?

MR. KNEEDLER: To be sure. Many States, for example, might count an accident, for example a certain number of points, to deprive someone of --

QUESTION: The judgment in Byers is that the citizens of California were compelled to leave their name and address if they had an automobile accident; and then that could be used against them in either civil or criminal.

MR. KNEEDLER: That is right; that is right. There were really two separate discussions of the Fifth Amendment privilege in Byers, one that it had to a certain extent this purpose of identifying persons involved in accidents for purposes of private liability. And then, secondly, the Court discussed the fact that the information was not in some respects -- it was not testimonial in nature.

QUESTION: I suppose you have no way of knowing now whether the California v. Byers was called to the attention of the Tenth Circuit.

MR. KNEEDLER: I don't know whether it was cited in our brief.

QUESTION: I would assume that the United States Attorney presenting it would have been aware of that case, wouldn't you?

MR. KNEEDLER: It was cited.

QUESTION: It was cited?

MR. KNEEDLER: Yes.

As I mentioned, the Government is somewhat concerned about the potential implications of the decision, not just with respect to the self-incrimination clause but if it were to be given a broader reading as it may affect the application of other rights under the Fifth and Sixth Amendments that normally attach in criminal proceedings. And in this case the Court of Appeals approach, which disregards the Congress' clear designation of this particular penalty as civil and substitutes instead a judicially-fashioned standard of when a penalty is sufficiently punitive, that the court believes it should be regarded as criminal. We think it would embark the courts on a difficult course of line drawing in trying to distinguish which particular statutes might carry attributes that in the abstract might seem punitive even though the statute was designated by Congress as being civil. And specifically with respect to the Fifth Amendment privilege the language of the privilege provides that no person should be compelled in any criminal case to be a witness against himself and the debates on the proposal in the Bill of Rights in the House in 1789 indicate that the limitation to criminal cases was deliberately inserted in the Bill of Rights at that time.

The term "criminal" of course appears in the Sixth

Amendment as well in identifying those prosecutions in which Sixth Amendment rights attach and there is no reason to think that the first Congress intended to distinguish between the two. And the recommendations of the four State ratifying conventions that proposed the conclusion of a privilege similar to the privilege against self-incrimination in the Bill of Rights also were limited in their concerns to the criminal context.

And while this Court has over the years repeatedly held that the privilege may be asserted in proceedings that are civil it has done so in the context where the testimony or evidence given in the civil or other proceeding would expose the person to criminal liability. The Court has not departed from the text of the amendment referring to a criminal case.

QUESTION: Well, was the claim made -- I suppose the Respondent here made the self-incrimination claim very early in the proceeding.

MR. KNEEDLER: Right. He made the claim before the Coast Guard.

QUESTION: But -- when what? When he was asked -- when he was assigned or what?

MR. KNEEDLER: Right. The procedure is that the Coast Guard assesses -- looks at all the factors and assesses what it believes to be the appropriate standard, the

administrative appeal from that, at that point Respondent did argue that the required reports could not be used for purposes of assessing the civil penalty.

QUESTION: Well, in the tax laws if someone wants -- isn't it the rule that if you want to claim your Fifth Amendment privilege you should claim it in connection with the matter that you don't want to report?

MR. KNEEDLER: Well, in this particular case the provision requiring a report under Section 311(b)(5) contains an expressed immunity clause similar in language to other immunity provisions although in this case it is self-executing, there is no requirement.

QUESTION: So you automatically are -- you cannot be convicted at all.

MR. KNEEDLER: It says it shall not be used in a criminal case. And then the question becomes what is a criminal case. And of course the language "criminal case" is directly parallel to the language in the Fifth Amendment. So the assumption would be that Congress intended them to have the similar scope.

QUESTION: Well, in filing a tax return it is not unknown, is it, that certain expenses and deductions will be claimed, have been claimed but the detailed explanation is reserved on Fifth Amendment grounds.

MR. KNEEDLER: I think that would be an appropriate --

QUESTION: Now, that of course might arouse the interest of an Internal Revenue agent somewhat but that is the way to go about it.

MR. KNEEDLER: That is right. Well, in this case there is a report form in the appendix indicating the information given by Respondent in the course of a telephone conversation with a person at EPA. And in this case he did indicate that the U.S. spill had occurred on his premises.

This Court has repeatedly stated that the question of whether a given sanction of his criminal or civil is a question of statutory interpretation. In the present case Congress could not have been clear in manifesting its intent that the sanction be civil. It is designated as civil and the procedure for its collection is civil, a factor which the Court found persuasive in Helvering v. Mitchell. We must therefore assume that Congress used the term "civil" advisedly and that it affirmatively decided the attainment of a monetary penalty under the Clean Water Act should not carry with it the usual stigma that attaches to someone who is convicted of a criminal offense. Indeed the administrative conference and the drafters of the model penal code and others have suggested that civil penalties be utilized instead of criminal provisions in regulatory statutes such as this for exactly that reason, to avoid the problem of exposing persons unnecessarily to the trauma of

the criminal process and to avoid stigmatizing persons who are exposed to the criminal process to the fact of criminal conviction when society at large would not usually regard the conduct of being worthy or deserving of that kind of punishment. We do not believe in the present case, for example, that the oil spill on Respondent's property would ordinarily be of the type that would tarrant bringing a criminal prosecution under some other statute such as the Rivers and Harbors Act and we do not understand that Respondent would suggest otherwise.

The civil penalty provision in Section 311(b)(5) can be contrasted we think instructively in this regard with the -- excuse me, Section 311(b)(6) can be contrasted with the criminal sanctions in Section 311(b)(5) for failing to report an oil spill to the Government, even where the owner/operator is wholly innocent with respect to the spill in the sense of not having been negligent or wilfull. Congress evidently believed that even where the person in charge of the vessel or facility had not been negligent in causing the spill that the public interest in requiring prompt notification was sufficiently strong in order to prevent damages to third parties and prevent damage to the environment that the failure to report should carry criminal consequences.

The civil nature of this, the penalty involved here

is further underscored by the fact mentioned earlier that the civil penalties are paid along with the recoveries from persons responsible for spills into this statutory revolving fund, it has the effect of paying the Government's clean-up costs for those particular spills in which the cost cannot be recovered from the owner/operator who is responsible for the particular spill.

The penalty can also be viewed as compensation to the Government acting parens patriae for the people of the Nation for what Congress presumably believed was the damage to the environment in the waters that would occur even when an oil spill was cleaned up relatively promptly. It would be a transitory damage to the environment and in some cases an oil spill could not be entirely cleaned up.

QUESTION: Mr. Kneedler, is it correct however that even if the oil spill were entirely cleaned up by the person who reported it he nevertheless might have a penalty assessed against him?

MR. KNEEDLER: Yes, indeed -- excuse me. The Coast Guard has construed the statute to require that that a penalty be paid in all cases. But one of the factors to be taken into account is the gravity of violation. Respondent does rely on the fact that the subsequent clean-up cannot be taken into account but in this case that reliance is wholly misplaced because the District Court in fact cut the penalty

in half because of what the District Court believed was the diligence of the Respondent cleaning up. And I have been informed that the Coast Guard has acquiesced in that position of the District Court now and others. And now it does take into account the administrative assessment, the clean-up.

QUESTION: As far as the legal issue is concerned, I understand the amount of the penalty can now be larger than at the time.

MR. KNEEDLER: Yes. One point should be clarified. The EPA has taken -- it is the EPA who enforces that new provision, although I do not know that this as yet has become final -- the EPA has expressed an opinion in earlier regulations that that is intended principally for hazardous substances, not for oil, hazardous substances, chemicals and other --

QUESTION: But as a matter of statutorial or constitutional power I would suppose that if the agency thought it were extremely serious and they wanted to deter future carelessness, even though there were no harm in the particular case, they could assess a penalty of $150,000 and we would have exactly the same legal issue, wouldn't we?

MR. KNEEDLER: Yes, I think -- it is essentially the same legal issue although several of this Court's decisions, I think most recently in One Lot Emerald Cut Stones, has suggested that the penalty is so disproportionate to the

conduct for which the penalty is attached that at that point it might be regarded as criminal.

QUESTION: Punitive.

MR. KNEEDLER: But the statutory language both in the civil penalty provision involved here and also in the new one enacted in 1978 both specifically provide that the penalty should be tailored to the gravity of the offense. So if that standard is rigidly applied, then there should not be an occasion where the penalty would end up being --

QUESTION: Mr. Kneedler, do you think it would be consitutional for the Congress to pass a law requiring motorists to report every time they exceeded the 55-mile limit and to pay a civil penalty of $5 a mile for the excess and say that the report could not be used in any criminal case against them?

MR. KNEEDLER: Well, I think in terms of the self-incrimination clause there would be no constitutional question because of the specific language of the --

QUESTION: Certainly there is as great an interest in preventing death on the highway, I suppose, as there is in preventing oil spills.

MR. KNEEDLER: That is right.

QUESTION: I should think your rationale would justify such a statute.

MR. KNEEDLER: Yes, I am trying -- I am not sure what

the constitutional objection would be outside of the self-incrimination clause. I mean I don't know whether there might be some Fourth Amendment issue at some point. But it might be possible, for example, with sophisticated technology, I suppose, to have a monitor on speedometers in automobiles that would measure that, which would have the effect of recording on behalf of the individual.

One other point I would like to make at this point is that the Respondent relies to a considerable extent on one of the factors mentioned in this Court's decision in Mendoza-Martinez. In that case the Court held that an expatriation provision under the Immigration Act for persons who departed the country to avoid military service was criminal and one of the factors mentioned in Mendoza-Martinez that could be looked to in discerning congressional intent is to whether a statute is criminal is whether the conduct regulated by the osensibly regulatory or civil sanction is otherwise made criminal. We agree that this can be a relevant factor but in this case it happens to cut the other way, because this Court has said on a number of occasions the Congress -- as it has under the tax laws and others, for example -- can attach both criminal and civil sanctions to the same conduct. And so where here Congress in the Refuse Act of 1899 has made the discharge of pollutants criminal and then in this particular statute designates the penalty as

civil I think the inference can only be that Congress meant what it said.

QUESTION: Tell me again, what happens if you don't file the report at all?

MR. KNEEDLER: If you don't file the report, you are subject to criminal liabilities for non-filing. Right; yes, it is.

QUESTION: Failure to file an income tax return?

MR. KNEEDLER: Right.

And in Mendoza-Martinez, on the other hand, the fact that the conduct was otherwise made in criminal and in fact cut the other way because Mendoza-Martinez, the statute involved there was concerned with people who had violated the Selective Service laws were criminally liable but had left the country and were beyond the reach of criminal prosecution. And the legislative history of the statute made it unmistakably clear that what Congress intended to do was fill a gap in the criminal punishments under that statute by saying any citizen has left the country and we cannot prosecute him, then we will do the alternative of taking away his citizenship.

And so while that is a factor, it is necessary to look at which way it cuts in a particular case.

QUESTION: Going back to Mr. Justice Stevens' hypothetical, suppose the statute provided that anyone going

over 55 miles an hour had to make a report saying exactly what his speed was and his average point to point and $50 or $5 for each mile over 55; but that failure to file a report at all would be a $500 fine -- not criminal, $500 civil penalty.

Do you think that would pass muster under your argument?

MR. KNEEDLER: Yes. Again, I don't think this raises self-incrimination problem, because it wouldn't be criminal. But I think the limitation as to where one would probably be a due process limitation if the sanction for failure to report at some point was so disproportionate to the offense of not reporting. I can imagine a situation for example in which a serious oil shortage, it was imperative that no one go over a certain speed and there would obviously be a strong public interest in insuring that all citizens obeyed that particular provision.

QUESTION: Should the civil penalty reach dimensions that would raise Fifth Amendment issues. Suppose it was $5,000 fine for not filing your report on speeding.

MR. KNEEDLER: Well, I would be reluctant to say that $5,000 would be a particular cutoff point. But again, in the case of discussing whether a case is criminal, for example, they have suggested that a penalty that is so disproportionate to the underlying offense is --

QUESTION: Suppose that it provided that forfeiture

of the truck would follow; forfeiture of the vehicle, total forfeiture would be the civil penalty?

MR. KNEEDLER: Well, in the Court's decision in Clara Toledo, for example, the Court upheld the forfeiture of a yacht that was based on essentially non- --

QUESTION: Registration error.

MR. KNEEDLER: Right. And of course in those situations there is often a provision for remission or mitigation of penalties which helps to undercut the harshness of the penalty.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jones.

ORAL ARGUMENT OF STEPHEN JONES, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. JONES: Mr. Chief Justice, and may it please the Court:

I would like to very briefly respond to certain questions that were asked of Mr. Kneedler and perhaps give an answer slightly in variance with that given by him.

With respect to the facts I believe that the Government left out two important considerations that the Court should bear in mind.

Number one, there was no evidence in the court below that Ward or any of his employees were responsible for the spill that occurred in this case. The Act of Congress makes

the penalty imposed on the basis of strict liability. Mr. Justice Stevens, for example, asked the question might the penalty be imposed. There is no "might" about it. The penalty is automatically imposed in every situation regardless of fault, regardless of clean-up, when there is an oil spill. And the penalty is imposed against the owner or the operator, not against the person responsible for the spill.

QUESTION: It is a stricter standard than the law that requires one to file an income tax return?

MR. JONES: Yes. As applied in this case it is.

QUESTION: Well, generally speaking.

MR. JONES: Yes, sir, under the statutory scheme. Let me explain why.

Your Honor raised the question of Helvering v. Mitchell. There is a critical difference. The information supplied in Helvering v. Mitchell, which was not a self-incrimination case in any event, was essentially neutral. And that case turned on another question. But the Supreme Court earlier had decided in Sullivan v. United States that the filing of an income tax return did not violate the Fifth Amendment clause dealing with self-incrimination, because the information was essentially neutral. But Mr. Justice Holmes in his opinion pointed out that if the information called for by filing the return would incriminate the taxpayer he need not provide that information.

QUESTION: But in Helvering, Justice Brandeis says to insure full and honest disclosure to discourage fraudulent attempts to evade the tax Congress imposes sanctions.

Now, that certainly doesn't suggest that the information is necessarily neutral.

MR. JONES: Sir, as I read Helvering and Sullivan and the other income tax cases and also Byers which I wanted to speak to, the information is essentially neutral. There is in reality no penalty or sanction imposed upon someone that files an honest income tax return. All he has to do is pay the tax. Here, though, if you are not responsible for the oil spill you still have to pay the penalty, even if you take every effort to avoid an oil spill as General Motors did in United States v. General Motors. The Coast Guard still assessed them a fine of $1,200 which the District Court cut to $1. The court inquired of counsel concerning Byers v. California and there are some critical differences in that case and this one. As I read the Court's decision in Byers there are at least. This Court in finding that the California hit and run statute, so-called hit and run statute did not violate the Fifth Amendment. It found first of all that the mere possibility of incrimination was insufficient and found also that driving a vehicle is a lawful activity and found that even if incriminating the report is not

necessarily testimonial.

Now, let us contrast that with here. Here, having an oil spill is an offense and that is the word used by Congress. It is an offense for which a civil penalty is imposed.

Number two, the report is clearly incriminating because it is on the basis of the report that the fine is assessed.

And number three, the report clearly is testimonial.

Now, this Court in California --

QUESTION: Incriminating only if you assume the answer to the issue --

MR. JONES: Yes, sir.

QUESTION: -- it is a criminal case.

MR. JONES: Yes, sir. Which I was going to address but if I could just say the Court in California v. Byers pointed out that there are many accidents where there is no liability attached and certainly no criminal liability.

Now, the heart of our case is that a proceeding to collect this penalty, even though denominated civil, is in reality a criminal case within the meaning of the Fifth Amendment. Counsel for the Government contrasted the Fifth and Sixth Amendment but there is a critical difference. The Sixth Amendment speaks of criminal prosecutions. The Fifth Amendment speaks of criminal cases. And the Sixth

Amendment guarantee has never been applied in an action to collect a civil penalty. But this Court and the State courts and the lower Federal courts, going back to the English system, have consistently applied the self-incrimination clause of the Fifth Amendment and the Fourth Amendment guarantees in actions to collect civil penalties. And that was the ruling of this Court in Boyd v. United States which has been reaffirmed either implicitly or -- implicitly in Lees v. United States, Hepner v. United States, Hogan v. United States and in Footnote 3 of Helvering v. Mitchell and U.S. v. U.S. Coin and Currency and in One 1958 Plymouth Sedan because the Court said in Boyd that an action to collect a civil penalty -- in that case $1,000 -- and the statute clearly said that it was non-criminal, this Court nevertheless found that the penalty was, in effect, quasi-criminal. And it required, if the Court will recall, in Boyd -- this was as I recall a statute involving an alien -- that you had to furnish certain reports and information to the Government; and if you did not furnish them, the penalty would be assessed. And the Court said, rightly so, that that was a violation of the Fifth Amendment self-incrimination clause even though it was denominated non-criminal.

Now, the Government in its reply brief has taken issue with our history and I would just like to call to the Court's attention very briefly that each of the authorities

cited by the Government, beginning with Dean Wigmore at Section 2256 of Volume 8, adopts our position that actions to collect civil penalties can violate the self-incrimination clause of the Fifth Amendment. The same position is taken in Greenleaf on Evidence, Taylor on Evidence and Mr. Joseph Story's Commentary on Equity Pleading. What the Government says is that this rule is not a constitutional rule, it is a rule of equity. But it overlooks the fact,as discussed in some length in Leonard Levy's classic The Origin of the Fifth Amendment, that in fact the Founding Fathers, the State constitutional conventions, the first Congress when it passed the Fifth Amendment had in mind these civil penalties which had been abused; and that the early cases make it clear that they were given the constitutional protection against the self-incrimination clause. And, as I indicated, that has been the position of this Court, this Court has consistently applied the protection of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment in actions to collect fines, penalties and forfeitures.

Now, in this case even if this Court were writing on a clean slate, if there had never been Boyd, if there had not been this history --

QUESTION: Mr. Jones, the cases you are referring to, do you treat the collection process as a criminal or not? Or did it just say that you could claim the Fifth

Amendment privilege because it wasn't an immunity statute?

MR. JONES: No, sir. As I understand the cases, they explicitly recognize that a civil collection procedure and proceeding was at issue. But they --

QUESTION: You mean there are cases saying that there can be no civil fines?

MR. JONES: No, sir.

QUESTION: All supposedly civil fines are criminal?

MR. JONES: No, sir. What this Court has said, as I understand the decisions, is that if you attempt to have the person from whom you are extricating the fine, if you compel him to testify, you cannot do that to collect a penalty.

QUESTION: Well --

MR. JONES: That was specifically the issue in Lees.

QUESTION: Yes, but that could be just because it would incriminate him in some other case.

MR. JONES: Well, no, sir. In Lees --

QUESTION: It is not because the civil collection proceeding is criminal, is it?

MR. JONES: Yes, sir. In Lees v. United States and Boyd v. United States the Court paid no attention and did not discuss at all that Mr. Boyd and Mr. Lees' answer might incriminate them in some other proceeding. It was that they

had to pay the fine, which I believe was $1,000 in those particular cases. But, as I indicated, even if the Court did not have that history before it, it is clear that this particular statutory scheme is punitive beyond any question. In the first place it is not referred to in any other way other than a penalty. And this Court has held repeatedly in U.S. v. LeFranka, U.S. v. Tex-Tow, One 1958 Plymouth Sedan and U.S. v. Futura that penalties are imposed for punishment, whether they are criminal penalties or civil penalties.

Number two, we have in this case the forced reporting. If you do not report this spill you can go to jail. If you do report this spill you can be given a civil penalty of up to a quarter of a million dollars.

In this particular case it was quite small: $500 and then cut to $250. But the statute as presently written authorizes a civil penalty of up to a quarter of a million dollars.

Number three, the exact same conduct, the exact same conduct in this case is also a crime. The Refuse Act does not require scienter, the Government does not have to show intent to violate it; it is a strict liability statute and it is also a crime. So the same conduct here is also a crime. The action that is referred to here is called an offense, Congress makes it an offense to spill oil or for

that matter be an owner or operator where oil is spilled, again showing the punitive nature.

And if there were any other question about it involved, we have cited on page 60 of our brief from page 3 of a Senate report that the whole purpose of passing this bill, or the original bill, the 1970 Act, was to punish oil spillers. So when we combine in a statutory network such phrases as penalty, offense, strict liability, and punishment, it is clear that what we have here is a punitive and not a remedial statute as this Court -- or at least some of the members of this Court considered in Kennedy v. Mendoza-Martinez.

QUESTION: I wouldn't think, counsel, that strict liability really helped you, because it cuts out all notion of mens re I think traditionally associated with culpable intent that are also associated with crime. I would think strict liability would cut in favor of the civil provision.

MR. JONES: Well, Your Honor, you can go to jail for strict liability crimes even though there is no mens re. That is the Refuse Act.

QUESTION: Well, but what we are arguing here is whether this is a crime or a civil assessed penalty.

MR. JONES: There is a unique feature about this. The Government attempts to have it both ways on the question of intent or scienter. It is not supposed to be a factor

but yet in the Coast Guard regulations it is a factor. That was a factor troublesome to the Tenth Circuit in its opinion and they treated that at some length. But in addition to the factors that I have already mentioned that I think clearly show it is punitive, what convinced the Tenth Circuit unanimously that this was a proceeding within the Fifth Amendment were the factors that the Coast Guard used. Because the Tenth Circuit said, "Look, if the factors to be considered in assessing this penalty are for non-punitive, remedial regulatory purposes, then this penalty -- or this proceeding may not be a criminal case within the meaning of the Fifth Amendment.

"On the other hand, if looking at these factors we find that they are not related to the regulatory goal that the Congress has put forward in the preamble to the Act," then they clearly are punitive."

And the Court went down and looked at each of those factors and pulled out from the Coast Guard regulations themselves. For example, the Coast Guard considers the gravity of a violation, the prior history, the person -- the owner/operator. It considers the effect of the fine on his business. It considers how large his business is. But at the time it expressly would not under any circumstances consider the clean-up effort of the operator or the fact that all of the oil had been removed.

Now, the Tenth Circuit said that when you look at that it is clear that what Congress intended here was a punitive penalty and that it simply was attempting to have the hammer to beat over the head of the oil spiller in an attempt to clean up the water.

Now, one thing that I think the Court might wish to consider is that the Tenth Circuit, in our opinion appropriately so, decision does not adversely affect the enforcement of this Act. The Circuit carved out a use immunity provision and it simply said this, that any information supplied by an owner or operator who is non-corporate cannot be used against him in assessing the penalty.

QUESTION: But Congress had already carved out a quite different use immunity provision, hadn't it?

MR. JONES: A use immunity for what Congress called a criminal proceeding.

QUESTION: Yes.

MR. JONES: Now, the way we feel that is significant here is that it meets the argument of the Government that if this Court would uphold the Tenth Circuit it would severely retard the enforcement of this Act. It would not retard the enforcement of this Act for at least three reasons.

First of all, the Tenth Circuit's decision does not apply to any corporation, as is obvious because corporations

have no Fifth Amendment protection against self-incrimination.

Number two, --

QUESTION: But it would still be a criminal proceeding, wouldn't it?

MR. JONES: Yes, sir, it would be a criminal proceeding.

QUESTION: And how about the burden of proof? How about jury trial?

MR. JONES: No, sir. This Court has --

QUESTION; A criminal proceeding?

MR. JONES: Mr. Justice White, this Court has never held that actions to collect civil penalties, even if they are quasi-criminal, involve the right to a jury trial. In fact the Federal courts have specifically ruled otherwise.

QUESTION: I know, but how -- what is the theory of saying this is a criminal proceeding for purposes of the Fifth Amendment and not for the Sixth?

MR. JONES: If we examine the cases closely what emerges to us, that the teaching of the case is just this: that the self-incrimination clause of the Fifth Amendment has a very high priority in our scheme of ordered liberty and that we are going -- I mean the courts are going to protect that and give it a greater breadth than we would otherwise enumerate in first ten Amendments. And in fact that is exactly what Justice Brandeis said in Footnote 3 to

Helvering v. Mitchell.

QUESTION: If the Government sues to collect a civil fine you can have summary judgment and --

MR. JONES: Yes, sir.

QUESTION: And directed verdicts.

MR. JONES: Yes, sir.

QUESTION: And preponderance of the evidence.

MR. JONES: Yes, sir.

QUESTION: No juries.

MR. JONES: Yes, sir.

In this particular case, incidentally, there was a jury trial simply because there was a dispute as to whether the water ever reached Boggie Creek, which is not material to the issue here. But that would be a rare instance.

If I could just go back to a moment as to why the Act would not be retarded, in addition to the fact that it does not cover, and by "it" I mean the Tenth Circuit's opinion does not cover corporations. If we look at the petition for certiorari filed in this case by --

QUESTION: The Government advanced an argument which it has not repeated in its brief on the merit and that is that --

Reason number one, they gave some interesting statistics concerning oil spills. It is obvious from reading those statistics prepared by the Coast Guard that the over-

whelming majority of oil spills occur on facilities operated by corporate owners and therefore this Act would not apply to this. As I calculate it that would be approximately 90 percent of the spills.

Thirdly, this would not apply if there was not an immediate notification.

So if the Court upheld the position of the Tenth Circuit the Act would not be retarded in its enforcement.

We have in our brief at some length discussed the Kennedy v. Mendoza-Martinez case. Quite frankly we believe that the factors used there are ambiguous and that Factors 1, 2 and 3 go either way. We say however that Factors 4, 5, 6 and 7 point toward this being a punitive statute and that was the reasoning of the Tenth Circuit in its opinion.

In the final analysis we bottom our position upon this Court's ruling in Boyd and that a reading of Kennedy v. Mendoza-Martinez and the statutory history and the statutory construction clearly show that this is a punitive statute.

Now, the argument may be made that this is not a criminal case in the sense that Mr. Ward was not arrested, he wasn't indicted by a grand jury and therefore, as the Government says, it is clear by stipulation -- not by stipulation, but it is clear from reading the statute that the self-incrimination clause doesn't apply here. But this Court has said in Ullman v. United States that the clause -- meaning the

self-incrimination clause is not to be interpreted literally. That is found at page 438. In Counselman v. Hitchcock at page 562 this Court said it is impossible that the meaning of the constitutional provisions involving self-incrimination can only be that a person shall not be compelled to be a witness against himself in criminal prosecutions against himself. The reason for that of course is that until the post-Civil War period in Federal criminal cases a defendant could not even be a witness in a criminal case, either for himself or for the Government. And of course that was the rule in most State prosecutions at the time the Fifth Amendment was adopted.

If we go down the history of the Fifth Amendment before this Court, this Court has defined the words "criminal case" which after all are the most important words in this case, to have a broader meaning than simply in a situation where an individual has been indicted by a grand jury and forced to stand trial. And of course the leading case in that respect is Boyd v. United States, although there are others.

In the final analysis, Boyd says that the mischief against which the Fifth Amendment is there to protect appears in its most attractive form to begin with. And that is what we have in this case. There is a natural concern by everyone to keep the waters clean. That is our concern as shown by the fact that Mr. Ward promptly moved to clean it up. The

Government says, "But this will inhibit other civil penalties."

It will not inhibit any other civil penalty because there is no other civil penalty currently on the books similar to this one. But if this Court lets down the guard and allows this type of compulsory reporting to come forward, then I respectfully submit that the Fifth Amendment would be emasculated and that it will be a stunted right against self-incrimination.

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

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