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# Compulsory Self-Incrimination and the Oil Spill Statute: What the EPA Does Not Know Will Hurt Them

## I. INTRODUCTION

Imagine the predicament of a bulldozer excavation worker who accidentally knocks out a sewer line. His unintentional act may cause massive amounts of raw sewage to flow downstream and threaten contamination of resident wells, yet neither he nor his boss will report what happened. This is true even though the excavation company is fully aware that the EPA has both the equipment and technology to clean up the mess effectively.<sup>1</sup> Why isn't the EPA notified immediately? Its actions could prevent irreparable environmental damage! Sadly, the accident goes unreported because of the existing structure of the Federal Water Pollution Control Act (FWPCA).<sup>2</sup>

Subsection 1321(b)(5)<sup>3</sup> of the FWPCA imposes a duty on any person in charge of a vessel or facility from which a hazardous substance is spilled to notify the "appropriate Governmental agency" as soon as that person has knowledge of the unlawful discharge. Failure to notify is punishable by a maximum one year prison term and/or \$10,000.00 fine. However, if the person in charge notifies the "appropriate Governmental agency", subsection (b)(6)(A)<sup>4</sup> requires that he be subjected to a mandatory "civil penalty" of not

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1. This *really* happens. Although it is impossible to ascertain the number of unreported accidents which occur each year, the United States government maintains between \$12,000,000 and \$35,000,000 in a "revolving" fund which is used to clean up spills of those who do not report and do not get caught. 33 U.S.C. § 1321 (K) (1982).

2. Federal Water Pollution and Control Act of 1948 (FWPCA), ch. 758, 62 Stat. 115 (1948) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). The provision of the FWPCA which is the focal point of this article is 33 U.S.C. § 1321 (1982 & Supp. 1983).

3. Any person in charge of a vessel or of an onshore 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 this [act], 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 \$10,000.00 or imprisoned for not more than one year, or both.  
33 U.S.C. § 1321 (b)(5) (1982).

4. 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

more than \$5,000.00. This penalty must be levied irrespective of fault.<sup>5</sup> In addition, the owner or operator may also be liable for paying up to \$50,000,000.00 in clean-up costs.<sup>6</sup> It is for these reasons nobody calls the EPA.

## II.

### THE FIFTH AMENDMENT

It may be argued that the Government violates the privilege against self-incrimination whenever information compelled under the self-reporting requirements of section 1321(b)(5) is used to establish liability for purposes of assessing "civil penalties" pursuant to subsection 1321(b)(6). However, the Fifth Amendment privilege only precludes the Government from using compelled disclosures in subsequent *criminal* proceedings;<sup>7</sup> therefore, the question is whether the mandatory fine authorized by subsection 1331(b)(6) is in reality a criminal sanction even though Congress has specifically labelled it as civil in nature.

The fact that Congress has labelled a particular sanction as "civil" does not conclusively preclude a judicial finding to the contrary. If it did, Congress would be given the power to deny an individual the protections he is guaranteed by the Bill of Rights.<sup>8</sup> In the *Mendoza-Martinez* line of cases,<sup>9</sup> the courts have looked beyond the

[this act] shall be assessed a civil penalty by the [Coast Guard] of not more than \$5,000.00 for each offense.

33 U.S.C. § 1321 (b)(6)(A) (Supp. 1983).

It is Coast Guard policy to assume that the penalty will be at or near the maximum unless a lesser penalty is justified by one of the following factors: the degree of culpability associated with the violation, the prior record of the responsible party, the amount of hazardous substance discharged, and the effect on the owner or operator's ability to continue in business. Two factors which are *not* taken into consideration in fixing the amount of the penalty are: 1) the responsible party's removal effort or expense and 2) a decision by federal and/or state authorities to bring criminal action for the same discharge. See Commandant Instruction 5922.11A.

Money collected from the (b)(6) penalty is deposited into the § 1321(K) revolving fund. See *supra* note 1.

5. The statutory language says that the owner of a discharging facility "*shall*" be assessed a penalty. 33 U.S.C. § 1321(b)(6)(A) (Supp. 1983). See *United States v. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978).

6. 33 U.S.C. § 1321 (f) (1982).

7. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

8. See, e.g., *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968).

9. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Trop v. Dulles*, 356 U.S. 86 (1958); *Telephone News Sys. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964).

mere label to the true nature of the sanction.<sup>10</sup> The Supreme Court has described this task as "extremely difficult and elusive of solution."<sup>11</sup> Since the analysis is a matter of statutory construction,<sup>12</sup> it will be helpful to determine the legislative purpose of section 1321 first, before undertaking specific inquiry into the penal character of the statute.

#### A. The Statutory Purpose

Congress declared that the objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>13</sup> Specifically, subsection 1321 was passed to ensure "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States."<sup>14</sup> Consistent with this explicit statutory policy, several courts have found that the (b) (6) penalty was passed for deterrent purposes.<sup>15</sup> These courts have rationalized that imposition of a mandatory fine deters accidents by providing an incentive for precaution.

Other provisions of the statute appear to have been passed for the purpose of minimizing damage should such spills occur. For example, subsection 1321 (c)<sup>16</sup> sets up removal procedures. However, of particular interest is the "notice immunity" provision contained in subsection 1321 (b)(5). This section grants "use immunity" to a violator who reports his spill to the "appropriate Governmental agency". In other words, this provision precludes the Government from using any information contained in the (b)(5) notification against the self-reporter in any subsequent *criminal* case.<sup>17</sup> Clearly, this section of the statute was enacted to encourage violators to report accidental hazardous discharges.

Thus, the purpose of the statute appears to be twofold: 1) to pre-

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10. Chief Justice Warren stated in *Trop v. Dulles*, 356 U.S. at 94, "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!"

11. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168.

12. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972), *Helvering v. Mitchell*, 303 U.S. 391 (1938).

13. 33 U.S.C. § 1251(a) (1982).

14. 33 U.S.C. § 1321 (b)(1) (1982).

15. *United States v. Le Beouf Bros. Towing Co., Inc.*, 537 F.2d 148, 152 (5th Cir 1976); *United States v. Atlantic Richfield Co.*, 429 F. Supp. 830, 838 (E.D. Pa. 1977)

16. 33 U.S.C. § 1321 (c) (1982).

17. Information contained in the notification may be used against the self-reporter in a subsequent criminal proceeding if the Government can establish that they derived this information from a source completely independent of the notification. *Kastigar v. United States*, 406 U.S. 441 (1972).

vent the spillage of hazardous substances into navigable waters, and (2) to minimize damage in the event spillage occurs. Since the mandatory fine discourages disclosure of spills, thereby frustrating the second purpose of the statute, this fine should not be applied whenever its purpose is outweighed by the Government's need for receiving notice of the spill. The *Mendoza-Martinez* analysis should reveal whether the (b)(6) sanction is for remedial or punitive purposes.

## B. The *Mendoza-Martinez* Test

The traditional judicial test used to determine whether a penalty is "civil" or "criminal" in nature is "whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question."<sup>18</sup> Some of the more pertinent criteria employed in this evaluation were set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*.

[I] Whether the sanction involves an affirmative disability or restraint, [II] whether it has historically been regarded as punishment, [III] whether it comes into play only on a finding of scienter, [IV] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [V] whether the behavior to which it applies is already a crime, [VI] whether an alternative purpose to which it may rationally be connected is assignable for it, and [VII] whether it appears excessive in relation to the alternative purpose assigned.<sup>19</sup>

### 1. The *Ward* Decision

In *Ward v. Coleman*<sup>20</sup> the Tenth Circuit found that application of the *Mendoza-Martinez* test revealed that a (b)(6) penalty was actually criminal in nature and that therefore the Fifth Amendment privilege precluded the assessment of a (b)(6) fine premised on information contained in the self-reporting requirements of (b)(5).<sup>21</sup> The Tenth Circuit based its holding on the fact that four out of the seven *Mendoza-Martinez* factors favored construing the penalty as

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18. *Telephone News Sys.*, 220 F. Supp. at 630; 372 U.S. at 164-65, 167.

19. *Mendoza-Martinez*, 372 U.S. at 168-69.

20. *Ward v. Coleman*, 598 F.2d 1187 (10th Cir. 1979).

21. *Ward* was the owner of a drill site which accidentally leaked oil into Boggie Creek, a tributary of the Arkansas River. After discovering the spill, he immediately began cleanup operations. He also filed a report of the spill with the EPA pursuant to § 1321 (b)(5). The EPA forwarded this report to the Coast Guard which used the information contained in it to assess him with a monetary fine. *Id.* at 1188, 1189.

criminal in character. The Supreme Court reversed.<sup>22</sup>

Writing for the majority,<sup>23</sup> Justice Rehnquist's opinion virtually disregarded the importance of the *Mendoza-Martinez* analysis. Nowhere did he even attempt to rebut the Tenth Circuit finding that factors III, IV, and VII of the test support a judicial construction of the (b) (6) penalty as criminal in nature. Although he admitted factor V seems to point in this direction,<sup>24</sup> he boldly concluded that the *Mendoza-Martinez* test was not sufficient to render unconstitutional the congressional classification of the penalty established in (b)(6) as civil.<sup>25</sup> Such an analysis seriously undermines the usefulness of the *Mendoza-Martinez* test.

In effect, Justice Rehnquist's opinion allowed a Congressional label to predetermine the applicability of constitutional safeguards. Understandably, Justice Blackmun, joined by Justice Marshall, felt obligated to write a concurring opinion in order to discuss the application of the *Mendoza-Martinez* factors.

## 2. Application of the *Mendoza-Martinez* Test

The crux of Justice Blackmun's determination that (b)(6) is "civil" in nature lies in his application of the sixth *Mendoza-Martinez* factor.<sup>26</sup> That factor is "whether an alternative punishment may rationally be ascribed to the sanction."<sup>27</sup> Justice Blackmun stated, "The fact that collected assessments are deposited in a revolving fund used to defray the expense of cleanup operations is a strong indication of the pervasively civil and compensatory thrust of the statutory scheme."<sup>28</sup> However, Justice Blackmun's conclusion is seriously undermined when one considers that money collected pursuant to the (b)(6) penalty is not used to clean up contamination caused by the violator.<sup>29</sup> Rather, assets in the re-

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22. *United States v. Ward*, 448 U.S. 241 (1980).

23. The decision was 8 to 1, Justice Stevens dissenting. Justice Blackmun, with whom Justice Marshall joined, wrote a concurring opinion.

24. *Ward*, 448 U.S. at 250.

25. *Id.* at 250, 251.

26. Justice Blackmun thought that the second factor, whether the sanction has historically been regarded as punishment, also supported a "civil" designation because "monetary assessments are traditionally a form of civil remedy". *Id.* at 256. However, fines have been applied pursuant to criminal statutes as well. See *United States v. Futura, Inc.*, 339 F. Supp. 162 (N.D. Fla. 1972); *United States v. Krapf*, 180 F. Supp. 886, (D.N.J. 1960); *aff'd*, 285 F.2d 647 (3rd Cir. 1961).

27. *Mendoza-Martinez*, 372 U.S. at 168-169.

28. *Ward*, 448 U.S. 256.

29. This is because an owner or operator is already liable for cleanup costs. 33 U.S.C. § 1321 (f) (1982). If the discharge is "nonremovable", the owner or operator is liable for liquidated damages. 33 U.S.C. § 1321(b)(2)(B)(i) (1982). Payment of these

volving fund are used to clean up damage caused by those who do not report their spills and who do not get caught. Furthermore, the amount of money a violator is fined has little rational or economic relationship to the extent of environmental damage caused.<sup>30</sup> Thus the operation of the statutory scheme indicates that the revolving fund is devoid of any compensatory element.

The third, fourth, fifth, and seventh *Mendoza-Martinez* factors all support the notion that the (b)(6) penalty is a "criminal" one. The third factor is "whether the sanction is activated only on a finding of scienter."<sup>31</sup> At first glance, this portion of the test appears to indicate that the (b) (6) sanction is civil in nature because it is imposed without regard to fault; however, "the degree of culpability" is a consideration used in determining the amount of the fine.<sup>32</sup>

Nevertheless, Justice Blackmun assigned little weight to the role of scienter. He noted, "[Scienter] is only one of many factors relevant to determination of an assessment under [the (b)(6) sanction]."<sup>33</sup> While this may be true, some of the other factors used to fix the penalty are indicative of scienter, i.e., the degree of negligence, the prior record of the responsible party, and the amount of hazardous material discharged.<sup>34</sup>

The Tenth Circuit stated that the fourth *Mendoza-Martinez* factor, "whether the statute promotes the traditional aims of punishment-retribution and deterrence"<sup>35</sup> "weighs heavily"<sup>36</sup> in favor of finding the statute criminal in nature. The court said:

[T]he fact that a party acted in good faith, could not have avoided the discharge, and, once it occurred, undertook cleanup measures immediately is to be given no consideration in relation to the imposition or amount of a civil penalty.<sup>37</sup>

The rationale persuaded Justice Stevens who said in his dissenting opinion that the (b)(6) penalty was "clearly aimed at exacting retribution for causing the spill."<sup>38</sup> Consequently, Justice Stevens concluded that the (b)(6) sanction was criminal in character and

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costs does not relieve the owner or operator of liability for civil penalties under 33 U.S.C. § 1321(b)(6) (Supp. 1983).

30. See *supra* note 4 at 102.

31. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168.

32. See *supra* note 4 at 102.

33. *United States v. Ward*, 448 U.S. at 256.

34. See Commandant Instruction 5922.11A.

35. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168.

36. *Ward v. Coleman*, 598 F.2d at 1193.

37. *Id.*

38. *United States v. Ward*, 448 U.S. 258.

that its imposition, premised on a (b)(5) notification, violates the Fifth Amendment.<sup>39</sup>

One of the most disturbing things about the decision in *United States v. Ward* is that neither Justice Rehnquist nor Justice Blackmun ever attempted to rebut this argument. Clearly, a monetary penalty not calculated to reimburse the Government for the cost of cleaning up the spill is not compensatory in nature.

The fifth *Mendoza-Martinez* factor, "whether the behavior to which [the sanction] applies is already a crime",<sup>40</sup> is further evidence that the (b)(6) penalty is criminal in character. The Rivers and Harbors Act of 1899<sup>41</sup> makes the discharge of any "refuse matter" into navigable waters of the United States a strict liability<sup>42</sup> crime. In *United States v. White*,<sup>43</sup> the owner of a tank farm was held criminally liable under this act when he accidentally caused oil to seep into the Boston Harbor. The court stated that no mens rea was required to sustain the conviction<sup>44</sup> and that the defendant's immediate efforts to clean up the contamination were irrelevant to guilt.<sup>45</sup> Since the (b)(6) sanction punishes behavior which has been historically regarded as a crime, it appears, therefore, that the fifth *Mendoza-Martinez* factor also supports a judicial construction favoring the (b)(6) penalty as criminal.

Only Justice Rehnquist addressed himself to the task of rebutting this proposition. He correctly stated that "Congress may impose both a criminal and a civil sanction for the same act or omission,"<sup>46</sup> but this statement only denigrates the use of the fifth factor of the test. Such criticism cannot stand because the test is widely supported.<sup>47</sup>

However, Justice Rehnquist felt "that 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

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39. *Id.* at 260.

40. *Kennedy v. Mendoza Martinez*, 372 U.S. at 168.

41. 33 U.S.C. § 407 (1982).

42. See *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974); *United States v. American Cyanamid Co.*, 354 F. Supp. 1202 (S.D. N.Y. 1973), *aff'd*, 480 F.2d 1132 (2d Cir. 1973); *United States v. U.S. Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970).

43. *United States v. White Fuel Corp.*, 498 F.2d 619 (L.A. Mass. 1974).

44. *Id.* at 622.

45. *Id.* at 621.

46. *United States v. Ward*, 448 U.S. at 250.

47. See, e.g., *Telephone News Sys., Inc., v. Ill. Bell Tel. Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964). See also *United States v. Futura, Inc.*, 339 F. Supp. 162 (N.D. Fla. 1972).



fifth *Mendoza-Martinez* criterion in this case."<sup>48</sup> The persuasive appeal of this argument is lost when one considers that the test mandates an analysis of whether the courts have historically punished a certain act as a crime which determines whether that behavior is criminal in nature. Since the courts have done this,<sup>49</sup> it is clear that the behavior to which the (b)(6) sanction applies is already a crime.

Finally, the seventh factor, "Whether [the sanction] appears excessive in relation to the alternative purpose assigned" also indicates that the (b)(6) penalty is punitive in nature. Fines are assessed even if the discharge occurred without fault,<sup>50</sup> and the operator cleans it up;<sup>51</sup> therefore, the penalty may be excessive in view of the factors used to derive it.

Justice Blackmun said, "[i]n the absence of evidence that excessive penalties have actually been assessed, I would be inclined to regard their likelihood as remote."<sup>52</sup> Yet this reason alone is not sufficient to support a finding that the (b)(6) sanction is civil in nature.

### III. CONCLUSION

It is reasonable to conclude that the Supreme Court did not base its decision on an objective application of the *Mendoza-Martinez* test, but rather decided the case the way they did on public policy grounds. The Supreme Court simply did not want to waive fines against those individuals responsible for causing an environmental accident.

Any penalty, including responsibility for cleanup costs, which has the effect of deterring accidents from being reported should be viewed as excessive and impermissible. Once an accident occurs, public policy should require cleanup as quickly as possible. Punishing the individual for having the accident defeats this goal because the imposition of mandatory sanctions only encourages violators not to report their accidents. Consequently, damage accumulates until it is impossible to clean up.

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48. *United States v. Ward*, 448 U.S. at 250.

49. *See United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974); *La Merced*, *United States v. Alaska Southern Packing Co.*, 84 F.2d 444 (9th Cir. 1936) (oil discharged from vessel into navigable water of the U.S. was 'refuse matter' within the meaning of the Rivers and Harbors Act).

50. *See supra* note 5 at 102.

51. *See supra* note 28 at 105.

52. *United States v. Ward*, 448 U.S. at 257.

It has been argued that punishment deters accidents from occurring in the first place. This is not true. No company has an "accident" on purpose. Of course those who purposefully discharge hazardous substances should continue to be punished, but an absolute liability standard causes much destruction to our environment.

Some type of government subsidy should be set aside to clean up damage caused by those individuals who discharge *accidentally*. Perhaps a tax on all companies involved in handling hazardous materials would be appropriate. As one bulldozer excavation worker told me, "Every company I know has accidents and *nobody* calls the EPA." The current structure is not working. It must be changed.

*Ron Unger*

