United States v. Ward: FWPCA Civil Penalty Prosecution, Not a Criminal Case For the Fifth Amendment

I. INTRODUCTION

The Federal Water Pollution Control Act ("FWPCA")[1] is a comprehensive statutory scheme designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] As part of the overall plan, section 1321[3] regulates the discharge of oil and other environmentally harmful substances into navigable waters and sets out a scheme of liability for cleanup costs resulting from an unlawful discharge.[4]

Section 1321(b)(6)[5] has been the subject of considerable litigation as the lower courts have awaited an authoritative resolution to the question of whether the penalty involved is civil or criminal.[6] The

1. 33 U.S.C. §§ 1251-1376 (1976 & Supp. I 1977 & Supp. II 1978). The first federal statute specifically dealing with oil pollution was the Oil Pollution Act of 1924, ch. 316, 43 Stat. 604 (repealed 1970). Subsequently, Congress passed the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91, which was amended by the FWPCA. The FWPCA underwent minor modification in the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. The cases central to this comment arose under the statute as it existed prior to the 1977 amendments.

2. 33 U.S.C. § 1251(a) (1976). For a concise legislative history, *see* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3731-33; Ipsen & Raisch, *Enforcement Under the Federal Water Pollution Control Act Amendments of 1972*, 9 LAND & WATER L. REV. 369 (1974). *See generally* Forster, *Civil Liability of Shipowners for Oil Pollution*, 1973 J. BUS. L. 23; Smith, *Highlights of the Federal Water Pollution Control Act Amendments of 1972: Effective Controls at Last?*, 39 BROOKLYN L. REV. 403 (1972); Comment, *Deficiencies in the Regulatory Scheme of the Federal Water Pollution Control Act Amendments of 1972*, 19 ST. LOUIS U. L.J. 208 (1974).

3. 33 U.S.C. § 1321 (1976 & Supp. I 1977 & Supp. II 1978).

4. At the same time, the states may enact their own laws imposing liabilities for damages and cleanup costs without necessarily running afoul of the " 'needs of a uniform federal maritime law.' " Askew v. Am. Waterways Operators, Inc., 411 U.S. 325, 338 (1973) (quoting Romero v. Int'l Terminal Co., 358 U.S. 354, 373 (1959)).

5. 33 U.S.C. § 1321(b)(6) (1976 & Supp. I 1977 & Supp. II 1978).

6. United States v. Allied Towing Corp., 578 F.2d 978 (4th Cir. 1978); United

imposition of such a label is significant, as a designation of a criminal penalty implies specific constitutional safeguards not afforded to a civil defendant.[7] Section 1321(b)(5)[8] requires the owner or operator of any vessel or facility which has spilled oil to report the spill immediately to an appropriate agency of the United States government. Failure to report such a spill is a criminal offense punishable by a fine of up to $10,000 and/or imprisonment for one year.[9] The section further provides that: "[n]otification 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."[10] Section 1321(b)(6) states, in part, that "any owner, operator, or person in charge" of a vessel or facility from which a polluting substance is discharged shall be assessed a *civil* penalty of not more than $5,000 for each offense.[11]

Although Congress clearly specified that the immunity from prosecution based on information derived from the mandatory report extended only to "criminal case[s],"[12] litigants have raised the question of whether the "civil" penalty imposed by section 1321 should be more properly characterized as "criminal." It seems clear that if the penalty specified in section 1321(b)(6) may be characterized as criminal, and if the self-disclosure mandated by section

States v. Atlantic Richfield Co., 429 F. Supp. 830 (E.D. Pa. 1977), *aff'd mem.*, 573 F.2d 1303 (3d Cir. 1978); United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975); United States v. W.B. Enterprises, Inc., 378 F. Supp. 420 (S.D.N.Y. 1974); United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977).

7. United States v. General Motors Corp., 403 F. Supp. 1151, 1157 (D. Conn. 1975).

8. 33 U.S.C. § 1321(b)(5) (1976 & Supp. I 1977 & Supp. II 1978).

9. *Id.*

10. *Id.*

11. 33 U.S.C. § 1321(b)(6) (1976 & Supp. I 1977 & Supp. II 1978).

12. 33 U.S.C. § 1321(b)(5) (1976 & Supp. I 1977 & Supp. II 1978). This provision has been interpreted as providing "use" immunity, which forbids the government from using the evidence derived from notification of a spill against a notifying party in a subsequent criminal case. *See* United States v. Republic Steel Corp., 491 F.2d 315, 318 (6th Cir. 1974); United States v. General Am. Transp. Corp., 367 F. Supp. 1284, 1290 (D.N.J. 1973); United States v. United States Steel Corp., 4 E.R.C. 1641 (W.D. Pa. 1972). The statutory immunity is extended only when the defendant has given immediate notice of an oil spill. Thus, in United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349, 350 (W.D. Ky. 1973), the court found that, although the defendant had given notice, it had not given immediate notice and concluded that the defendant was not entitled to the statutory immunity.

1321(b)(5), or evidence derived therefrom, furnishes the basis for imposition of the penalty, then the Act mandates a violation of the constitutional privilege against self-incrimination. This formidable safeguard protects the accused when confronted with the traditionally onerous criminal sanction of imprisonment.[13] Hence, the proper legal characterization of that penalty is of primary importance.

The use of fines labelled as civil penalties has gained increasing attention recently as a means of substituting streamlined administrative proceedings for the more cumbersome judicial proceedings which typify the criminal process.[14] Congress may provide for civil proceedings for the imposition and collection of penalties which are civil or remedial in nature, rather than punitive, and prescribe that administrative agencies make the determination of facts forming the basis for such a civil penalty.[15] However, the constitutional rights of individuals should not be compromised for the benefit of streamlined implementation.

Against this constitutional challenge, the Supreme Court decided the case of *United States v. Ward*,[16] resolving the issue contested among the lower courts as to whether the "civil" penalty of section 1321 is actually civil. The Court reversed a decision of the United States Court of Appeals for the Tenth Circuit[17] and held that the use of the oil spill report required under the FWPCA to support assessment of a "civil penalty" for oil spills does not violate the fifth

13. Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 383 (1976).

14. The Administrative Conference of the United States has suggested that increased use of civil penalties may lead to greater administrative efficiency and in some cases to a better rendition of due process, since fewer cases will suffer from delay and forced settlement than in the criminal process. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *Recommendation 72-6: Civil Money Penalties as a Sanction*, in 2 RECOMMENDATIONS AND REPORTS 67 (1972). The recommendation was based on an evaluation of civil penalties by Prof. Harvey J. Goldschmid of Columbia University School of Law. An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies (Nov. 17, 1972), *reprinted in* 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 896 (1972).

15. Helvering v. Mitchell, 303 U.S. 391 (1938); Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909); Passavant v. United States, 148 U.S. 214 (1893); Olshausen v. Commissioner, 273 F.2d 23, 27 (9th Cir. 1959), *cert. denied*, 363 U.S. 820 (1960); United States v. General Motors Corp., 403 F. Supp. 1151, 1157-58 (D. Conn. 1975).

16. 448 U.S. 242 (1980).

17. Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* United States v. Ward, 448 U.S. 242 (1980).

amendment's protection against self-incrimination in criminal cases.[18] In addition, the Court held that the civil penalty of section 1321 could not be viewed as "quasi-criminal," in other words, not so criminal in nature as to call for an application of the fifth amendment's self-incrimination privileges.[19]

This comment examines the history of challenges to the FWPCA's civil penalty provision, explains the constitutional ramifications of such a legislatively imposed label, and concludes that the Supreme Court's blind adherance to such a label without an investigation of the underlying constitutional rights which may be affected is a complete abdication of the judicial role of the Court. The Supreme Court's decision in *Ward* has settled the long disputed question of the status of the FWPCA's penalty provision, yet the decision does not adequately provide the in-depth analysis which the issue warrants. Moreover, the Supreme Court in *Ward* failed to provide much needed guidelines for future challenges to congressional labeling of penalty provisions.[20]

II. THE LEGISLATIVE HISTORY

A major obstacle in the interpretation of the character of the penalty provision involved is the fact that there is a lack of coherent legislative history. The congressional debates prior to the passage of the FWPCA Amendments of 1972[21] are instructive, insofar as the record shows approval of retention of the "civil penalty" provision of the 1970 Act.[22] In particular, speakers commended the Coast Guard[23] policy relating to the enforcement of that provision, as set forth in Commandant Instruction 5922.11.[24]

18. 448 U.S. at 250-51.

19. *Id.* at 255.

20. In determining the applicability of constitutional safeguards in proceedings involving civil sanctions, the Supreme Court has treated particular laws as criminal in some contexts but civil in others. For example, in Boyd v. United States, 116 U.S. 616 (1886), the Court stated that forfeiture proceedings are sufficiently "criminal" that the property owner can claim the protection of the fifth amendment's self-incrimination clause. *But cf.* One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972) (the double jeopardy clause of the fifth ammendment did not apply in forfeiture cases). *See* United States v. Zucker, 161 U.S. 475 (1896) (criminal trial safeguards of the sixth amendment did not apply to forfeiture cases).

21. Pub. L. No. 92-500, 86 Stat. 816.

22. 118 CONG. REC. 33,757-58 (1972).

23. President Nixon designated the Coast Guard and the Environmental Protection Agency to assess section 1321(b)(6) penalties. Exec. Order No. 11,375, 38 Fed. Reg. 21,243 (1973).

24. United States Coast Guard, Commandant Instruction 5922.11 (Sept. 22, 1972)

In the instruction, it is emphasized that imposition of the penalty is regarded as mandatory and that the penalty will be "at or near the maximum unless a lesser penalty is clearly justified by one of the factors listed in the statute,"[25] among which is the gravity of the violation.[26] To further clarify that phrase, the Commandant's instruction indicates that factors in assessing the gravity of the violation should be the "degree of culpability" associated with it, the prior record of the responsible party, and the amount of the discharge.[27] Not to be considered in determining the amount of the penalty are any decisions by federal or state authorities to bring criminal charges,[28] or any cleanup efforts by the violator, the assessed penalty being "entirely unrelated" to the subsequent removal responsibility.[29]

Upon first glance, the overall tone of the Commandant's instruction suggests a punitive intent. The use of words such as "culpability," traditionally associated with criminal law, as well as consideration of offenders' prior records and the proviso that removal efforts should have no bearing on the amount of the penalty, clearly do not indicate a remedial tone. However, too much importance should not be placed on congressional commendation of a separate agency's directive. One cannot label the statute a criminal sanction merely because of this one attribute. Legislative history requires a more authoritative pronouncement by Congress of the character of the penalty provision. It is difficult to make a firm determination that Congress intended the penalty to be punitive, since the statute is ambiguous in its wording and lacks historical antecedents clarifying its purpose.

[hereinafter cited as Instruction], *reprinted in* United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558, app. (1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977); 118 CONG. REC. 33,757-58 (1972).

25. Instruction, *supra* note 24.

26. 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. . . .

33 U.S.C. § 1321(b)(6) (1976 & Supp. I 1977 & Supp. II 1978).

27. Instruction, *supra* note 24.

28. The Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401, 403, 404, 406, 407, 408, 409, 411-15, 418, 502, 549, 686, 687 (1976), prohibits the discharge of refuse into navigable waters of the United States, and provides for fines and/or imprisonment. *Id.* § 411. United States v. Standard Oil Co., 384 U.S. 224 (1966).

29. Instruction, *supra* note 24.

III. THE CIVIL/CRIMINAL DISTINCTION IN FWPCA LITIGATION

If the legislative history indicating the character of the FWPCA penalty provision is ambiguous, it can be expected that the decisions of the federal courts will not be uniform. Indeed, a number of cases have refused to apply criminal procedural limitations to the penalty provision, which is arguably punitive in character, while other courts have found the provision arguably "quasi-criminal." An examination of those cases is therefore warranted.

United States v. W.B. Enterprises, Inc.,[30] involved monetary penalties imposed for the illegal seepage of twenty-five to thirty gallons of oil into New York City's East River from a barge loading oil at a utility plant. The defendant barge owner, an oil company, challenged the civil penalty, pointing out that the company had completely cleaned up the spill, thereby preventing any harmful effects for which compensatory damages would normally be awarded. Any penalty assessed after the damage had been rectified, the defendant argued, could only be viewed as punitive rather than remedial.[31] However, the district court adhered to a liquidated damages theory of the penalty, rejecting the claim that it was of a criminal nature.[32] The court determined that the penalty was established as compensation for harm done to the environment, even in a case in which the party responsible for the discharge completely cleaned up the spill.[33] The court stated, "the Secretary of the Interior had determined that environmental damages result from a discharge of oil. The penalty assessed in this case was clearly a civil, remedial penalty designed to compensate the government for this harm."[34] Thus, the court saw the civil penalty as compensation to the government and society for the environmental harm caused by the illegal discharge.[35]

Within the year, another court addressed the same issue but reached a different result. The successful challenge to the FWPCA civil penalty came in *United States v. LeBeouf Brothers Towing*

30. 378 F. Supp. 420 (S.D.N.Y. 1974).
31. *Id.* at 422.
32. *Id.*
33. *Id.*
34. 378 F. Supp. at 422-23.
35. *Contra*, Ward v. Coleman, 598 F.2d 1181, 1194 (10th Cir. 1979), *rev'd*, 448 U.S. 242 (1980) (penalty could not be regarded as compensation for environmental harm because the factors involved in determining the amount of the penalty are not reasonably related to the extent of the damages to the environment).

Co.,[36] decided in the United States District Court for the Eastern District of Louisiana. In *LeBeouf*, a quantity of gasoline was spilled from one of defendant's boats. In compliance with the law,[37] defendant notified the Coast Guard of the spill. Subsequently, notice was given to the defendant that a penalty of $3,000, later compromised to $2,500, would be assessed. Relying heavily on the mandatory nature of the penalty provision, the *LeBeouf* court declared that its purpose was criminal and that the self-disclosure provision for oil spills was violative of the fifth amendment.[38]

The court noted the difficulty in making civil/criminal distinctions, and the lack of persuasive legislative history[39] on the Water Quality Improvement Act of 1970 ("WQIA"),[40] the predecessor to the FWPCA.[41] As there was no clear indicator of legislative intent, the court found it necessary to invoke the guidelines set by the Supreme Court in *Kennedy v. Mendoza-Martinez*[42] for judicial determination of the civil or criminal nature of a statutory sanction.[43] Among the *Mendoza-Martinez* factors are:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of

36. 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977).

37. Since the spill occurred prior to the effective date of the 1972 amendments, the applicable law was the Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91. Thus, the court referred throughout the opinion to "paragraph 4" and "paragraph 5," meaning 33 U.S.C. §§ 1161(b)(4), 1161(b)(5) (1970). These provisions are identical to 33 U.S.C. §§ 1321(b)(5), 1321(b)(6) (1976 & Supp. I 1977 & Supp. II 1978), respectively, save for the deletion from the latter of the word "knowingly" as a condition precedent to imposition of the civil penalty, and a reduction of the maximum fine from $10,000 to $5,000. The court did not stress these changes, 377 F. Supp. at 559 n.1, nor do they appear to have any real significance with regard to the legality of the penalty.

38. *Id.* at 568. The *LeBeouf* court did not address the question whether a corporate defendant is entitled to the notice immunity. However, the defendant is a "person in charge" entitled to the immunity. 33 U.S.C. § 1321(b)(6) (1976 & Supp. I 1977 & Supp. II 1978).

39. *See* 115 CONG. REC. 9,015-52 (1969).

40. Pub. L. No. 91-224, 84 Stat. 91.

41. *See* note 1 *supra*.

42. 372 U.S. 144 (1963).

43. Courts have traditionally accepted the *Mendoza-Martinez* test as the proper approach to deciding whether particular penalties are civil or criminal in nature. *See, e.g.*, Telephone News-Sys., Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd mem.*, 376 U.S. 782 (1964). *See also* United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972).

> punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[44]

Without applying each of these tests to the facts, the *LeBeouf* court declared that in the aggregate they clearly indicated the punitive nature of the FWPCA penalty.[45] It was unthinkable, the court reasoned, to allow the discharger to report the spill and thereby immunize itself from prosecution, but leave itself open to "civil" assessment. "This result," the court stated, "presents a classical Catch-22 situation. . . ."[46]

The court further observed that the compulsion on the discharger to notify the government must lead to frustration of the statute's purpose. Offenders would be tempted to withhold reports of spills when the risk of detection was small, while conscientious operators would face the certainty of a monetary penalty. Therefore, maximum detection of spills would not be achieved.[47] Moreover, the court concluded that the mandatory nature of the penalty was inconsistent with the remedial purpose of the Act, because the sanction "exists mainly, if not solely, to punish those who fail to abide by the regulatory provisions of the Act, and, not conversely, as an impetus to pragmatically and justly regulate users and handlers of petroleum. This section is not overshadowed by the general remedial tenor of the Act."[48]

The court characterized the interplay between the mandatory self-disclosure provision and the penalty provision as a "backdoor procedure" for circumventing the statutory guarantees of immunity, constituting sui generis legislation, since no other statutes have been noted to couple such provisions in this manner.[49] The district court also stated that this "civil" penalty is at least quasi-criminal in form, as the penalty is "incurred by the commission of an offense against the law,"[50] a violation of the River and Harbors Appropriation Act of 1899.[51]

44. 372 U.S. at 168-69.
45. 377 F. Supp. at 563.
46. *Id.*
47. *Id.* at 564.
48. *Id.* at 565.
49. *Id.* at 565, 566.
50. *Id.* at 566.
51. 33 U.S.C. §§ 407, 411 (1976).

On appeal, the United States Court of Appeals for the Fifth Circuit reversed,[52] finding only that the penalty had been duly and thus lawfully imposed. The court chose not to concern itself with the nature of the monetary penalty, because it found neither constitutional issues nor ambiguity in the language of the statute.[53] It also held that a discharger did not, by reporting an oil spill, obtain immunity with respect to the "civil" penalty mandated by the WQIA.

The decision has been described as "cryptic,"[54] perhaps because it rests so importantly on what the court did *not* find. The Fifth Circuit reasoned that no constitutional right was involved, since the fifth amendment privilege against self-incrimination does not extend to corporations.[55] Thus, the court found that the issue was purely one of statutory wording.[56] In the absence of "the most compelling demonstration of a contrary legislative intent,"[57] the court saw no reason to question the "civil label." The court did, however, leave a seed of hope for individual dischargers by stating, "[i]f appellees were individuals, then we would of necessity examine the nature of the so-called 'civil penalties'. . . ."[58]

IV. United States v. Ward

After *W.B. Enterprises* and *LeBeouf*, a number of corporate dischargers tried and failed to challenge the civil classification of the FWPCA penalties.[59] The constitutional claim of an individual dis-

52. United States v. LeBeouf Bros. Towing Co., Inc., 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977).

53. *Id.* at 151. The court dismissed any possibility of the implication of a constitutional right because the fifth amendment privilege against self-incrimination did not extend to corporations. *See* California Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974); George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968). The court also rejected any due process, fundamental fairness argument, finding that Congress has not "unfairly deprived" corporate entities of a right afforded to individuals.

54. Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U. L. REV. 576, 602 (1980).

55. George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); Wilson v. United States, 221 U.S. 361, 382-85 (1911). *See generally* H. Henn, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 80 (2d ed. 1970).

56. *See* Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1937).

57. 537 F.2d at 152.

58. 537 F.2d at 151.

59. United States v. Allied Towing Corp., 578 F.2d 978 (4th Cir. 1978); United States v. Atlantic Richfield Co., 429 F. Supp. 830 (E.D. Pa. 1977), *aff'd mem.*, 573 F.2d 1303 (3d Cir. 1978). For cases prior to *W.B. Enterprises* and *LeBeouf*, *see*

charger or "person in charge,"[60] however, was not addressed by the courts until *United States v. Ward*.[61]

A. *The Supreme Court Opinion*

In March, 1975, oil stored in a retention pit of an Oklahoma drilling facility leased by L.O. Ward, owner and operator of L.O. Ward Oil and Gas Operations, overflowed into Boggie Creek, a distant tributary of the Arkansas River.[62] Upon discovering the discharge, Ward immediately began cleanup operations in the area.[63] Pursuant to section 1321(b)(5), Ward submitted a report of the spill to the regional office of the Environmental Protection Agency ("EPA").[64] The EPA forwarded the report to the Coast Guard. Following notice and opportunity to be heard, the Coast Guard assessed a civil penalty against Ward in the amount of $500.[65] Ward appealed the administrative ruling of the Coast Guard, contending the reporting and enforcement scheme violated his fifth amendment privilege against compulsory self-incrimination.[66] The appeal was denied.[67]

United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975).

60. Although the FWPCA provides a definition for the word "person," 33 U.S.C. § 1321(a)(7) (1976), no definition is given for the term "person in charge." As a result, the question has arisen whether a corporation, as owner of a vessel or facility, may be considered a "person in charge" and thereby avail itself of the statutory immunity to criminal prosecution. United States v. Republic Steel Corp., 491 F.2d 315 (6th Cir. 1974); United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972). Note, *Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases*, 55 B.U. L. REV. 112 (1975); Note, *Corporate Immunity from Prosecution Under the Federal Water Pollution Control Act*, 51 TEX. L. REV. 155 (1972).

61. 448 U.S. 242 (1980).

62. The Arkansas River is a navigable river. Therefore, Boggie Creek, as its tributary, is also a navigable waterway of the United States for purposes of the FWPCA. 33 U.S.C. § 1362(7) (1976). *See* United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

63. Respondent's Brief at 2, United States v. Ward, 448 U.S. 242 (1980). Indeed, the district court after jury trial reduced the civil penalty from $500 to $250 because of Ward's prompt and effective cleanup methods. 448 U.S. at 247.

64. 448 U.S. at 246. Ward notified the EPA eight days after one of his employees was informed of the discharge by an official of the Oklahoma Department of Health. There was some question as to whether this constituted "immediate" notification, as section 1321(b)(5) requires. *See* United States v. Kennecott Copper Corp., 523 F.2d 821 (9th Cir. 1975); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

65. Petitioner's Brief for Certiorari at 9, United States v. Ward, 448 U.S. 242 (1980).

66. *Id.* at 9-10.

67. *Id.* at 10.

In April, 1976, Ward filed suit in the United States District Court for the Western District of Oklahoma to enjoin enforcement of sections 1321(b)(5) and 1321(b)(6) and to recover the administratively assessed penalty. The United States filed a separate action to collect the unpaid penalty, and the court consolidated the two cases for trial. As a matter of statutory construction, the district court found section 1321(b)(6) to be unambiguous and the congressional intent to impose a civil penalty clear from the language of the statute.[68]

The United States Court of Appeals for the Tenth Circuit reversed the district court in *Ward v. Coleman*,[69] answering the question of "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."[70] The court held that the former was the legislative aim, and that the civil penalty proceeding under section 1321(b)(6) was a "criminal case" within the meaning of the self-incrimination clause of the fifth amendment.[71]

The Supreme Court reversed, holding, in an eight-to-one decision,[72] that the penalty imposed by section 1321(b)(6) was civil and did not trigger the protections afforded by the Constitution to a criminal defendant. The Court stated further that the proceeding in which the penalty was imposed was not "quasi-criminal," so as to implicate the fifth amendment's protections.[73] Unfortunately, the majority opinion barely touched the constitutional issues involved in the case.[74] The opinion quickly dismissed Ward's argument, in an effort both to salvage the civil enforcement mechanism of FWPCA and to limit an ancient ruling of the Court.[75]

To determine whether a particular statutorily defined penalty is

68. Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976), *rev'd*, 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* United States v. Ward, 448 U.S. 242 (1980).

69. 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* United States v. Ward, 448 U.S. 242 (1980).

70. *Id.* at 1190.

71. *Id.* at 1194.

72. Justice Rehnquist delivered the majority opinion. Justice Stevens dissented.

73. 448 U.S. at 251-55.

74. The defendant, an individual in this case, had raised the issue of the fifth amendment privilege against self-incrimination, forcing the inquiry beyond the statutory language that must be undertaken when a constitutional protection is implicated by the imposition of a penalty. *See* United States v. LeBeouf Bros. Towing Co., Inc., 537 F.2d 149, 151 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977). Ward v. Coleman, 423 F. Supp. 1352, 1355-57 (W.D. Okla. 1976), *rev'd*, 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* United States v. Ward, 448 U.S. 242 (1980). *See also* United States v. J.B. Williams Co., 498 F.2d 414, 421 (2d Cir. 1974).

75. Boyd v. United States, 116 U.S. 616 (1886).

civil or criminal, the Supreme Court will analyze the structure of the provision in question.[76] The Court's inquiry follows two lines. First, the Court investigates whether Congress, in establishing the penalty scheme, indicated either expressly or implicitly a preference for one label or the other. Second, if Congress has labelled a penalty civil, the Court asks whether it has actually established a statutory scheme so punitive either in purpose or effect as to ignore that label.[77]

The *Ward* Court began its inquiry into congressional intent by merely inferring an intent to penalize civilly from the label "civil" which Congress had provided in section 1321(b)(6).[78] This deference to legislative labeling is nothing less than an abdication of the judicial role of the Court. Although such an approach appears to be an enlightened attempt to carry out congressional purpose through statutory interpretation, it avoids the substantive question of whether the legislature has exceeded its constitutional authority. No amount of congressional labeling should determine that question.[79] At this point, the Court should have investigated the effects of such a label on rights of the accused. Instead, the Court advanced to the second inquiry to consider whether Congress, despite its manifest intention to establish a civil penalty, nevertheless provided for a criminal penalty.

The Supreme Court has recognized the difficulty of determining whether a penalty is civil or criminal in nature, describing this

76. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972); Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

77. Congressional labeling of a statutory penalty as civil or criminal has been found to be not dispositive. In Trop v. Dulles, 356 U.S. 86, 94-95 (1958), the Court addressed the question of whether the eighth amendment's "cruel and unusual punishment" limitations applied to a statute which would deprive the petitioner of his citizenship and concluded that the legislature's view of the statute as nonpenal was not talismanic. *But cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (the seven *Mendoza-Martinez* factors need not be addressed when there is conclusive evidence that Congress intended the statute in question to be punitive).

78. 448 U.S. at 249.

79. Reliance on legislative history has its risks because much legislative history is not made by the Congress as a whole but by individual congressmen or small groups interested in particular legislation.

> [I]t is questionable whether the penal or regulatory character of an act should turn on the color it acquires as a result of congressional debate. A decision based on legislative labels can hardly be termed "judicial review;" nor, as is evident from the discordant opinions in the instant cases, can the subjective method be expected to achieve that ease of application found wanting under the objective tests.

37 TUL. L. REV. 831, 834 (1963). *See also* 112 U. PA. L. REV. 761, 763 (1964).

problem as "extremely difficult and elusive of solution."[80] In *Kennedy v. Mendoza-Martinez*,[81] the Court set forth a test to determine the nature of a legislative sanction, based on seven factors which have traditionally been applied to determine whether an act of Congress is penal or regulatory in nature.[82]

However, in *Ward*, the Supreme Court misapplied the *Mendoza-Martinez* test by not engaging in the thorough exploration the Court itself had presented to the lower courts as the method for sounding the nature of a penalty provision. The Court summarily dismissed six of the seven factors which the Tenth Circuit, under a more thorough investigation, had found indicative of the punitive nature of the section 1321 "civil" penalties.[83] The Court concluded that only the fifth one, the degree to which behavior to which the penalty applies is already a crime, was worthy of discussion.[84] Since the conduct penalized civilly by section 1321(b)(6) is similar to that penalized criminally by section 13[85] of the Rivers and Harbors Appropriation Act of 1899, opponents of the penalty provision have argued that the FWPCA penalty is actually a punitive penalty. The Court pointed out that reference to the criminal penalties of the latter statute, enacted seventy years before the civil penalties of the FWPCA, was not dispositive of the issue.[86]

The Court next discussed the respondent's claim that even if the penalty imposed upon him was not sufficiently criminal in nature to trigger all the constitutional guarantees afforded a criminal defendant, it was "quasi-criminal" and therefore sufficient to implicate the fifth amendment's protection against compulsory self-incrimination.[87] The quasi-criminal situation, in which a civil penalty or forfeiture is held by the courts to be so criminally oriented as to require the traditional constitutional safeguards, originated in dictum in *Boyd v. United States*.[88] This statement has discomfited the Supreme Court in recent litigation.[89] *Boyd* was a

80. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).
81. 372 U.S. 144 (1964).
82. *See* text accompanying note 44 *supra*.
83. 598 F.2d at 1192-94 (10th Cir. 1979).
84. 448 U.S. at 249-50.
85. 33 U.S.C. § 407 (1976). *See* note 28 *supra*.
86. 448 U.S. at 250.
87. 448 U.S. at 251.
88. 116 U.S. 616, 634 (1886).
89. *See* Andresen v. Maryland, 427 U.S. 463 (1976) (denying attorney's privilege to block issuance of warrant for search of his files); Fisher v. United States, 425 U.S. 391 (1976) (denying taxpayer's privilege to resist subpoena of taxpayer's records from

proceeding, civil in form, for the forfeiture of certain goods imported illegally, under a statute which provided for criminal penalties as well as forfeiture proceedings.[90] During the trial for the forfeiture, Boyd was compelled to produce evidence in his possession. In passing on Boyd's claim that this compulsion offended both the fourth and fifth amendments, the Supreme Court held that the proceeding, though technically civil, was in substance criminal, or at least "quasi-criminal," and thus entitled Boyd to the constitutional protections claimed.[91]

The Supreme Court in *Ward*, recognizing that a broad reading of *Boyd* might control the present case,[92] declined to give full scope to the reasoning and dicta in *Boyd*. The Court distinguished *Boyd* on several grounds, notably the nature of the penalty and proceedings.[93] *Boyd* dealt with the forefeiture of ill-gotten property, a penalty meted out without reference to the damage sustained by society or to the cost of enforcing the law, unlike the fines in *Ward*. In substance, then, *Boyd* appears to mandate the constitutional protection against self-incrimination in proceedings where the collection of penalties and forfeitures stems from offenses for which independent criminal sanctions exist, even though such proceedings are civil in form, with the caveat that such protection may not be available if it is determined that the penalty assessed has a remedial function.

The Court's decision in *Ward* ignores the importance of the issue involved. For a more thorough examination of the proper way to analyze whether a particular provision is remedial or penal, lower courts will find greater assistance in the earlier opinion of the Tenth Circuit in *Ward v. Coleman*.[94] That opinion presents a three-pronged test which should be used in assessing the punitive nature of a penalty: the congressional intent discernible from the statutory language, the enforcement mechanism of the statute, and

his lawyer); Couch v. United States, 409 U.S. 322 (1973) (denying taxpayer's privilege to resist subpoena of taxpayer's records from her accountant).

90. An Act to Amend the Customs-Revenue Laws and to Repeal Moieties, ch. 391, § 12, 18 Stat. 186 (1874).

91. 116 U.S. at 634.

92. 448 U.S. at 253.

93. The Court stated that "*Boyd* dealt with forfeiture of property, a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." 448 U.S. at 254.

94. 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* Ward v. United States, 448 U.S. 242 (1980).

the indicators of congressional intent as outlined in the *Mendoza-Martinez* test.[95] An examination of the appellate court's analysis is necessary to appreciate the shortcomings of the Supreme Court opinion.

B. *The Tenth Circuit Opinion*

1. Remedial Function

The Tenth Circuit began its investigation of the character of the penalty provision by examining the statute for indicia of punitive or remedial/regulatory functions. If the purpose is to punish wrongdoers and deter others, the statute must be considered penal[96] and the appropriate constitutional limitations should apply. Conversely, if the statutory disability is imposed to accomplish some other legitimate governmental purpose, constitutional criminal safeguards may be inappropriate.[97] The appellate court agreed with the government that the "civil" penalty included a number of remedial features, giving weight to a determination that it was indeed civil. Remedial provisions included a revolving fund in which civil penalties collected pursuant to section 1321(b)(6) are deposited. This fund partially finances cleanups and administrative expenditures attributable to oil spills which cannot be traced to a single perpetrator, are caused by acts of God, or are committed by financially insolvent parties.[98] However, it was the opinion of the court that the statutory language dealing with the mandatory notification and automatic assessment of a penalty regardless of the fault of the perpetrator indicated too punitive a purpose. While the statute had a remedial aspect, the factors used in determining the amount of the penalty were "retributive," and not reasonably related to the purpose of the fund.[99] In the Tenth Circuit's analysis, then, although a statute might have particular remedial features, a determination of its overall character should be influenced by the mechanism which enforces the penalty.

95. *Id.* at 1190.

96. Trop v. Dulles, 356 U.S. 86, 96 (1958). *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Meeker & Co. v. Lehigh Valley R.R., 236 U.S. 412 (1915); United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972); Telephone News-Sys. Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd mem.*, 376 U.S. 782 (1964).

97. Trop v. Dulles, 356 U.S. 86, 96 (1958).

98. 33 U.S.C. § 1321(k) (1976 & Supp. I 1977).

99. 598 F.2d at 1193, 1194.

2. The Administrative Enforcement Scheme

The Tenth Circuit's second inquiry concerned the provisions for implementing the penalty. Any inquiry into the penal or civil nature of a particular statute must focus not only on the draftsman's diction but also on the actual procedure used to assess the penalty. The court found the language of the enforcement scheme to be totally "lacking in any 'remedial' ring."[100] After reviewing the administrative and enforcement mechanisms of the Coast Guard,[101] the court concluded that the assessment and determination of the amount of the penalty was based on punitive considerations such as the discharger's degree of culpability and prior record, and the amount of oil discharged.[102] Moreover, the court concluded, the amount of the penalty was not related to the extent of damage caused to the environment, a consideration which a remedial statute would have addressed.

3. Other Indicators of Congressional Intent: the *Kennedy v. Mendoza-Martinez* Factors

Insofar as they apply, the considerations listed in *Mendoza-Martinez*[103] for differentiating civil from criminal penalties also suggest, although perhaps less strongly, the conclusion that the section 1321(b)(6) penalty is criminal. However, the Supreme Court chose to evaluate only one of the seven factors. This leaves the lower courts to ponder the following questions. Do the remaining six factors of the test apply when evaluating penalty provisions? Did the Supreme Court assume that the remaining six factors indicated a clearly non-punitive intent, leaving only the fifth to warrant discussion? Finally, is the Supreme Court inclined to retreat from the *Mendoza-Martinez* test?

The Tenth Circuit, on considering these factors, found that the first two gave little indication of congressional intent, and, like the Supreme Court, quickly bypassed them.[104] The third factor, scienter, seemed to favor the government as an indication of the penalties' remedial nature, since the fine is imposed without regard to fault.[105] However, the court felt that such an indication could not

100. *Id.* at 1192.
101. *See* notes 23, 24 *supra*.
102. 598 F.2d at 1192.
103. 372 U.S. 144 (1963).
104. 598 F.2d at 1193.
105. *Id.* Prior to 1972, the civil penalty provision specifically included the element of acting "knowingly" and provided for a maximum penalty of $10,000. *See*

overshadow the fact that the particular language of the Commandant's instruction, which speaks of "gravity of the violation," "degree of culpability" and whether the discharge was intentional or resulted from gross negligence, indicated a scienter requirement.[106] Scienter is also not required under the criminal penalty provision of the Act. The court concluded that this indicator lent credence to the finding that the statute was criminal in nature.

The court also viewed the fourth factor, "whether the statute promotes the traditional aims of punishment—retribution and deterrence," as an indicator of the criminal nature of the penalty. It announced that the language of the statute was couched in retributive terms, as gravity of violation, degree of culpability, and the prior record of the party, once again indicating a criminal nature.[107]

The fifth factor, "whether the behavior to which it applies is already a crime," was answered in the affirmative. The court found a direct parallel between the conduct penalized by section 1321(b)(6) and that penalized as a crime in section 13[108] of the Rivers and Harbors Appropriation Act of 1899. The Rivers and Harbors Appropriation Act prohibits the discharge of refuse into the navigable waters of the United States, and provides fines and/or imprisonment. In *United States v. White Fuel Corp.*,[109] a case whose factual situation parallels that of *Ward*, the United States Court of Appeals for the First Circuit found a tank farm operator criminally liable for underground seepage of oil into a navigable waterway. The Tenth Circuit found, therefore, that the behavior involved in the present case has already been found to be a crime by another court.

The court also found the sixth factor, "whether an alternative purpose other than punishment may rationally be ascribed to the sanction," to be an indication of punitive intent. The court reiterated its acknowledgement of the remedial tenor of such aspects of

note 37 *supra*. *But see* United States v. Eureka Pipeline Co., 401 F. Supp. 934, 938 (N.D. W. Va. 1975) (court concluded that the amendment indicated a desire on the part of Congress to move away from the appearance of criminality which could have attached to the penalty under the 1970 Act as a result of the *scienter* requirement).

106. *Id.*

107. *But see* United States v. General Motors Corp., 403 F. Supp. 1151, 1162 (D. Conn. 1975) (retribution is not the basic thrust of the penalty imposed under § 1321(b)(6), "which is aimed less at the acts of polluters than at the resulting pollution itself").

108. 33 U.S.C. § 407 (1976).

109. 498 F.2d 619 (1974).

the Act as the revolving fund, yet it could not fully agree with the government's claim that the penalty should be regarded as compensation to the United States for tortious damage to the environment.[110] The court agreed that the penalty *could* be regarded as compensation, but because the extent of the damages are not considered in the assessment procedure of the penalty, compensation could not have been Congress's intention.[111]

The court also viewed the final factor, "whether the sanction appears excessive in relation to the alternative purpose," as an indication of the penalty's punitive tenor. A "civil" penalty assessed against an accidental, non-negligent, non-intentional discharger presents problems for an advocate of the penalty's remedial purpose. The assessment procedure presently lacks a system to give the defendant an opportunity to employ affirmative defenses.[112] Therefore, the court held that the "civil" penalties were penal in nature. Section 1321(b)(6) was a criminal sanction, which invoked the immunity provisions to exclude evidence obtained through the mandatory notification reports.[113] However, the Tenth Circuit specifically limited its decision to the determination that the reports could not be used against individual defendants; it refused to address the applicability of the reports to corporations.[114]

V. THE SIGNIFICANCE OF *Ward*

The Supreme Court's decision that a civil penalty proceeding under section 1321(b)(6) is not a "criminal case" within the meaning of the fifth amendment, as well as its cursory dismissal of the constitutional challenge to the FWPCA penalty provision, will have a significant impact on both environmental and constitutional law.

The positive aspect for environmentalists, rightly concerned about the serious problem presented by oil pollution of our waters, is that the decision upholds the enforcement of a useful and potent provision of the FWPCA. The Tenth Circuit decision, holding that

110. 598 F.2d at 1194.

111. *Id.*

112. The only defenses available to a discharger are to show that the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States government, or an act or omission of a third party. 33 U.S.C. § 1321(f)(1) (1976 & Supp. I 1977).

113. Civil penalties could still have been assessed provided the government could prove its case based on evidence derived from a source wholly independent of the compelled disclosure. *Cf.* Harrison v. United States, 392 U.S. 219 (1968); Wong Sun v. United States, 371 U.S. 471 (1963).

114. 598 F.2d at 1194 n.7.

the self-reporting provisions infringed the right to avoid self-incrimination, could have significantly disrupted administration and enforcement of the Act. Once the procedural safeguards traditionally associated with criminal prosecution are added to the penalty assessment scheme, litigants could prolong proceedings by demanding discovery and jury rights. In addition, the Tenth Circuit stated that its decision would not strike down the self-reporting requirement, or the statute requiring imposition of civil penalties; however, to ensure the privilege against self-incrimination, evidence used to establish the discharge would have to be derived from a source wholly independent of the compelled disclosure required by section 1321(b)(5).[115]

The self-reporting provisions serve a vital function in the scheme of civil liability assessment because of the vast numbers of dischargers. In 1978, 14,741 oil discharges were reported to the Coast Guard.[116] Of this total, approximately 8,000 were traced to particular vessels or facilities.[117] The Coast Guard claims to have assessed at least the minimum penalty in all the cases reported,[118] meaning that at least 8,000 civil penalty cases were brought in 1978 alone. The government conducted a survey of 100 civil penalty cases in each of the twelve Coast Guard districts, and concluded that of the 8,000 cases, more than 1,400 involved an individual owner or operator.[119] Approximately one-fourth of these cases involved self-reporting of the discharges;[120] thus, the Coast Guard would have been barred from making use or derivative use of that information in some 350 cases.[121] Moreover, barring the information from the self-notification reports from the penalty assessment would create a new defense for dischargers. The government would be compelled to prove that its case for imposition of civil penalties was not dependent on information provided by the reports.[122] This would also

115. If a proceeding under § 1321(b)(6) were held to be a criminal case for purposes of the fifth amendment privilege, a further question would be presented as to exactly what, if any, information required to be furnished by an individual under § 1321(b)(5) could be used against the individual in the proceedings. *See* California v. Byers, 402 U.S. 424 (1971).

116. Petitioner's Brief for Certiorari at 12, United States v. Ward, 448 U.S. 242 (1980).

117. *Id.*

118. *Id.* at 12-13.

119. *Id.* at 13.

120. *Id.*

121. *Id.*

122. *Id.* at 14. *See also* Kastigar v. United States, 406 U.S. 441, 460-61 (1972).

apply to any criminal case.[123]

Had the Tenth Circuit's decision not been overturned by the Supreme Court, it would have barred the imposition of civil penalties in situations where the individual reported the spill himself. The revolving fund established[124] to cover cleanup and administrative costs would be deprived of a source of funds intended by Congress to sustain it. Furthermore, the government would be compelled to incur additional expense to establish independent evidence of the occurrence of a discharge, which would create an additional drain on the resources of the revolving fund.

A negative aspect of the Court's decision is that its implied acceptance of the congressional labeling technique places individual rights in jeopardy. The opinion opens the door for further congressional encroachment upon constitutional rights in the name of more streamlined administrative proceedings. One blatant example of this trend in federal legislation is the 1972 amendment[125] to the Intercoastal Shipping Act,[126] the purpose of which is set out in the Senate Report:[127]

> [p]enalties provided for violations of many of the provisions of the Shipping Act, 1916, are criminal. Where there appears to have been a violation of one of these provisions it is necessary to conduct an investigation of the incident, to thoroughly document the violation and then to refer it to the Department of Justice for prosecution. Adequate documentation is time-consuming, and considerable time can elapse between the commission of the offense and the actual referral to the Department of Justice. Additional time and effort is expended by the Department in its review and evaluation of the offense. A further lapse of time occurs after the filing of a complaint before the case is assigned for trial. By the time the penalty is imposed, the courts frequently are inclined to impose a much lighter sentence than if the case had been prosecuted promptly. In such instances no regulatory purpose is served, since the amount of the penalty is usually insufficient to deter the offender or others from further transgressions.
>
> To change the penalties for violations of these provisions from criminal to civil should make the documentation of violations

123. Petitioner's Brief for Certiorari at 14, United States v. Ward, 448 U.S. 242 (1980).

124. 33 U.S.C. § 1321(k) (1976).

125. Pub. L. No. 92-416, § 2, 86 Stat. 653.

126. 46 U.S.C. §§ 843-848 (1976 & Supp. II 1978).

127. S. REP. NO. 1014, 92d Cong., 2d Sess. (1972) *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3121.

> simpler, thereby expediting final consideration by the Commission, or the Department of Justice and the courts. Since proving a violation would be easier, the threat of imposition of the prescribed penalty should act as a more effective deterrent to further violations.[128]

The legal question raised by these civil penalty statutes is whether a mere change of label, from criminal to civil, eliminates the need to extend to individuals prosecuted under them all of the constitutional protections accorded defendants in criminal trials. The answer, of course, is that criminal prosecution masquerading in the guise of civil penalties cannot be tolerated; the alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case.[129]

VI. Conclusion

United States v. Ward offered the Supreme Court the opportunity to define the constitutional limits on compulsory self-reporting in a leading environmental protection statute carrying a penalty labelled as civil. An in-depth analysis of the FWPCA section 1321 civil penalty would have provided a much-needed guideline for future challenges to congressional labeling of penalty provisions and could have checked a trend toward administrative streamlining which may imperil the right against self-incrimination. Instead, the Court upheld this legislative gambit without making use of its own guidance, laid down in an earlier case, for looking beyond labels to statutory structure. Further, in its attempt to limit an ancient dictum statement the Court ignored its own role as the protector of individual rights. By its too-timid investigation of the section 1321 assessment process, the Supreme Court in *United States v. Ward* subordinated the rights of individual defendants to the convenience of an efficient penalty provision.

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128. *Id.* at 2-3.

129. Nevertheless, this movement to substitute civil penalties for criminal penalties to avoid the difficulty of criminal law enforcement was given added support by a unanimous recommendation of the Administrative Conference of the United States. 41 U.S.L.W. 2326, 2327 (Dec. 26, 1972). *See* note 14 *supra*.