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Fifth Amendment--Statutory Dilution of the Privilege against Self-Incrimination

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FIFTH AMENDMENT—STATUTORY DILUTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

United States v. Apfelbaum, 100 S. Ct. 948 (1980).
United States v. Ward, 100 S. Ct. 2636 (1980).

I. INTRODUCTION

The Supreme Court this year heard two cases concerning the permissible uses of testimony compelled despite the invocation by a witness of the fifth amendment privilege against self-incrimination. The first case, *United States v. Apfelbaum*,[1] addressed the question of the constitutional limits on the use of testimony compelled under a grant of immunity under 18 U.S.C. § 6002,[2] which provides that testimony so compelled may not be used in any criminal prosecution of the witness except for perjury or false swearing. The second case, *United States v. Ward*,[3] concerned the extent of protection afforded by the self-incrimination privilege against attempts by the government to collect what Congress has denoted as a civil penalty.

In each case, the holding of the Supreme Court allows the government broader power in law enforcement by expanding the permissible uses of testimony in situations where the party called upon to provide information invokes the fifth amendment privilege. This note will analyze the reasoning of the Court, and the likely impact of that reasoning on future decisions.

[1] 100 S. Ct. 948 (1980).
[2] 18 U.S.C. § 6002 (1970) reads:
Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
[3] 100 S. Ct. 2636 (1980).

II. *UNITED STATES v. APFELBAUM*

A. PROCEDURAL HISTORY

Stanley Apfelbaum, an administrative assistant to the District Attorney in Philadelphia, appeared as an immunized witness before a federal grand jury investigating extortion and racketeering. In the course of his testimony, Apfelbaum denied that he had tried to locate one Harry Brown in Fort Lauderdale in December 1975. He also testified that he did not recall telling FBI agents that he had loaned $10,000 to Brown.[4] These statements were the basis of a later indictment for perjury.[5]

In the course of Apfelbaum's perjury trial, the government introduced a series of excerpts taken from the transcript of Apfelbaum's grand jury testimony concerning the degree of friendship between Apfelbaum and Brown, the circumstances surrounding Apfelbaum's discovery of Brown in 1976, and other matters. Apfelbaum objected to the introduction of this testimony. The jury returned a verdict of guilty, and Apfelbaum received a sentence of two years in prison.[6] His appeal to the United States Court of Appeals for the Third Circuit charged that the fifth amendment privilege against compelled self-incrimination precluded admission into evidence of his immunized grand jury testimony.

The Third Circuit ruled that the admission of testimony other than that which constituted the "corpus delicti" of the indictment was error, and ordered a new trial.[7] The Supreme Court reversed, holding that the admission of the testimony was permissible.

B. PRIOR SUPREME COURT DECISIONS

To understand the Supreme Court ruling in *Apfelbaum*, a brief outline of the history of the relationship between the self-incrimination privilege and immunity statutes is helpful. The privilege arose from the reluctance of the constitutional

[4] 584 F.2d 1264, 1266 (3d Cir. 1978).
[5] *Id.*
[6] *Id.* at 1268.
[7] *Id.* at 1271.

framers to subject those suspected of crime to the trilemma of self-accusation, perjury, or contempt. It reflects the fear that self-incriminating statements will be elicited by inhumane treatment,[8] as was the case in the Star Chamber. The fifth amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself ...."[9]

In 1868 Congress enacted the first statute providing immunity for witnesses.[10] This "use" immunity statute prohibited the use of any testimony of a witness against himself in any criminal proceeding, with the exception of a prosecution for perjury. Once the witness was granted this immunity, he was no longer in danger of self-incrimination, as his testimony could not be used to his detriment in any criminal case. He could not thereafter legitimately refuse to answer on the basis of the privilege. If he refused to answer, it was intended that he be subject to the sanctions of contempt.[11]

The Supreme Court struck down this statute in *Counselman v. Hitchcock*, holding that an immunity statute, in order to meet the constitutional standard, must provide protection coextensive with that of the constitutional provison.[12] The use immunity statute under scrutiny in *Counselman* failed because, although it prohibited the use of the immunized testimony in a criminal prosecution of the witness, it did not prevent the use of his testimony to search out other evidence to be used to his detriment in a criminal prosecution. If, however, he had refused to answer, there would have been no testimony which could be used to his disadvantage in any way whatsoever.[13] The protection afforded by the use immunity statute was therefore not coextensive with that provided by the privilege. The Court further held that no statute which fails to secure the witness from being prosecuted criminally for any matters to which his immunized testimony may relate would provide the requisite protection.[14]

Following *Counselman*, Congress enacted a statute providing "transaction" immunity, which immunized the witness from prosecution for any transaction about which he testified.[15] In *Brown v. Walker*,[16] the first Supreme Court decision sustaining a federal immunity statute, the Court held that a witness given immunity under the statute has no right to refuse to answer.[17]

In *Murphy v. Waterfront Commission*,[18] the Supreme Court indicated that it no longer held to the *Counselman* view that an immunity statute cannot grant protection coextensive with that provided by the privilege unless the statute provides transaction immunity. The *Murphy* court indicated that the problem of derivative use of immunized testimony would be satisfactorily resolved by a statute which prohibited the use of compelled testimony and its fruits in later criminal prosecutions.[19] Prosecution

[8] Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964).

[9] U.S. CONST. amend. V.

[10] 15 Stat. 37 (1868) provided:
That no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided*, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid.

[11] Counselman v. Hitchcock, 142 U.S. 547, 552 (1892).

[12] *Id.* at 585.

[13] *Id.* at 564.

[14] *Id.* at 585.

[15] 27 Stat. 443 (1893), provided:
no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission ... on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or any such case or proceeding....

[16] 161 U.S. 591 (1896).

[17] *Id.* at 610.

[18] 378 U.S. 52 (1964).

[19] *Id.* at 79. The Court's opinion reads:
[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.

for acts concerning which the witness testified would not be prohibited if based on independent evidence.

Congress enacted a use/derivative use immunity statute in 1970.[20] The Supreme Court upheld it in *Kastigar v. United States.*[21] The Court held that even though this new statute did not provide the transaction immunity which the *Counselman* Court believed necessary, it was in accord with the conceptual basis of *Counselman*, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.[22]

The Court has since reaffirmed the principle that the immunized testimony may not be used for any use or derived use whatever in a criminal trial, and that the protection afforded must be so "broad as to have the same extent in scope and effect" as the constitutional privilege.[23] In *Mincey v. Arizona*,[24] decided in 1978, the Court held that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process."[25] The following term, the Court in *New Jersey v. Portash*,[26] again held, "[A] defendant's compelled statements ... may not be put to any testimonial use whatever against him in a criminal trial."[27]

The history of the Supreme Court's construction of immunity statutes shows that from the first challenge to an immunity statute in *Counselman v. Hitchcock*,[28] the constitutional standard which must be met by an immunity statute is as expressed in the following syllogism:

1. Protection under the immunity statute must be coextensive with that provided by the invocation of the fifth amendment privilege.

2. This requires that the witness be left in substantially the same position as if he had remained silent.[29]

3. Any subsequent use of immunized testimony in a criminal prosecution fails to provide protection which leaves the witness in substantially the same position as if he had remained silent.

4. Therefore, any subsequent use of immunized testimony in a criminal prosecution does not provide protection coextensive with that provided by the invocation of the privilege, and is unconstitutional.

Every previous Supreme Court decision to deal with the constitutionality of immunity statutes had reaffirmed this standard, until *United States v. Apfelbaum.*[30] *Apfelbaum* concerned the issue of perjured testimony following a grant of immunity. The statute under which the immunity was granted prohibited the use or derived use of immunized testimony in any subsequent criminal prosecution of the witness, with the exception of a prosecution for perjury. Under the perjury exception, the immunized testimony would be admissible.[31]

A perjury prosecution is a criminal prosecution; perjury is a criminal offense. The admission of immunized testimony in a perjury trial is therefore irreconcilable with the constitutional standard as expressed above, which requires that immunized testimony be excluded from all subsequent criminal prosecution of the witness. Therefore, either the syllogism is defective, or the use of immunized testimony in perjury prosecutions is unconstitutional.

Without the use of the immunized testimony, subsequent prosecution for perjury following the grant of imunity would be impossible because successful prosecution of a crime where all references to the criminal act are excluded is unthinkable. Without the sanction of perjury prosecution, there is no means of ensuring the reliability of immunized testimony, and the witness may commit perjury with impunity. Without the perjury exception, then, the grant of immunity is futile, the immunity statute useless.

The Supreme Court in *Apfelbaum* therefore faced the dilemma of over a century of affirmation of a constitutional standard which is irreconcilable with the perjury exception, without which the immunity statute cannot function. The Court's options were to: a) declare that any immunity statute which is to be effective must also be unconstitutional, b) modify the requirements of the test of constitutionality for an immunity statute, or c) apply the rule of law in an inconsistent manner.

C. THE REASONING OF THE THIRD CIRCUIT

The Third Circuit ruled that the exception of perjury prosecutions from the general rule prohibiting the use of compelled testimony in any respect is justified by the need to preserve the integrity of the truth-seeking process, and to prevent the wit-

[20] *See* note 2 *supra.*
[21] 406 U.S. 441 (1972).
[22] *Id.* at 461.
[23] New Jersey v. Portash, 440 U.S. 450, 456 (1979).
[24] 437 U.S. 385 (1978).
[25] *Id.* at 398.
[26] 440 U.S. 450 (1979).
[27] *Id.* at 459.
[28] 142 U.S. 547 (1892).
[29] *Id.* at 564.
[30] 100 S. Ct. 948 (1980).
[31] *See* 18 U.S.C. § 6002 (1970).

ness from making a mockery of the immunity granted.[32] The court further ruled that the exception must be drawn narrowly. This requires that only so much of the testimony as is necessary to prove the *corpus delicti* of the government's case is admissible.[33] The court defined *corpus delicti* as the statement or statements of the defendant which the grand jury has charged to be perjurious, together with no more than that minimal testimony essential to place the charged falsehood into its proper context.[34] All the testimony constituting the *corpus deliciti*, must be incorporated *in haec verba* in the perjury indictment. The rest of the immunized testimony remains protected by the grant of immunity and is inadmissible.[35]

The Third Circuit felt that admission of the *corpus delicti* was sufficient to prevent the witness from making a mockery of the immunity grant.[36] Because the exception from the general rule that the witness must be treated as if he had remained silent is justified only by the need to prevent the witness from making a mockery of the proceeding, and allowing the *corpus delicti* is sufficient to meet that need, the extension of the exception beyond the *corpus delicti* is not justified.

In explaining that the purpose of the exception is to prevent the witness from making a mockery of the immunity grant, the Third Circuit did nothing to reconcile the exception with the standard from which it deviates. To say that it is an exception with a good reason is to say nothing. There may be many reasons to except various crimes from the immunity grant, perhaps better reasons than the protection of the truth-seeking process. Examples might be the protection of society against murderers and child molesters. But these reasons have not been adequate to justify the violation of constitutional principles. Rather the Supreme Court regards constitutional principles to be of supreme importance, upholding them,[37] even if this means setting free arsonists and rapists through the working of the privilege against compelled self-incrimination. The Third Circuit gave no indication why the interest in preventing the witness from making a mockery of the immunity granted is of such paramount importance.

The history of immunity statutes indicates the contrary, that the use of immunity to compel testimony is not important at all. The nation survived from its inception until 1868 before Congress passed the first immunity statute. The Third Circuit's reasoning thus fails to show why the efficacy of the immunity statute is so important as to justify a novel deviation from the rule that in cases of conflict between the Constitution and a statute, the Constitution must prevail.

The Third Circuit also stated that "[t]he Fifth Amendment privilege does not condone perjury, ... [nor] endow the person who testifies with a license to commit perjury."[38] The court cited six Supreme Court decisions in support of this principle.[39] Of the six cases, only one, *Glickstein v. United States*,[40] concerned perjury following a grant of immunity. The other cases involved witnesses who responded to questioning with false answers, but never invoked the fifth amendment privilege.

The statement that the fifth amendment does not provide a license to commit perjury fails to address the issue. The privilege does not provide a license to commit perjury any more than it provides a license to commit murder. It does provide a license to remain silent rather than provide self-incriminating testimony. Once that privilege is invoked, the murderer and the perjuror alike must go free unless the prosecutor finds evidence sufficient to prove his case without the help of the accused. The fact that, as a practical matter, murderers and perjurors may occasionally go free as a result, is really an argument against the fifth amendment itself. The proper remedy for a defect in an amendment is a further amendment to the Constitution. If exceptions to the protections of the Constitution are made whenever the protections are found to be inconvenient, nothing is left of the constitutional protection.

[32] United States v. Apfelbaum, 584 F.2d 1264, 1270 (3d Cir. 1978).

[33] *Id.*

[34] *Id.* at 1270 n.9.

[35] *Id.*

[36] *Id.* at 1270.

[37] Counselman v. Hitchcock, 142 U.S. at 565 ("Legislation cannot detract from the privilege afforded by the Constitution.... [A] mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso"). *See also* Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence").

[38] 584 F.2d 1264, 1269 (quoting United States v. Wong, 431 U.S. 174, 178 (1977), quoting Glickstein v. United States, 222 U.S. 139, 142 (1911)).

[39] *Id.* at 1269–70. The six cases are United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976); United States v. Kahan, 415 U.S. 239 (1974); Harris v. New York, 401 U.S. 222 (1971); United States v. Knox, 396 U.S. 77 (1969); and Glickstein v. United States, 222 U.S. 139 (1911).

[40] 222 U.S. 139.

D. THE REASONING OF THE SUPREME COURT

Justice Rehnquist, writing for the majority, attacked the syllogism itself. He found defective the second proposition of the syllogism—that the witness must be treated as if he had remained silent so that the protection of the immunity may be coextensive with the protection afforded by the invocation of the privilege. He argued that it has never been the case that immunized testimony must, for all purposes, leave the witness in substantially the same position as if he had remained silent.[41] Rather, the fifth amendment requires only that the grant of immunity leave the witness in the same position as if he had remained silent for those purposes which come under the protection of the privilege.[42]

In defense of the proposition that the immunized testimony may be used in some situations to the detriment of the witness, Rehnquist cited several Supreme Court decisions which establish that civil proceedings, disgrace, and loss of employment do not come within the protection of the privilege,[43] and that therefore, the immunity statute need not be designed to prevent these effects from occurring as a result of the immunized testimony. These effects may follow consistently with the constitutional protection, though they would not have occurred had the witness remained silent.[44] Therefore, Justice Rehnquist argued, it has never been the position of the Court that the witness must be left as if he had remained silent for all purposes.

Possibly, then, an immunity statute may provide protection coextensive with that provided by the privilege, even if it does not leave the witness in the same position as if he had remained silent. The salient point, the Court held, is not the effect of the testimony, but the protection intended by the self-incrimination privilege. The immunized testimony must not put the witness in a worse position than he would have been in if he had remained silent for those purposes which come within the protection of the privilege. Because civil proceedings, disgrace, and loss of employment do not come within the protection of the privilege, the grant of immunity need not protect the witness from them.

Just as civil proceedings, disgrace, and loss of employment do not come within the protection of the privilege, prospective acts do not come within the protection of the privilege. Just as one may not invoke the fifth amendment privilege to refuse to answer a question for fear that one will be disgraced, so one may not refuse to answer for fear that he will be incriminated in a crime that he has not yet committed.[45] Finally, just as the grant of immunity does not prohibit the effect of use of the testimony to cause disgrace, so the grant of immunity does not prohibit the use of the testimony to effect a prosecution for perjury subsequent to the invocation of the privilege.[46]

The immunized testimony may therefore be used in any criminal prosecution for a crime committed subsequent to the grant of immunity because immunized testimony is available for use for purposes other than those which the fifth amendment privilege was designed to prohibit. The determination is whether the privilege could have been invoked with respect to that use at the time the immunity was granted.[47] Since Apfelbaum could not have invoked the privilege to avoid self-incrimination for the crime of perjury at the time the immunity was granted the immunized testimony may be used against him at a trial for that act of perjury.

The reasoning employed by Justice Rehnquist as the underlying rationale of the perjury exception is equally applicable to criminal prosecutions for offenses other than perjury, though the Court found no occasion to reach other offenses in its discussion. Possibly one item of testimony would be potentially incriminating for several crimes, and the grant of immunity would prohibit the introduction of that testimony at a prosecution for one crime, but allow the same testimony at a prosecution for the other crimes. As an example, the statement that one owns a certain gun may be relevant to a prosecution for a murder and for armed robbery, both committed with the same gun—the murder committed the day before the immmunized testimony, the armed robbery the day following. If, in the course of the immunized testimony, the owner of the gun were asked whether the gun were his, he legitimately could invoke the fifth amendment and refuse to answer, as the answer would implicate him in the murder case. He could not refuse to answer, however, with reference to his use of the gun in the armed robbery

[41] United States v. Apfelbaum, 100 S. Ct. 948, 954 (1980).

[42] *Id.* at 954.

[43] *Id.* at 954. *E.g.,* Uniformed Sanitation Men Assn. v. Comm'r of Sanitation, 392 U.S. 280, 284–85 (1968); Ullman v. United States, 350 U.S. 422, 430–31 (1956); Smith v. United States, 337 U.S. 137, 147 (1949).

[44] 100 S. Ct. at 954–55.

[45] *Id.* at 956–57.

[46] *Id.* at 957.

[47] *Id.* at 956.

which he had not yet performed. If he were granted immunity and compelled to answer, according to the Court, his answer could not be entered in evidence at the trial for those crimes which he had already committed at the time the immunity was granted. The testimony would be admissible, however, in a trial for the armed robbery committed after his testimony. Thus, the same immunized testimony would be inadmissible in one criminal prosecution, but admissible in another.

The Court's reasoning refutes the long-standing principle that a grant of immunity must prohibit any use of the immunized testimony in any criminal prosecution. Since the statute in *Apfelbaum* prohibits the use of any immunized testimony in any criminal prosecution, with the exception of prosecution for perjury, there was no occasion to apply the broader implications of the Court's reasoning. Rehnquist's discussion was not in terms of a narrow exception for the purposes of protecting the integrity of the immunity transaction, but rather in terms of a comprehensive standard which redefines the scope of immunity which must be granted by an immunity statute. The new standard would require that "the testimony [remain] inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant."[48] Exceptions to such immunity are to be construed as "narrow" exceptions.[49]

If such narrow exceptions are permissible, then Congress may enact a statute which provides that "no testimony ... compelled under [an] order [to testify following invocation of the Fifth Amendment privilege] ... may be used against the witness in any criminal case, except a prosecution for offenses committed subsequent to the grant of immunity."[50] Such an immunity statute, under the reasoning of Justice Rehnquist, would provide protection coextensive with that required by the fifth amendment, and would therefore be permissible.

Justice Brennan wrote a concurring opinion, arguing that the logic and exigencies of the perjury exception require that the government be permitted to introduce portions of the immunized testimony other than the *corpus delicti* to prove perjury, and that the Third Circuit limitation of use of immunized testimony to the *corpus delicti* should for that reason be overturned.[51]

Justice Brennan did not see any contradiction between the perjury exception and the accepted constitutional standard that the immunity must leave the witness in the same position as if he had remained silent. He found two justifications for the perjury exception. First, prior to the immunity grant the witness had no fifth amendment right to answer falsely. False statements are therefore outside the protection of the privilege, and immunized statements may be used to prosecute them.[52] The second justification is that the perjury exception is necessary to protect the integrity of the immunity transaction.[53] Because these reasons are adequate to support the perjury exception, Justice Brennan would contend the analysis by Justice Rehnquist was too broad, and was unnecessary.[54]

But the reasons advanced by Justice Brennan are identical to those of the Third Circuit, and are unsatisfactory. The first justification, that the fifth amendment gives no right to answer falsely, does not address the issue, which is not whether the accused has the right to perform his illegal act, but whether his compelled testimony may be used to convict him for that act. The fifth amendment says that it may not. The second justification adds nothing to the first. The Constitution does not require an effective immunity statute. It does require that no one be compelled to testify against himself in a criminal case. If judicial construction of the protections of that rule are to be modified in order to render statutes efficacious, there will be no end to the modifications, but a rather quick end to the protections of the Constitution.

Justice Blackmun's concurring opinion recognized the problem of reconciling traditional constitutional analysis with the perjury exception. He argued that even though the rule that the witness must be treated as if he had remained silent has exceptions, this does not justify the abandonment of the rule.[55] The perjury exception is unique because perjury violates the basic assumption on which the privilege and hence the immunity depends—that the witness will provide truthful testimony. Thus it differs from all other instances in which the witness's testimony might be used.[56]

[48] *Id.*

[49] *Id.*

[50] This hypothetical statute is modeled after the provision in 18 U.S.C. § 6002 which creates the perjury exception.

[51] 100 S. Ct. at 958.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 959.

[56] *Id.*

Because Justice Blackmun found this sufficient to dispose of *Apfelbaum*, he did not reach the broader reasoning used by Justice Rehnquist.

Perhaps the concurring opinions provide some limits to Justice Rehnquist's willingness to broaden the exceptions to the privilege against self-incrimination. That test could come very quickly if Congress follows the direction Justice Rehnquist points to when it drafts its next immunity statute.

II. *United States v. Ward*

A. PROCEDURAL HISTORY

United States v. Ward[57] arose over a violation of 33 U.S.C. § 1321, which provides for penalties against those who discharge oil or other hazardous substances into navigable waters. The person responsible for the discharge is required by law to report it, and failure to do so is a criminal violation that carries the possibility of fine and imprisonment. The notification received may not be used for any purpose against the notifying party except a prosecution for perjury or giving a false statement.

The statute expressly sets out a civil penalty of not more than five thousand dollars for each offense. The amount of the penalty is based on considering the size of the business of the owner or operator charged, the effect on the operator's ability to continue in business, and the gravity of the violation.[58] Under guidelines issued by the Commandant of the Coast Guard, factors determinative of the gravity of the violation include the degree of culpability, the prior record of the operator, and the amount of oil discharged.[59] Substantial and intentional discharges, as well as cases of gross negligence, result in more severe penalties. However, the responsible party cannot avoid or reduce the civil penalty by removing the discharged oil—his effort and expense in cleaning up are not to be considered.[60] The proceeds from penalties are put into a fund established to help pay clean-up costs for unpunished spills, and administrative costs incurred in enforcing the penalty. The operator, in addition to the penalty, is liable for clean-up costs.[61]

Oil from an oil retention pit operated by Ward seeped into Boggie Creek in Enid, Oklahoma, violating the statute. Ward reported the seepage to the Environmental Protection Agency, who forwarded the report to the Coast Guard, who assessed a five-hundred-dollar penalty. Ward lost an administrative appeal, then filed suit in the United States District Court,[62] claiming that the reporting requirement violated his fifth amendment privilege against compelled self-incrimination.

The District Court found that the penalty was civil in nature, and therefore outside the protection of the fifth amendment, whereupon Ward appealed to the United States Court of Appeals for the Tenth Circuit.[63] The Tenth Circuit found that the penalty was criminal, and that the fifth amendment privilege was applicable, whereupon the government appealed to the Supreme Court. The Supreme Court, in another opinion by Justice Rehnquist, held that the penalty was civil, and that the fifth amendment privilege was not available to Ward.

B. PRIOR SUPREME COURT DECISIONS

Ward, by claiming that a penalty which had been designated by Congress as a civil penalty was in fact criminal, and that he was therefore entitled to the fifth amendment protection against self-incrimination, raised an issue which goes back to 1886, when the Court decided *Boyd v. United States.*[64] In that case, the Supreme Court recognized the danger that, because the self-incrimination privilege extends only to criminal cases, and not civil proceedings, the legislature may designate as "civil" proceedings actions which are in fact criminal prosecutions, thereby avoiding the due process requirements of the fifth amendment, and depriving the accused of his self-incriminat on right.[65] If the distinction between civil and criminal proceedings is left to the unrestricted determination of the legislature, then the fifth amendment protections are illusory, i.e., subject to avoidance or even annihilation at the legislature's discretion. There must, therefore, be objective content to the term "criminal case" sufficient to distinguish it from the term "civil case." The *Boyd* court indicated that, for the purposes of the self-incrimination privilege, the term "criminal case" included cases involving forfeiture of property.[66]

[57] 100 S. Ct. 2636.

[58] 33 U.S.C. § 1321(b)(6) (1977).

[59] United States Coast Guard Commandant Instruction 5922.11A (1973).

[60] *Id.*

[61] *Id.*

[62] 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, 100 S. Ct. 2636 (1980).

[63] 598 F.2d 1187 (10th Cir. 1979).

[64] 116 U.S. 616 (1886).

[65] *Id.* at 634-35.

[66] *Id.* at 634.

In 1937, the Court held in *Helvering v. Mitchell*[67] that Congress may impose civil sanctions, without recourse to judicial power or the requirements of the fifth amendment, to ensure payment of taxes and tariffs.[68] The Court found that the crucial issue in determining the civil or criminal character of a sanction is whether the sanction is punitive or remedial in purpose.[69] The *Helvering* Court found that sanction to be remedial because its purpose was to secure full compensation to the government for the expense of enforcing the law. The same behavior (tax fraud) which gave rise to the civil penalty was also subject to criminal sanctions. The Court stated that Congress might legitimately impose both civil and criminal penalties for the same behavior,[70] and that this did not indicate that the civil penalty was a criminal penalty in disguise.

In 1960 the Court decided *Flemming v. Nestor*,[71] in which it held that a punitive design is determinative of the criminal nature of a proceeding. The determinative factor was whether the penalty imposed an affirmative disability or restraint. The Court further stated that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."[72] Unmistakable evidence of punitive intent must be found before it would strike down the Congressional enactment.[73]

In 1963, the Court in *Kennedy v. Mendoza-Martinez*[74] suggested a test for punitive intent based on seven factors used in previous cases: 1) whether the sanction involves an affirmative disability or restraint, 2) whether it has historically been regarded as a punishment, 3) whether it comes into play only on a finding of scienter, 4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, 5) whether the behavior to which it applies is already a crime, 6) whether an alternative purpose to which it may rationally be connected is assignable for it, and 7) whether it appears excessive in relation to the alternative purpose assigned.[75] The Court recognized that the determination of whether a statute provides for civil or criminal penalties is an extremely difficult problem and one elusive of solution, and that these seven factors may often point in differing directions.[76] The *Mendoza-Martinez* Court did not apply those seven factors. Rather, it found that the objective manifestations of congressional intent conclusively showed the challenged penalty to be punitive, which rendered analysis under the seven factors unnecessary.[77]

Two years later, in *One 1958 Plymouth Sedan v. Pennsylvania*,[78] the Court found that *Boyd* controlled a situation where a civil penalty requiring the forfeiture of a sedan worth one thousand dollars was invoked in lieu of criminal prosecution which carried a maximum fine of five hundred dollars. The Court held that it would be anomalous to apply the protections of the fourth amendment when attempting to enforce the lesser criminal penalty, but not to apply them when attempting to enforce the greater penalty which was nominally civil.[79] The Court found the penalty too excessive to be civil, and required the application of the fourth amendment protections.

In 1972, the Court decided *One Lot Emerald Cut Stones v. United States*,[80] stressing the factors concerning excessiveness of the penalty and the previous criminality of the behavior. The Court found that the penalty was not excessive, but rather indicated a remedial purpose, as it was reasonably related to the investigation and enforcement expenses of the government.[81] The previous criminality of the action also indicated the civil nature of the penalty because Congress had clearly and intentionally distinguished the two types of penalty within the statute.[82]

Finally, in 1978, in *Bell v. Wolfish*,[83] the Court cited *Mendoza-Martinez* to the effect that the civil, as opposed to criminal, purposes of a statute will generally turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[84]

This review of the history of the distinction between civil and criminal penalties indicates that no single test has been used. Different factors are used in different cases; perhaps a different test is applied in each case. Because the viability of the

[67] 303 U.S. 391 (1938).
[68] *Id.* at 399.
[69] *Id.* at 400 n.3.
[70] *Id.* at 399.
[71] 363 U.S. 603 (1960).
[72] *Id.* at 617.
[73] *Id.* at 619.
[74] 372 U.S. 144 (1963).
[75] *Id.* at 168-69.
[76] *Id.*
[77] *Id.* at 169.
[78] 380 U.S. 693 (1965).
[79] *Id.* at 701.
[80] 409 U.S. 232 (1972).
[81] *Id.* at 237.
[82] *Id.* at 236.
[83] 441 U.S. 520 (1979).
[84] *Id.* at 538 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. at 168-69).

self-incrimination privilege is dependent on the application of the test for determining whether proceedings are criminal or civil, a coherent and reliable test is essential. Such a test has not emerged from the above-mentioned Supreme Court decisions.

C. LOWER COURT REASONING

In *Ward v. Coleman*,[85] the district court and the Tenth Circuit both relied on the test outlined in *Mendoza-Martinez*, but with conflicting results. The District Court found that *Mendoza-Martinez* indicated a civil penalty, the Tenth Circuit that it indicated a criminal penalty.

Of the seven factors set forth in *Mendoza-Martinez*, two relate to the behavior penalized: whether the penalty comes into play only on a finding of scienter, and whether the behavior to which it applies is already a crime. The district court observed that the penalty is assessed regardless of scienter, and that this factor points to a finding that 33 U.S.C. § 1321 is remedial.[86] The Tenth Circuit found that the amount of the penalty varies according to the culpability and intention or negligence of the party penalized, therefore indicating a scienter requirement, and hence a criminal penalty.[87] The issue thus raised by the differing interpretations of the two courts is whether the fact of the penalty itself, or the amount of the penalty, was to be the basis of the scienter factor.

The second factor relating to the behavior penalized is that of whether the behavior to which the penalty applies is already a crime. In *Ward*, the same behavior penalized by the five-hundred-dollar fine was subject to criminal punishment under 33 U.S.C. § 407. However, 33 U.S.C. § 1321(b)(6) provides that the information required for the purposes of the civil penalty may not be used for the purposes of prosecution under the criminal section of the statute. The district court, therefore, found that this factor does not indicate that the penalty is punitive.[88] The Tenth Circuit found this distinction irrelevant, holding that the factor indicated a criminal penalty.[89]

The other five factors in *Mendoza-Martinez* are concerned with the penalty provided by the statute under scrutiny, and are: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, ... whether its operation will promote the traditional aims of punishment—retribution and deterrence, ... 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 ...."[90] The district court and the Tenth Circuit both found that the factors of affirmative disability or restraint and historical characterization are relatively useless in determining the character of a monetary penalty.[91] The factors found crucial by the two courts were those relating to the purpose of the sanction. The district court found that such factors, i.e., whether the operation of the statute promotes retribution and deterrence or is grounded in some alternative purpose, indicate a civil penalty, while the Tenth Circuit found that they indicate a criminal penalty.

The different conclusions resulted from different analyses. The district court found that the statute had an incidental deterrent effect, but that this was a legitimate part of a regulatory scheme.[92] Congress' real intent, as indicated by the use of a penalty to pay the Act's administrative costs and the costs of clean-up, was to clean up the nation's waters.[93] That is, the purpose of the act turned on an analysis of the uses to which the proceeds of the penalty were put. Because the proceeds are used for remedial purposes, the purpose of the act was held to be remedial.

The Tenth Circuit found the purpose of the penalty in the method of assessing it. Because the defendant is liable to pay the costs of cleaning up the oil spill even without the civil penalty, the assessment of the civil penalty bears no relation to clean-up costs.[94] The penalty varies according to the culpability and the prior record of the party responsible, and the gravity of the violation, and thus has the effect of retribution.[95] Because the factors used in assessing the penalty have no reasonable relation to the damage done, the alternative purpose of compensation for damage is not present. The penalty, therefore, was held to be excessive in relation to any legitimate alternative purpose.[96]

[85] 423 F. Supp. 1352.
[86] 423 F. Supp. at 1356.
[87] 598 F.2d at 1193.
[88] 423 F. Supp. at 1357.
[89] 598 F.2d at 1193.
[90] Kennedy v. Mendoza-Martinez, 372 U.S. at 168–69.
[91] 423 F. Supp. at 1356; 598 F.2d at 1193.
[92] 423 F. Supp. at 1356.
[93] *Id.*
[94] 598 F.2d at 1193.
[95] *Id.* at 1193–94.
[96] *Id.* at 1194.

The issues raised by the lower courts, then, are 1) whether the scienter requirement factor is determined by analysis of the behavior which triggers the penalty, or by analysis of the method of assessing the amount of the penalty; 2) whether the factors relating to the purpose of the penalty are analyzed with reference to the method of assessing the amount of penalty or with reference to the uses to which the penalty is put; and 3) the significance of whether the behavior penalized is already a crime. The two lower courts differed sharply in their interpretation of these factors, with each court drawing support from earlier Supreme Court decisions. The viability of the fifth amendment protection against compelled self-incrimination is dependent on the existence of a dispositive test for determining the civil or criminal nature of a penalty, therefore the clarification of these issues by the Supreme Court would have been very helpful. Unfortunately, Justice Rehnquist's opinion did not resolve the conflict.

D. THE SUPREME COURT REASONING

Justice Rehnquist's opinion in *United States v. Ward*[97] stated that, given congressional intention to establish a civil penalty, only the clearest proof of a punitive purpose or effect could suffice to establish the unconstitutionality of the statute. Justice Rehnquist found that Congress, by labelling the sanction as civil, intended to establish a civil penalty.[98]

Justice Rehnquist then noted that the factors listed in *Mendoza-Martinez* were useful, though "certainly neither exhaustive nor dispositive."[99] The Court found that only the factor concerning whether the behavior penalized is already a crime supported the conclusion that the penalty was punitive. Moreover, even though the behavior penalized is criminal, the force of this factor was diminished by the fact that the civil and criminal penalties were contained in statutes enacted seventy years apart.[100]

The Court did not engage in further analysis of the *Mendoza-Martinez* factors, but simply held a finding of prior criminalization of the penalized behavior was not sufficient to support a finding that the penalty was punitive, and that therefore the requirement that he provide information rendering him liable to the penalty did not violate his privilege against compelled self-incrimination.[101] Thus the case did nothing to clarify the proper function of the *Mendoza-Martinez* test, and actually undermined it by finding that the test is neither exhaustive nor dispositive on the issue of whether a penalty is criminal for the purposes of the fifth amendment.

The Court then turned to an analysis of the test in *Boyd v. United States*,[102] where it was held that forfeiture is a sanction sufficiently criminal to trigger the self-incrimination privilege. The Court distinguished *Boyd* on two grounds: first, that the penalty in *Boyd* had no relation to damages sustained by society or the cost of enforcing the law, while in *Ward*, the penalty was more analagous to traditional civil damages;[103] and second, that the proceedings in *Boyd* posed a danger that those penalized would prejudice themselves in respect to later criminal proceedings, while the information provided by Ward could not be used in later criminal proceedings.[104]

The first basis for distinction between *Boyd* and *Ward* relied on by the Court concerns the same issue inherent in the *Mendoza-Martinez* consideration of whether the purpose of the statute is retribution and deterrence or some alternative purpose. The issue in the lower courts was whether the determination of the function of the penalty was to be made by investigation of the method of assessing the penalty, or by investigation of the uses to which the penalty is put.[105] The Supreme Court in *Ward* found that the penalty was related to compensation to society for damages sustained, but did not expressly state the basis for its determination of this finding. Because the penalty is assessed in addition to clean-up costs, it is unrelated to the damages to the environment caused by defendant. Because the factors determining the amount of the penalty are the culpability of the party, his ability to pay, and the gravity of the violation, the penalty doesn't appear to be related to administrative costs. In fact, the only basis for the finding that the penalty is related to enforcement costs and clean-up costs appears to be the fact that the penalty is placed in

[97] 100 S. Ct. 2636.
[98] *Id.* at 2641.
[99] *Id.*
[100] *Id.* at 2641-42.
[101] *Id.* at 2642.
[102] 116 U.S. 616.
[103] 100 S. Ct. at 2643.
[104] *Id.* at 2644.
[105] The district court determined that the penalty was remedial because it was used for enforcement and clean-up costs. 423 F. Supp. at 1356. The Tenth Circuit found a retributive purpose in the fact that the factors used in assessing the penalty tended to promote the ends of retribution. 598 F.2d at 1193.

a fund which is used for clean-up expenses in those spills where the responsible party has not been found, and for the administrative costs of enforcing the penalty. If this is the basis of the finding of a remedial purpose, then any monetary penalty whatsoever may be related to damages to society and enforcement costs, and may, therefore, be found to be remedial in purpose. A fine for bribery or theft need only be placed in a fund to pay enforcement costs, and that fine would be related to damages to society and enforcement costs. The penalty would, therefore, be civil, and the one accused of theft or bribery would not be entitled to invoke the fifth amendment privilege against self-incrimination. Requiring that the penalty be used for administrative costs is thus no guarantee that a penalty is not assessed in avoidance of a criminal penalty, but rather that it is a legitimate civil penalty.

The second ground of distinction between *Boyd* and *Ward* relied on by the Court is equally flawed. The *Boyd* Court was not concerned that those penalized would be prejudiced in later criminal proceedings, but that the prosecutor would elect to take by civil proceeding in lieu of the criminal action.[106] The prosecutor, finding that he cannot marshal enough evidence to secure a conviction without the evidence provided by the defendant, may choose to enforce the desired penalty through a civil proceeding, where the evidence of the defendant may be compelled. This danger is not eliminated by the grant of immunity in future criminal proceedings. The distinction between *Boyd* and *Ward* relied on by the Court is therefore irrelevant. The danger that the legislature will establish civil penalties to avoid the requirements of due process cannot be avoided by requiring that the information compelled in enforcing the civil penalty be prohibited from use in enforcing a criminal penalty, or by requiring that the civil penalty be used to pay damages to society or administrative costs. The danger may be averted only by the establishment of a clearly defined standard which distinguishes criminal proceedings from civil proceedings.

[106] Boyd v. United States, 116 U.S. at 634: If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them ... a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.

The Court in *Ward* failed to establish such a test. The Court undermined the test used by the lower courts, first by stating that the test was neither exhaustive nor dispositive, secondly by failing to resolve, or even address, the problems faced by the lower courts in the application of the test. Having undermined the *Mendoza-Martinez* test, the Court did not establish a new test, but merely ruled that the Congressional intent to establish a civil penalty may be overcome only by the clearest proof of punitive purpose or effect. In most cases, however, no clear or precise test is available to measure the intent of Congress or the effect of the statute. The Court therefore has given Congress the broadest possible latitude to avoid the requirements of the self-incrimination privilege, and to enforce penalties without meeting the rigorous standards of due process.

III. Conclusion

In *United States v. Apfelbaum*, the Supreme Court addressed a contradiction inherent in prior decisions. One line of cases required that a witness compelled to testify under a grant of immunity after he had invoked his fifth amendment privilege against self-incrimination must be left in the same position as if he had remained silent, and that this required his immunized testimony to be excluded from any use in future criminal prosecution of him. Another line of cases supported provisions of immunity statutes which allow the use of immunized testimony in prosecutions for perjury or false swearing. The Court in *Apfelbaum* refuted the requirement that the witness be left as if he had remained silent, and ruled that the immunity statute need leave the witness in the same position as if he had remained silent only for those purposes for which the fifth amendment could have been invoked at the time the immunity was granted. The Court further held that the witness cannot invoke the fifth amendment privilege for actions not yet performed at the time immunity was granted. Because the perjury had not been performed at the time immunity was granted, it does not come within the protection of the privilege, and so the privilege does not require that the protection of the immunity extend to a prosecution for that perjury.

The implication of the new reasoning advanced by the Court is that immunized testimony would be admissible in prosecutions for any offenses committed after the grant of immunity.

In *United States v. Ward*, the issue was the distinction between criminal and civil cases. The Court found that the test announced in *Kennedy v. Men-*

doza-Martinez did not establish by clear proof that the civil penalty assessed against Ward was so punitive as to render the penalty criminal for the purposes of the fifth amendment privilege against self-incrimination. The Court did not address the problems faced by the lower courts in applying the test, and therefore left the lower courts with no certain test to apply to legislative enactments to ensure that civil penalties are indeed civil, and are not denominated as civil penalties to avoid the requirements of the self-incrimination privilege.

Both cases involved a determination of the extent to which compelled information may be used against one facing a sanction. In *Apfelbaum*, the Court's clearly defined modification of earlier case law greatly expanded the possible uses of testimony compelled under a grant of immunity. In *Ward*, the Court's reasoning was not clearly defined, and it is this very lack of definition which potentially expands the discretion of the legislature in compelling information by the device of establishing civil penalties. By establishing a civil penalty rather than a criminal penalty, the government may compel information which renders the defendant liable to sanctions, whereas if the penalty were a criminal penalty, the information could not be compelled.

The two cases thus provide two devices for the compulsion of testimony which otherwise would not be available to the prosecution of the witness because of the fifth amendment privilege against compelled self-incrimination.

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