

# The Burger Court Opinion Writing Database

## *United States v. Ward*

448 U.S. 242 (1980)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

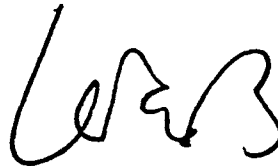
May 12, 1980

Re: 79-394 - U.S. v. Ward

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WR', written in a cursive, stylized manner.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 9, 1980

United States v. Ward, No. 79-394

Dear Bill:

Although I am otherwise prepared to join your opinion in United States v. Ward, I am puzzled by the penultimate paragraph (p. 11), stating that "it would be quite anomalous to hold that § 311(b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. . .," and suggesting that if Boyd is to the contrary, it be limited.

If this reference to Boyd is meant to imply that we generally abandon the notion that the Self-Incrimination Clause may apply in a broader range of proceedings than do the "guaranties in Article III and the Sixth Amendment," United States v. Regan, 232 U.S. 37, 50 (1914); see Helvering v. Mitchell, 303 U.S. 391, 400 n. 3 (1938), it seems to go quite a bit further than necessary to dispose of this case. As Regan and Helvering indicate, our decisions defining sanctions as

"criminal" or "civil" have been influenced substantially by the particular criminal law right claimed as applicable.\* Perhaps we should reconsider whether this sort of analysis is sensible as a general proposition, but we certainly should not reach out to reject it in a terse sentence at the end of an opinion.

Perhaps all you intended to indicate was that Boyd's holding that a forfeiture was criminal for Fifth Amendment purposes should not apply in this case, for reasons stated earlier in your opinion. If so, I agree, but am then concerned that the use of the word "limited" is somewhat confusing.

It may be that you have entirely something else in mind. Accordingly, I await further enlightenment.

Sincerely,

Bill

Mr Justice Rehnquist

cc: The Conference

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\*Thus, we have treated forfeitures as "quasi-criminal" for Fourth, as well as Fifth, Amendment purposes. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

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April 10, 1980

Dear Bill:

Sincerely,

Bill

Mr Justice Rehnquist  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 10, 1980

RE: No. 79-394 United States v. Ward

Dear Bill:

Thank you for your note of April 10. Your proposed substitute for the entire paragraph is entirely satisfactory to me. I very much appreciate your willingness to consider and accommodate my worries. Please join me.

Sincerely,

*Bill*

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 9, 1980

Re: No. 79-394, United States v. Ward

Dear Bill,

Your proposed change in response to Bill Brennan's letter is satisfactory to me, and I do not anticipate any difficulties with any further responses you make to Bill's and Harry's letters. In short, I shall be glad to join your opinion for the Court if you will insert the word "compulsory" before the phrase "self-incrimination" at the following points in the opinion, and perhaps at others that I missed: in the next to last line of the first paragraph on page 1; in the fourth line of the final paragraph beginning on page 4; in the next to last line of the first full paragraph on page 5; in the seventh line of the second full paragraph on page 8; and in the fifth line of the run-over paragraph at the top of page 10.

Sincerely yours,

P.S.  
/

Mr. Justice Rehnquist

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 7, 1980

Re: No. 79-394 - United States v. Ward

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Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 16, 1980

Re: No. 79-394 - U.S. v. L.O. Ward

Dear Harry:

Please join me in your concurring opinion.

Sincerely,

*JM.*  
T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

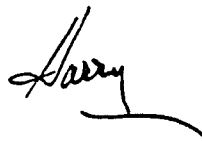
April 9, 1980

Re: No. 79-394 - United States v. Ward

Dear Bill:

I share the concerns Bill Brennan has expressed in his letter of today to you. I am also mildly concerned about what seems to be the rather summary dismissal on page 7 of your opinion of the Mendoza-Martinez factors. The Court of Appeals rather carefully went through these factors, and I suspect the participating judges might find the casual dismissal of the analysis a bit disconcerting. Perhaps, however, you feel that this will not be the case.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

NOT RECORDED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 27 1980

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No. 79-394 - United States v. Ward

MR. JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that a proceeding for assessment of a monetary penalty under § 311(b)(6) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(6), is not a "criminal case" within the meaning of the Fifth Amendment. I reach this conclusion, however, for a number of reasons in addition to those discussed in the Court's opinion.

The Court of Appeals engaged in a careful analysis of the standards set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963), for distinguishing civil from criminal proceedings. These standards are catalogued in a footnote of

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice  
Mr. Justice  
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Mr. Justice  
Mr. Justice

From: Mr. Justice

1st DRAFT

Circulated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

Circulated: ~~MAY 28 1980~~

No. 79-394

United States, Petitioner,  
v.  
L. O. Ward dba L. O. Ward Oil  
and Gas Operations. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Tenth  
Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that a proceeding for assessment of a monetary penalty under § 311 (b)(6) of the Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6), is not a "criminal case" within the meaning of the Fifth Amendment. I reach this conclusion, however, for a number of reasons in addition to those discussed in the Court's opinion.

The Court of Appeals engaged in a careful analysis of the standards set forth in *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 168-169 (1963), for distinguishing civil from criminal proceedings. These standards are catalogued in a footnote of the Court's opinion. *Ante*, at 5, n. 7. The Court of Appeals concluded that some of the seven stated factors offered little guidance in this case, while others supported a "criminal" designation. In particular, it found that scienter played a part in determining the amount of penalty assessments; that the penalties promote traditional retributive aims of punishment; that behavior giving rise to the assessment is subject to criminal punishment under § 13 of the Rivers and Harbors Act of 1899, 33 U. S. C. § 407, and that the criteria employed by the Coast Guard to set the amount of assessments permit penalties that may be excessive in relation to alternative remedial or nonpunitive purposes. *Ward v. Coleman*, 598 F. 2d 1187, 1192-1194 (CA10 1979). The Court is content to discuss only one of these findings. See *ante*, at 7. Because of the consideration given the others

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 2, 1980

79-394 U.S. v. L. O. Ward

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

PP 1257

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

1 APR 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-394

|  |   |
|--|---|
| United States, Petitioner,<br>v.<br>L. O. Ward dba L. O. Ward Oil<br>and Gas Operations. | } On Writ of Certiorari to the<br>United States Court of<br>Appeals for the Tenth<br>Circuit. |
|--|---|

[April —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States seeks review of a decision of the United States Court of Appeals for the Tenth Circuit that a proceeding for the assessment of a "civil penalty" under § 311 (b)(6) of the Federal Water Pollution Control Act (FWPCA) is a "criminal case" within the meaning of the Fifth Amendment's guarantee against self-incrimination. We granted certiorari and now reverse.

I

At the time this case arose,<sup>1</sup> § 311 (b)(3) of the FWPCA prohibited the discharge into navigable waters or onto adjoining shorelines of oil or hazardous substances in quantities determined by the President to be "harmful."<sup>2</sup> Section 311 (b)(5) of the Act imposed a duty upon "any person in charge of a vessel or of an on-shore facility or an off-shore facility" to

<sup>1</sup> Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1506, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468. Except as noted, those amendments have no bearing on the present case. See nn 2 and 4, *infra*.

<sup>2</sup> Section 311 (b)(3) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as may be harmful" (emphasis added), as determined by the President.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 9, 1980

Re: <sup>394</sup>No. 79-~~792~~ - United States v. Ward

Dear Bill and Harry:

Having received letters from you both on the same day with respect to this case, I thought in the interest of fiscal economy I would try to respond to them with only one reply.

If I understand your expressed concern aright, Bill, it is that we are laying down too broad a rule in my proposed draft opinion, and that the penultimate sentence should be more closely tied to the facts of this case. I am quite willing to try to move in that direction if those who have already joined the draft are agreeable, and if it would satisfy your concerns. The revision I would propose is the substitution of the following for the present penultimate sentence of the penultimate paragraph on pages 11 and 12:

"More importantly, however, we believe that in the light of what we have found to be overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect it would be quite anomalous

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 10, 1980

Re: No. 79-394 United States v. Ward

Dear Bill:

In my response of yesterday, I had thought that I indicated no intent to drop the final sentence in the last paragraph preceding Part IV. Although I believe that we are, in fact, limiting Boyd to some extent, I could live with the following substitute for the entire paragraph being considered:

"More importantly, however, we believe that in the light of what we have found to be overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect it would be quite anomalous to hold that § 311(b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. We do not read Boyd as requiring a contrary conclusion."

Sincerely,



Mr. Justice Brennan

Copies to the Conference



PG 12, 4, 5, 8, 10-12

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-394

|                               |   |                              |
|-------------------------------|---|------------------------------|
| United States, Petitioner,    | } | On Writ of Certiorari to the |
| v.                            |   | United States Court of       |
| L. O. Ward dba L. O. Ward Oil |   | Appeals for the Tenth        |
| and Gas Operations.           |   | Circuit.                     |

[April —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States seeks review of a decision of the United States Court of Appeals for the Tenth Circuit that a proceeding for the assessment of a "civil penalty" under § 311 (b)(6) of the Federal Water Pollution Control Act (FWPCA) is a "criminal case" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. We granted certiorari and now reverse.

I

At the time this case arose,<sup>1</sup> § 311 (b)(3) of the FWPCA prohibited the discharge into navigable waters or onto adjoining shorelines of oil or hazardous substances in quantities determined by the President to be "harmful."<sup>2</sup> Section 311 (b)(5) of the Act imposed a duty upon "any person in charge of a vessel or of an on-shore facility or an offshore facility" to

<sup>1</sup> Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468. Except as noted, those amendments have no bearing on the present case. See nn. 2 and 4, *infra*.

<sup>2</sup> Section 311 (b)(3) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as may be harmful" (emphasis added), as determined by the President.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 9, 1980

Re: 79-394 - United States v. Ward

Dear Bill:

Although further study may cause me to change my mind, I am still persuaded the Court of Appeals was right. Please bear with me for another week or so.

Respectfully,



Mr. Justice Rehnquist

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79-394 - United States v. Ward

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

MR. JUSTICE STEVENS, dissenting.

From: Mr. Justice Stevens

Circulated: JUN 23 '80

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There are a host of situations in which the Government requires the citizen to provide it with information that may later be useful in proving that the citizen has some liability to the Government. In determining whether the combination of compulsion and liability is consistent with the Fifth Amendment, I would look to two factors: first, whether the liability actually imposed on the citizen is properly characterized as "criminal" and second, if so, whether the compulsion of information was designed to assist the Government in imposing such a penalty rather than furthering some other valid regulatory purpose.

Although this case is admittedly a close one, I am persuaded that the monetary penalty imposed on respondent pursuant to § 311(b)(6) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(6), was a "criminal" sanction for purposes of the Fifth Amendment protection against compelled self-incrimination. As the Court of Appeals pointed out,

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Mr. Justice Rehnquist

From: Mr. Justice Stevens

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-394

|  |   |
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| United States, Petitioner,<br>v.<br>L. O. Ward dba L. O. Ward Oil<br>and Gas Operations. | } On Writ of Certiorari to the<br>United States Court of<br>Appeals for the Tenth<br>Circuit. |
|--|---|

[June —, 1980]

MR. JUSTICE STEVENS, dissenting.

There are a host of situations in which the Government requires the citizen to provide it with information that may later be useful in proving that the citizen has some liability to the Government. In determining whether the combination of compulsion and liability is consistent with the Fifth Amendment, I would look to two factors: first, whether the liability actually imposed on the citizen is properly characterized as "criminal" and second, if so, whether the compulsion of information was designed to assist the Government in imposing such a penalty rather than furthering some other valid regulatory purpose.

Although this case is admittedly a close one, I am persuaded that the monetary penalty imposed on respondent pursuant to § 311 (b)(6) of the Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6), was a "criminal" sanction for purposes of the Fifth Amendment protection against compelled self-incrimination. As the Court of Appeals pointed out, penalties under § 311 (b)(6) are not calculated to reimburse the Government for the cost of cleaning up an oil spill.<sup>1</sup> Rather, this part of the statute is clearly aimed at exacting retribution for causing the spill:

"The penalties are based on such factors as the gravity

<sup>1</sup> An owner or operator is liable for clean-up costs or, in the event that the discharge is "nonremovable," for liquidated damages under 33 U. S. C.