UNITED STATES v BAJAKAJIAN

SUPREME COURT OF THE UNITED STATES

524 U.S. 321
June 22, 1998
[5 - 4]

OPINION: Justice Thomas/Stevens/Souter/Ginsburg/Breyer...Hosep Bajakajian attempted to leave the United States without reporting...that he was transporting more than $10,000 in

currency. Federal law...provides that a person convicted of willfully violating this reporting requirement **shall forfeit** to the government "**any property...involved in such offense.**" **The question in this case is whether forfeiture of the entire [currency] that respondent failed to declare would violate the Excessive Fines Clause of the Eighth Amendment. We hold that it would, because full forfeiture of respondent's currency would be grossly disproportional to the gravity of his offense**.

...[R]espondent, his wife, and his two daughters were waiting at Los Angeles International Airport to board a flight to Italy; their final destination was Cyprus. Using dogs trained to detect currency by its smell, customs inspectors discovered some $230,000 in cash in the Bajakajians' checked baggage. A customs inspector...told them...they were required to report all money in excess of $10,000 in their possession or in their baggage. Respondent said...he had $8,000 and...his wife had... $7,000, but that the family had no additional currency to declare. A search of their carry-on bags,

purse, and wallet revealed more cash; [the new total was — **cha-ching**[1] — **$357,144**]. The currency was seized and respondent was taken into custody.

A federal grand jury indicted respondent...[for] (1) [willfully] failing to report...that he was transporting more than $10,000 outside the United States, ...[and with] (2) making a false material statement to the United States Customs Service...[and (3) seeking a] forfeiture of the $357,144...

18 U.S.C. §982(a)(1)...provides:

> The court, in imposing sentence..., **shall order [forfeiture of]...any property... involved in such offense**...

Section 5322(a) provides:

> A person willfully violating this subchapter...shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

Respondent pleaded guilty to the failure to report...[T]he Government agreed to dismiss the false statement charge...and respondent elected to have a bench trial on the forfeiture...After the bench trial, the District Court found that **the entire $357,144 was subject to forfeiture** because it was "involved in" the offense. The court also found that the funds were not connected to any other crime..., [the] respondent was transporting the money to **repay a lawful debt** [and]...that respondent had failed to report that he was taking the currency out of the United States because of **fear stemming from "cultural differences"**: Respondent, who had grown up as a member of the Armenian minority in Syria, had a "distrust for the Government."

Although §982(a)(1) directs sentencing courts to impose full forfeiture, the District Court concluded that such forfeiture would be "extraordinarily harsh" and "grossly disproportionate to the offense in question" and that it would therefore violate the Excessive Fines Clause. The court instead ordered forfeiture of $15,000, in addition to a sentence of three years of probation and a fine of $5,000--the maximum fine under the Sentencing Guidelines--because the court believed that the maximum Guidelines fine was "too little" and that a $15,000 forfeiture would "make up for what I think a reasonable fine should be."

The United States appealed, **seeking full forfeiture**...as provided in §982(a)(1). The Court of Appeals...affirmed...[and] held that, to satisfy the Excessive Fines Clause, a forfeiture must fulfill two conditions: **The property forfeited must be an "instrumentality" of the crime committed, and the value of the property must be proportional to the culpability of the owner.** A majority of the panel determined that the currency was not an "instrumentality" of the crime of failure to report because "the crime in a currency reporting offense is the withholding of information,...not the possession or the transportation of the money." The majority therefore held that §982(a)(1) could never satisfy the Excessive Fines Clause in cases involving forfeitures of currency and that it was

---

[1]Sound effects courtesy of ELL!

unnecessary to apply the "proportionality" prong of the test. Although the panel majority concluded that the Excessive Fines Clause did not permit forfeiture of *any* of the unreported currency, it held that it lacked jurisdiction to set the $15,000 forfeiture aside because **respondent had not cross-appealed** to challenge that forfeiture...[W]e granted certiorari.

...This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as **punishment for some offense**." *Browning-Ferris Industries v. Kelco Disposal*[2]. The Excessive Fines Clause thus limits the government's power to extract payments..."as punishment for some offense." *Austin v. United States*[3]. Forfeitures -- payments in kind -- are thus "fines" if they constitute punishment for an offense.

We have little trouble concluding that the forfeiture of currency ordered by §982(a)(1) constitutes punishment. The statute directs a court to order forfeiture as an additional sanction when "imposing sentence on a person convicted of" a willful violation of [the] reporting requirement...

The United States argues, however, that the forfeiture of currency under §982(a)(1) "also serves **important remedial purposes**." The Government asserts that it has "an overriding sovereign interest in controlling what property leaves and enters the country." It claims that full forfeiture of unreported currency supports that interest by serving to "**deter illicit movements of cash**" and aiding in providing the Government with "valuable information to investigate and detect criminal activities associated with that cash." Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss...Although the Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of respondent's $357,144.

The United States also argues that the forfeiture mandated by §982(a)(1) is constitutional because it falls within a class of historic forfeitures of property tainted by crime. In so doing, the Government relies upon a series of cases involving traditional civil...forfeitures that are inapposite because such forfeitures were historically considered non-punitive. The theory behind such forfeitures was the fiction that the action was directed against "guilty property," rather than against the offender himself...Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. *Origet v. United States* ("The merchandise is to be forfeited irrespective of any criminal prosecution...The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent"). As Justice Story explained:

---

[2]Case 8A-F-1 on this website.

[3]Case 8A-F-2 on this website.

> The **thing** is here primarily considered as the offender, or rather the offence is attached primarily to the **thing**;...The...proceeding...stands independent of, and wholly unaffected by any criminal proceeding...

Traditional...forfeitures were thus not considered punishment against the individual for an offense...Because they were viewed as non-punitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause...

The forfeiture in this case does not bear any of the hallmarks of traditional civil...forfeitures ...The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed upon innocent owners...[Criminal forfeitures] have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law [and although]...criminal forfeitures were well established in England at the time of the Founding, they were rejected altogether in the laws of this country until very recently.

The First Congress explicitly rejected forfeitures as punishments for federal crimes. It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking. Organized Crime Control Act of 1970/ Comprehensive Drug Abuse Prevention and Control Act of 1970. In providing for this mode of punishment, which had long been unused in this country, the Senate Judiciary Committee acknowledged that "criminal forfeiture...represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." Indeed, it was not until 1992 that Congress provided for the criminal forfeiture of currency at issue in this case. *18 U.S.C.§982*(a).

The Government specifically contends that the forfeiture of respondent's currency is constitutional because it involves an "instrumentality" of respondent's crime...because it "does not merely facilitate a violation of law," but is "the very *sine qua non* of the crime." The Government reasons that "there would be no violation at all without the exportation (or attempted exportation) of the cash."

Acceptance of the Government's argument would require us to expand the traditional understanding of instrumentality forfeitures. This we decline to do...; **the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination. Because the forfeiture of respondent's currency constitutes punishment and is thus a "fine" within the meaning of the Excessive Fines Clause, we now turn to the question of whether it is "excessive."**

The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: **The amount of the forfeiture must bear some relationship to the gravity of the offense** that it is designed to punish. *Austin v. United States*...Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is **grossly disproportional to the gravity of a defendant's offense**.

The text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to

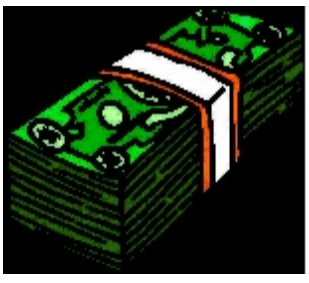
the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be "excessive." Excessive means surpassing the usual, the proper, or a normal measure of proportion...The constitutional question that we address, however, is just how proportional to a criminal offense a fine must be, and the text of the Excessive Fines Clause does not answer it.

Nor does its history. The Clause was little discussed in the First Congress and the debates over the ratification of the Bill of Rights. As we have previously noted, the Clause was taken verbatim from the English Bill of Rights of 1689. *Browning-Ferris Industries.* That document's prohibition against excessive fines was a reaction to the abuses of the King's judges during the reigns of the Stuarts, but the fines that those judges imposed were described contemporaneously only in the most general terms...Similarly, Magna Charta--which the Stuart judges were accused of subverting--required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood...

None of these sources suggests how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive. We must therefore rely on other considerations in deriving a constitutional excessiveness standard, and there are two that we find particularly relevant. The **first**, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that **judgments about the appropriate punishment for an offense belong in the first instance to the legislature**...The **second** is that any **judicial determination** regarding the gravity of a particular criminal offense **will be inherently imprecise**. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents...

In applying this standard, the...courts...must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.

Under this standard, the forfeiture of respondent's entire $357,144 would violate the Excessive Fines Clause. Respondent's crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it. Section 982(a)(1) orders currency to be forfeited for a "willful" violation of the reporting requirement. Thus, the essence of respondent's crime is a willful failure to report the removal of currency from the United States. Furthermore,... respondent's violation was unrelated to any other illegal activities. The money was the proceeds of legal activity and was to be used to repay a lawful debt. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader. And under the Sentencing Guidelines, the maximum sentence that could have been imposed on respondent was six months, while the maximum fine was $5,000. **Such penalties confirm a minimal level of culpability.**



The harm that respondent caused was also minimal. Failure to report his

currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country. The Government and the dissent contend that there is a correlation between the amount forfeited and the harm that the Government would have suffered had the crime gone undetected. We disagree. There is no inherent proportionality in such a forfeiture. It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs.

Comparing the gravity of respondent's crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense. It is larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government.

Finally, we must reject the contention that the proportionality of full forfeiture is demonstrated by the fact that the First Congress enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value. It is argued that the enactment of these statutes at roughly the same time that the Eighth Amendment was ratified suggests that full forfeiture, in the customs context at least, is a proportional punishment. The early customs statutes, however, do not support such a conclusion because, unlike §982(a)(1), the type of forfeiture that they imposed was not considered punishment for a criminal offense.

Certain of the early customs statutes required the forfeiture of goods imported in violation of the customs laws, and, in some instances, the vessels carrying them as well. These forfeitures, however, were civil *in rem* forfeitures, in which the Government proceeded against the property itself on the theory that it was guilty, not against a criminal defendant. Such forfeitures sought to vindicate the Government's underlying property right in customs duties, and like other traditional *in rem* forfeitures, they were not considered at the Founding to be punishment for an offense. They therefore indicate nothing about the proportionality of the punitive forfeiture at issue here.

Other statutes, however, imposed monetary "forfeitures" proportioned to the value of the goods involved. See, *e.g.,* Act of July 31, 1789 (if an importer, "with design to defraud the revenue," did not invoice his goods at their actual cost at the place of export, "all such goods, wares or merchandise, or the value thereof...shall be forfeited"); (any person concealing or purchasing goods, knowing they were liable to seizure for violation of the customs laws, was liable to "forfeit and pay a sum double the value of the goods so concealed or purchased")...These "forfeitures" were similarly not considered punishments for criminal offenses...Significantly, the fact that the forfeiture was a multiple of the value of the goods did not alter the Court's conclusion:

> The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value...Double the value may not be more than complete indemnity.

The early monetary forfeitures, therefore, were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties. They were thus no different in purpose and effect than the *in rem* forfeitures of the goods to whose value they were proportioned...By contrast, the full forfeiture mandated by §982(a)(1) in this case serves no remedial purpose; it is clearly punishment. The customs statutes enacted by the First Congress, therefore, in no way suggest that §982(a)(1)'s currency forfeiture is constitutionally proportional.

For the foregoing reasons, the full forfeiture of respondent's currency would violate the Excessive Fines Clause. The judgment of the Court of Appeals is Affirmed.

DISSENT: Justice Kennedy/Rehnquist/O'Connor/Scalia...**For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment.** The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court's test, its decision portends serious disruption of a vast range of statutory fines. The Court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and **disrespectful of the separation of powers**. The irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it. To make its rationale work, the Court appears to remove important classes of fines from any excessiveness inquiry at all. This, too, is unsound; and with all respect, I dissent.

In striking down this forfeiture, the majority treats many fines as "remedial" penalties even though they far exceed the harm suffered. Remedial penalties, the Court holds, are not subject to the Excessive Fines Clause at all. Proceeding from this premise, the majority holds customs fines are remedial and not at all punitive, even if they amount to many times the duties due on the goods. In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment.

This novel, mistaken approach requires reordering a tradition existing long before the Republic and confirmed in its early years. The Court creates its category to reconcile its unprecedented holding with a six-century-long tradition of *in personam* customs fines equal to one, two, three, or even four times the value of the goods at issue. Tariff Act of 1930 (failing to declare goods); Act of Mar. 3, 1823 (importing without a manifest); Act of Mar. 2, 1799 (failing to declare goods; failing to re-export goods; making false entries on forms); Act of Aug. 4, 1790 (submitting incomplete manifests; unloading before customs; unloading duty-free goods); Act of July 31, 1789 (using false invoices; buying uncustomed goods); *King* v. *Manning* (assisting smugglers); 1 Eliz. 1 (declaring goods under wrong person's name); 1 & 2 Phil. & M. (exporting food without a license; exporting more food than the license allowed); 5 Rich. 2 (exporting gold or silver without a license; using ships other than those of the King's allegiance).

In order to sweep all these precedents aside, the majority's remedial analysis assumes the settled tradition was limited to "reimbursing the Government for" unpaid duties. The assumption is wrong. Many offenses did not require a failure to pay a duty at all. Act of Mar. 3, 1863 (importing under false invoices); Act of Mar. 3, 1823 (failing to deliver ship's manifest); Act of Mar. 2, 1799

(transferring goods from one ship to another); 5 Rich. II (exporting gold or silver without a license). None of these *in personam* penalties depended on a compensable monetary loss to the government. True, these offenses risked causing harm, but so does smuggling or not reporting cash. A sanction proportioned to potential rather than actual harm is punitive, though the potential harm may make the punishment a reasonable one. **The majority nonetheless treats the historic penalties as nonpunitive and thus not subject to the Excessive Fines Clause, though they are indistinguishable from the fine in this case. (It is a mark of the Court's doctrinal difficulty that we must speak of nonpunitive penalties, which is a contradiction in terms.)**

...Forfeiture of the money involved in the offense would compensate for the investigative and enforcement expenses of the Customs Service...The majority, in short, is not even faithful to its own artificial category of remedial penalties.

The majority's novel holding creates another anomaly as well. The majority suggests *in rem* forfeitures of the instrumentalities of crimes are not fines at all. The point of the instrumentality theory is to distinguish goods having a "close enough relationship to the offense" from those incidentally related to it. *Austin v. United States*. From this, the Court concludes the money in a cash smuggling or non-reporting offense cannot be an instrumentality, unlike, say, a car used to transport goods concealed from taxes. There is little logic in this rationale. The car plays an important role in the offense but is not essential; one could also transport goods by jet or by foot. The link between the cash and the cash-smuggling offense is closer, as the offender must fail to report while smuggling more than $10,000. The cash is not just incidentally related to the offense of cash smuggling. It is essential, whereas the car is not. Yet the car plays an important enough role to justify forfeiture...The cash does as well. Even if there were a clear distinction between instrumentalities and incidental objects, when the Court invokes the distinction it gets the results backwards.

Turning to the question of excessiveness, the majority states the test: A defendant must prove a gross disproportion before a court will strike down a fine as excessive. This test would be a proper way to apply the Clause, if only the majority were faithful in applying it. The Court does not, however, explain why in this case forfeiture of all of the cash would have suffered from a gross disproportion. The offense is a serious one, and respondent's smuggling and failing to report were willful. The cash was lawful to own, but this fact shows only that the forfeiture was a fine; it cannot also prove that the fine was excessive.

The majority illuminates its test with a principle of deference. Courts "should grant substantial deference to the broad authority that legislatures necessarily possess" in setting punishments. Again, the principle is sound but the implementation is not. The majority's assessment of the crime accords no deference, let alone substantial deference, to the judgment of Congress. Congress deems the crime serious, but the Court does not. Under the congressional statute, the crime is punishable by a prison sentence, a heavy fine, and the forfeiture here at issue. As the statute makes clear, the Government needs the information to investigate other serious crimes, and it needs the penalties to ensure compliance...

The majority does not explain why respondent's knowing, willful, serious crime deserves no higher

penalty than $15,000. It gives only a cursory explanation of why forfeiture of all of the money would have suffered from a gross disproportion. The majority justifies its evisceration of the fine because the money was legal to have and came from a legal source. This fact, however, shows only that the forfeiture was a fine, not that it was excessive...

In assessing whether there is a gross disproportion, the majority concedes, we must grant "substantial deference" to Congress' choice of penalties. Yet, ignoring its own command, the Court sweeps aside Congress' reasoned judgment and substitutes arguments that are little more than speculation.

Congress considered currency smuggling and non-reporting a serious crime and imposed commensurate penalties. It authorized punishments of five years' imprisonment, a $250,000 fine, plus forfeiture of all the undeclared cash. Congress found the offense standing alone is a serious crime, for the same statute doubles the fines and imprisonment for failures to report cash "while violating another law of the United States." Congress experimented with lower penalties on the order of one year in prison plus a $1,000 fine, but it found the punishments inadequate to deter lucrative money laundering. **The Court today rejects this judgment...**The majority, then, departs from its promise of deference in the very case announcing the standard...

The crime of smuggling or failing to report cash is more serious than the Court is willing to acknowledge. The drug trade, money laundering, and tax evasion all depend in part on smuggled and unreported cash. Congress enacted the reporting requirement because secret exports of money were being used in organized crime, drug trafficking, money laundering, and other crimes. Likewise, tax evaders were using cash exports to dodge hundreds of millions of dollars in taxes owed to the Government.

The Court does not deny the importance of these interests but claims they are not implicated here because respondent managed to disprove any link to other crimes. Here, to be sure, the Government had no affirmative proof that the money was from an illegal source or for an illegal purpose. This will often be the case, however. By its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean. The point of the statute, which provides for even heavier penalties if a second crime can be proved, is to mandate forfeiture regardless. It is common practice, of course, for a cash courier not to confess a tainted source but to stick to a well-rehearsed story. The kingpin, the real owner, need not come forward to make a legal claim to the funds. He has his own effective enforcement measures to ensure delivery at destination or return at origin if the scheme is thwarted. He is, of course, not above punishing the courier who deviates from the story and informs. The majority is wrong, then, to assume *in personam* forfeitures cannot affect kingpins, as their couriers will claim to own the money and pay the penalty out of their masters' funds. Even if the courier confessed, the kingpin could face an *in personam* forfeiture for his agent's authorized acts, for the kingpin would be a co-principal in the commission of the crime.

In my view, forfeiture of all the unreported currency is sustainable whenever a willful violation is proven. The facts of this case exemplify how hard it can be to prove ownership and other crimes, and they also show respondent is far from an innocent victim. For one thing, he was guilty of

repeated lies to Government agents and suborning lies by others. Customs inspectors told respondent of his duty to report cash. He and his wife claimed they had only $15,000 with them, not the $357,144 they in fact had concealed. He then told customs inspectors a friend named Abe Ajemian had lent him about $200,000. Ajemian denied this. A month later, respondent said Saeed Faroutan had lent him $170,000. Faroutan, however, said he had not made the loan and respondent had asked him to lie. Six months later, respondent resurrected the fable of the alleged loan from Ajemian, though Ajemian had already contradicted the story. As the District Court found, respondent "has lied, and has had his friends lie." He had proffered a "suspicious and confused story, documented in the poorest way, and replete with past misrepresentation."

Respondent told these lies, moreover, in most suspicious circumstances. His luggage was stuffed with more than a third of a million dollars. All of it was in cash, and much of it was hidden in a case with a false bottom.

The majority ratifies the District Court's see-no-evil approach... Because of the problems of individual proof, Congress found it necessary to enact a blanket punishment. One of the few reliable warning signs of some serious crimes is the use of large sums of cash...**Money launderers will rejoice to know they face forfeitures of less than 5% of the money transported,...a modest cost of doing business in the world of drugs and crime. Given the severity of respondent's crime, the Constitution does not forbid forfeiture of all of the smuggled or unreported cash. Congress made a considered judgment in setting the penalty, and the Court is in serious error to set it aside...**I dissent.