SUPREME COURT OF THE UNITED STATES

No. 96–1487

UNITED STATES, PETITIONER *v.*
HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 1998]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

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.

I

A

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. See, *e.g.*, *ante*, at 20. 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. See *ante*, at 19–22. 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. *E.g.*, *Cross* v. *United States*, 6 F. Cas. 892 (No. 3,434) (CC Mass. 1812) (Story, J., Cir. J.); *United States* v. *Riley*, 88 F. 480 (SDNY 1898); *United States* v. *Jordan*, 26 F. Cas. 661 (No. 15,498) (Mass. 1876); *In re Vetterlein*, 28 F. Cas. 1172 (No. 16,929) (CC SDNY 1875); *United States* v. *Hughes*, 26 F. Cas. 417 (No. 15,417) (CC SDNY 1875); *McGlinchy* v. *United States*, 16 F. Cas. 118 (No. 8,803) (CC Me. 1875); *United States* v. *Hutchinson*, 26 F. Cas. 446 (No. 15,431) (Me. 1868); Tariff Act of 1930, §497, 46 Stat. 728, as amended, 19 U. S. C. §1497(a) (failing to declare goods); Act of Mar. 3, 1863, §1, 12 Stat. 738 (same); Act of Mar. 3, 1823, ch. 58, §1, 3 Stat. 781 (importing without a manifest); Act of Mar. 2, 1799, §§ 46, 79, 84, 1 Stat. 662, 687, 694 (failing to declare goods; failing to re-export goods; making false entries on forms); Act of Aug. 4, 1790, §§10, 14, 22, 1 Stat. 156, 158, 161 (submitting incomplete manifests; unloading before customs; unloading duty-free goods); Act of July 31, 1789, §§22, 25, 1 Stat. 42, 43 (using false invoices; buying uncustomed goods); *King* v. *Manning*, 2 Comyns 616, 92 Eng. Rep. 1236 (K. B. 1738) (assisting smugglers); 1 Eliz. 1, ch. 11, §5 (1558–1559) (Eng.)

(declaring goods under wrong person's name); 1 & 2 Phil. & M., ch. 5, §§1, 3 (1554–1555) (Eng.) (exporting food without a license; exporting more food than the license allowed); 5 Rich. 2, Stat. 1, chs. 2, 3 (1381) (Eng.) (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. *Ante*, at 20. The assumption is wrong. Many offenses did not require a failure to pay a duty at all. See, *e.g.*, Act of Mar. 3, 1863, §1, 12 Stat. 738 (importing under false invoices); Act of Mar. 3, 1823, ch. 58, §1, 3 Stat. 781 (failing to deliver ship's manifest); Act of Mar. 2, 1799, §28, 1 Stat. 648 (transferring goods from one ship to another); Act of Aug. 4, 1790, §14, 1 Stat. 158 (same); 5 Rich. II, st. 1, ch. 2 (1381) (Eng.) (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, *ante*, at 20, n. 17, 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. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 460–462 (1993) (opinion of STEVENS, J.). 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.)

Even if the majority's typology were correct, it would have to treat the instant penalty as nonpunitive. In this respect, the Court cannot distinguish the case on which it twice relies, *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972) *(per curiam)*. *Ante*, at 6, 21. *Emerald*

Stones held forfeiture of smuggled goods plus a fine equal to their value was remedial and not punitive, for purposes of double jeopardy, because the fine "serves to reimburse the Government for investigation and enforcement expenses." 409 U. S., at 237. The logic, however, applies with equal force here. Forfeiture of the money involved in the offense would compensate for the investigative and enforcement expenses of the Customs Service. There is no reason to treat the cases differently, just because a small duty was at stake in one and a disclosure form in the other. See *Bollinger's Champagne*, 3 Wall. 560, 564 (1866) (holding falsehoods on customs forms justify forfeiture even if the lies do not affect the duties due and paid). The majority, in short, is not even faithful to its own artificial category of remedial penalties.

B

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. See *ante*, at 10–11, and nn. 8, 9. 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*, 509 U. S. 602, 628 (SCALIA, J., concurring in part and concurring in judgment). 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. *Ante*, at 11, n. 9. 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. See 31 U. S. C. §§5316(a), 5322(a). 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, as the majority concedes. *A fortiori,* 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.

II

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. See *ante,* at 12. 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. *Ante,* at 13 (quoting *Solem* v. *Helm,* 463 U. S. 277, 290 (1983)). 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.

A

By affirming, the majority in effect approves a meager

$15,000 forfeiture. The majority's holding purports to be narrower, saying only that forfeiture of the entire $357,144 would be excessive. *Ante*, at 14, and n. 11. This narrow holding is artificial in constricting the question presented for this Court's review. The statute mandates forfeiture of the entire $357,144. See 18 U. S. C. §982(a)(1). The only ground for reducing the forfeiture, then, is that any higher amount would be unconstitutional. The majority affirms the reduced $15,000 forfeiture on *de novo* review, see *ante*, at 14, and n. 11, which it can do only if a forfeiture of even $15,001 would have suffered from a gross disproportion. Indeed, the majority leaves open whether the $15,000 forfeiture itself was too great. See *ante*, at 14, n. 11. Money launderers, among the principal targets of this statute, may get an even greater return from their crime.

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. See *ante*, at 16. This fact, however, shows only that the forfeiture was a fine, not that it was excessive. As the majority puts it, respondent's money was lawful to possess, was acquired in a lawful manner, and was lawful to export. *Ante*, at 15–16. It was not, however, lawful to possess the money while concealing and smuggling it. Even if one overlooks this problem, the apparent lawfulness of the money adds nothing to the argument. If the items possessed had been dangerous or unlawful to own, for instance narcotics, the forfeiture would have been remedial and would not have been a fine at all. See *Austin*, 509 U. S., at 621; *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 364 (1984) (unlicensed guns); *Commonwealth* v. *Dana*, 43 Mass. 329, 337 (1841)

(forbidden lottery tickets). If respondent had acquired the money in an unlawful manner, it would have been forfeitable as proceeds of the crime. As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right or ownership. See *United States* v. *Ursery*, 518 U. S. 267, 284 (1996). Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines. Hence, the lawfulness of the money shows at most that the forfeiture was a fine; it cannot at the same time prove that the fine was excessive.

B

1

In assessing whether there is a gross disproportion, the majority concedes, we must grant "'substantial deference'" to Congress' choice of penalties. *Ante*, at 13 (quoting *Solem*, 463 U. S., at 290). 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 nonreporting 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. 31 U. S. C. §5322(a); 18 U. S. C. §982(a)(1). 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." 31 U. S. C. §5322(b). 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. See President's Commission on Organized Crime, The Cash Connection: Organized Crime, Financial Institu-

tions, and Money Laundering 27, 60 (Oct. 1984). The Court today rejects this judgment.

The Court rejects the congressional judgment because, it says, the Sentencing Guidelines cap the appropriate fine at $5,000. See *ante*, at 16, and n. 14. The purpose of the Guidelines, however, is to select punishments with precise proportion, not to opine on what is a gross disproportion. In addition, there is no authority for elevating the Commission's judgment of what is prudent over the congressional judgment of what is constitutional. The majority, then, departs from its promise of deference in the very case announcing the standard.

The Court's argument is flawed, moreover, by a serious misinterpretation of the Guidelines on their face. The Guidelines do not stop at the $5,000 fine the majority cites. They augment it with this vital point: "Forfeiture is to be imposed upon a convicted defendant as provided by statute." United States Sentencing Commission, Guidelines Manual §5E1.4 (Nov. 1995). The fine thus supplements the forfeiture; it does not replace it. Far from contradicting congressional judgment on the offense, the Guidelines implement and mandate it.

2

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. See H. R. Rep. No. 91–975, pp. 12–13 (1970). Likewise, tax evaders were using cash exports to dodge hundreds of millions of dollars in taxes owed to the Government. See *ibid.*

The Court does not deny the importance of these interests but claims they are not implicated here because re-

spondent 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. See 31 U. S. C. §5322(b); 18 U. S. C. §982(a)(1). 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. See *ante*, at 6, n. 3. 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. See 18 U. S. C. §2.

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." Tr. 54 (Jan. 19, 1995). He had proffered a "suspicious and confused story, documented in the poorest way, and replete with past misrepresentation." *Id.*, at 61–62.

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. The District Court ignored respondent's lies in assessing a sentence. It gave him a two-level downward adjustment for acceptance of responsibility, instead of an increase for obstruction of justice. See *id.*, at 62. It dismissed the lies as stemming from "distrust for the Government" arising out of "cultural differences." *Id.*, at 63. While the majority is sincere in not endorsing this excuse, *ante*, at 15, n. 12, it nonetheless affirms the fine tainted by it. This patronizing excuse demeans millions of law-abiding American immigrants by suggesting they cannot be expected to be as truthful as every other citizen. Each American, regardless of culture or ethnicity, is equal before the law. Each has the same obligation to refrain from perjury and false statements to the Government.

In short, respondent was unable to give a single truthful explanation of the source of the cash. The multitude of lies and suspicious circumstances points to some form of crime. Yet, though the Government rebutted each and every fable respondent proffered, it was unable to adduce affirmative proof of another crime in this particular case.

Because of the problems of individual proof, Congress found it necessary to enact a blanket punishment. See S.

Rep. No. 99–130, p. 21 (1985); see also Drug Money Laundering Control Efforts, Hearing before the Subcommittee on Consumer and Regulatory Affairs of the Senate Banking, Housing, and Urban Affairs Committee, 101st Cong., 1st Sess., 84 (1989) (former IRS agent found it "'unbelievably difficult'" to discern which money flows were legitimate and which were tied to crime). One of the few reliable warning signs of some serious crimes is the use of large sums of cash. See *id.*, at 83. So Congress punished all cash smuggling or non-reporting, authorizing single penalties for the offense alone and double penalties for the offense coupled with proof of other crimes. See 31 U. S. C. §§5322(a), (b). The requirement of willfulness, it judged, would be enough to protect the innocent. See *ibid.* The majority second-guesses this judgment without explaining why Congress' blanket approach was unreasonable.

Money launderers will rejoice to know they face forfeitures of less than 5% of the money transported, provided they hire accomplished liars to carry their money for them. Five percent, of course, is not much of a deterrent or punishment; it is comparable to the fee one might pay for a mortgage lender or broker. Cf. 15 U. S. C. §1602(aa)(1)(B) (high-cost mortgages cost more than 8% in points and fees). It is far less than the 20–26% commissions some drug dealers pay money launderers. See Hearings on Money Laundering and the Drug Trade before the Subcommittee on Crime of the House Judiciary Committee, 105th Cong., 1st Sess. ___ (1997) (testimony of M. Zeldin); Andelman, The Drug Money Maze, 73 Foreign Affairs 108 (July/August 1994). Since many couriers evade detection, moreover, the average forfeiture per dollar smuggled could amount, courtesy of today's decision, to far less than 5%. In any event, the fine permitted by the majority would be a modest cost of doing business in the world of drugs and crime. See US/Mexico Bi-National Drug Threat Assessment 84 (Feb. 1997) (to drug dealers,

transaction costs of 13%–15% are insignificant compared to their enormous profit margins).

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.

III

The Court's holding may in the long run undermine the purpose of the Excessive Fines Clause. One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison. See *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 267 (1989); 4 W. Blackstone, Commentaries on the Laws of England 373 (1769) ("[C]orporal punishment, or a stated imprisonment, . . . is better than an excessive fine, for that amounts to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms . . . .") Concern with imprisonment may explain why the Excessive Fines Clause is coupled with, and follows right after, the Excessive Bail Clause. While the concern is not implicated here– for of necessity the money is there to satisfy the forfeiture– the Court's restrictive approach could subvert this purpose. Under the Court's holding, legislators may rely on mandatory prison sentences in lieu of fines. Drug lords will be heartened by this, knowing the prison terms will fall upon their couriers while leaving their own wallets untouched.

At the very least, today's decision will encourage legislatures to take advantage of another avenue the majority leaves open. The majority subjects this forfeiture to scrutiny because it is *in personam*, but it then suggests most *in rem* forfeitures (and perhaps most civil forfeitures) may not be fines at all. *Ante*, at 8, 18, and n. 16; but see *ante*,

at 9, n. 6. The suggestion, one might note, is inconsistent or at least in tension with *Austin* v. *United States*, 509 U. S. 602 (1993). In any event, these remarks may encourage a legislative shift from *in personam* to *in rem* forfeitures, avoiding *mens rea* as a predicate and giving owners fewer procedural protections. By invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to circumvent it.

IV

The majority's holding may not only jeopardize a vast range of fines but also leave countless others unchecked by the Constitution. Non-remedial fines may be subject to deference in theory but overbearing scrutiny in fact. So-called remedial penalties, most *in rem* forfeitures, and perhaps civil fines may not be subject to scrutiny at all. I would not create these exemptions from the Excessive Fines Clause. I would also accord genuine deference to Congress' judgments about the gravity of the offenses it creates. I would further follow the long tradition of fines calibrated to the value of the goods smuggled. In these circumstances, the Constitution does not forbid forfeiture of all of the $357,144 transported by respondent. I dissent.