

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Appellant V. IRWIN HALPER
CASE NO: 87-1383
PLACE: WASHINGTON, D.C.
DATE: January 17, 1989
PAGES: 1 thru 57

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 UNITED STATES, :

4 Appellant :

5 v. :

No. 87-1383

6 IRWIN HALPER :

7 -----x
8 Washington, D.C.

9 Tuesday, January 17, 1989

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:00 o'clock a.m.

13 APPEARANCES:

14 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor

15 General, Department of Justice, Washington, D.C.; on
16 behalf of the Appellant.

17 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; as Amicus
18 Curiae in support of judgment below.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1383, United States v. Irwin Halper.

Mr. Dreeben, you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE APPELLANT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns the application of the Double Jeopardy Clause of the Fifth Amendment to the civil False Claims Act, Title 31 U.S.C. 3729. The district court invoked the Double Jeopardy Clause to bar a recovery by the government of penalties under the False Claims Act from Appellee who had previously been criminally convicted of making the same false claims.

QUESTION: And fined?

MR. DREEBEN: Yes, Your Honor, he had been fined.

Appellee knowingly made 65 separate false claims under the Medicare program, each of which overcharged the government by \$9. The False Claims Act provides a \$2,000 mandatory penalty at the time that

1 this action was brought for each such false claim. The
2 government accordingly sought a penalty of \$130,000 in
3 this case.

4 The district court focused on the fact that
5 Appellee's overpayment by the government was \$585 from
6 his 65 false claims. It compared the penalty to the
7 loss and determined that in the factual setting of this
8 case, the sanction amounted to a criminal penalty that
9 could not be imposed in view of Appellee's previous
10 criminal conviction and punishment. It therefore held
11 the False Claims Act unconstitutional as applied to
12 Appellee in this case.

13 We believe that the district court's analysis
14 and conclusions are incorrect. The False Claims Act has
15 been on the books for 125 years. It has been upheld
16 before by this Court against a double jeopardy challenge
17 very similar to the one accepted by the court below. A
18 statute very similar to the False Claims Act was upheld
19 after that case in a similar double jeopardy challenge.

20 In the False Claims Act, Congress has provided
21 a reasonable lump sum recovery for every false claim
22 made on the government. It is designed to cover
23 reasonably anticipated losses in the average case. It
24 is also designed to compensate the government for the
25 costs of investigation and prosecution, which can be

1 extremely heavy in ferreting out, detecting and bringing
2 wrongdoers to justice. Finally, it serves the purpose
3 of deterring wrongdoers from committing false claims
4 such as the kind that Appellee committed.

5 It is not a criminal statute.

6 QUESTION: Isn't there some sort of a volume
7 discount, though? I mean, if there are 65 claims
8 investigated, it wouldn't cost as much as to investigate
9 just one.

10 MR. DREEBEN: It -- it may be true that in
11 some cases the costs of investigation do not rise as
12 rapidly as the number of false claims, but Congress can
13 anticipate that over the large majority of cases, when
14 someone has cheated the government a large multiple of
15 times, the costs of investigation do go up.

16 This case, although the facts surrounding the
17 investigation are not in the record, does illustrate
18 that there are very heavy costs involved in prosecuting
19 Medicare fraud. There was a substantial degree of
20 investigation that was required, and Appellee's criminal
21 trial consumed four days.

22 QUESTION: I'm just curious, counsel. Is this
23 amount collectible against this man?

24 MR. DREEBEN: The government has taken
25 discovery from Mr. Halper in the civil action and has

1 determined that he has substantial assets that were
2 transferred out of his name into his wife's name and
3 into his son's name. And it's the opinion of the United
4 States Attorney's Office that's responsible for this
5 case that there is a good chance of collecting part or
6 all of the judgment in this case should this Court
7 reverse and allow the case to go forward.

8 QUESTION: Well, the district court set the
9 amount at \$16,000. Wasn't -- isn't that a finding of
10 fact that that's the reasonable amount of the
11 government's cost?

12 MR. DREEBEN: No, Your Honor. It is not a
13 finding of fact. This case was decided on summary
14 judgment. The government moved for collection of the
15 full amount of the penalties to which it is entitled
16 under the False Claims Act by virtue of the false
17 claims. It never submitted any evidence of its costs of
18 investigation. The district court essentially
19 speculated about what it believed those costs of
20 investigation would be, without any evidence whatsoever.

21 One of the objections that we have to this --

22 QUESTION: It -- it -- it came to that
23 conclusion by eight times \$2,000?

24 MR. DREEBEN: That's correct, Your Honor. It
25 simply said --

1 QUESTION: Was there any rationale given for
2 the eight count -- for the figure eight?

3 MR. DREEBEN: Not -- not to my knowledge.
4 There is no rationale whatsoever except for the fact
5 that the district court simply believed that that amount
6 would be adequate in this case to cover the government's
7 expenses.

8 QUESTION: Well, Mr. Dreeben, do you think
9 that the amount of the so-called civil penalty has to
10 bear some relationship to the cost to the government?

11 MR. DREEBEN: I think that in the average case
12 it does have to bear some cost, but this Court made
13 quite clear in Rex Trailer Co. v. United States that the
14 task for deciding what a reasonable recovery would be
15 per fraud is one for Congress so long as it remains
16 within a reasonable realm of -- of magnitude. And
17 clearly, \$2,000, as an estimate of what the government
18 would have to devote in terms of resources to prosecute
19 fraud, is reasonable.

20 QUESTION: Well, I guess the statute has now
21 been amended to a range of not less than \$5,000 and not
22 more than \$10,000?

23 MR. DREEBEN: That's correct, Your Honor. It
24 was amended in 1986, when Congress took a look at the
25 False Claims Act, concluded that the \$2,000 figure which

1 had originally been set in 1863 had now been so eroded
2 by inflation that it really was not fulfilling the
3 purposes it was intended to fulfill. And Congress
4 accordingly did raise the figure that can be permitted
5 for each false claim, and it allowed a certain amount of
6 discretion to district courts to decide between \$5,000
7 and \$10,000 how much should be awarded. But Congress
8 did take a look at the false claims amount and realized
9 that \$2,000 in 1863 dollars would now be about \$18,000.

10 QUESTION: Was there a lot of discussion in
11 that amendment about how much it costs in fact to
12 prosecute a claim or to investigate a claim?

13 MR. DREEBEN: No, Your Honor. I --

14 QUESTION: Was there any discussion about how
15 much it costs to investigate or to prosecute a claim?

16 MR. DREEBEN: I don't believe that either of
17 the committee reports discussed that explicitly.

18 QUESTION: Is Congress unaware of the -- the
19 principle of economies of scale?

20 MR. DREEBEN: I think that Congress is well
21 aware of it, but it's also aware that there may be other
22 measures of recovery that are appropriate --

23 QUESTION: Is there any reason to believe in
24 the legislative history of the amendment or of the
25 original statute that Congress at all adverted to how

1 much it costs to investigate and prosecute?

2 MR. DREEBEN: I think, Your Honor, to the
3 extent that Congress displayed its awareness of this
4 Court's decision in United States ex rel. Marcus v. Hess
5 and that the Congress is presumed to be aware of other
6 decisions of this Court that have held that reasonable
7 lump sum penalties do help compensate the government for
8 the heavy costs of investigation.

9 QUESTION: Well, I'm sure Congress was aware
10 that we -- we might strike it down if it went too far,
11 but what I'm trying to say is -- is do we really take
12 this as a congressional estimation of how much it costs
13 to investigate and prosecute? Was there any attempt
14 whatever to estimate that? Or rather, was it an attempt
15 to pick a figure that we would leave alone?

16 MR. DREEBEN: Well, I think that both elements
17 are there. There was not a scientific study that I'm
18 aware of of how much it costs the government on average
19 to investigate fraud. But Congress was made aware that
20 it is expensive to investigate fraud, and it did provide
21 a figure that it felt would ensure that the government
22 is fully compensated.

23 It also provided the \$2,000 figure originally
24 and the \$5,000 to \$10,000 range that's currently in
25 existence to provide some deterrence so that there is an

1 economic disincentive for continued false claims of this
2 nature.

3 QUESTION: Was there -- were there hearings on
4 the amendment?

5 MR. DREEBEN: There were hearings on the
6 amendment.

7 QUESTION: Did -- was -- who proposed the
8 legislation?

9 MR. DREEBEN: The Justice Department, I
10 believe, originally --

11 QUESTION: Well, in your transmittal letters,
12 did you talk about costs?

13 MR. DREEBEN: Now, I'm not aware -- I haven't
14 reviewed the transmittal letters. So, I'm not aware.

15 QUESTION: Well, did a Justice Department
16 representative testify?

17 MR. DREEBEN: Yes, (inaudible) Justice --

18 QUESTION: Anything about costs?

19 MR. DREEBEN: Specifically about the -- the
20 need for a particular dollar figure for costs, I'm not
21 sure that it was. But the legislative history does
22 display a desire to ensure that the government is fully
23 compensated, and there are repeated references to the
24 fact that it's very difficult to ferret out and detect
25 fraud. To the extent that -- that Congress is aware of

1 -- of these problems, it's entitled to pick a reasonable
2 figure to address them.

3 QUESTION: While I've got you interrupted, if
4 there hadn't been a criminal proceeding here, I suppose
5 -- if there weren't a criminal proceeding in this case,
6 I suppose the theory of the district court would mean
7 that the case would have to be tried as a crime -- as a
8 criminal case.

9 MR. DREEBEN: Yes, Your Honor, I think that it
10 would. But the district court essentially construed the
11 sanction in this case to be so heavy as to amount to a
12 criminal punishment, and the logic of its decision would
13 require the case to be tried beyond a reasonable doubt.

14 QUESTION: So -- so -- so, some -- you would
15 have to -- in a case like this, you would have to decide
16 in advance what might -- how much of a fine might be
17 determined to be criminal?

18 MR. DREEBEN: The government is not aware of
19 how we would live with a ruling like this because we
20 would never know in advance whether a case would be
21 civil or criminal under the district court's test. The
22 district court did not even articulate why the ratio in
23 this case was excessive and what ratios would satisfy it.

24 QUESTION: Well, I suppose you could say that
25 the government knows that it's always a civil

1 proceeding, but that if the fine is shown to be
2 excessive, it's just scaled down.

3 MR. DREEBEN: If the statute were written to
4 permit that result, that would be a reasonable way to
5 handle it, but the statute was not written that way.
6 The 1986 amendments make crystal clear that Congress
7 anticipated mandatory, automatic forfeitures for each
8 fraud that was committed on the government and it
9 intended that the government be able to collect the
10 penalty for each fraud that --

11 QUESTION: Well, but --

12 MR. DREEBEN: -- existed.

13 QUESTION: The case would have to be tried.
14 If it were an excessive fine, it would supposedly have
15 to have been tried under the criminal rules and proved
16 beyond a reasonable doubt and things like that.

17 MR. DREEBEN: Yes, Your Honor, it would if in
18 fact it were a criminal sanction.

19 We think where the district court went wrong
20 is in analyzing the False Claims Act to impose a
21 criminal sanction at all. The -- the theory of the
22 action is to compensate the government for false claims
23 and for economic damages that occur from such false
24 claims, and it is not intended to stigmatize the
25 defendant as a violator of criminal laws and, therefore,

1 is not within the scope of -- of the coverage of the
2 Double Jeopardy Clause in the first place. This --

3 QUESTION: So long as that's the theory, it's
4 all right. I mean, so all Congress has to say is at the
5 beginning of a statute that imposes a \$10,000 forfeiture
6 or 100 -- or \$1 million forfeiture, the theory of this
7 statute is not criminal. It is simply a civil penalty.

8 MR. DREEBEN: That's the first step in the
9 analysis, Your Honor.

10 QUESTION: But not the last. Don't we have --

11 MR. DREEBEN: That's correct.

12 QUESTION: -- to look it to see if it bears
13 any reasonable relationship to the -- to the monetary
14 cost to the government in the case?

15 MR. DREEBEN: Well, I -- I think that -- that
16 the second step of the inquiry that this Court has
17 suggested does require some oversight of whether the
18 penalty is so excessive as to transform it into a
19 criminal one. But the question of -- of what dollar
20 figure is necessary to compensate the government in the
21 broad run of cases is one that is -- that's clearly
22 belongs to Congress. And the deference that is owed to
23 it is reflected in this Court's frequent admonition that
24 it would take the clearest proof to overcome Congress'
25 intent to create a civil sanction and to deem it

1 transformed into a criminal one.

2 In fact, this Court has never found that a
3 monetary penalty set by Congress in the fashion of the
4 False Claims Act was so excessive as to be transformed
5 into a criminal penalty. The only settings in which
6 this Court has overturned Congress' intent to create a
7 civil judgment is when Congress has prescribed something
8 like imprisonment or loss of nationality, which are the
9 kinds of sanctions that are really not consistent with
10 civil law at all.

11 But a fixed monetary penalty is a historically
12 civil kind of remedy. It is related to an action in
13 debt, and this Court (inaudible) traced the history of
14 actions in debt in Tull against United States and
15 expressly viewed them as being a civil type of recovery.

16 QUESTION: You're saying we -- we can never
17 look into the -- the monetary amount? Is that your
18 position?

19 MR. DREEBEN: No, no. The Court has to look
20 into it to some extent. But it has to look into it with
21 a very deferential approach to it.

22 QUESTION: To determine what? To determine
23 whether it is reasonable to think that Congress was
24 trying to come up with an amount that overall would
25 compensate the government?

1 MR. DREEBEN: To determine two things: first,
2 whether the amount that Congress came up with does bear
3 a reasonable relationship to its purpose of compensating
4 the government.

5 QUESTION: You mean in the average case?

6 MR. DREEBEN: In the average case, that's
7 correct. Not in every specific case because Congress is
8 legislating for the broad categories.

9 And the second factor is whether it's
10 reasonably related to Congress' deterrent purpose
11 without so moving into the realm of over-deterrence as
12 to be essentially a criminal sanction.

13 There would come a point, I'm -- I'm quite
14 sure, where a -- a fine would be so heavy that this
15 Court could not say that it truly is civil in character,
16 but I don't think that the False Claims Act comes close
17 to that. Fixed monetary sums of \$1,000 were common in
18 the early part of this century, and the Court had no
19 difficulty in *Hepner* against United States and in *United*
20 *States v. Reagan* in saying that those kinds of penalties
21 were civil.

22 The False Claims Act was passed in 1863. When
23 Congress amended the False Claims Act in 1986, it did
24 not even bring the \$2,000 figure up to where inflation
25 had eroded it. It only increased it a small fraction of

1 that amount.

2 QUESTION: My problem is that it -- it is so
3 obvious that it does not cost the government as much to
4 prosecute 65 repetitive violations than it does to
5 prosecute 65 separate violations. That is such an
6 obvious principle that any legislative body that had in
7 mind providing for whatever you call the average case an
8 amount that would not be taking from that defendant any
9 more than would be necessary to compensate the
10 government -- any legislative body would take account of
11 the fact of -- of that economy of scale and -- and would
12 not say \$2,000 per offense, but would say \$2,000 per
13 offense, with a maximum of blank dollars per prosecution
14 or something like that.

15 Otherwise, I really -- it doesn't seem to me
16 the government is even trying to make the -- to make the
17 -- it isn't the punishment fit the crime. What would
18 you call it? The -- the penalty fit the civil violation.

19 MR. DREEBEN: Well, Your Honor, it does serve
20 both the purpose of deterring repeated small frauds and
21 of compensating the government. And we've never denied
22 that it has both of those functions. Without some sort
23 of a fixed monetary penalty that attached to each
24 successive small fraud, there would be very little
25 incentive for contractors not to try to commit small

1 frauds in the hope of evading detection.

2 The Medicare program, for example, gets
3 literally millions of claims made on it each year. The
4 government is not capable nor are its fiscal
5 intermediaries capable of reviewing all of those claims.
6 So, it prescribes a figure that both allows it to get
7 compensated when it does catch somebody and also
8 provides an economic disincentive for continuing it.

9 If -- if there were not a fixed penalty, the
10 government would be virtually incapable of prosecuting
11 and collecting damages for this kind of case because the
12 -- the burden on the government of showing how much did
13 it cost for this FBI agent to conduct this interview --

14 QUESTION: (Inaudible). Is there any -- where
15 did the district court find out, if it did, how much the
16 government's expense was in investigating? It said even
17 adding that amount to the government's expense of
18 investigating and prosecuting the statute, the total
19 amount is excessive. How did it know what it cost the
20 government?

21 MR. DREEBEN: Your Honor, I have no idea how
22 the district court knows because it didn't set out any
23 reasoning and it had no evidence. I think the best
24 explanation of it is that it speculated. It substituted
25 its judgment for Congress' judgment about what an

1 appropriate penalty would be.

2 In other settings, Congress has provided
3 formulas for recovery of damages and to ensure adequate
4 deterrence of wrongdoing. The best example of that is
5 perhaps the treble damages remedy that's allowed for
6 Sherman Act violations. It has never been held by this
7 Court that Congress cannot allow an action for treble
8 damages to follow an action for criminal violations
9 under the Sherman Act.

10 QUESTION: Well -- well, but in this statute I
11 take it's your position that if the average that
12 Congress somehow sets meets some rational standard, that
13 the statute can never be criminally applied to any
14 person no matter how excessive it is in his individual
15 case.

16 MR. DREEBEN: Well, it is our position that
17 this statute --

18 QUESTION: Well, you said earlier that the
19 statute could be unreasonable. Did you mean in the
20 amount that it sets on the face of the statute or as
21 applied to the particular case?

22 MR. DREEBEN: I think the analysis would have
23 to be on the face of the statute. If Congress had
24 picked an amount that was so excessive --

25 QUESTION: Again, so that it follows that a

1 particular statutory penalty can never be criminally
2 punitive as to some persons, but not as to others.

3 MR. DREEBEN: That's correct. And as to this
4 statute, that's right because the only reason why a
5 penalty would be large is if someone had committed a
6 very large number of false claims on the government.
7 That is the explanation for the penalty in this case.
8 Appellee committed 65 knowing false claims of which he
9 was criminally convicted. And the penalty for that
10 corresponds only to that large number of false claims.
11 The statute isn't transformed into a criminal type of
12 penalty simply because there are a large number of false
13 claims involved.

14 QUESTION: I suppose if this Court were to
15 hold that the statute has to recognize some sort of
16 volume discount or economy of scale, you couldn't have a
17 fixed penalty for 65 different counts. It would have to
18 be a kind of a declining scale of some sort.

19 MR. DREEBEN: That's right, Your Honor. And
20 there are going to be cases where the costs of
21 prosecution do rise proportional to the amount of false
22 claims. So, for Congress to be limited in a way that
23 requires it to reduce the government's compensation with
24 the number of false claims may, in effect, deprive the
25 government of full compensation in given cases. So, the

1 lump sum penalty does function, in the broad category of
2 cases, to ensure that the government is recompensed for
3 the costs of investigating these false claims and that
4 it has a mechanism to ensure deterrence of the false
5 claims.

6 We think that the consideration in the 1986
7 amendments of the penalty reflects a very recent
8 congressional judgment that indeed the kinds of
9 penalties involved in this case are civil and do not
10 pose the double jeopardy problems that have been alluded
11 to by the district court. Congress specifically
12 provided for a form of collateral estoppel between
13 criminal convictions and the civil judgments which
14 recognizes that it intended that one action follow the
15 other. It also recognized that in cases of Medicare
16 fraud, there may be a very large number of false
17 claims. So, the congressional determination in this
18 case was, indeed, that the statute be applied very much
19 in the fashion that it was applied by the district court
20 in this case.

21 If the district court's theory were adopted,
22 the government would have virtually no way to ensure
23 that it would be fully compensated when, as in this
24 case, there are a great number of false claims.

25 I'd like to reserve the rest of my time.

1 QUESTION: Very well, Mr. Dreeben.

2 Mr. Roberts, we'll hear from you now.

3 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

4 AS AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

5 MR. ROBERTS: Mr. Chief Justice, and may it
6 please the Court:

7 After punishing Mr. Halper with two years in
8 prison and a \$5,000 fine for his \$585 in false claims,
9 the government brought a second proceeding against him
10 seeking a \$130,000 penalty for those same false claims.
11 The district court correctly concluded that this would
12 be punishing Halper twice for the same offense, in
13 violation of the Double Jeopardy Clause, and the
14 judgment below should be affirmed.

15 Now, the government does not dispute that the
16 second proceeding was based on precisely the same false
17 claims for which Halper had been previously convicted
18 and punished. Indeed, the government relied exclusively
19 on Halper's prior criminal conviction to establish his
20 liability in the second action. What the government
21 says is that the \$130,000 penalty should not be regarded
22 as a second punishment because it served a remedial
23 purpose, that of compensating the government for its
24 losses.

25 But the facts belie that contention. A

1 \$130,000 recovery cannot be dismissed simply as
2 compensation for \$585 in damages. Nor is the answer any
3 different if the government's costs of investigation and
4 prosecution are factored into the equation. The
5 district court, which was intimately familiar with the
6 details of Halper's fraud, the record in the case and
7 all the judicial proceedings concluded that \$16,000
8 would fully compensate the government for all its costs.

9 QUESTION: How did the district court reach
10 that conclusion, Mr. Roberts?

11 MR. ROBERTS: Well, it did the best it could
12 on what the government gave it. Only the government
13 knows how much it cost to investigate and prosecute.
14 And in the first opinion the district court arrived at
15 the \$16,000 figure and said --

16 QUESTION: Well, did the district court hold a
17 hearing and give the government an opportunity to
18 present evidence?

19 MR. ROBERTS: Well, I think in -- in any
20 particular case where the district --

21 QUESTION: I mean, did the district court do
22 that here?

23 MR. ROBERTS: No, it didn't. In its first
24 opinion, though, it challenged the government to come up
25 with some evidence. It said this is my approximation.

1 He did use that word. But the government hasn't given
2 me any evidence of the expenses, so this is the best I
3 can do.

4 QUESTION: Well, he -- he just talked about
5 investigation. Is that it?

6 MR. ROBERTS: The costs of investigation and
7 prosecution.

8 QUESTION: Of the whole criminal case?

9 MR. ROBERTS: Investigating the fraud. It's
10 not clear to me whether he --

11 QUESTION: Well, I can't imagine that it only
12 cost the government \$16,000 to prosecute the criminal
13 case.

14 MR. ROBERTS: Well, this was actually a fairly
15 easy case. This is not a complicated fraud. If you
16 recall the -- the details, you -- you got an extra \$9 on
17 your Medicare claim for the first patient you visited at
18 a facility. And Halper turned in invoices listing 12
19 people as the first person visited that day. It was a
20 very transparent fraud, very easy to investigate and
21 very easy to prosecute.

22 QUESTION: Well, it started -- I suppose it
23 started in the -- in another department? I mean,
24 somebody turned it over to Justice, didn't they?

25 MR. ROBERTS: It started as a -- as a criminal

1 investigation. I don't know if there's --

2 QUESTION: I know, but wasn't it referred to
3 Justice by somebody else?

4 MR. ROBERTS: I'm not aware that it -- it was.
5 It could have been from a -- from a Medicare fraud unit
6 or something.

7 QUESTION: I would suppose it would, wouldn't
8 you?

9 MR. ROBERTS: If it had been, I would suppose
10 that would reduce even further the costs of
11 investigation and prosecution.

12 QUESTION: I don't know. It might increase it.

13 MR. ROBERTS: Well, if they have a set unit
14 there who looked -- presumably which looks at the -- the
15 claims that are -- are submitted as a -- as a routine --
16 that's their -- their job -- it wouldn't be very hard to
17 pick Halper out.

18 QUESTION: And then it's referred to the
19 Justice Department and then it goes to the U.S. Attorney?

20 MR. ROBERTS: Yes. And -- and the civil side
21 of the case, of course, was -- was -- was open and shut.
22 It was collateral estoppel from the criminal conviction.
23 There was no need to put on any --

24 QUESTION: Mr. Roberts, do you take the
25 position that the court in every case brought under this

1 False Claims Act has to force the government to litigate
2 the specific cost to the government of prosecuting and
3 investigating that case to see if it bears a rational
4 relation to the amount of the fine?

5 MR. ROBERTS: Well, I think as an initial
6 matter, the Court can assume --

7 QUESTION: That -- that just seems like -- a
8 -- a -- an unusually complex burden to place on the
9 government.

10 MR. ROBERTS: Well, I think it would really
11 only come into play when you have a disproportion
12 between penalty and actual damages as stark as it is in
13 this case. The government relies on the Hess case.
14 There the penalty recovery equaled the -- the
15 government's loss. Here it was 220 times the
16 government's loss. In this sort of case, I think the
17 district court does have to look and say if this is
18 remedial, show me how this compensates you for loss and
19 how it --

20 QUESTION: Do you think the government can win
21 its case just by producing average costs of
22 investigation and prosecution of civil fraud?

23 MR. ROBERTS: No, I don't, Your Honor. The
24 government argues today that we shouldn't concern
25 ourselves with what the facts are in any particular

1 case, but just, as they've said, if it works out well
2 enough as a general matter. I don't think that's how
3 the Double Jeopardy Clause works. The issue is the
4 rights of this particular defendant in this particular
5 case, and it doesn't strike me as an adequate answer to
6 say that the statutory formula works out well enough as
7 a general matter in the average case.

8 And it shouldn't come as a surprise that there
9 might be this disproportion between recovery and -- and
10 actual loss because the formula for calculating that
11 recovery bears absolutely no relation to the
12 government's loss. It's based on the number of counts
13 in the complaint, not actual damages or costs of
14 investigation.

15 QUESTION: Well, supposing in this case, Mr.
16 Roberts, the district court had found through whatever
17 method he used that the costs were \$16,000 and the
18 statute required the imposition of a penalty of, say,
19 \$40,000. Let's say there were 20 counts instead of 65.
20 Is that good or bad under your theory? Can that be
21 maintained as a civil prosecution?

22 MR. ROBERTS: No, Your Honor, it cannot. It
23 -- it can be maintained up to the \$16,000 limit.
24 Anything beyond that is -- is punishment and a second
25 punishment when the defendant has already been --

1 QUESTION: So, there's no play at the joints.
2 It's just strictly the cost of prosecution of this
3 particular case.

4 MR. ROBERTS: Well, plus the actual damages.

5 QUESTION: Plus the actual damages.

6 MR. ROBERTS: There is play at the joints, and
7 -- and the district court recognized that in arriving at
8 that \$16,000 figure, it did have to take into account
9 the difficulty of calculating the costs and -- and --
10 and the damages. And he expressly did that. But once --

11 QUESTION: What about -- what about this
12 Medicare fraud unit that is over there in -- in HHS?
13 And -- and they're permanently in place just to look at
14 these submissions by -- by doctors. And this is the
15 only -- the only guy they caught all year long. Why --
16 why wouldn't the -- the total annual salary of that
17 whole unit properly be chargeable to -- to this
18 prosecution?

19 MR. ROBERTS: Well, I don't think the -- the
20 defendant in any particular case has to pay for the
21 wasted efforts going after others.

22 QUESTION: Why not?

23 MR. ROBERTS: He should certainly be made to
24 pay for the costs that he caused, in other words, the
25 time spent investigating his case.

1 QUESTION: Well, he caused the whole year's
2 worth of work. There was nobody else that they caught.
3 I mean, as far as that year's of work go, he was it.

4 MR. ROBERTS: Well, I think there's a point at
5 which the rational in Hess, in other words, compensating
6 the government for its losses -- there has to be a point
7 at which -- certainly he doesn't have to pay his share
8 of the overhead on the -- on the national debt.

9 These -- the notion of the costs of
10 investigation and prosecution is not a novel one. In --
11 In private litigation, indeed, in litigation involving
12 the government, there are many cases where they are, for
13 example, claiming attorney's fees. It's fairly
14 routine. You submit an affidavit from the prosecutor
15 detailing the costs involved. I don't think it need go
16 much beyond that in this sort of case, including the
17 costs of the -- the investigation.

18 But even if you -- you regard the \$16,000
19 figure as a little soft in terms of --

20 QUESTION: Was there an indictment here?

21 MR. ROBERTS: In the first case, yes.

22 QUESTION: In the criminal case?

23 MR. ROBERTS: In the criminal case, yes.

24 QUESTION: Do you know how long that took?

25 MR. ROBERTS: Before the grand jury? No, Your

1 Honor. I do not.

2 Again, I -- I'd just reiterate that this --
3 this is not --

4 QUESTION: Only -- only one government
5 attorney before the grand jury, or do you know?

6 MR. ROBERTS: The indictment was signed by one
7 assistant United States attorney. I suspect this is the
8 sort of case that could be easily handled on the
9 documents. You have the claims saying here are the 12
10 people, each of whom was the first one I saw on this
11 particular day. It struck me as -- as a fairly routine
12 case in which the government's estimate --

13 QUESTION: Did the government have to go
14 before a judge during the grand jury proceeding to --
15 for some rulings or not?

16 MR. ROBERTS: I'm not sure. I don't believe
17 so. I think they can just go before the grand jury.

18 QUESTION: They have five going at one time in
19 the Southern District, don't you?

20 MR. ROBERTS: Five grand juries?

21 QUESTION: Yes, at the same time, don't you?

22 MR. ROBERTS: I think that's right, Your
23 Honor. Yes.

24 QUESTION: Well, how can you keep track of all
25 five?

1 MR. ROBERTS: Well, I think when they get to
2 the point -- in a case that shows the disproportion, as
3 in this case, 220 times the actual damages --

4 QUESTION: You're not going to charge him for
5 all five grand juries.

6 MR. ROBERTS: No, and not all the time of the
7 one, just -- just the time spent in this particular case
8 because the issue concerns the rights of this particular
9 defendant in this case. And I don't think the principle
10 that you can average out the Double Jeopardy Clause is
11 one that this Court has accepted in the past.

12 Now, under the government's theory, the
13 penalty in this case is remedial and compensatory,
14 regardless of what the facts show. I've pointed out the
15 facts in this case, which I think are stark enough. But
16 the government says it could have prosecuted Halper
17 under the amended act, in which case his minimum penalty
18 would have been \$325,000 and it could have gone up to
19 \$650,000. A defendant who filed 200 false claims of \$1
20 each for total damages to the government of \$200 would
21 face a minimum mandatory penalty of \$1 million. And
22 still the government would say that that's remedial and
23 compensatory.

24 And there's no reason to stop there. If this
25 Court accepts the government's theory, Congress can up

1 the ante and raise the maximum penalty from \$10,000 to
2 \$20,000 or \$100,000 or \$1 million. There is nowhere to
3 draw the line under the government's theory.

4 QUESTION: Supposing this were a criminal
5 prosecution and exactly the same facts were shown, but
6 the statute, after a criminal conviction, provided for a
7 fine of \$1 million. Now, do -- do you think the
8 district court could impose a fine of \$1 million in a
9 case like this in a criminal prosecution?

10 MR. ROBERTS: The only issue would be whether
11 it violated the Eighth Amendment, the excessive fines or
12 cruel and unusual punishment provision. But this was
13 not a criminal prosecution.

14 And I think, Justice White, in response to one
15 of your earlier questions, the district court's holding
16 isn't necessarily that this penalty can only be imposed
17 in a criminal prosecution. What the district court did
18 was recognize that when the defendant had been punished
19 once --

20 QUESTION: Why did he say this was a criminal
21 prosecution?

22 MR. ROBERTS: Well, he did say this was a
23 criminal penalty, but he --

24 QUESTION: Well, I -- I can't imagine why
25 you'd come out differently if there hadn't been another

1 criminal -- if there hadn't been a criminal prosecution
2 --

3 MR. ROBERTS: Well, it would be --

4 QUESTION: -- preceding it. It would still be
5 a -- a -- the government seeking a disproportionate
6 fine, and he would say this -- you can't -- this is a
7 criminal case.

8 MR. ROBERTS: That may be, but he --

9 QUESTION: And I can't imagine that he would
10 -- he would -- he would say you'll have -- we want to
11 try this like a criminal case.

12 MR. ROBERTS: But in terms of the holding, I
13 think it's a different question whether this on its face
14 is a criminal prosecution because, after all, the
15 district court did allow the proceeding to continue to
16 the extent of awarding the government its double damages
17 and all the costs of the -- of the prosecution.

18 QUESTION: Well, you -- do you think we'd have
19 to overrule Rex Trailer?

20 MR. ROBERTS: Not at all. In Rex Trailer,
21 this Court simply held that \$10,000 was reasonable
22 liquidated damages for the fraudulent purchase of five
23 automobiles.

24 QUESTION: Well, yes, but it also -- but the
25 Court also said that there is no requirement, statutory

1 or judicial, that specific damages be shown.

2 MR. ROBERTS: And the Court specifically noted
3 that the government, while it had not shown the amount
4 of its damages, it didn't doubt that the government had
5 been injured, and it was simply saying liquidated
6 damages of \$10,000 is close enough in this case.

7 The notion of permitting the recovery as
8 liquidated damages is the same notion as in Hess. It
9 sets a ceiling.

10 QUESTION: So, should we -- our inquiry here
11 is -- is that we look at the \$132,000 and try to
12 speculate what the government -- whether the government
13 spent that much in HEW and everything else? It's just
14 out of bounds.

15 MR. ROBERTS: Well, it's not -- it's not
16 speculation. The government to -- when the
17 disproportion is as high as it is here, 220 times, the
18 government should be -- has the burden of coming forward
19 and saying this --

20 QUESTION: Two hundred and twenty times what?

21 MR. ROBERTS: Times its actual damages, the
22 \$585 in false claims.

23 And the government has the burden of saying,
24 yes, it did cost us this much and here's why.
25 Otherwise, the justification is totally divorced from

1 the facts. They're justifying this \$130,000 penalty as
2 remedial, as compensatory, and then they're saying they
3 don't care if in any particular case it is so.

4 QUESTION: At what point in the trial does the
5 government come in and make this sort of a showing?

6 MR. ROBERTS: I think at the end of the
7 proceeding after liability has been established and the
8 statutory penalty is set, if there is a disproportion,
9 in this case, the \$130,000 versus \$585, then the
10 district court says this doesn't look like
11 compensation. This looks like punishment. Show me that
12 it's actually compensation.

13 And the district court did that in this case.
14 In its initial opinion it said my approximation is
15 \$16,000. The government hasn't come up with anything to
16 show me I'm wrong.

17 QUESTION: You mean you -- this -- you -- can
18 the government -- can the court transform a criminal
19 proceeding into a civil one just by reducing the fine?

20 MR. ROBERTS: Absolutely. It can just -- just
21 as -- as in -- in *Morris v. Mathews* the Court,
22 confronted with the proceeding where the conviction
23 violated the Double Jeopardy Clause, reduced the penalty
24 to a non-barred offense and, therefore, said that was
25 acceptable.

1 QUESTION: Well, yes, that's a double jeopardy
2 solution, but it still was a criminal prosecution.

3 MR. ROBERTS: It was a criminal prosecution.

4 QUESTION: And you're saying we -- we reduce
5 it -- we can -- we can change a case that should have
6 been tried as a criminal case into a civil case just by
7 reducing the fine.

8 MR. ROBERTS: I don't think he's saying it
9 should have been tried as a criminal case. What he's
10 saying is that this is a civil case and it can be
11 brought, but only so long as you don't impose punishment
12 a second time. If you seek a recovery beyond the
13 damages and costs, that's punishment and since the
14 defendant has already been punished, he can't be
15 punished a second time.

16 Now, the government has a fall-back position
17 to this remedial and compensatory rationale, one that's
18 flatly inconsistent with it. It says that the penalty
19 can be upheld because it will deter future false claims
20 by Halper and others. But it will deter by punishing.
21 As this Court noted in Bell v. Wolfish, deterrence is
22 "not a legitimate non-punitive governmental objective."
23 It's a punitive objective. The catch is, of course,
24 that Halper has already been punished and can't be
25 punished again.

1 The government relies on the distinction
2 between criminal and civil proceedings. It says that it
3 can punish you twice in successive proceedings so long
4 as in one of those proceedings the punishment is imposed
5 in a civil forum.

6 Initially, I think there's something very
7 counter-intuitive about that argument. The government
8 agrees that it can't punish you twice in two successive
9 criminal prosecutions, in each of which the defendant
10 would enjoy all the protections of criminal due process,
11 the right to make the government prove its case beyond a
12 reasonable doubt, the privilege against
13 self-incrimination, the right to call and confront
14 witnesses.

15 Under the government's theory it can punish
16 you twice in successive proceedings but only so long as
17 you don't have those protections in one of the
18 proceedings.

19 QUESTION: Well, what does your argument do,
20 Mr. Roberts, to the punitive damages that -- that are
21 awarded in many civil actions?

22 MR. ROBERTS: Well, I think in a typical civil
23 action where it is brought by a private party, it
24 wouldn't implicate the Double Jeopardy Clause at all.
25 It would only be -- only come into play if the

1 government, after punishing a defendant, sought punitive
2 damages --

3 QUESTION: So, the -- the action of a
4 governmental court in awarding the damages does not make
5 it subject to any sort of a --

6 MR. ROBERTS: No, Your Honor, I don't think
7 that would be enough to trigger the Double Jeopardy
8 Clause.

9 QUESTION: Well, suppose the city is injured
10 in an antitrust action, and there's a criminal antitrust
11 prosecution, and then the state or the city sues and
12 gets triple damages. Is that -- is that a violation?

13 MR. ROBERTS: It would depend, Your Honor, on
14 whether the triple damages exceeded the costs of
15 investigating and prosecuting the violation. I think
16 the same analysis --

17 QUESTION: So -- so, in your view antitrust
18 damages under the -- under the Sherman Act, when the
19 city is injured, cannot be tripled automatically. You
20 have to -- there has to be a showing that the cost of
21 investigation is -- is -- is reasonably comprehended
22 within the triple amount?

23 MR. ROBERTS: If the only rationale that can
24 be advanced on the facts for the triple damages is
25 punitive, punishment, then the same analysis would apply

1 because the defendant would already have been punished --

2 QUESTION: Well, what is their rationale for
3 triple damages under -- under the Sherman Act?

4 MR. ROBERTS: (Inaudible).

5 QUESTION: It's -- there's a large deterrence
6 rationale that has a civil -- that has a civil
7 consequence, isn't there?

8 MR. ROBERTS: I think so. Perhaps they could
9 be justified as an incentive to bring these sorts of
10 suits, but I think in most cases they would be punitive,
11 and this -- this analysis would apply.

12 Now, it's not likely to present problems on
13 the facts because -- look at this case, for example.
14 Triple damages would have been \$1,755.

15 QUESTION: No, but an antitrust suit's triple
16 damages can be astronomic and generally, I -- I would
17 assume, are well in excess of the costs of investigation
18 and prosecution.

19 QUESTION: You get attorney's fees in
20 addition, don't you, under the Antitrust Act?

21 MR. ROBERTS: Under the -- under the Sherman
22 Act.

23 I suppose, though, as the damages increased,
24 perhaps the costs of investigation and prosecution of
25 the antitrust case is, of course, very -- unlike this

1 one -- very complex.

2 QUESTION: But you're willing to make your
3 case here rise or fall on the -- whether or not triple
4 damages can be granted to a government after a criminal
5 prosecution?

6 MR. ROBERTS: Well, I think the analysis does
7 apply. There may be a difference to the extent that the
8 formula of triple damages is related to the government's
9 loss and perhaps in that sort of a case, Congress could
10 say triple damages will cover the costs of investigation
11 and prosecution.

12 But this formula is completely unrelated to
13 the government's loss. It's -- it's \$2,000 per count
14 regardless of how small the damage or how great. One
15 count fraud of \$1 million gets you a \$2,000 penalty, and
16 Halper's \$585 in false claims, of course, netted him a
17 hundred --

18 QUESTION: Mr. Roberts, isn't there another
19 difference too on the triple damages setting? The
20 triple damages are paid to a private third party, but
21 when the United States recovers damages after a
22 conviction, they only get single damages, don't they?

23 MR. ROBERTS: Well, in that -- that's true,
24 and that might further support a remedial rationale. I
25 know in -- in United States v. Ward, for example, the

1 government noted that the penalty that was assessed went
2 into a revolving fund that helped clean up the -- the
3 oil spills.

4 QUESTION: Doesn't this statute permit private
5 suits for recovery?

6 MR. ROBERTS: There is a qui tam provision --

7 QUESTION: All right.

8 MR. ROBERTS: -- in which --

9 QUESTION: And so what happens if a private
10 person were here instead of the government seeking
11 triple the penalty?

12 MR. ROBERTS: Well, the analysis would still
13 be the same. The -- the amount the government sets --

14 QUESTION: So, if a private person brings it
15 under this statute, you would still be arguing that it's
16 invalid and the court has to look at the amount.

17 MR. ROBERTS: Well, it -- it may be
18 distinguishable. If you look back at the government's
19 brief in the Hess case, for example, they had no doubt
20 that -- there that the penalty was, in essence,
21 criminal. The only thing they were concerned about was
22 whether a private party could bring this suit and there
23 somehow prevent the government from bringing a criminal
24 prosecution. Under this --

25 QUESTION: It's rather odd to apply a double

1 jeopardy analysis if -- if the suit is brought by a
2 private person, isn't it?

3 MR. ROBERTS: I think so, and I -- and I don't
4 think, for example, it would apply in a case in which a
5 private individual brings the antitrust action after a
6 government prosecution under the Sherman Act. And the
7 current statute has very elaborate protective mechanisms
8 in which the government can prevent a private qui tam
9 action from interfering with any proceeding it may -- it
10 may wish to bring.

11 The -- the government --

12 QUESTION: That would have the quixotic effect
13 of if the government brought the civil penalty action
14 and -- and sought the statutory amount of the penalty,
15 you would urge a double Jeopardy application. But if a
16 private person brought the action and sought triple the
17 amount, then no double jeopardy application.

18 MR. ROBERTS: I think that conclusion follows
19 from the assumption that the Double Jeopardy Clause
20 doesn't -- is an inhibition on government action and
21 doesn't preclude private actions for -- for damages.
22 The -- the government relies --

23 QUESTION: Then you'd say that there may be
24 other limitations on the level of private actions that
25 may be allowed, but not the Double Jeopardy Clause.

1 MR. ROBERTS: Well, that's right. I know the
2 -- the Court has the -- the Browning-Ferris case coming
3 up in which it will decide whether the excessive fines
4 provision applies to private actions. But I don't think
5 that's -- that's implicated here.

6 QUESTION: The fine can be a fine even though
7 not assessed in a -- it possibly can be a fine for that
8 purpose even though not assessed in a criminal
9 proceeding.

10 MR. ROBERTS: That's the -- the argument I
11 think in the -- in the Browning-Ferris case, yes, which
12 depending on how it comes out, would make -- could lead
13 to a curious result here. If the -- the Eighth
14 Amendment doesn't apply at all to civil proceedings,
15 then there's not even that limit on the extent of the
16 civil punishment the government can impose. And if it
17 does apply in the civil proceeding, then the government
18 presumably would say that this isn't punishment until it
19 becomes excessive punishment, which would be an odd
20 result.

21 There is no natural cutoff. My brother today
22 mentioned that there will come a point at which the
23 recovery may be so excessive, but there's no logical way
24 to draw that point other than the -- the line that was
25 drawn in Hess and in Rex Trailer when the amount exceeds

1 the remedial purpose. When it's no longer compensatory,
2 then it is a second punishment.

3 And the fact that it's imposed in a civil
4 forum makes no difference for the application of the
5 Double Jeopardy Clause. It makes no difference to the
6 defendant whether this \$130,000 penalty, the second
7 punishment, is called criminal or civil because he has
8 already been criminally convicted of the underlying
9 offense.

10 The government refers to the greater stigma,
11 the moral condemnation, that attaches to a criminal
12 punishment. But that argument simply doesn't work in
13 this case. The issue is not whether Halper is going to
14 be stigmatized or morally condemned. We know the answer
15 to that. He is for precisely these same false claims.
16 The issue is how many different times the government can
17 punish him as a result of that moral condemnation, and
18 the answer in the Double Jeopardy Clause is once.

19 The government's focus on the distinction
20 between criminal and civil is -- is misdirected. Under
21 the Double Jeopardy Clause, as this Court has frequently
22 noted, there are three distinct protections: protects
23 against a second prosecution after an acquittal,
24 protects against a second prosecution after a
25 conviction, and it protects against multiple punishments

1 for the same offense.

2 Now, when the first two of those protections
3 are at issue, you need to know if it's a prosecution.
4 Is this an inherently criminal proceeding? But when the
5 third protection is at issue, you simply need to know if
6 it's a multiple punishment, if he's being punished a
7 second time.

8 Finally, the government argues for reversal
9 with a parade of -- of horrors, all these routine
10 civil sanctions after a conviction that will supposedly
11 go out the door if the judgment is affirmed. For
12 example, it cites in its reply brief debarment from
13 further government contracting, loss of a professional
14 license, disbarment. The decision below will not at all
15 threaten those routine sanctions.

16 In each case, those sanctions can be justified
17 with reference to a remedial objective: in the case of
18 debarment, maintaining the integrity of the government
19 contracting programs; in the case of disbarment,
20 maintaining public confidence in the integrity of the
21 bar. Here there is no remedial justification for the
22 \$130,000 penalty. It is punishment pure and simple.

23 Finally, the decision below will not upset the
24 government's efforts to stamp out false claims. It can
25 bring a criminal action and get what are now very high.

1 fines, up to \$250,000 per count, and then later bring a
2 civil proceeding in which the defendant is collaterally
3 estopped to collect all its damages, all its costs. Or
4 it can bring the civil proceeding separately. I don't
5 think anything in the holding below means that the
6 government cannot collect this penalty in a civil
7 proceeding. It just means if he has already been
8 punished, this is punishment and can't be brought --

9 QUESTION: It would also mean that the civil
10 proceeding wouldn't be a civil proceeding, wouldn't it,
11 that you have to have a reasonable doubt standard and
12 all the safeguards that apply in a criminal trial?

13 MR. ROBERTS: No, Your Honor, I don't think it
14 means that. The -- the district court did refer to
15 this as a criminal penalty. But there's nothing in the
16 logic of his decision that says you can't bring this
17 alone. The key to his conclusion was this was multiple
18 punishment. This was a second punishment. I think it's
19 a very different question whether it could be punished
20 -- whether you could be punished in a civil forum alone
21 without the prior criminal conviction and punishment.

22 QUESTION: That would be a rather strange
23 animal.

24 MR. ROBERTS: Well --

25 QUESTION: It's a strange dichotomy you're

1 giving us here. You're -- you're saying this is bad
2 because he has been convicted criminally, although they
3 could have made this an additional part of the criminal
4 penalty. They could have easily said in addition to the
5 criminal fine already allowed, you will be fined \$2,000
6 per -- per offense. You acknowledge that would be okay.

7 MR. ROBERTS: Yes, Your Honor.

8 QUESTION: That wouldn't be cruel or unusual.
9 It wouldn't be excessive or anything if it were done in
10 the criminal case. So --

11 MR. ROBERTS: And the government makes that
12 argument.

13 QUESTION: But -- but only because he has been
14 convicted criminally already, it's bad here. Had he not
15 been -- had there not been any criminal offense
16 involved, the government could have -- could have
17 assessed this civil penalty without any problem. Is
18 that right?

19 MR. ROBERTS: I -- I think it -- it may well
20 have. There's nothing in the decision --

21 QUESTION: That's strange. I think that's a
22 strange result.

23 MR. ROBERTS: -- below that -- you don't have
24 to conclude that this proceeding is inherently criminal
25 to recognize that it does impose a second punishment.

1 The second punishment is enough to give you the double
2 jeopardy violation. There may be other questions to
3 consider in concluding that it's an inherently criminal
4 prosecution.

5 QUESTION: If there hadn't been a -- if there
6 weren't a prior criminal case, you wouldn't say that the
7 government could collect this \$132,000 in a civil case.

8 MR. ROBERTS: It would be a very different
9 question because you --

10 QUESTION: I didn't -- I didn't want to --
11 what would be your answer? Would they -- would there --

12 MR. ROBERTS: I think --

13 QUESTION: Wouldn't -- wouldn't the court say,
14 well, this is punishment and you can't collect it?

15 MR. ROBERTS: I think that would be a very
16 reasonable conclusion on the facts, given the disparity
17 between recovery and -- and punishment. But it's not a
18 necessary conclusion. I think once you see that
19 punishment has been imposed, the double jeopardy
20 analysis is at an end, and you don't have to go further
21 and say is this criminal punishment or is it civil
22 punishment.

23 The government says that it could have sought
24 the civil penalty in the same proceeding with the
25 criminal prosecution and then says why can't we seek

1 them separately. I think that conclusion misses the
2 entire point of the Double Jeopardy Clause which is that
3 there are things you cannot do twice that you can do
4 once. Whether the government could have sought this
5 civil penalty together with the criminal fine and the
6 sentence of imprisonment is entirely unrelated to the
7 question of whether they can break it up and bring this
8 additional punishment, punishment which follows
9 automatically from the criminal conviction and the
10 criminal prosecution in a separate proceeding.

11 The district court's decision that the Double
12 Jeopardy Clause would be violated by the excessive
13 punishment was correct and the judgment should be
14 affirmed.

15 QUESTION: Thank you, Mr. Roberts.

16 Mr. Dreeben, you have nine minutes remaining.

17 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

18 MR. DREEBEN: Thank you, Your Honor.

19 Amicus focuses his argument solely on the
20 proposition that if the second proceeding involves
21 punishment, then it is barred by the Double Jeopardy
22 Clause. And he defines punishment to mean anything in
23 addition to what the government can actually show are
24 its out-of-pocket, actual losses.

25 This Court in the Hess case considered the

1 identical argument to that and held that to the extent
2 that a second action does impose some punishment, that
3 is not enough to declare it a criminal sanction. And
4 the Double Jeopardy Clause's concern is with a second
5 criminal sanction, not with a second proceeding that may
6 to some extent impose punishment.

7 The Sherman Act treble damages remedy in
8 punitive damages cannot be adequately differentiated
9 merely because the government is not a party because
10 amicus has argued that the prospective must be from the
11 defendant, and the defendant experiences either second
12 proceeding as punishment.

13 QUESTION: It -- it is true what -- what
14 amicus says that the Double Jeopardy Clause applies to
15 the government --

16 MR. DREEBEN: That's correct.

17 QUESTION: -- and not -- not to private
18 parties.

19 MR. DREEBEN: That's true, but the punishment
20 in this case, if there is some, would be awarded by the
21 court pursuant to a statute passed by Congress, and
22 there's no reason why the Double Jeopardy Clause would
23 not be concerned with it. The Hess case itself involved
24 a qui tam plaintiff, and the Court considered and
25 evaluated the Double Jeopardy Clause even though the

1 arguments were presented in the brief that the Double
2 Jeopardy Clause might not have a role to play in that
3 setting.

4 QUESTION: In other words, any civil plaintiff
5 who obtains punitive damages from a court is perhaps
6 violating the Double Jeopardy Clause?

7 MR. DREEBEN: No, Your Honor, we don't believe
8 that it does violate the Double Jeopardy Clause for any
9 civil action to follow a criminal one even if there is a
10 recovery above and beyond actual damages because that is
11 not the line that the Double Jeopardy Clause draws. It
12 protects against a second criminal proceeding because
13 the Constitution draws a line between criminal and civil
14 proceedings and determines that criminal proceedings
15 have more severe consequences, but it does not bar a
16 second civil sanction that can be imposed after the
17 earlier criminal conviction.

18 QUESTION: Isn't there another factor in the
19 -- in the qui tam action and in the treble damage
20 antitrust actions that the extra recovery is partially
21 justified as an incentive for the third private party to
22 bring the action? So, it's not strictly compensatory,
23 but yet it -- it pays for getting something done by
24 getting the third party activated in the matter.

25 MR. DREEBEN: Yes, it does, Your Honor, but in

1 -- in the case where a criminal conviction has already
2 happened and the private plaintiff brings the treble
3 damages action, he's entitled to rely on the facts
4 established in the criminal trial. And the wrongdoer
5 has already been exposed, so the costs of investigation
6 would be far less in that kind of a --

7 QUESTION: No, that's true. But there's still
8 the incentive. If you're going to get treble damages
9 instead of single damages, there's much more -- greater
10 motivation to bring the action.

11 MR. DREEBEN: That's true, Your Honor, but the
12 same incentives exist in this case because if the
13 government did not have the opportunity to recover
14 penalties, it would be virtually incapable of
15 prosecuting small frauds like this because the costs of
16 prosecuting them would far outweigh the costs of
17 investigating.

18 QUESTION: But what is the maximum criminal
19 fine you could recover?

20 MR. DREEBEN: There is a \$250,000 per count
21 penalty that could be --

22 QUESTION: You could recover a lot of money in
23 the criminal proceeding.

24 MR. DREEBEN: That's correct, but under the
25 Sentencing Commission guidelines, the fine would be

1 assessed by looking in part at the actual damage to the
2 government.

3 QUESTION: Well --

4 MR. DREEBEN: So, it's a very different
5 formula that has been prescribed. But the fact that
6 there is such a broad difference between what can be
7 recovered in a criminal proceeding and what the civil
8 proceeding allows in terms of a penalty helps underscore
9 that the civil proceeding does have a different purpose
10 and a different effect.

11 QUESTION: Does the Sentencing Commission
12 consider civil penalties in -- in formulating its
13 guidelines for -- for criminal fines?

14 MR. DREEBEN: Not to my knowledge, Your Honor.

15 There -- there are other statutes where
16 Congress has provided different kinds of formulas to
17 attack this kind of wrongdoing. There's more than one
18 way to skin a cat in this setting, and Congress has
19 provided for a mandatory, fixed-sum penalty in this act;
20 in other acts, has provided for more discretion. There
21 is currently discretion between \$5,000 and \$10,000 under
22 the False Claims Act. But Congress is trying to do what
23 it can to come up with adequate methods both to
24 compensate and to deter.

25 QUESTION: That -- that discretion will

1 presumably be -- be limited by the -- by the Commission,
2 the Sentencing Commission, won't it?

3 MR. DREEBEN: Under the False Claims Act on
4 the civil side, the Sentencing Commission would not have
5 jurisdiction over it, only on the criminal side.

6 Amicus argues that the costs of investigation
7 in this case were relatively small because the fraud was
8 relatively simple. The record in the civil case was not
9 developed on the question of what sort of investigation
10 occurred. But the record in the criminal case shows
11 that an extensive investigation was necessary to bring
12 this episode of wrongdoing to light. It's not a simple
13 matter of looking on the face of the claim form and
14 determining whether or not there was a fraud.

15 To begin with, Medicare does not -- and its
16 fiscal intermediaries don't even review each form. They
17 rely on an honor system. But more fundamentally, there
18 was a need to determine whether in fact the services
19 were performed that Mr. Halper claimed he had performed
20 and attempting to determine the magnitude of the problem
21 because the government is not --

22 QUESTION: But if all that has been done under
23 the criminal case, it's hard to see how -- how the costs
24 would be substantial for the civil prosecution -- the
25 civil action.

1 MR. DREEBEN: The civil action's costs are
2 less than the criminal prosecution, but there were still
3 costs of --

4 QUESTION: And you can rely on -- on the
5 conviction obtained --

6 MR. DREEBEN: Yes.

7 QUESTION: -- In the criminal case.

8 MR. DREEBEN: To establish liability, that's
9 correct.

10 QUESTION: Sure.

11 MR. DREEBEN: Not to find assets which is a
12 problem that frequently complicates civil actions of
13 this nature. But the government is forced to devote an
14 enormous amount of resources to trying to figure out in
15 the first place is this a fraud. Is it a fraud that's
16 worth prosecuting? It doesn't prosecute cases that
17 involve one or two accidental misstatements on a
18 Medicare form. It has to determine whether --

19 QUESTION: That was all done in the criminal
20 case.

21 MR. DREEBEN: That's true, Your Honor, and the
22 government has never been compensated for that. And
23 under the judgment below, the --

24 QUESTION: But, in theory, it could be under
25 the sentencing guidelines, presumably.

1 MR. DREEBEN: The sentencing guidelines are
2 not structured to compensate the government for its
3 costs of investigation and prosecution. They simply
4 don't work that way. The focus of the criminal episode
5 is really to punish the defendant. The focus of this
6 kind of proceeding is to ensure that the government is
7 compensated for the problem and to have a deterrent
8 mechanism in place to prevent successive types of frauds
9 like this.

10 QUESTION: It is the government's position,
11 though, that even if the government had lost the
12 criminal prosecution, it could then have brought this
13 action with a burden of proof not beyond a reasonable
14 doubt, but just more likely than not, and imposed the --
15 the level of fines that are at issue here.

16 MR. DREEBEN: That's right, Your Honor,
17 whether or not there has been a prior criminal --

18 QUESTION: Because this is not a criminal case.

19 MR. DREEBEN: That's correct.

20 QUESTION: This is just -- just compensation
21 to the government.

22 MR. DREEBEN: That's correct. It could go
23 either way on that point.

24 We believe that the result that the district
25 court reached in this case would require each court to

1 speculate in each case about what the government's true
2 damages were before it could decide whether the False
3 Claims Act were civil or criminal in a given setting or,
4 alternatively, it would force the government to attempt
5 to quantify exactly how much it had spent in attorney
6 time, how much it had spent in investigatory time, which
7 is simply not a process that can reasonably be done.
8 It's precisely the reason why liquidated damages are
9 provided in contracts. This is not a direct -- it's not
10 directly identical to liquidated damages because
11 Congress is legislating for a broad category of cases.

12 QUESTION: Of course, it's not unusual to
13 provide in a statute that the plaintiff recovers single,
14 treble damages, plus attorney's fees, plus costs of suit.

15 MR. DREEBEN: That's correct.

16 QUESTION: So, you can -- I mean, that would
17 not be an unusual statute to say government can recover
18 its costs and they have to prove them.

19 MR. DREEBEN: That's correct, but costs are
20 usually a very small component of the actual development
21 of a case and bringing it to trial. Costs that are
22 recoverable in a civil action are really limited to the
23 costs that you incur.

24 QUESTION: But you -- you haven't really
25 called our attention to anything that suggests that the

1 -- the government -- the statute was designed to enable
2 the government to recover the costs of running the
3 government, including its fraud investigation and all
4 the rest, have you?

5 MR. DREEBEN: Congress did not specifically
6 itemize those kinds of issues. It did rely --

7 QUESTION: Well, they didn't even mention it,
8 did they?

9 MR. DREEBEN: It didn't -- it mentioned it to
10 the extent that it alluded to the Hess case and it
11 approved of the rationale of the Hess case.

12 QUESTION: Yes, which was -- you had to pay
13 the informer half of the recovery there.

14 MR. DREEBEN: Your Honor, the -- Court's
15 reasoning did not rely on the qui tam provision in that
16 setting.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Dreeben.

19 The case is submitted.

20 (Whereupon, at 11:00 o'clock a.m., the case in
21 the above-entitled matter was submitted.)
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CERTIFICATION

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NO. 87-1383 - UNITED STATES, Appellant V. IRWIN HALPER

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