

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: JOHN HUDSON, LARRY BARESEL AND JACK  
BUTLER RACKLEY Petitioners v. UNITED STATES

CASE NO: 96-976

PLACE: Washington, D.C.

DATE: Wednesday, October 8, 1997

PAGES: 1-47

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

**LIBRARY**

OCT 24 1997

Supreme Court U.S.

ORIGINAL

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'97 OCT 24 A9:59

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
JOHN HUDSON, LARRY BARESEL :  
AND JACK BUTLER RACKLEY :  
Petitioners :  
v. : No. 96-976  
UNITED STATES :  
- - - - -X

Washington, D.C.  
Wednesday, October 8, 1997

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:05 a.m.

APPEARANCES:

BERNARD J. ROTHBAUM, ESQ., Oklahoma City, Oklahoma; on  
behalf of the Petitioners.  
MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on  
behalf of the Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

|   | PAGE |
|---|------|
| ORAL ARGUMENT OF<br>BERNARD J. ROTHBAUM, ESQ.<br>On behalf of the Petitioners     | 3    |
| ORAL ARGUMENT OF<br>MICHAEL R. DREEBEN, ESQ.<br>On behalf of the Respondent       | 22   |
| REBUTTAL ARGUMENT OF<br>BERNARD J. ROTHBAUM, ESQ.<br>On behalf of the Petitioners | 44   |

1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-976, John Hudson v. United States.

5 Spectators are admonished do not talk until you  
6 get out of the courtroom. The Court remains in session.

7 Mr. Rothbaum.

8 ORAL ARGUMENT OF BERNARD J. ROTHBAUM

9 ON BEHALF OF THE PETITIONERS

10 MR. ROTHBAUM: Mr. Chief Justice and may it  
11 please the Court:

12 The double jeopardy claims case before the Court  
13 today had its genesis in some bank loans in the mid-  
14 1980's in several small Oklahoma banks controlled by the  
15 petitioners. These loans were challenged by Federal bank  
16 examiners as collectively violating insider lending  
17 regulations.

18 As a result, in 1989 the Comptroller of the  
19 Currency proposed to impose civil penalties on petitioner,  
20 two types petitioners -- that's two types. First, a  
21 lifetime bar from the business of banking or at any  
22 federally insured institution, subject to the right to  
23 reapply at a later time in writing.

24 QUESTION: You said the business of banking or  
25 any federally insured institution. Would that have

1 applied to a bank which was not federally insured?

2 MR. ROTHBAUM: Your Honor, it applies to -- it  
3 actually -- the State banking system through the FDIC  
4 insurance system, or through the national banks through  
5 the Comptroller's regulatory authority, and it would have  
6 to be with the permission of both agencies before they  
7 could return.

8 In addition to which, the Comptroller proposed  
9 civil penalties of \$100,000 against Mr. Hudson and \$50,000  
10 each against the other two petitioners, Messrs. Baresel  
11 and Rackley.

12 Now, these sentences were imposed pursuant to a  
13 statutory scheme that, unlike some, for these sections --  
14 for these section required timing rules that there be  
15 willful acts and the Administrator then considered whether  
16 it is repetitive, whether there is concealment, questions  
17 of bad faith and so forth.

18 With regard to that scheme those findings were  
19 met here, remain here and are in the record. The statutes  
20 do not contain any authority for the administrative  
21 agencies to consider matters such as internal  
22 investigatory costs, expenses incurred in investigating  
23 the bankers, or other similar matters, nor did the  
24 Government contend at any time that it had suffered  
25 quantifiable monetary loss for which this sanctions, these

1 bonds were some sort of recompense. At no time did the  
2 OC -- did OCC ever take such a position. In 1992, the  
3 petitioners were indicted for the same 18 loans, the only  
4 difference being that there is one conspiracy count in the  
5 indictment. However, it is important to note that the  
6 Comptroller purported to find that these were acts done by  
7 the petitioners together, and that the statutes under  
8 which he imposed his sanctions allowed that to be  
9 considered in the penalty.

10 QUESTION: May I just interrupt with one  
11 thought, Mr. Rothbaum? You say they were indicted for the  
12 same loans. Now, of course, they were actually indicted  
13 for violating certain statutes, and you were penalized for  
14 violating certain rules, and the Government argues the  
15 Blockburger test is not met in this case, and you say the  
16 Blockburger test doesn't apply, as I understand.

17 If the Blockburger test did apply, is it not  
18 clear that it's not satisfied?

19 MR. ROTHBAUM: Your Honor, if the Blockburger  
20 test applies, then it applies at the level of generality  
21 that the Government seeks.

22 QUESTION: Well, it's a simple test. One  
23 statute requires an element, the other does not, and vice  
24 versa.

25 MR. ROTHBAUM: Well, but Your Honor --

1 QUESTION: You don't meet that test here, do  
2 you?

3 MR. ROTHBAUM: I suppose, stated that  
4 abstractly, we might not, but our views on that point is  
5 twofold. First, the Court has never applied that type of  
6 analysis in this case, in this type of case, whether it's  
7 a civil --

8 QUESTION: Right.

9 MR. ROTHBAUM: -- proceeding, and the use of  
10 the language same transaction repeatedly appears to me not  
11 to be an accident, because particularly if you look at  
12 the --

13 QUESTION: So even acknowledging that we've  
14 never done it expressly in this -- because we don't have  
15 very many of these cases, is there any reason why that  
16 test should not be applied, because even if you say same  
17 transaction, you have to in some way define exactly what  
18 it is the transaction gave rise to the two different  
19 punishments. Why doesn't it make sense just to apply  
20 Blockburger?

21 MR. ROTHBAUM: I think it makes sense to say,  
22 when we're talking about introducing punishment upon a  
23 particular individual for allegedly getting involved with  
24 an insider loan transaction, that the same insider loan  
25 transaction should not be punished twice in separate



1 proceedings, and to that extent, the cases upon which the  
2 Court relied in LaFranca, Justice Miller's opinion on  
3 circuit in the McKee case, and the opinion of the Southern  
4 District of New York in the Gates case support that view,  
5 and I think clearly those two cases and probably Halper  
6 itself can come out differently under a strict Blockburger  
7 analysis, so I do think the Court has taken the position.

8 QUESTION: If Blockburger is adequate protection  
9 for two criminal prosecutions, then a fortiori ought to be  
10 adequate protection for a criminal and a civil  
11 prosecution. What's wrong with that formula?

12 MR. ROTHBAUM: Your Honor, I suppose my response  
13 to that is, Blockburger presupposes this elements  
14 analysis, and I'm not sure that always fits. And I think  
15 often times it doesn't, where you do not have -- where you  
16 have the penalty problem, if you determine your punishment  
17 but there's not necessarily a criminal offense associated  
18 with it.

19 For example, last term's decision in the CFI  
20 Fabricators case the Court determined there the type of  
21 punishment, penalty for failure to pay a tax..

22 That did not mean that there had to be a  
23 criminal prosecution or that the criminal process had to  
24 be invoked, but I think it has to focus on the realities  
25 of the statutory schemes that are at issue, and the

1 threshold question, is this punishment?

2 QUESTION: But double, double jeopardy provision  
3 is designed to protect someone from being twice  
4 prosecuted, basically.

5 MR. ROTHBAUM: Or twice punished.

6 QUESTION: Yes, and what you're doing is, you  
7 have had one criminal prosecution, you've had one civil  
8 prosecution, and now you're saying, well, we claim that  
9 the civil prosecution was actually punitive under Halper,  
10 but surely if the double jeopardy provision is designed to  
11 prohibit two prosecutions Blockburger should be plenty  
12 of -- plenty sufficient to protect the double jeopardy  
13 interest, for one of the things is civil.

14 MR. ROTHBAUM: I agree, Mr. Chief Justice, where  
15 there are two criminal prosecutions, but where, as here,  
16 the question, the first question is, is there punishment  
17 imposed by --

18 QUESTION: But you have to really squeeze to get  
19 the civil thing into double jeopardy at all, because the  
20 classic doctrine is that the law doesn't prohibit the  
21 imposition of one criminal and one civil penalty.

22 MR. ROTHBAUM: If it is a civil penalty, if it  
23 is truly civil.

24 QUESTION: And that's what Congress said here,  
25 was that it was civil.

1 MR. ROTHBAUM: Congress said this was a civil  
2 penalty, that is how they cast it, but it is our view, it  
3 is our submission, that as the Seventh Circuit held in  
4 regard to an almost identical worded statute, in the Healy  
5 case, that the effect here is necessarily cumulative.

6 QUESTION: Well, strain to get it -- to make it  
7 criminal, in order to get it within the double jeopardy  
8 rule, then once there, you strain to get it out through  
9 the Blockburger test.

10 MR. ROTHBAUM: Your Honor, I'm not -- I would  
11 not characterize it as a strain to say that it's criminal.  
12 The Court, the Court has not said it was criminal. In  
13 cases going back as far as Choteau in the 1880s. Helwig  
14 in the 1900's, which is cited and quoted in the CFI case,  
15 in each of those cases the Court held that the statutory  
16 scheme there imposed punishment. In none of them, or at  
17 least not in most of them, was that made in the context of  
18 a criminal proceeding. It was found to be the effect of  
19 what had been done to the defendant.

20 And what has been done here in our case is  
21 punitive, and let me add --

22 QUESTION: Were those double jeopardy cases, the  
23 ones you --

24 MR. ROTHBAUM: No, sir. No, sir -- well,  
25 Chouteau was. Helwig was the case in which jurisdiction

1 in the court is at the time was divided between the  
2 district and circuit courts. If it was civil it went to  
3 the district court, it was criminal it went to the circuit  
4 court, and the Court held since it was criminal the  
5 district court had no jurisdiction.

6 And let me add another point here with regard to  
7 the nature of this proceeding. This proceeding is  
8 slightly different than many of the regulatory enforcement  
9 actions brought by various Government agencies, because  
10 they, many of them rest upon pure negligence, or upon a  
11 standard of conduct of less than knowing the rule for  
12 misconduct. That is not -- that happens not to be true  
13 here, at least under the statute as it was written prior  
14 to the 1981 amendments, and if the Court will look on page  
15 62, I believe, of the appendix to the petition, the  
16 Comptroller's office says.

17 Second, these statutes -- this is true from the  
18 legislative history that is in our brief, it's true for  
19 similar statutes. These statutes have come into existence  
20 on the premise that what will happen here, what in fact  
21 happened here wouldn't have happened, that what was needed  
22 was a lesser penalty so that the criminal process did not  
23 have to be invoked.

24 QUESTION: Well, Mr. Rothburger, I -- Rothbaum,  
25 I assume that to succeed here you really have to rely on

1 this Court's Halper decision in large part.

2 MR. ROTHBAUM: Well, Halper is certainly an  
3 important decision for our position, I believe because it  
4 is the first time that the Court announced categorically  
5 that the Constitution's Double Jeopardy Clause could apply  
6 in a civil proceeding.

7 QUESTION: But it certainly said on its face  
8 that it was reserved for the rare case, and there was a  
9 far greater disparity there in the amounts selected, and  
10 the Government's expenses, than would be the case here.  
11 I'm not sure that even on its face your petition would  
12 meet Halper under any standard, and the second thing I  
13 want you to address is that it looks to me like Halper may  
14 have been driven in part by due process concerns about  
15 vindictive use of civil proceedings following a criminal  
16 prosecution.

17 Now, here, the civil sanctions were imposed  
18 first, were they not?

19 MR. ROTHBAUM: Yes, they were, Your Honor.

20 QUESTION: So there's no danger here of a  
21 vindictiveness or a due process sort of concern that may  
22 have driven Halper.

23 MR. ROTHBAUM: That is correct. We do not claim  
24 vindictive prosecution.

25 QUESTION: No.

1 MR. ROTHBAUM: With regard to the --

2 QUESTION: So if Halper is limited in that  
3 fashion, as I think it might be, how do you prevail?

4 MR. ROTHBAUM: Well, Your Honor, as to the first  
5 part of your question, a rare case, this too, is an  
6 unusual case. It would be an unusual case where the  
7 Government will elect to try and claim both severe  
8 administrative sanctions and criminal --

9 QUESTION: About every book on my wall is a rare  
10 case.

11 (Laughter.)

12 QUESTION: We're never very successful up here  
13 when you say this is a rare case. The States are having a  
14 tremendously difficult time.

15 MR. ROTHBAUM: Your Honor, the only point I was  
16 making was at least within the Federal system, careful  
17 coordination between the SEC and the Justice Department,  
18 1940's in the Justice Department, bringing civil and  
19 criminal proceedings is the norm today.

20 QUESTION: Yes, but wasn't the rarity that  
21 Halper was talking about a reference to the nature of the  
22 civil penalty involved there, and if so, what is the  
23 rarity here?

24 MR. ROTHBAUM: Well, it seems to me that the --  
25 perhaps rarity is the wrong word. The distinguishing

1 factor in Halper was that part of the sanction there  
2 admitted to be obtained as remedial.

3 The problem was determining how much more, at  
4 what point along a continuum did that \$2,000 for each  
5 false claim penalty become penal, if at all?

6 QUESTION: Are we still talking about civil  
7 preceding criminal, which is how we got into this  
8 discussion with a question from Justice O'Connor?

9 I thought your response for that is that the  
10 basic claim here is a double jeopardy claim.

11 MR. ROTHBAUM: That's correct.

12 QUESTION: And the assertion is that double  
13 punishment violates the Double Jeopardy clause, as Halper  
14 held, whether it's civil or criminal, and double  
15 punishment is double punishment, no matter which one comes  
16 first.

17 MR. ROTHBAUM: No matter which one come first.

18 QUESTION: I don't see -- how do you run around that?

19 MR. ROTHBAUM: I don't run around that. I don't  
20 run around it. I say, I believe that is a correct  
21 statement, that the order of the proceedings does not  
22 matter.

23 If, for example, in the case in which there has  
24 been a civil punishment imposed, say this is the CFI  
25 Federal case, if thereafter on the same facts there had

1 been an attempt to indict, and say, well, the defendant  
2 would at least in my judgment have a strong argument, that  
3 once this Court had determined this was punishment, that  
4 he could not be further punished in a separate proceeding.

5 QUESTION: Well, some civil penalties aren't  
6 punishment, others are, and they're all penalties, and so  
7 accepting that it doesn't matter, that the order doesn't  
8 matter, accepting that arguendo, what penalties are okay  
9 because they're civil, and what civil penalties are not  
10 okay because they're really punishment?

11 How do we -- the books are filled with civil  
12 penalties. How do we which ones are okay, don't get us  
13 into double jeopardy problems, and the ones that do? I  
14 mean, what standards would pass muster as a genuine civil  
15 penalty, no double jeopardy problem?

16 MR. ROTHBAUM: I think one of the most useful  
17 precedents would be the Hicks case, in view of the  
18 distinctions between civil and criminal intent, is it a  
19 determinate or indeterminate sentence. If, for example,  
20 to take a hypothetical out of the reply brief, if the  
21 petitioners had been ordered to make a capital  
22 contribution to make up capital impairment and given a  
23 specific amount of time to do it, and thereafter, if you  
24 didn't, impose a certain fine there will be a strong  
25 argument, as I read Justice White's opinion in Hicks, that



1 that is an indeterminate and therefore remedial sanction.

2 Another question --

3 QUESTION: But why should we import from the  
4 distinction between civil contempt and criminal contempt,  
5 which Hicks dealt with, I think -- why should we import  
6 that into this area?

7 MR. ROTHBAUM: Because I think, in answer to  
8 your question, Mr. Chief Justice, it provides a useful  
9 standard for answering the question which Justice Ginsburg  
10 asked. And that is, how do you know -- how is one to  
11 determine which is which?

12 Another --

13 QUESTION: When is a penalty not a punishment, a  
14 wonderful -- the unsophisticated mind would think that a  
15 penalty is always a punishment, wouldn't it?

16 MR. ROTHBAUM: Your Honor, the unsophisticated  
17 mind might, but Congress having chosen to use the word  
18 penalty in different contexts, it is simply a fact which  
19 exists in the United States Code. And as I read this  
20 Court's cases from Chouteau forward, that cannot affect  
21 the fourth principle --

22 QUESTION: So, but -- it's got to be something  
23 more than, like, a day fine that's meant to get you to  
24 comply with the law. That will never be the case here,  
25 because you've already not complied, and whatever the

1 penalty is for, it's for past conduct. It's already done.  
2 So you're giving Hicks as an example, where the whole idea  
3 is, you got the keys to the kingdom, to the jailhouse in  
4 your pocket, comply, and you're home free.

5 Here, you're being penalized for something you  
6 did in the past, so that's why I can't get much from  
7 Hicks.

8 MR. ROTHBAUM: And we're being penalized for  
9 something we did in the past, after having been told we  
10 can no longer participate in the business of banking, it  
11 would be different.

12 QUESTION: Well, I would just like to know what  
13 is a civil penalty -- that is, definitely was something  
14 you'd done in the past, not to get you to comply, come  
15 into compliance with the law, but something that you've  
16 done in the past, what kind of penalty -- can there be  
17 such a thing as a civil penalty that doesn't get you into  
18 double jeopardy problems?

19 MR. ROTHBAUM: Yes, I think there can. For  
20 example, if the Government has suffered -- in the example  
21 of a false claim, if the Government has suffered an  
22 economic measurable financial --

23 QUESTION: That's like revoking a drivers  
24 license.

25 MR. ROTHBAUM: Your Honor, I would not take

1 credit for -- process of law --.

2 QUESTION: One of the things you haven't brought  
3 up is the -- in response to Justice Ginsburg's question is  
4 the justification that the Government is basically  
5 recouping its enforcement costs. Why isn't that something  
6 we ought to consider as a criterion?

7 MR. ROTHBAUM: Your Honor, in the first place,  
8 I -- two points. The first one is, at the very least,  
9 Congress should enact it. And this statute, by no stretch  
10 of the imagination, directs or allows the Administrator to  
11 consider that action.

12 QUESTION: Well, it leaves the question entirely  
13 open, I guess. I mean, you can't tell from what Congress  
14 has said what the object is, I guess, can you?

15 MR. ROTHBAUM: From what Congress has said, you  
16 can determine that it did not authorize consideration of  
17 Government costs, and second --

18 QUESTION: Well, I mean, how can we say that? I  
19 mean, I would --

20 MR. ROTHBAUM: Well, Your Honor, it says, in  
21 considering the amount of the fine, and then lists the  
22 criteria.

23 QUESTION: I thought the criteria were the OCC's  
24 criteria.

25 MR. ROTHBAUM: They are in the statute, and then

1 the OCC has expanded on through what is called the penalty  
2 matrix, which has a series of points, functioning like the  
3 Sentencing Guidelines, but the criteria as to what must be  
4 considered statutory.

5 QUESTION: Mm-hmm.

6 MR. ROTHBAUM: And the second point I would make  
7 on that issue is that we are not talking about costs in  
8 the sense of obtaining expert witnesses or something like  
9 that. What the Government was attempting to do here is to  
10 say they could simply take the cost of operation.

11 QUESTION: Sure, to the extent that it may be  
12 attributable to your -- to any given defendant's behavior,  
13 but I guess your answer is that if we were to assume that  
14 recoupment of Government cost, even on this attribution  
15 basis, was a relevant criterion in deciding where the --  
16 whether a penalty had crossed the line into something that  
17 was significant for double jeopardy purposes, that your  
18 client in fact would have the advantage of such a  
19 criterion, because you're saying under this statute that  
20 clearly is not what Congress was intending to do, so --

21 MR. ROTHBAUM: And that clearly is not what  
22 happened.

23 QUESTION: So do you think it would be a  
24 relevant consideration as a general matter for us?

25 MR. ROTHBAUM: As a general matter, certainly if

1 Congress speaks to it, that's one thing. If Congress  
2 doesn't speak, and if it is simply a matter allocating the  
3 cost of Government to someone to defeat a double jeopardy  
4 claim, I think that's very problematic.

5 In the Walter case in the Ninth Circuit I think  
6 Judge Noonan said that this case makes a strong point,  
7 that on that theory no private individual has that much  
8 money.

9 QUESTION: How many statutes are there with  
10 standards like, has this been done in the past, good  
11 faith, the standards that are used here? Aren't there  
12 many statutes labeled civil penalties that are just like  
13 this one? I'm trying to see the consequences of holding  
14 in your favor, if we say statutes like this are no good.  
15 Aren't there dozens of them on the books?

16 MR. ROTHBAUM: Your Honor, I'm not -- I don't  
17 think in order to resolve this case in my client's favor  
18 it is necessary to say that statutes such as this are no  
19 good. We are saying that in this instance the use of the  
20 statutes resulted in punishment.

21 I would point out --

22 QUESTION: But you've said the reason is that  
23 the statute is not a Hicks-type, comply with the law, and  
24 it isn't compensating the Government for a specific  
25 financial loss, so I'm thinking how many statutes fit that

1 standard, and my guess is, there are a great many.

2 MR. ROTHBAUM: Your Honor, I don't know the  
3 exact number off-hand, but I --

4 QUESTION: Well, many civil provisions are  
5 designed to prohibit unlawful conduct where the Government  
6 itself isn't harmed at all.

7 MR. ROTHBAUM: That --

8 QUESTION: But under your theory, I mean, that  
9 would mean they'd never fit --

10 MR. ROTHBAUM: Well --

11 QUESTION: -- the criteria, and it seems to me  
12 you also are characterizing both the civil money penalties  
13 and the nonparticipation orders here as punitive, and  
14 under your theory, I guess, they couldn't even be brought  
15 in separate proceedings without falling in violation of  
16 the Double Jeopardy Clause.

17 MR. ROTHBAUM: Your Honor, with regard to your  
18 last point, we do not argue that the nonparticipation  
19 sanctions appease. We argue that, given the  
20 nonparticipation, that with imposition on top of that a  
21 fixed monetary sums as a penalty for completed acts can  
22 have no remedial nonremedial purpose. If my client had  
23 been allowed to continue in the industry, and it had been  
24 determined that they had caused X amount of loss, then if  
25 the question --

1           QUESTION: Well, what -- suppose -- but they had  
2 the liberty to reapply, didn't they, so the monetary  
3 penalties in case they got in again would surely deter  
4 them from doing what they did before.

5           MR. ROTHBAUM: Well, Your Honor, that's possible  
6 I suppose.

7           QUESTION: It's very possible.

8           MR. ROTHBAUM: But it was not the intent with  
9 which they were imposed. The intent, according to the  
10 OCC, in its published order, was -- repeated at the  
11 hearing before Judge Thompson, was to deter others through  
12 publicizing this order.

13           Now, making of my clients an example in order to  
14 deter third parties is a classic definition of punishment  
15 regardless of what --

16           QUESTION: But if we look at the statute, I  
17 mean, are we bound by what OCC says at the time?

18           The question is, what was Congress' intent,  
19 wasn't it?

20           MR. ROTHBAUM: I agree with that, but there has  
21 not been any suggestion thus far that there was any  
22 divergence between the two.

23           QUESTION: Well, I'm suggesting it.

24           MR. ROTHBAUM: If I could --

25           (Laughter.)

1 MR. ROTHBAUM: -- I would like to reserve -- I'm  
2 sorry, sir. I didn't --

3 QUESTION: Go ahead.

4 MR. ROTHBAUM: I was going to say, I'll reserve  
5 time, but if I missed a question, I apologize.

6 QUESTION: No, you didn't miss anything.

7 (Laughter.)

8 QUESTION: Thank you, Mr. Rothbaum.

9 Mr. Dreeben.

10 ORAL ARGUMENT OF MICHAEL R. DREEBEN

11 ON BEHALF OF THE RESPONDENT

12 MR. DREEBEN: Mr. Chief Justice, and may it  
13 please the Court:

14 Civil money penalties serve a vital purpose in  
15 Federal regulatory schemes because they serve as an  
16 ongoing motivation to regulated parties to conform their  
17 conduct to the requirements of the law. For four reasons,  
18 our position is that the imposition of civil money  
19 penalties in such regulatory schemes does not constitute a  
20 bar under the Double Jeopardy Clause to petitioners'  
21 subsequent criminal prosecution.

22 First, civil money penalties in such regulatory  
23 schemes, like civil forfeiture actions, do not constitute  
24 punishment for purposes of the Double Jeopardy Clause of  
25 the Fifth Amendment. Second, even assuming that these



1 penalties --

2 QUESTION: Well, what do we do with language in  
3 Halper? Halper's part of the problem, right?

4 MR. DREEBEN: I think, Justice O'Connor, that to  
5 a large extent this Court has clarified and limited much  
6 of the language in Halper which could be read to lead to  
7 very broad results, including results such as petitioners  
8 are arguing for today.

9 One of the most significant features of Halper  
10 was its extraordinarily broad definition of punishment as  
11 encompassing any sanction that had --

12 QUESTION: Yes, that's what I'm talking about.  
13 I mean, that leads to a lot of problems.

14 MR. DREEBEN: It leads to a lot of problems  
15 because Halper thought, or said that any sanction that  
16 couldn't be solely explained without reference to  
17 deterrence or retribution must be deemed punishment for  
18 double jeopardy purposes.

19 At least twice since that case this Court has  
20 retrenched somewhat from Halper's description of  
21 punishment in that respect.

22 QUESTION: May I ask, assuming the language is  
23 much too broad in Halper, do you think there was  
24 punishment in Halper?

25 MR. DREEBEN: I think not, Justice Stevens. Our

1 position in Halper was that there was not punishment  
2 within the meaning of double jeopardy. There was in a  
3 common sense --

4 QUESTION: So it really isn't just a question of  
5 language. The holding is basically wrong in your  
6 position.

7 MR. DREEBEN: Oh, our position was then --

8 QUESTION: We can't ignore cases as though they  
9 had never been decided --

10 MR. DREEBEN: Excepting --

11 QUESTION: -- and having been decided, do you  
12 think --

13 MR. DREEBEN: Except in the holding of Halper --

14 QUESTION: Okay.

15 MR. DREEBEN: -- yes. Then the Court's  
16 conclusion in that case was that there was punishment, but  
17 the Court reached that by a process of analysis that  
18 required looking at the fact that it was a fixed penalty,  
19 that the penalty was totally disproportionate to the only  
20 legitimate aims of the statute that were not punitive,  
21 which in that case --

22 QUESTION: Was there some element of  
23 vindictiveness in sort of a due process focus, do you  
24 think, in Halper?

25 MR. DREEBEN: I have never seen that in the

1 opinion, Justice O'Connor. I do think that it was  
2 significant to the Court that Halper had been first  
3 criminally prosecuted, that the Government then came in  
4 and obtained civil penalties --

5 QUESTION: That's the vindictiveness element.

6 MR. DREEBEN: I wouldn't be prepared to concede  
7 that that was vindictiveness, because there was no showing  
8 in that case, and I don't think that the record would bear  
9 the conclusion that the Government was motivated to punish  
10 Halper for exercise of any of his constitutional rights,  
11 which is normally the due process test that would apply in  
12 a criminal case.

13 QUESTION: No, but a dissatisfaction by the  
14 Government, we had this criminal prosecution and we didn't  
15 get much punishment out of it, now let's go do something  
16 about that. We've got this civil remedy here.

17 MR. DREEBEN: Well, if that were true, then it  
18 would mean that Halper should not be viewed as a double  
19 jeopardy case at all, because that analysis I would think  
20 would apply even if it were clear that the second case had  
21 nothing to do with the elements that were proved in the  
22 first case and thus wasn't the same offense under  
23 Blockburger.

24 We do think that Halper should be, to the extent  
25 that it's --

1           QUESTION: Halper didn't discuss Blockburger for  
2 some reason, in the sense of thinking that applied.

3           MR. DREEBEN: We didn't raise a Blockburger or  
4 same elements issue in Halper because the Civil False  
5 Claims Act and the criminal false claims provisions would  
6 appear to be satisfied under that test.

7           We brought the case on a direct appeal from a  
8 district court decision to this Court, raising only the  
9 question of whether a civil false claims sanction could  
10 ever be deemed punishment within the meaning of the Fifth  
11 Amendment. We argued then that only criminal punishment  
12 could satisfy the Double Jeopardy Clause.

13           This Court rejected that, and the question is  
14 whether the analysis that was used in Halper should carry  
15 over to the very different kind of penalties that are at  
16 issue in this case.

17           Civil money regulatory penalties aim primarily  
18 to shape the conduct of parties who are subject to  
19 regulation by sitting as an ever-present reminder that  
20 there are consequences for violation of the law, and  
21 agencies use them for precisely that purpose, which is  
22 appropriately described as a deterrent purpose.

23           Now, under a broad reading of Halper, which I  
24 think petitioners have at times embraced, any deterrent  
25 purpose would brand these sanctions as punitive for double

1 jeopardy purposes, but this Court has made clear, both in  
2 Kurth Ranch and in United States v. Ursery, that even an  
3 obvious deterrent purpose does not mean that a civil  
4 sanction constitutes punishment and applying an analysis  
5 that respected that factor in Ursery, this Court concluded  
6 that even though civil forfeiture proceedings are imposed  
7 largely to motivate owners of property not to allow their  
8 property to be used in violation of the law, that civil  
9 forfeiture should not be deemed punishment for double  
10 jeopardy purposes even if it might be deemed punishment  
11 under a common sense view, or plain view, or under other  
12 constitutional provisions.

13 QUESTION: Were the penalties in Halper not  
14 regulatory under this scheme that you're putting forth,  
15 that they're distinguishable from the kind of penalties  
16 that we have here?

17 MR. DREEBEN: They were, Justice Kennedy, and  
18 they are for two reasons. The first reason is that --

19 QUESTION: They were distinguishable, or they  
20 were regulatory?

21 MR. DREEBEN: They are distinguishable. They  
22 were not regulatory.

23 The Court deemed the penalties that were imposed  
24 under the False Claims Act to be analogous to liquidated  
25 damages that a party may collect, whether it governmental

1 or private, when it has been damaged by fraud, and the  
2 Court reached that conclusion by looking at the character  
3 of the sanctions that were authorized by the statute:  
4 damages, actual damages, double damages, and a fixed  
5 penalty which the Court viewed as a way of getting rough  
6 compensation for the Government, to include not only its  
7 direct losses, but costs of investigation and costs of  
8 prosecution.

9 QUESTION: Mr. Dreeben, apart from the fact that  
10 this definition of punishment would enable the Government  
11 to win this case, what is there to be said for it? I  
12 mean, in the language of the Double Jeopardy Clause, in  
13 the common understanding of punishment? I mean, are we  
14 just authorized to give punishment whatever definition in  
15 the world we want in order to produce results that we sort  
16 of like?

17 MR. DREEBEN: I think, Justice Scalia, that the  
18 starting point is suggested by the fact that the word  
19 punishment is not in the Double Jeopardy Clause.

20 QUESTION: Yes, well, that -- yes, we could  
21 start with that, and 48 States have asked us to overrule  
22 Halper because of that.

23 MR. DREEBEN: Well, there is, I think, an  
24 irreducible need to consider the fact that the Double  
25 Jeopardy Clause speaks in language that undeniably

1 connotes a criminal offense. It speaks of putting  
2 somebody in jeopardy of life or limb, and it speaks of an  
3 offense, and those are concepts that have primary  
4 application, if not exclusive application, to criminal  
5 conduct.

6 Now, we suggest in this case that the  
7 appropriate test to reconcile the Double Jeopardy Clause  
8 and -- with the possibility that civil sanctions may be  
9 misused in a way that could implicate that clause, is to  
10 apply the test that this Court described in United States  
11 v. Ward. First determine whether Congress intended a  
12 civil sanction, and then determine whether there is any  
13 evidence, by the clearest proof, that Congress' intent to  
14 create a civil sanction should be overridden and that the  
15 sanction should be deemed criminal.

16 That is a test that I think is not only  
17 responsive to the language of the Double Jeopardy Clause,  
18 but reflects the fact that the consequences under double  
19 jeopardy are very significant to the Government.

20 In this case, we went in through the OCC and  
21 found violations of banking regulations, imposed civil  
22 penalties, imposed nonparticipation requirements on the  
23 petitioners through their settlement, and obtained  
24 important results from the point of view of the Office of  
25 the Comptroller of the Currency's regulation of the

1 banking system. Subsequently --

2 QUESTION: May I just interrupt? It seems  
3 fairly clear, if you apply Blockburger, that wouldn't have  
4 barred the criminal proceeding.

5 MR. DREEBEN: I agree, Justice Stevens.

6 QUESTION: So that really in this statute you  
7 don't have the practical problem that concerns you  
8 generally.

9 MR. DREEBEN: I agree with that, Justice  
10 Stevens. There are many other Federal regulatory statutes  
11 where there is a civil enforcement provision that includes  
12 money penalties and that has a criminal counterpart that  
13 requires perhaps an additional element of scienter or  
14 wilfulness, but that the elements are essentially  
15 identical, and --

16 QUESTION: How would you go about applying  
17 Blockburger when you compare the civil and the criminal  
18 charges in light of the different burdens of proof? Does  
19 that matter?

20 MR. DREEBEN: I don't think that it does,  
21 Justice O'Connor, if one embarks on the enterprise of  
22 applying the Double Jeopardy Clause to civil proceedings.  
23 The question then would be, under Blockburger, are the  
24 elements required to be proved by the Government in the  
25 civil case the same constitutionally.



1 QUESTION: Regardless of the burden.

2 MR. DREEBEN: Regardless of the burden of proof.  
3 That would not be a ground on which we would suggest that  
4 these can be distinguished.

5 Now, it is, of course, true, that if we brought,  
6 for example, a criminal Federal securities case, and the  
7 defendant was acquitted, and we then sought to bring a  
8 civil Federal securities case that had the same identical  
9 elements, we would not be barred because the defendant  
10 would have no multiple punishment argument and the burden  
11 of proof is lighter in a civil case, so the criminal  
12 conviction -- the criminal acquittal would not constitute  
13 any kind of a collateral estoppel bar on the Government  
14 proceeding.

15 But that, of course, is not what we have here.  
16 What we have here is an agency that, in the course of  
17 enforcing its own requirements, and to keep its reins on  
18 the regulatory -- regulated parties that are before it,  
19 imposes civil penalties to let all regulated parties know  
20 that there are consequences for violating the law.

21 QUESTION: But Mr. Dreeben, going back to the  
22 second part of Ward, the criteria that the agency uses  
23 sound like traditional sentencing criteria to me, I mean,  
24 as set out on page 3 -- wilfulness, insider status,  
25 previous warnings, history of violations, loss, number of

1 violations, duration, continuation, and so on. I mean,  
2 that sounds like common law punishment to me.

3 MR. DREEBEN: Well, the criteria, Justice  
4 Souter, may not be very different, but those criteria are  
5 aimed at determining what level of penalties is  
6 appropriate to send a deterrence signal not only to these  
7 individuals but to the world at large, and the Court  
8 has --

9 QUESTION: Yes, but that's exactly what common  
10 law courts do in sentencing.

11 MR. DREEBEN: That is true, but the Court has  
12 recognized that deterrence is a legitimate nonpunitive  
13 objective of the civil law. That is exactly what the  
14 Court said in Ursery, when it looked at civil in rem  
15 forfeiture, recognized that one of the main purposes of it  
16 was to motivate parties, not to allow their property to be  
17 used in violation of the law, and then held that that form  
18 of sanction is not punishment for double jeopardy  
19 purposes.

20 QUESTION: May we're trying to have it both  
21 ways, and maybe you're accepting that difficulty of ours  
22 in answering as you do, because I don't know how to draw  
23 the line.

24 MR. DREEBEN: The line is one that I think  
25 should be drawn with reference to the fact that the

1 consequence under double jeopardy is entirely to foreclose  
2 the second proceeding, as petitioners have presented the  
3 question here.

4 If they are right, and we have imposed  
5 punishment in the first proceeding, and assuming that  
6 Blockburger were satisfied on their behalf, we would then  
7 lose any right whatsoever to bring a criminal prosecution.  
8 In consequence, if the --

9 QUESTION: So it's the order of the proceedings  
10 that you're getting at.

11 MR. DREEBEN: Well, the order of the  
12 proceedings, but what I wanted to focus on here is simply  
13 that there are radical consequences from deeming a  
14 sanction to be covered by the Double Jeopardy Clause.

15 If the Court were to hold, and we would not  
16 dispute that these civil fines were sufficiently punitive  
17 to implicate the concerns of the Eighth Amendment, what  
18 that would mean is that there would be constitutional  
19 review of the amount of the fines that were imposed to  
20 determine that they were not excessive.

21 If the Court were to determine that there was  
22 a --

23 QUESTION: The Eighth Amendment uses the word  
24 punishment, by the way, which is a great advantage over  
25 the Double Jeopardy Clause.

1 MR. DREEBEN: Well, it does in the Cruel and  
2 Unusual Punishments Clause, but it does not in the  
3 Excessive Fines Clause, and I think that the Court has  
4 incorporated notions of punishment into both of those  
5 clauses to capture in a colloquial way what they are  
6 getting at.

7 QUESTION: All right, but --

8 MR. DREEBEN: But the Constitution itself  
9 doesn't use that word.

10 QUESTION: But I think -- what -- if I  
11 understand what your telling me is, number 1 we ought to  
12 consider the consequence of applying double jeopardy here,  
13 and you're saying, when it would foreclose the criminal  
14 proceeding that is a more serious consequence, and is  
15 entitled to weight in our line-drawing than if it would  
16 impose merely a civil proceeding. I think that's the  
17 first thing you're saying.

18 Beyond that, is there any sort of line-drawing  
19 criterion?

20 MR. DREEBEN: The --

21 QUESTION: Well, if you're --

22 MR. DREEBEN: The line that I think that comes  
23 out of United States v. Ursery is that -- is entirely  
24 permissible for the Court -- for Congress to authorize  
25 civil sanctions that pursue a deterrent purpose, and that

1 that does not brand them as punishment under the Double  
2 Jeopardy Clause.

3 QUESTION: So right away --

4 QUESTION: That's not a line. That's what's not  
5 a line. We're asking you what the line is. You're  
6 telling us what the line isn't.

7 MR. DREEBEN: The line would be --

8 QUESTION: The line is not deterrence.

9 MR. DREEBEN: Correct.

10 QUESTION: But what is it?

11 MR. DREEBEN: The test that we're suggesting in  
12 this context is the test articulated in United States v.  
13 Ward. If the sanction is framed as a civil sanction but  
14 in purpose or effect it is so punitive as to betray that  
15 characterization, then the Court will determine that --

16 QUESTION: And how does one know that when it's  
17 so punitive?

18 MR. DREEBEN: It does -- how does one know that,  
19 Justice Ginsburg?

20 QUESTION: I thought you had started out by  
21 saying you're not -- you're accepting Halper, Halper's  
22 language is too broad, it has to be confined, and I had  
23 written down, fixed penalty, totally disproportionate.  
24 Now, what else?

25 MR. DREEBEN: As far as the scope of Halper?

1           QUESTION: To -- no. What should our standard  
2 be for saying, this is labeled civil penalty, but it gets  
3 into double jeopardy territory because it's punishment,  
4 and we know that for what identifying characteristics?

5           And so you -- what you started to say now, using  
6 Ward, is, when it becomes -- the words were -- are highly  
7 generalized, so I would like you to be more concrete.

8           MR. DREEBEN: The most concrete that I can be,  
9 Justice Ginsburg, is to note that first, any civil  
10 sanction needs to be considered on its own terms, so that  
11 there will be different results for different kinds of  
12 civil sanctions, and second, the kind of civil sanction  
13 that we're talking about here, it is not the entire class  
14 of civil money penalties, it is the class of civil money  
15 penalties that are imposed for regulatory purposes, and  
16 our submission is that categorically the Court should  
17 conclude that if those sanctions are enacted under --  
18 imposed under statutes that passed the Ward test, there is  
19 not a double jeopardy problem.

20           Now, the Ward test will always be a highly case-  
21 specific enterprise for this Court because, to the extent  
22 it's been particularized, it looks to the list of factors  
23 that the Court articulated in Kennedy v. Martino Mendoza,  
24 and those factors, the Court noted even in that case, may  
25 point in different directions and they have to be

1 balanced.

2 QUESTION: Well, if --

3 QUESTION: Well, Mr. Dreeben, in Halper the  
4 criminal prosecution occurred first and then the civil  
5 penalties.

6 MR. DREEBEN: Correct.

7 QUESTION: And at least as I look at it it  
8 seemed to me to have some element in there of a concern by  
9 the Court of vindictiveness and disproportionality, if you  
10 will, and due process-type concerns.

11 Here, in this case, the civil sanctions were  
12 imposed first, so none of that could be present. Maybe  
13 that line is useful. What comes first?

14 MR. DREEBEN: Well, that would certainly confine  
15 Halper to its facts, and would restrict --

16 QUESTION: It would really cut Halper loose from  
17 all reasoning, wouldn't it?

18 MR. DREEBEN: It would cut Halper loose from the  
19 Double Jeopardy Clause.

20 QUESTION: Yes, which -- on which it was based.

21 QUESTION: Mr. Dreeben, don't you think it would  
22 be even more vindictive if the Government, having lost an  
23 action for civil penalties, was so mad that it prosecuted  
24 the person criminally? That's real vindictiveness.

25 MR. DREEBEN: Well, I don't think that Halper

1       itself involved a case in which vindictiveness was  
2       established.

3                QUESTION:  No.  I'm saying, if you're looking  
4       for a situation that displays vindictiveness, it's not the  
5       one where the civil precedes -- follows the criminal, it's  
6       the one where the civil precedes the criminal and, having  
7       lost the civil case, the Government is so enraged it  
8       prosecutes the person criminally.

9                MR. DREEBEN:  We might have a problem --

10              QUESTION:  That seems to be more vindictive, not  
11       less.

12              MR. DREEBEN:  We might have a problem under  
13       conventional collateral estoppel doctrine if we fail to  
14       persuade the fact-finder by a preponderance of the  
15       evidence that certain facts were proved, and then we  
16       sought to prove to another fact-finder that they were  
17       established beyond a reasonable doubt.

18              There are already conventional protections in  
19       the law that would cover cases like that, and I'm not  
20       aware of any case where we did that.

21              QUESTION:  But you did mention issue preclusion,  
22       which would be a good, neutral reason for doing the  
23       criminal prosecution first, because if you win in the  
24       criminal prosecution, if you've established the facts  
25       beyond a reasonable doubt, then you do have issue



1 preclusion --

2 MR. DREEBEN: That is true.

3 QUESTION: In the civil case.

4 MR. DREEBEN: That is true, and there are often  
5 good reasons to do the criminal prosecution first, not the  
6 least of which is that grand jury investigations are  
7 surrounded by secrecy, and you want to encourage the grand  
8 jury to be able to gather information without interfering  
9 with any civil process, and oftentimes grand jury  
10 investigations will go forward, the civil case will sit  
11 back, and there are also many cases where the Government  
12 decides after a criminal conviction is obtained there's no  
13 need to proceed with any further proceedings for  
14 penalties.

15 But in a case like this, the agency made a  
16 perfectly valid judgment that there was an importance to  
17 moving promptly to impose the nonparticipation order to  
18 protect members of the public from further potential  
19 banking violations by these individuals, and to impose the  
20 civil penalties so that the rest of the regulated industry  
21 was aware that even a regulatory violation has  
22 consequences, whether or not down the road somewhere the  
23 particular individuals who committed it were so culpable  
24 that they should also be subjected to criminal  
25 prosecution.

1           And it would therefore be a fairly dramatic  
2 consequence for the Government to have to choose an  
3 election of remedies at a point where the agency knows  
4 that there's a violation, but nobody knows whether there  
5 will be sufficient evidence of criminal activity to  
6 warrant a grand jury to indict.

7           And in that sense, the order of proceedings not  
8 only has a great practical significance, but I think that  
9 it also has a constitutional significance.

10           The submission of the defendants here is that  
11 the multiple punishments doctrine exists in a fashion that  
12 makes a punishment a jeopardy for constitutional purposes.  
13 That has never been the traditional way that this Court  
14 has analyzed multiple punishments questions even before  
15 Halper.

16           The Court has applied the multiple punishments  
17 doctrine even when there was indisputably a single  
18 jeopardy. The Court has held that the multiple  
19 punishments doctrine prohibited the imposition of  
20 cumulative punishments in one proceeding when the  
21 legislature has not authorized it, and in those cases  
22 there was clearly only one jeopardy.

23           The basic premise of the multiple punishments  
24 doctrine was that once an individual has been put in a  
25 criminal jeopardy, additional punishment shall not be

1 imposed on that individual for the same crime, and that is  
2 not satisfied in a case in which petitioners here have  
3 never been criminally indicted and have never been  
4 criminally charged.

5 Now, if the Court agrees with us that the Double  
6 Jeopardy Clause is categorically not applicable to civil  
7 regulatory sanctions unless the defendant is able to make  
8 the showing that, despite the civil characterization, the  
9 civil sanctions were in fact criminal under the United  
10 States v. Ward test, it doesn't mean that there's no  
11 constitutional limit, or no statutory limit to the amount  
12 of civil penalties that the Government can impose.

13 There is judicial review that is governed by  
14 traditional APA standards of whether a particular civil  
15 penalty is within the boundaries that have been set by  
16 Congress and that are established by the criteria of the  
17 regulatory agency, and there is also review under the  
18 Eighth Amendment Excessive Fines Clause to keep the  
19 particular civil penalties in question within  
20 constitutional bounds.

21 QUESTION: But both of those standards would  
22 have been met in Halper, of course.

23 MR. DREEBEN: Well, it's not clear whether they  
24 would have been met in Halper, as --

25 QUESTION: But the statute authorized the

1 penalties.

2 MR. DREEBEN: The statute clearly authorized it,  
3 and one of the problems that the Court had in Halper that  
4 is not present here is that the statute required the  
5 imposition of fixed penalties for every violation  
6 regardless of how significant the fraud was to the  
7 Government, and that created the potential for hugely  
8 disproportionate civil sanctions being imposed for the  
9 particular fines, the particular violations that were at  
10 issue. This case --

11 QUESTION: But before you get to the Eighth  
12 Amendment excessive fines provision, you have to show that  
13 it is a penalty, do you not?

14 MR. DREEBEN: I don't think so, Justice Kennedy.

15 QUESTION: In our punitive damages cases and  
16 jurisprudence, haven't we said that the Eighth Amendment  
17 applies only to a criminal proceeding for excessive fines?

18 MR. DREEBEN: No. In fact, the holding of  
19 Austin v. United States is that the Eighth Amendment  
20 applies to civil in rem forfeiture, which is clearly a  
21 civil proceeding. The holding in the punitive damages  
22 cases --

23 QUESTION: In the forfeiture area, yes.

24 MR. DREEBEN: Because it's an exaction by the  
25 Government of money for a violation of the law, and it is

1 true that it has to be in some sense a penalty.

2 I don't think a tax, for example, that is a true  
3 tax is subject to the Excessive Fines Clause, and I don't  
4 think that a disgorgement remedy or a damages remedy would  
5 be subject to the Excessive Fines Clause, but all that is  
6 constitutionally necessary is that there be a fine, and we  
7 would readily concede that the civil penalties that are  
8 applicable under the statutes at issue here are  
9 constitutional fines.

10 QUESTION: We have said punitive damages are not  
11 fines, though. All right, I'll look it up. Thank you.

12 MR. DREEBEN: In addition, the Court has said  
13 that punitive damages are not paid to the Government  
14 directly.

15 The Court reserved the question in the Browning-  
16 Ferris case of whether a qui tam case might be viewed  
17 differently because the Government collects part of the  
18 money, and I think the Court would likewise reserve  
19 punitive damage schemes where the punitive damages were  
20 paid in part to the State, but in the conventional case  
21 where a private party brings a civil case and collects  
22 punitive damages the Eighth Amendment has nothing to say  
23 about it.

24 The Eighth Amendment has a lot to say about what  
25 the Government does in these civil fines, and therefore

1 there should be no reservation on the Court's part that  
2 there would be no constitutional constraint whatsoever  
3 were the Double Jeopardy Clause ruled inapplicable to  
4 these civil penalties.

5 Thank you.

6 QUESTION: Thank you, Mr. Dreeben.

7 Mr. Rothbaum, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF BERNARD J. ROTHBAUM

9 ON BEHALF OF THE PETITIONERS

10 MR. ROTHBAUM: Thank you, Your Honor. Mr. Chief  
11 Justice, may it please the Court:

12 With regard to the order of proceedings, I would  
13 note the obvious. That is up to the Government. If it  
14 wishes to bring a criminal prosecution first, it may do  
15 so, and as a practical matter, whenever there is a belief  
16 that -- on the part of the Government that that kind of  
17 dual proceeding will be forthcoming, there's traditionally  
18 very close coordination, reflected, for example, in the  
19 decisions of this Court and the courts of appeals  
20 regarding the rights of a litigant to civil discovery  
21 while the grand jury is still sitting.

22 With regard to the Eighth Amendment issue, it  
23 may be that the Eighth Amendment also would apply, but  
24 that is not an exclusive application. It is our position  
25 that the Double Jeopardy Clause of the Fifth Amendment

1 under this Court's cases apply to a statute such as this,  
2 which imposes punishment on solely punitive or  
3 traditionally punitive criteria set forth in the statute  
4 and expounded by the administrator called upon to do so in  
5 a matrix, as it is called, that is self-consciously  
6 patterned on the Federal Criminal Sentencing Guidelines.

7 QUESTION: What happens if you have a Government  
8 agency or something says, we're going to fine you \$10 if  
9 you're late for a meeting. What's the point of the fine?  
10 Well, we want to get people to the meeting. Only  
11 deterrence.

12 MR. ROTHBAUM: If the person is allowed to go to  
13 the meeting after he pays the fine, that might very well  
14 be a remedial imposition.

15 QUESTION: So it's not remedial. They said,  
16 why'd you do it? Well, people are late for the meeting.  
17 We want them to be there on time, \$3 first meeting, \$5  
18 second. Criminal? You have to have a trial, and -- I  
19 mean --

20 MR. ROTHBAUM: Your Honor, I know of no such  
21 statute --

22 QUESTION: Maybe there's never such a thing, but  
23 perhaps some day somebody might think of it. People get  
24 late for the meetings in other organizations. They fine  
25 you if you're late, a little fine.

1 QUESTION: I think it would be a very good idea.

2 (Laughter.)

3 QUESTION: Right. Right. If that's so, I'm  
4 interested in the criteria.

5 MR. ROTHBAUM: I understand that.

6 Your Honor, the difficulty I have with your  
7 question is that this statute and these criteria are so  
8 specific --

9 QUESTION: They're solely deterrent, just like  
10 my fine.

11 MR. ROTHBAUM: Well, when one measures the size  
12 of the fine according to whether it's a recidivism, and  
13 according to whether --

14 QUESTION: All right. Then it's the size. It's  
15 not now a question of whether it's serving a purely  
16 deterrent --

17 MR. ROTHBAUM: But it must also be an  
18 intentional act, at least under the statute as it then  
19 existed, and with regard to that point, and where to draw  
20 the line on what is and isn't a penalty, I would invite,  
21 if I could, the Court's attention to one of the first  
22 cases in this area, Chouteau, which held that first a  
23 settlement agreement would be treated as being the  
24 equivalent of a criminal acquittal or conviction so that  
25 the defendant could plead double jeopardy, saying that



1 otherwise a great principle would be sacrificed to mere  
2 form, and second, that the mode by which the penalty was  
3 imposed did not matter, whether by a civil action or a  
4 criminal prosecution.

5 A unanimous Court repeated that holding in La  
6 Franca, and I think the point of La Franca, in  
7 distinguishing between the penalty and the tax issue, it  
8 must serve some other purpose.

9 And that, I think, is the point of Ursery. In  
10 addition to the historical, unique -- thank you, Your  
11 Honor.

12 CHIEF JUSTICE REHNQUIST: Thank you,  
13 Mr. Rothbaum. The case is submitted.

14 (Whereupon, at 12:01 p.m., the case in the  
15 above-entitled matter was submitted.)

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that  
the attached pages represents an accurate transcription of electronic  
sound recording of the oral argument before the Supreme Court of  
The United States in the Matter of:

JOHN HUDSON, LARRY BARESEL AND JACK BUTLER RACKLEY Petitioners v.  
UNITED STATES  
CASE NO: 96-976

and that these attached pages constitutes the original transcript of  
the proceedings for the records of the court.

BY Ann Marie Fedrico

(REPORTER)