SUPREME COURT OF THE UNITED STATES

No. 96–976

JOHN HUDSON, LARRY BARESEL, AND JACK BUTLER RACKLEY, PETITIONERS *v.*
UNITED STATES

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

[December 10, 1997]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Government administratively imposed monetary penalties and occupational debarment on petitioners for violation of federal banking statutes, and later criminally indicted them for essentially the same conduct. We hold that the Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal. Our reasons for so holding in large part disavow the method of analysis used in *United States* v. *Halper,* 490 U. S. 435, 448 (1989), and reaffirm the previously established rule exemplified in *United States* v. *Ward,* 448 U. S. 242, 248–249 (1980).

During the early and mid-1980's, petitioner John Hudson was the chairman and controlling shareholder of the First National Bank of Tipton (Tipton) and the First Na-

tional Bank of Hammon (Hammon).[1] During the same period, petitioner Jack Rackley was president of Tipton and a member of the board of directors of Hammon, and petitioner Larry Baresel was a member of the board of directors of both Tipton and Hammon.

An examination of Tipton and Hammon led the Office of the Comptroller of the Currency (OCC) to conclude that petitioners had used their bank positions to arrange a series of loans to third parties, in violation of various federal banking statutes and regulations. According to the OCC, those loans, while nominally made to third parties, were in reality made to Hudson in order to enable him to redeem bank stock that he had pledged as collateral on defaulted loans.

On February 13, 1989, OCC issued a "Notice of Assessment of Civil Money Penalty." The notice alleged that petitioners had violated 12 U. S. C. §§84(a)(1) and 375b (1982) and 12 CFR §§31.2(b) and 215.4(b) (1986) by causing the banks with which they were associated to make loans to nominee borrowers in a manner that unlawfully allowed Hudson to receive the benefit of the loans. App. to Pet. for Cert. 89a. The notice also alleged that the illegal loans resulted in losses to Tipton and Hammon of almost $900,000 and contributed to the failure of those banks. *Id.*, at 97a. However, the notice contained no allegation of any harm to the Government as a result of petitioners' conduct. "After taking into account the size of the financial resources and the good faith of [petitioners], the gravity of the violations, the history of previous violations and other matters as justice may require, as required by 12 U. S. C. §§93(b)(2) and 504(b)," OCC assessed penalties of $100,000 against Hudson and $50,000 each against both Rackley and Baresel. *Id.*, at 89a. On August 31, 1989,

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[1]Tipton and Hammon are two very small towns in western Oklahoma.

OCC also issued a "Notice of Intention to Prohibit Further Participation" against each petitioner. *Id.*, at 99a. These notices, which were premised on the identical allegations that formed the basis for the previous notices, informed petitioners that OCC intended to bar them from further participation in the conduct of "any insured depository institution." *Id.*, at 100a.

In October 1989, petitioners resolved the OCC proceedings against them by each entering into a "Stipulation and Consent Order." These consent orders provided that Hudson, Baresel, and Rackley would pay assessments of $16,500, $15,000, and $12,500 respectively. *Id.*, at 130a, 140a, 135a. In addition, each petitioner agreed not to "participate in any manner" in the affairs of any banking institution without the written authorization of the OCC and all other relevant regulatory agencies.[2] *Id.*, at 131a, 141a, 136a.

In August 1992, petitioners were indicted in the Western District of Oklahoma in a 22-count indictment on charges of conspiracy, 18 U. S. C. §371, misapplication of bank funds, §§656 and 2, and making false bank entries, §1005.[3] The violations charged in the indictment rested on the same lending transactions that formed the basis for the prior administrative actions brought by OCC. Petitioners moved to dismiss the indictment on double jeopardy grounds, but the District Court denied the motions. The Court of Appeals affirmed the District Court's holding

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[2]The Consent Orders also contained language providing that they did not constitute "a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate." App. to Pet. for Cert. 133a, 143a, 138a. The Court of Appeals ultimately held that this provision was not a waiver of petitioners' double jeopardy claim. 14 F. 3d 536, 539 (CA10 1996).

[3]Only petitioner Rackley was indicted for making false bank entries in violation of 18 U.S.C. §1005.

on the nonparticipation sanction issue, but vacated and remanded to the District Court on the money sanction issue. 14 F. 3d 536 (CA10 1994). The District Court on remand granted petitioners' motion to dismiss the indictments. This time the Government appealed, and the Court of Appeals reversed. 92 F. 3d 1026 (CA10 1996). That court held, following *Halper*, that the actual fines imposed by the Government were not so grossly disproportional to the proven damages to the Government as to render the sanctions "punishment" for double jeopardy purposes. We granted certiorari, 520 U. S. ___ (1997), because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*.[4] We now affirm, but for different reasons.

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, "'In common parlance,'" be described as punishment. *United States ex*

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[4]*E.g.*, *Zukas* v. *Hinson*, 1997 WL 623648 (CA11, Oct 21, 1997) (challenge to FAA revocation of a commercial pilot's license as violative of double jeopardy); *E. B.* v. *Verniero*, 119 F. 3d 1077 (CA3 1997) (challenge to "Megan's Law" as violative of double jeopardy); *Jones* v. *Securities & Exchange Comm'n*, 115 F. 3d 1173 (CA4 1997) (challenge to SEC debarment proceeding as violative of double jeopardy); *United States* v. *Rice*, 109 F. 3d 151 (CA3 1997) (challenge to criminal drug prosecution following general military discharge for same conduct as violative of double jeopardy); *United States* v. *Hatfield*, 108 F. 3d 67 (CA4 1997) (challenge to criminal fraud prosecution as foreclosed by previous debarment from government contracting); *Taylor* v. *Cisneros*, 102 F. 3d 1334 (CA3 1996) (challenge to eviction from federally subsidized housing based on guilty plea to possession of drug paraphernalia as violative of double jeopardy); *United States* v. *Galan*, 82 F. 3d 639 (CA5) (challenge to prosecution for prison escape following prison disciplinary proceeding as violative of double jeopardy), cert. denied, 519 U. S. ___ (1996).

rel. Marcus v. *Hess*, 317 U. S. 537, 549 (1943) (quoting *Moore* v. *Illinois*, 14 How. 13, 19 (1852)). The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, *Helvering* v. *Mitchell*, 303 U. S. 391, 399 (1938); see also *Hess*, 317 U. S., at 548-549 ("Only" "criminal punishment" "subject[s] the defendant to 'jeopardy' within the constitutional meaning"); *Breed* v. *Jones*, 421 U. S. 519, 528 (1975) ("In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution"), and then only when such occurs in successive proceedings, see *Missouri* v. *Hunter*, 459 U. S. 359, 366 (1983).

Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. *Helvering*, *supra*, at 399. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Ward*, 448 U. S., at 248. Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," *id.*, at 248–249, as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty," *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154 (1956).

In making this latter determination, the factors listed in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963), provide useful guideposts, including: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "hether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment– retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the

alternative purpose assigned." It is important to note, however, that "these factors must be considered in relation to the statute on its face," *id.* at 169, and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty, *Ward*, *supra*, at 249 (internal quotation marks omitted).

Our opinion in *United States* v. *Halper* marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature. In that case, Irwin Halper was convicted of, *inter alia*, violating the criminal false claims statute, 18 U. S. C. §287, based on his submission of 65 inflated Medicare claims each of which overcharged the Government by $9. He was sentenced to two years' imprisonment and fined $5,000. The Government then brought an action against Halper under the civil False Claims Act, 31 U. S. C. §§ 3729–3731 (1982 ed., Supp. II). The remedial provisions of the False Claims Act provided that a violation of the Act rendered one "liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action." *Id.*, §3729. Given Halper's 65 separate violations of the Act, he appeared to be liable for a penalty of $130,000, despite the fact he actually defrauded the Government of less than $600. However, the District Court concluded that a penalty of this magnitude would violate the Double Jeopardy Clause in light of Halper's previous criminal conviction. While explicitly recognizing that the statutory damages provision of the Act "was not itself a criminal punishment," the District Court nonetheless concluded that application of the full penalty to Halper would constitute a second "punishment" in violation of the Double Jeopardy Clause. 490 U. S., at 438–439.

On direct appeal, this Court affirmed. As the *Halper*

Court saw it, the imposition of "punishment" of any kind was subject to double jeopardy constraints, and whether a sanction constituted "punishment" depended primarily on whether it served the traditional "goals of punishment," namely "retribution and deterrence." *Id.*, at 448. Any sanction that was so "overwhelmingly disproportionate" to the injury caused that it could not "fairly be said *solely* to serve [the] remedial purpose" of compensating the government for its loss, was thought to be explainable only as "serving either retributive or deterrent purposes." See *id.*, at 448–449 (emphasis added).

The analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. First, the *Halper* Court bypassed the threshold question: whether the successive punishment at issue is a "criminal" punishment. Instead, it focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute "punishment." In so doing, the Court elevated a single *Kennedy* factor– whether the sanction appeared excessive in relation to its nonpunitive purposes– to dispositive status. But as we emphasized in *Kennedy* itself, no one factor should be considered controlling as they "may often point in differing directions." 372 U. S., at 169. The second significant departure in *Halper* was the Court's decision to "asses[s] the character of the actual sanctions imposed," 490 U. S., at 447, rather than, as *Kennedy* demanded, evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction, 372 U. S., at 169.

We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill considered.[5] As subse-

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[5]In his concurrence, JUSTICE STEVENS criticizes us for reexamining our *Halper* opinion rather than deciding the case on what he believes is the narrower *Blockburger* grounds. But the question upon which we

quent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is "punitive," and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable. We have since recognized that all civil penalties have some deterrent effect. See *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 777, n. 14 (1994); *United States* v. *Ursery*, 518 U. S. ___, ___, n. 2 (1996) (slip op., at 16–17, n. 2).[6] If a sanction must be "solely" remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause. Under *Halper*'s method of analysis, a court must also look at the "sanction actually imposed" to determine whether the Double Jeopardy Clause is implicated. Thus, it will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even *"attempting*

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granted certiorari in this case is "whether the imposition upon petitioners of monetary fines as *in personam* civil penalties by the Department of the Treasury, together with other sanctions, is 'punishment' for purposes of the Double Jeopardy Clause." Pet. for Cert. i. It is this question, and not the *Blockburger* issue, upon which there is a conflict among the Courts of Appeals. Indeed, the Court of Appeals for the Tenth Circuit in this case did not even pass upon the *Blockburger* question, finding it unnecessary to do so. 92 F. 3d, at 1028, n. 3.

[6]In *Kurth Ranch*, we held that the presence of a deterrent purpose or effect is not dispositive of the double jeopardy question. 511 U. S., at 781. Rather, we applied a *Kennedy*-like test, see 511 U. S., at 780–783, before concluding that Montana's dangerous drug tax was "the functional equivalent of a successive criminal prosecution." Similarly, in *Ursery*, we rejected the notion that civil *in rem* forfeitures violate the Double Jeopardy Clause. 518 U. S., at ___ (slip op., at 1). We upheld such forfeitures, relying on the historical support for the notion that such forfeitures are civil and thus do not implicate double jeopardy. *Id.*, at ___ (slip op., at 24–25).

a second time to punish criminally." *Helvering*, 303 U. S., at 399 (emphasis added).

Finally, it should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions. The Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational. *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). The Eighth Amendment protects against excessive civil fines, including forfeitures. *Alexander* v. *United States*, 509 U. S. 544 (1993); *Austin* v. *United States*, 509 U. S. 602 (1993). The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and "nonpunitive" penalties.

Applying traditional double jeopardy principles to the facts of this case, it is clear that the criminal prosecution of these petitioners would not violate the Double Jeopardy Clause. It is evident that Congress intended the OCC money penalties and debarment sanctions imposed for violations of 12 U. S. C. §§84 and 375b to be civil in nature. As for the money penalties, both 12 U. S. C. §§93(b)(1) and 504(a), which authorize the imposition of monetary penalties for violations of §§84 and 375b respectively, expressly provide that such penalties are "civil." While the provision authorizing debarment contains no language explicitly denominating the sanction as civil, we think it significant that the authority to issue debarment orders is conferred upon the "appropriate Federal banking agenc[ies]." §§1818(e)(1)-(3). That such authority was conferred upon administrative agencies is prima facie evidence that Congress intended to provide for a civil sanction. See *Helvering*, *supra*, at 402; *United States* v. *Spector*, 343 U. S. 169, 178 (1952) (Jackson, J., dissenting) ("Administrative determinations of liability to deportation have been sustained as constitutional only by considering

them to be exclusively civil in nature, with no criminal consequences or connotations"); *Wong Wing* v. *United States*, 163 U. S. 228, 235 (1896) (holding that quintessential criminal punishments may be imposed only "by a judicial trial").

Turning to the second stage of the *Ward* test, we find that there is little evidence, much less the clearest proof that we require, suggesting that either OCC money penalties or debarment sanctions are "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Ursery*, *supra*, at ___ (slip op., at 22). First, neither money penalties nor debarment have historically been viewed as punishment. We have long recognized that "revocation of a privilege voluntarily granted," such as a debarment, "is characteristically free of the punitive criminal element." *Helvering*, 303 U. S., at 399, and n. 2. Similarly, "the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforcable by civil proceedings since the original revenue law of 1789." *Id.*, at 400.

Second, the sanctions imposed do not involve an "affirmative disability or restraint," as that term is normally understood. While petitioners have been prohibited from further participating in the banking industry, this is "certainly nothing approaching the 'infamous punishment' of imprisonment." *Flemming* v. *Nestor*, 363 U. S. 603, 617 (1960). Third, neither sanction comes into play "only" on a finding of scienter. The provisions under which the money penalties were imposed, 12 U. S. C. §§93(b) and 504, allow for the assessment of a penalty against any person "who violates" any of the underlying banking statutes, without regard to the violator's state of mind. "Good faith" is considered by OCC in determining the amount of the penalty to be imposed, §93(b)(2), but a penalty can be imposed even in the absence of bad faith. The fact that petitioners' "good faith" was considered in determining the amount of the penalty to be imposed in this case is irrelevant, as we

look only to "the statute on its face" to determine whether a penalty is criminal in nature. *Kennedy*, 372 U. S., at 169. Similarly, while debarment may be imposed for a "willful" disregard "for the safety or soundness of [an] insured depository institution," willfulness is not a prerequisite to debarment; it is sufficient that the disregard for the safety and soundness of the institution was "continuing." 12 U. S. C. §1818(e)(1)(C)(ii).

Fourth, the conduct for which OCC sanctions are imposed may also be criminal (and in this case formed the basis for petitioners' indictments). This fact is insufficient to render the money penalties and debarment sanctions criminally punitive, *Ursery*, 518 U. S., at ___ (slip op., at 24–25), particularly in the double jeopardy context, see *United States* v. *Dixon*, 509 U. S. 688, 704 (1993) (rejecting "same-conduct" test for double jeopardy purposes).

Finally, we recognize that the imposition of both money penalties and debarment sanctions will deter others from emulating petitioners' conduct, a traditional goal of criminal punishment. But the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence "may serve civil as well as criminal goals." *Ursery*, *supra*, at ___ (slip op., at 24); see also *Bennis* v. *Michigan*, 516 U. S. 442, 452 (1996) ("[F]orfeiture . . . serves a deterrent purpose distinct from any punitive purpose"). For example, the sanctions at issue here, while intended to deter future wrongdoing, also serve to promote the stability of the banking industry. To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation of institutions such as banks.

In sum, there simply is very little showing, to say nothing of the "clearest proof" required by *Ward*, that OCC money penalties and debarment sanctions are criminal. The Double Jeopardy Clause is therefore no obstacle to

their trial on the pending indictments, and it may proceed.

The judgment of the Court of Appeals for the Tenth Circuit is accordingly

Affirmed.