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]

JUSTICE SOUTER, concurring in the judgment.

I concur in the Court's judgment and with much of its opinion. As the Court notes, *ante*, at 8, we have already recognized that *Halper*'s statements of standards for identifying what is criminally punitive under the Fifth Amendment needed revision, *United States* v. *Ursery*, 518 U. S. __, ___, n. 2 (1996) (slip op., at 16, n. 2), and there is obvious sense in employing common criteria to point up the criminal nature of a statute for purposes of both the Fifth and Sixth Amendments. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 362–366 (1984); *United States* v. *Ward*, 448 U. S. 242, 248–249 (1980); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963); see also *Ward*, *supra*, at 254 ("[I]t would be quite anomalous to hold that [the statute] created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for other purposes").

Applying the Court's *Kennedy-Ward* criteria leads me directly to the conclusion of JUSTICE STEVENS's concurring opinion. The fifth criterion calls for a court to determine whether "the behavior to which [the penalty] applies is already a crime." *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–169. The efficient starting point for identifying consti-

tutionally relevant "behavior," when considering an objection to a successive prosecution, is simply to apply the same-elements test as originally stated in *Blockburger* v. *United States*, 284 U.S. 299 (1932). See *United States* v. *Dixon*, 509 U. S. 688 (1993). When application of *Blockburger* under *Kennedy-Ward* shows that a successive prosecution is permissible even on the assumption that each penalty is criminal, the issue is necessarily settled. Such is the case here, as JUSTICE STEVENS explains. See *ante*, at 2 (STEVENS, J., concurring in judgment). Applying the *Kennedy-Ward* criteria, therefore, I would stop just where JUSTICE STEVENS stops.

My acceptance of the *Kennedy-Ward* analytical scheme is subject to caveats, however. As the Court points out, under *Ward*, once it is understood that a legislature intended a penalty to be treated as civil in character, that penalty may be held criminal for Fifth Amendment purposes (and, for like reasons, under the Sixth Amendment) only on the "clearest proof" of its essentially criminal proportions. While there are good and historically grounded reasons for using that phrase to impose a substantial burden on anyone claiming that an apparently civil penalty is in truth criminal, what may be clear enough to be "clearest" is necessarily dependent on context, as indicated by the cases relied on as authority for adopting the standard in *Ward*. *Flemming* v. *Nestor*, 363 U. S. 603 (1960), used the quoted language to describe the burden of persuasion necessary to demonstrate a criminal and punitive purpose unsupported by "objective manifestations" of legislative intent. *Id.*, at 617. *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154 (1956), cited as secondary authority, required a defendant to show that a "measure of recovery" was "unreasonable or excessive" before "what was clearly intended as a civil remedy [would be treated as] a criminal penalty." *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972), cited *Rex Trailer* for that stan-

dard and relied on the case as exemplifying a provision for liquidated damages as distinct from criminal penalty. I read the requisite "clearest proof" of criminal character, then, to be a function of the strength of the countervailing indications of civil nature (including the presumption of constitutionality enjoyed by an ostensibly civil statute making no provision for the safeguards guaranteed to criminal defendants. See *Flemming*, *supra*, at 617).

I add the further caution, to be wary of reading the "clearest proof" requirement as a guarantee that such a demonstration is likely to be as rare in the future as it has been in the past. See *United States* v. *Halper*, 490 U.S. 435, 449 (1989) ("What we announce now is a rule for the rare case"). We have noted elsewhere the expanding use of ostensibly civil forfeitures and penalties under the exigencies of the current drug problems, see *Ursery*, *supra*, at ____ (slip op., at 4) (STEVENS, J., concurring in judgment in part and dissenting in part) ("In recent years, both Congress and the state legislatures have armed their law enforcement authorities with new powers to forfeit property that vastly exceeded their traditional tools"); *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 81–82 (1993) (THOMAS, J., concurring in part and dissenting in part), a development doubtless spurred by the increasingly inviting prospect of its profit to the Government. See *id.*, at 56, n. 2 (opinion of the Court) (describing the government's financial stake in drug forfeiture); see also *id.*, at 56 (citing *Harmelin* v. *Michigan*, 501 U. S. 957, 979, n. 9 (1991) (opinion of SCALIA, J.) for the proposition that "it makes sense to scrutinize governmental action more closely when the State stands to benefit"). Hence, on the infrequency of "clearest proof," history may not be repetitive.