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 STEVENS, concurring in the judgment.

The maxim that "hard cases make bad law" may also apply to easy cases. As I shall explain, this case could easily be decided by the straightforward application of well-established precedent. Neither such a disposition, nor anything in the opinion of the Court of Appeals, would require a reexamination of the central holding in *United States* v. *Halper,* 490 U. S. 435 (1989), or of the language used in that unanimous opinion. Any proper concern about the danger that that opinion might be interpreted too expansively would be more appropriately addressed in a case that was either incorrectly decided or that at least raised a close or difficult question. In my judgment it is most unwise to use this case as a vehicle for the substitution of a rather open-ended attempt to define the concept of punishment for the portions of the opinion in *Halper* that trouble the Court. Accordingly, while I have no hesitation about concurring in the Court's judgment, I do not join its opinion.

I

As is evident from the first sentence of the Court's opinion, this is an extremely easy case. It has been settled since the decision in *Blockburger* v. *United States,* 284 U. S.

299 (1932), that the Double Jeopardy Clause is not implicated simply because a criminal charge involves "essentially the same conduct" for which a defendant has previously been punished. See, *e.g.*, *United States* v. *Dixon*, 509 U. S. 688, 696, 704 (1993); *Rutledge* v. *United States*, 517 U. S. 292, 297 (1996). Unless a second proceeding involves the "same offense" as the first, there is no double jeopardy. The two proceedings at issue here involved different offenses that were not even arguably the same under *Blockburger*.

Under *Blockburger*'s "same-elements" test, two provisions are not the "same offense" if each contains an element not included in the other. *Dixon*, 509 U. S., at 696. The penalties imposed on the petitioners in 1989 were based on violations of 12 U. S. C. §§84(a)(1) and 375b (1982) and 12 CFR §§31.2(b) and 215.4(b) (1986). Each of these provisions required proof that extensions of credit exceeding certain limits were made,[1] but did not require proof of an intent to defraud or the making of any false entries in bank records. The 1992 indictment charged violations of 18 U. S. C. §§371, 656, and 1005 and alleged a conspiracy to willfully misapply bank funds and to make false banking entries, as well as the making of such entries; none of those charges required proof that any lending limit had been exceeded.

Thus, I think it would be difficult to find a case raising a double jeopardy claim that would be any easier to decide than this one.[2]

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[1] Title 12 U. S. C. §84(a)(1) prohibits total loans and extensions of credit by a national banking association to any one borrower from exceeding 15 percent of the bank's unimpaired capital and surplus. 12 U. S. C. §375b and 12 CFR §§31.2(b) and 215.4(b) (1986) impose similar lending limits on loans to bank officers and other insiders.

[2] Petitioners challenge this conclusion by relying on dicta from *Kansas* v. *Hendricks*, 521 U. S. ___, ___ (1997). There, after rejecting a double jeopardy challenge to Kansas' Sexually Violent Predator Act, the Court added: "The *Blockburger* test, however, simply does not apply

II

The Court not only ignores the most obvious and straightforward basis for affirming the judgment of the Court of Appeals; it also has nothing to say about that Court's explanation of why the reasoning in our opinion in *United States* v. *Halper* supported a rejection of petitioners' double jeopardy claim. Instead of granting certiorari to consider a possible error in the Court of Appeals' reasoning or its judgment, the Court candidly acknowledges that it was motivated by "concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*." *Ante*, at 4.

The Court's opinion seriously exaggerates the significance of those concerns. Its list of cases illustrating the problem cites seven cases decided in the last two years. *Ante*, at 4, n. 4. In every one of those cases, however, the Court of Appeals *rejected* the double jeopardy claim. The only ruling by any court favorable to any of these "novel" claims was a preliminary injunction entered by a District Court postponing implementation of New Jersey's novel, controversial "Megan's Law." *E. B.* v. *Poritz*, 914 F. Supp. 85 (NJ 1996), reversed, *E. B.* v. *Verniero*, 119 F. 3d 1077 (CA3 1997). Thus, the cases cited by the Court surely do not indicate any need to revisit *Halper*.

The Court also claims that two practical flaws in the *Halper* opinion warrant a prompt adjustment in our double jeopardy jurisprudence. First, the Court asserts that

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outside of the successive prosecution context." *Id.*, at ___ (slip op., at 23). This statement, pure dictum, was unsupported by any authority and contradicts the earlier ruling in *United States* v. *Dixon*, 509 U. S. 688, 704–705 (1993), that the *Blockburger* analysis applies to claims of successive punishment as well as successive prosecution. See also *id.*, at 745–746 (SOUTER, J., concurring in judgment in part and dissenting in part) (explaining why the *Blockburger* test applies in the multiple punishments context). I cannot imagine a good reason why *Blockburger* should not apply here.

Halper's test is unworkable because it permits only successive sanctions that are "solely" remedial. *Ante*, at 8. Though portions of *Halper* were consistent with such a reading, the express statement of its holding was much narrower.[3] Of greater importance, the Court has since clarified this very point:

> "Whether a particular sanction 'cannot fairly be said *solely* to serve a remedial purpose' is an inquiry radically different from that we have traditionally employed in order to determine whether, as a categorical matter, a civil sanction is subject to the Double Jeopardy Clause. Yet nowhere in *Halper* does the Court purport to make such a sweeping change in the law, instead emphasizing repeatedly the narrow scope of its decision." *United States* v. *Ursery*, 518 U. S. ___, ___ (1996) (slip op., at 17, n. 2).

Having just recently emphasized *Halper*'s narrow rule in *Ursery*, it is quite odd for the Court now to suggest that its overbreadth has created some sort of judicial emergency.

Second, the Court expresses the concern that when a civil proceeding follows a criminal punishment, *Halper* would require a court to wait until judgment is imposed in the successive proceeding before deciding whether the latter sanction violates double jeopardy. *Ante*, at 8–9. That concern is wholly absent in this case, however, because the criminal indictment followed administrative sanctions. There can be no doubt that any fine or sentence imposed on the criminal counts would be "punishment." If

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[3] "We . . . hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *United States* v. *Halper*, 490 U. S. 435, 448–449 (1989).

the indictment charged the same offense for which punishment had already been imposed, the prosecution itself would be barred by the Double Jeopardy Clause no matter how minor the criminal sanction sought in the second proceeding.

Thus, the concerns that the Court identifies merely emphasize the accuracy of the comment in *Halper* itself that it announced "a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U. S., at 449.

III

Despite my disagreement with the Court's decision to use this case as a rather lame excuse for writing a gratuitous essay about punishment, I do agree with its reaffirmation of the central holding of *Halper* and *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767 (1994). Both of those cases held that sanctions imposed in civil proceedings constituted "punishment" barred by the Double Jeopardy Clause.[4] Those holdings reconfirmed the settled proposition that the Government cannot use the "civil" label to escape entirely the Double Jeopardy Clause's command, as we have recognized for at least six decades. See *United States* v. *La Franca*, 282 U. S. 568, 574–575 (1931); *Helvering* v. *Mitchell*, 303 U. S. 391, 398–399 (1938). That proposition is extremely important because the States and the Federal Government have an enormous array of civil ad-

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[4] Other recent double jeopardy decisions have also recognized that double jeopardy protection is not limited to multiple prosecutions. See *United States* v. *Ursery*, 518 U. S. ___, ___ (1996) (slip op., at 4); *Kansas* v. *Hendricks*, 521 U. S., at ___ (slip op., at 22). Otherwise, it would have been totally unnecessary to determine whether the civil forfeitures in *Ursery* and the involuntary civil commitment in *Hendricks* imposed "punishment" for double jeopardy purposes, for neither sanction was implemented via criminal proceedings.

ministrative sanctions at their disposal that are capable of being used to punish persons repeatedly for the same offense, violating the bedrock double jeopardy principle of finality. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States*, 355 U. S. 184, 187 (1957). However the Court chooses to recalibrate the meaning of punishment for double jeopardy purposes, our doctrine still limits multiple sanctions of the rare sort contemplated by *Halper*.

IV

Today, as it did in *Halper* itself, the Court relies on the sort of multi-factor approach to the definition of punishment that we used in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963), to identify situations in which a civil sanction is punitive. Whether the Court's reformulation of *Halper*'s test will actually affect the outcome of any cases remains to be seen. Perhaps it will not, since the Court recommends consideration of whether a sanction's "'operation will promote the traditional aims of punishment– retribution and deterrence,'" and "'whether it appears excessive in relation to the alternative [nonpunitive] purpose assigned.'" *Ante*, at 5–6 (quoting *Kennedy*, 372 U. S., at 168–169). Those factors look awfully similar to the reasoning in *Halper*, and while we are told that they are never by themselves dispositive, *ante*, at 7, they should be capable of tipping the balance in extreme cases. The danger in changing approaches midstream, rather than refining our established approach on an incremental basis, is that the Government and lower courts may be unduly influenced by the Court's new attitude,

rather than its specific prescribed test.

It is, of course, entirely appropriate for the Court to perform a lawmaking function as a necessary incident to its Article III responsibility for the decision of "Cases" and "Controversies." In my judgment, however, a desire to reshape the law does not provide a legitimate basis for issuing what amounts to little more than an advisory opinion that, at best, will have the precedential value of pure dictum and may in time unduly restrict the protections of the Double Jeopardy Clause. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U. S. 283, 295 (1905); see also *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring). Accordingly, while I concur in the judgment of affirmance, I do not join the Court's opinion.