UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 2, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 95C00009
ALBERTO NORIEGA-PEREZ, Respondent.	)	

DECISION AND ORDER

Appearances: Alan Rabinowitz, Esquire, Immigration and Naturalization Service, United States Department of Justice, San Diego, California, for complainant;
Alberto Noriega-Perez, *pro se*.

Before: Administrative Law Judge McGuire

Procedural History

On January 23, 1995, complainant, acting by and through the Immigration and Naturalization Service (INS), filed a two (2)-count Complaint alleging that Alberto Noriega-Perez (respondent), had violated the document fraud provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. §§1324c(a)(1)–(a)(2), as amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101–649, 105 Stat. 322 (1990). The Complaint alleged 328 violations of IRCA, for which civil money penalties totaling $96,000 were assessed.

Count I of the Complaint asserted that after November 29, 1990, respondent had knowingly forged, counterfeited, altered and falsely made eight (8) temporary immigration documents and had done so

in order to satisfy a requirement of the Immigration and Nationality Act (INA), in violation of IRCA, 8 U.S.C. §1324c(a)(1). Complainant levied civil money penalties totaling $16,000, or $2000 for each of those eight (8) alleged infractions.

In Count II, complainant averred that after November 29, 1990, respondent had knowingly possessed the forged, counterfeit, altered and falsely made documents described therein in paragraph A, namely 298 U.S. Immigration and Naturalization Forms I–94, 21 U.S. Social Security cards, and one (1) U.S. Immigration and Naturalization Form I–151, and had done so for the purpose of satisfying a requirement of the INA, in violation of IRCA, 8 U.S.C. §1324c(a)(2). Complainant assessed a civil money penalty of $250 for each of those 320 alleged violations, or a total civil money penalty of $80,000.

On October 27, 1995, the undersigned issued an Order Denying Respondent's Motion for Extension of Time, Denying Respondent's Motion for Reconsideration of Order, Granting Complainant's Motion for Sanctions, Granting Complainant's Motion for Summary Decision, and Denying Respondent's Cross-Motion for Summary Decision. That Order, which more fully set forth the procedural history in this proceeding, directed the parties to submit concurrent written briefs containing recommended civil money penalties for those 328 violations. It further instructed the parties to present arguments addressing whether the requested civil money penalty of $96,000 is tantamount to a "punitive" or criminal penalty, and thus constitutes double jeopardy within the Supreme Court's holding in *United States v. Halper*, 490 U.S. 435 (1989).

On November 15, 1995, respondent filed a pleading captioned Motion for A. Amendment of Judgement as per Rule 59(e) F.R.C.P. B. Relief from Judgement or Order F.R.C.P. Rule 60(b) C. Stay of Proceeding to inforce [sic] a Judgement F.R.C.P. Rule 62(a)(b)(c) D. Pending Appeal. In that Motion, respondent alternately argued the following: that this Office is a division of the executive branch and lacks subject matter jurisdiction because its administrative law judges are not Article III judges as required by the Constitution; that the undersigned's October 27, 1995 Order deprived respondent of due process, the equal protection of the law, and violated his First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment rights; that this Office's jurisdiction is defective because the alleged conduct is criminal in nature, "no matter how labeled," which is a

suit by the government for over $20, and thus must be tried in a federal court before a jury; that respondent has been placed in jeopardy four (4) or five (5) times for the same conduct; that this Office lacks jurisdiction due to respondent's mental defect, as evidenced by correspondence from his physician; that respondent had been denied due process and equal protection of the law because this Office had refused to recognize his "*absolute* fifth amendment [right] against self incrimination," which supersedes OCAHO discovery requirements, and further failed to provide respondent a full evidentiary hearing; that respondent could not locate the OCAHO case law cited in earlier orders issued by the undersigned, and thus, his compliance with those orders was "impossible"; that the government has acted improperly by "willfully refus[ing] to comply with respondent's discovery demand knowing that the exculpatory evidence in their [sic] files will destroy their [sic] case against Mr. Noriega," by illegally searching his premises and illegally seizing evidence, by characterizing blank, "innocuous" forms and a seal which "only had a picture of a bird on it" as counterfeit, by misrepresenting the amount of money and time spent to investigate and apprehend respondent, and by maliciously prosecuting respondent "because he like the Jews in Nazi Germany has property and . . . [is] a minority and . . . that the government feels that it can use any pretext to take [that property]." *See* Nov. 15, 1995 Motion at 2–21.

On November 20, 1995, complainant filed its Brief in Support of Civil Money Penalty, outlining its arguments in support of the requested penalty of $96,000. Further, addressing the question of whether the proposed penalty serves to compensate the government for its loss, or whether it is actually another form of "punishment" within the contemplation of *United States v. Halper*, 490 U.S. 435 (1989), complainant presented an accounting documenting its estimated cost of prosecuting respondent in this matter.

On December 5, 1995, respondent filed an Emergency Ex Party [sic] Motion 1. To Compell [sic] Discovery for Briefs on Court Ordered Civil and Money Penalties, and that of Double Jeopardy 2. Stay on Ordered Briefs and Continuance until I.N.S. Provides Discovery Or 3. that this Motion be Consider [sic] an Interlocutory and Mandamus Appeal to the C.A.H.O. for Review. Respondent requested that the undersigned impose sanctions against complainant for its failure to respond to its earlier discovery requests and to dismiss the Complaint, or, alternately, order the INS to answer his discovery requests, including some 12 contentions made in paragraphs

A through I and one (1) through three (3), and issue a continuance until such discovery responses had been received. Respondent also requested that his brief be considered an "urgent appeal, to the C.A.H.O. and that he issue a stay on the required Monday December 11, 1995 filing date." Mot. at 8.

On December 11, 1995, respondent filed a pleading captioned Motion(s) Two (1) Recuse the Honorable Judge Joseph E. McGuire with Prejedeous [sic] in Favor of the U.S. Dept. of Justice and the I.N.S. (2) Dissmissal [sic] for Lack of Jurisdiction as 8 U.S.C. 1324(A)(B)(C) Inactment [sic] by Congress was Unconstitutional (3) Dissmissal [sic] for Lack of Jurisdiction as this Proceeding is in Violation of the Seperation [sic] of Powers Doctrine, and the Constitutional Requirement, for a Hearing before a Member of an Independent Federal Judge and a Jury of Respondents [sic] Pears [sic] (4) Dissmissal [sic] for Lack of Jurisdiction on Grounds of Double Jeopardy, Collateral Estoppel, Res Judicata and Laches (5) Dissmissal [sic] of Complaint for Outrageous, Goverment [sic] Misconduct, for thier [sic] Suppression of Favorable Evidence and Withholding of Discovery (6) Dissmissal [sic] for Failure to Hold an Evedentuary [sic] Hearing, for the Surppression [sic] of Evidence, Obtain [sic] Thru Illigal [sic] Search and Seizure (7) Answer to the Courts Orde [sic] Brief, as to Civil Money Penalty's [sic] and Double Jeopardy, Filed Here in under Protest.

Respondent's Arguments Addressing Issues Other Than the Penalty Assessment

Subject Matter Jurisdiction

In his December 11, 1995 motion, respondent requested that the undersigned dismiss the instant proceeding for lack of jurisdiction on one or two alternate bases: (1) that Congress' enactment of IRCA was unconstitutional; and (2) that the proceeding violates the separation of powers doctrine because this Office is not an Article III court. Resp't's Dec. 11, 1995 Mot. at 7. Respondent, however, offers absolutely no support in fact or law for these arguments.

Respondent's request that this Office dismiss this case on the first of these grounds cannot be entertained. The undersigned agrees with and adopts the Supreme Court's position that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Johnson*

v. Robison, 415 U.S. 361, 368 (1974) (citations omitted); *see also United States v. Hotel Martha Washington Corp.*, 5 OCAHO 786, at 7 (1995) (finding that unsupported allegations that IRCA is unconstitutional and unlawful did not create a genuine issue of material fact in a motion arguing against the granting of summary decision); *United States v. Southwest Marine Corp.*, 3 OCAHO 429, at 5 (1992) (noting that an OCAHO administrative law judge "lacks the authority to adjudicate this constitutional issue since it is well established that an administrative agency may not declare an act of Congress unconstitutional."); *United States v. Rodriguez*, 1 OCAHO 158, 1112 (1990) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that "the constitutionality of a statute is a matter to be decided by the courts organized under Article III . . . This tribunal is not such a court; the [ALJ] assumes the constitutionality of the statute being applied."). Thus, the question of IRCA's constitutionality will not be addressed.

Respondent's claims regarding the separation of powers doctrine are similarly not properly before this Office. It is well established that Congress has the authority to designate Article I judges in certain situations:

> On its face, Article III, §1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch. The [Supreme] Court has, however, recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts, *see, e.g., American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242 (1828); courts-martial, *see, e.g., Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838 (1857); and courts that adjudicate certain disputes concerning public rights, *see, e.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372 (1856) (remaining citations omitted) . . .
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> . . . . The exceptions [the Court] ha[s] recognized for territorial courts, courts-martial, and administrative courts were each based on "certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus." *[Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (opinion of Brennan, J.)].

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859, 861 (1986) (Brennan, J., dissenting). The Office of the Chief Administrative Hearing Officer (OCAHO) is an administrative agency, and thus arguably falls within the third of the three (3) exceptions listed above.

Regardless, it is not within the power of this Office to second guess Congress' power to enact IRCA and its authority to provide for hear-

ings before an Article I judge. *See Bowen v. Massachusetts,* 487 U.S. 879, 929 (1988) (Scalia, J., dissenting) (observing that "[i]t is the norm for Congress to designate an Article I judge, usually an administrative law judge, as the initial forum for resolving policy disputes (to the extent they are to be resolved in adjudication rather than by rulemaking)"). Congress dictated that hearings regarding Section 274C of the INA, 8 U.S.C. §1324c, "shall be conducted before an administrative law judge" and that a decision issuing from such a hearing "shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order." 8 U.S.C. §1324c(d)(2)(B), (d)(4). Nowhere within IRCA is an administrative law judge given the authority to dismiss actions because of the statute's purported constitutional infirmities. Accordingly, the undersigned declines to do so.

Collateral Estoppel, Res Judicata, Laches and Double Jeopardy

Respondent next argues that the undersigned must dismiss this proceeding, alternately, on the grounds of collateral estoppel, res judicata, laches and/or double jeopardy in view of his earlier guilty plea to criminal charges relating to the same conduct.

Prior OCAHO case law has stricken the affirmative defenses of collateral estoppel and res judicata as inapplicable to a subsequent IRCA proceeding that had been initiated after earlier criminal charges had been commenced, but then later dismissed. Administrative Law Judge Robert B. Schneider's June 24, 1994 Order Denying Complainant's Motion for Default and Granting and Denying in Part Complainant's Motion to Strike Affirmative Defenses addressed in detail the applicability of collateral estoppel (or issue preclusion) and res judicata (or claim preclusion) to IRCA cases. *United States v. Alvarez-Suarez*, 4 OCAHO 655 (1994). In that case, the criminal charges against Alvarez-Suarez had been dismissed prior to the OCAHO civil case. Judge Schneider noted:

> Claim preclusion does not extend from criminal prosecutions to civil actions. The division between civil and criminal procedure does not contemplate any opportunity for joining any civil claim with the criminal prosecution. [18 Charles A. Wright, et al., *Federal Practice and Procedure* §4474, at 748 (1981).] Federal decisions hold that a different claim or cause of action is involved in a subsequent civil action between private parties, or in an action brought by the criminal defendant against the government. [citations omitted]

> *"Even when the government appears as plaintiff in the civil action, the claim is different."* [citing 18 *Federal Practice and Procedure* §4474, at 749]

Alvarez-Suarez, 4 OCAHO 655, at 9 (1994) (emphasis added).

Thus, even though Noriega-Perez's factual scenario differs from that in *Alvarez-Suarez*—specifically, respondent in this instance apparently entered a plea of guilty to the government's criminal charges in a prior criminal proceeding and was sentenced and fined (Letter from Alberto Noriega-Perez to Alan Rabinowitz, INS, of 12/7/93, at 1), while the charges against Alvarez-Suarez were dismissed—the distinguishing factor of dismissal was *not* key to Judge Schneider's ultimate conclusion that collateral estoppel and res judicata based upon previous criminal proceedings are inapplicable to IRCA's civil proceedings because "the difference in the relative burdens of proof in the criminal and civil action precludes the application of the *doctrine of collateral estoppel* or *res judicata* to this case." *Alvarez-Suarez*, 4 OCAHO 655, at 13 (citing *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (holding that civil fraud penalties were permissible after acquittal in a criminal tax evasion prosecution)). Contrary to respondent's contentions, complainant was not afforded "a full and fair opportunity to litigate" the civil violations in the prior criminal action. Resp't's Dec. 11, 1995 Mot. at 8–9.

Thus, neither collateral estoppel nor res judicata are proper grounds for dismissal. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 359, 362 (1984) (reiterating the principles declared in *Helvering*, 303 U.S. at 397, that the difference in the relative burdens of proof in a criminal and a civil action precludes application of both collateral estoppel and res judicata); *see also State Farm Fire & Casualty Co. v. Bomke,* 849 F.2d 1218, 1220 (1988) ("Even though a guilty plea is not conclusive for purposes of collateral estoppel, a guilty plea 'is admissible in a subsequent civil action on the independent ground that it is an admission.") (citation omitted).

Respondent next avers that complainant is estopped from proceeding with this case because of the equitable doctrine of laches. "The defense of laches 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Kansas v. Colorado*, 115 S. Ct. 1733, 1742 (1995) (citing *Costello v. United States*, 365 U.S. 265, 282 (1961)). *Black's Law Dictionary* states that the "[d]octrine of laches,' is based upon [the] maxim that equity aids the vigilant and not those who

slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to [the] adverse party, operates as [a] bar in [a] court of equity." *Black's Law Dictionary* 875 (6th ed. 1990).

Respondent's single allegation that the government "had the authority and ability to bring this case for civil punishment in November 1992, and yet they [sic] waited until November 1993 to bring this current action," is inadequate proof of a lack of diligence. Resp't's Dec. 11, 1995 Mot. at 7. Further, respondent fails entirely to indicate how a delay of one (1) year prejudiced his ability to defend himself against the Complaint. Thus, laches does not preclude this cause of action.

Respondent's final affirmative defense is that of double jeopardy. As noted previously, the parties were directed in the undersigned's October 27, 1995 Order to address the impact of *United States v. Halper*, 490 U.S. 435 (1989), on this proceeding.

Respondent contends in his December 11, 1995 motion:

> Plaintiff is farther [sic] bared [sic] from bringing this action under the U.S. Constitutions [sic] protection against double jeporday [sic]. In the U.S. v. Harper [sic] 490 U.S. 437 the Court held that the double jepordy [sic] clause protects against 3 distinct abuses (1) a second prosecution for the same offense after aquittal [sic] [2] a second prosecution for the same [offense] after conviction and [3] multiple punishment for the same offense. North Carolina v. Pearce 395 U.S. 711 (1969). . . .
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> The case law in this matter and [sic] is well settled in the 9th Circuit regarding double jeopardy, as U.S. v. 405089.23 U.S. Currency held that:
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> That the basis of the 5th Amendmant [sic] protection against double jeopardy is that a person shall not be harrased [sic] by successive trials, that an accused shall not have to marshal the resourses [sic] and energies nessary [sic] for his defense more than once for the same alledge [sic] criminal acts. Abbate v. U.S. 3 Led2d 729, Green v. U.S. 2 Led2d 199, Bartkus v. Illinois 3 Led2d 684.
>
> In this instant case just as in the case of the U.S. v. 405,089.23 in U.S. Currency the I.N.S. waited for almost one year after respondent was charge [sic] with the criminal charges to bring action in regards to this civil fined [sic], this was after he had been put in jeopardy and punished (a) the first time by inprisonment [sic] and a criminal fined [sic] for the exact same documents in question in this proceedings.
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> B. Respondent was put in jeopardy a second time by the goverment [sic] (I.)(N.)(S.) taking $800.00 dollars of his personal money taken from him at the time of his arrest money that was not related to any crime, refused to return it to him, and instead consfiscated [sic] this money for the goverments [sic] on [sic] use their by [sic] punishing him a second time for the same offense.

> C. Respondent was put in jeopardy for the third time, by their refuseal [sic] to return his office equipment and invalueable [sic] business papers. And then disposing of same causing him incurrable [sic] harm, and punishing him again a third time for the same offense.
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> D. The goverment [sic] now seeks to punished [sic] respondent yet a fourth time through the pretext of a civil proceeding and without the protection of an independent judiciary as required by the U.S. Constitution and seeks to use so call [sic] civil penalties, involving the exact same documents, that he was punished for in the criminal proceedings and theirfore [sic] the goverment [sic] now seeks to punished [sic] him a fourth time for the same offense.
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> Theirfore [sic] is self evident that the prosecution of this case is bared [sic] by the Constitution [sic] command against double jeopardy.

Resp't's Dec. 11, 1995 Mot. at 9–12.

United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1214 (1994), addressed "the constitutional limits on the government's ability to seek criminal penalties and civil forfeiture based on the same violations of law." In *$405,089.23 U.S. Currency*, the United States brought separate and parallel civil forfeiture and criminal proceedings against the defendants, each based upon the same course of conduct. *Id.* at 1214. The criminal prosecution ended in conviction of the defendants. *Id.* Subsequently, the United States was granted summary judgment as to the civil forfeiture proceedings, and the defendants appealed *pro se*. *Id.* at 1215. On appeal, they argued that the civil forfeiture proceeding constituted double jeopardy in light of their earlier criminal conviction based on the same violations of law. *Id.* In arriving at its determination that the civil forfeiture violated the Fifth Amendment's prohibition against double jeopardy, the Court posed two (2) issues: (1) whether the civil and criminal proceedings constituted "separate proceedings," and (2) whether civil forfeiture under the applicable statute constituted "punishment." *Id.* at 1216. Because it answered both of those questions affirmatively, the Court held that the civil forfeiture action was barred by the Double Jeopardy Clause. *Id.* at 1219.

In contrast to *$405,089.23 U.S. Currency*, the instant proceeding does not involve asset forfeiture. Rather, it involves the imposition of civil money penalties. There are substantial and significant differences between an in rem forfeiture action and an action for civil money penalties. For example, unlike forfeiture of property, which is "a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law," *United States v. Ward*, 448 U.S. 242, 254 (1980), IRCA's civil money penalties have

been carefully delimited by Congress. *See* 8 U.S.C. §1324c(d)(3). Further, the propriety of each levy under IRCA is individually assessed in light of each case's specific facts. Respondent's attempts to fit the square peg of forfeiture into the round hole of civil money penalties are simply unavailing.

To determine whether a civil money penalty proceeding constitutes a criminal punishment, the seminal case to be examined is not the Ninth Circuit's decision in *$405,089.23 U.S. Currency*, but rather the Supreme Court's decision in *United States v. Halper*, 490 U.S. 435 (1989). In *Halper*, the government was granted summary judgment based on the facts established in Halper's earlier criminal conviction, which were incorporated into the civil suit. *Id.* at 438. Because the statute in question provided for a minimum penalty of $2000 for each violation, and Halper was found to have violated that statute 65 separate times, he appeared to be liable for a civil penalty of more than $130,000. *Id.* Halper argued that the penalty was a second punishment that placed him in double jeopardy, and was thus barred. To determine whether a civil penalty might constitute punishment for purposes of the Double Jeopardy Clause, the Supreme Court indicated that the proper inquiry was not whether or not the cause of action was labeled "criminal" or "civil" in nature, but rather involved a deeper evaluation of the action's purpose:

> It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. *To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.* Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

Id. at 447–48 (emphasis added) (citations omitted).

Succinctly stated, the Court in *Halper* held "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." *Id.* at 448–49.

The first inquiry is thus whether respondent has been punished previously in a criminal prosecution. The record clearly indicates that respondent has pled guilty to a single count of conspiracy to possess forged, counterfeit and false documents, in violation of 18 U.S.C. §§371, 1546. *United States v. Noriega-Perez*, No. 92–1581–R–Crim (S.D. Cal. May 10, 1993). While respondent was apparently initially sentenced to 18 months imprisonment and ordered to pay a criminal fine of $20,000, there is evidence indicating that in "June of 1994, after the respondent filed a writ of habeas corpus to reduce sentencing and fine, his sentence was reduced to timed [sic] served and the fine was reduced to $5,000.00." Complainant's Br. Supp. Civil Money Penalty at Ex. C (Mem. from Alejandro R. Kastner, INS Special Agent, to File of 12/22/94, at 1). Regardless of the exact length of respondent's incarceration or the amount of criminal fine assessed, the Ninth Circuit has recently unequivocally stated that "jeopardy attaches when a court accepts the defendant's guilty plea." *United States v. Singleton*, 897 F. Supp. 1268, 1271 (N.D. Cal. 1995) (citations omitted). Respondent's guilty plea was accepted by the United States District Court for the Southern District of California on May 10, 1993, and his criminal sentence imposed. *United States v. Noriega-Perez*, No. 92–1581–R–Crim (S.D. Cal. May 10, 1993). Thus, respondent meets the definition of "a defendant who already has been punished in a criminal prosecution." *Halper*, 490 U.S. at 448–49.

The second inquiry is whether or not IRCA's §1324c provision imposing civil money penalties for document fraud constitutes punishment, or if it can "fairly be said solely to serve a remedial purpose." *Id.* at 448. Thus, "to the extent that the second [civil money] sanction may not fairly be characterized as remedial, but only as a deterrent or retribution," it violates the Double Jeopardy Clause. *Id.* at 449. On the other hand, if IRCA solely serves a remedial purpose, both in general and as applied to the instant factual scenario, then respondent has not been placed in double jeopardy. *See Department of Revenue of Mont. v. Kurth Ranch,* 114 S. Ct. 1937, 1945 (1994) (indicating that the Court had "recognized in *Halper* that a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct.")

In order to determine whether §1324c was intended to serve a remedial purpose, or if it was intended to serve as punishment, the first step is to examine its legislative history. Section 1324c was en-

acted by Congress on November 29, 1990, as part of IMMACT, and amended IRCA by adding civil money penalties for document fraud. 8 U.S.C. §1324c; *see generally* 56 Fed. Reg. 24,758 (1991) (to be codified at 8 C.F.R. pt. 270) (proposed May 31, 1991). In his statement introducing the language ultimately adopted in IMMACT, Senator Alan Simpson (R. Wyo.) noted the following:

> In fiscal year 1986, the INS made 1.6 million apprehensions of illegal aliens on our Southern border. In fiscal year 1987, after IRCA was enacted, the number of apprehensions fell to just over 1 million. In fiscal year 1988 . . . and in fiscal year 1989, apprehensions fell again . . .
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> Unfortunately, this positive trend has reversed itself. Southern border apprehensions for fiscal year 1990 are up 25 percent. . . .
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> . . . .
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> Therefore, I am today introducing legislation which would do the following: . . . fourth, create a system of civil fines to deter users of fraudulent documents . . .
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> . . . .
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> I am introducing this legislation today because I believe it will attack the two greatest weaknesses in our current enforcement efforts: First, the large number of false documents that now exist which can be used to fraudulently satisfy the employment authorization requirement of employer sanctions . . . [and second, insufficient existing barriers to illegal entry].

136 Cong. Rec. S13,616–05, S13,628–29 (daily ed. Sept. 24, 1990) (statement of Sen. Simpson introducing S.3099, a bill to strengthen IRCA).

Based upon the legislative record, it would appear that Congress intended IMMACT to strengthen IRCA's "desired effect of reducing the 'magnet' of U.S. jobs as an inducement to illegal immigration." *United States v. Remileh*, 5 OCAHO 724, at 6 (1995) (modification by CAHO) (citing 136 Cong. Rec. S13,616–05, S13,628 (daily ed. Sept. 24, 1990) (statement of Sen. Simpson)). While Sen. Simpson states that the legislation is designed to "deter users of fraudulent documents," his statement also "indicates that the focus of the language that became 8 U.S.C. §1324c was the increase in fraudulent documents being used to evade effective compliance with the employment eligibility verification requirements." *Remileh*, 5 OCAHO 724, at 6 (1995) (modification by CAHO).

The Supreme Court has indicated that the proper inquiry is not whether the cause of action is labeled "criminal" or "civil" in nature, but rather involves a deeper evaluation of the action's purpose.

Halper, 490 U.S. at 447. Therefore, in terms of classifying §1324c as either remedial or retributive, use of the word "deter" within the statute's legislative history does not necessarily establish that the statute must be classified as punishment. Instead, it is critical to examine §1324c's entire statutory scheme to arrive at an appropriate characterization of its general purpose, rather than focusing exclusively on one senator's views of what the legislation would accomplish. A deeper evaluation of §1324c's purpose reveals that Congress enacted IMMACT with the intention of strengthening IRCA's capacity to lessen the attraction of U.S. jobs—which costs United States' citizens untold millions of dollars each year, both in terms of budgetary costs of apprehension and enforcement, as well as lost wages for legal employees. *See House Hears Testimony on Verification Systems, Impact of Undocumented Aliens*, 72 (No. 15) Interpreter Releases 522, 525 (Apr. 17, 1995) (relating estimates of the cost to taxpayers of undocumented aliens, which range from a low of $2 billion per year to a high of $16–21.6 billion annually); *Clinton Administration Announces Enhanced Border Initiatives*, 73 (No. 4) Interpreter Releases 101, 101 (Jan. 22, 1996) (estimating the cost of new measures designed to strengthen immigration enforcement measures and deter illegal border crossings at $2.6 million per month); *Immigration: INS Arrests 1,100 Illegal Aliens Under Work Site Enforcement Operations*, 1996 Daily Lab. Rep. News (BNA) 75 col. d7 (Apr. 18, 1996) (indicating that "[a] series of work site enforcement operations led to the arrest of more than 1,100 illegal aliens and made more than $15.5 million in wages available to legal workers in the United States."). Thus, it is fair to characterize IMMACT's purpose as remedial. *Accord United States v. Widow Brown's Inn*, 3 OCAHO 399, at 18 (1992) (noting that "[t]he coincidence that criminality may attach to the same conduct does not change the civil character of the cause of action before the administrative law judge. . . . This is not a criminal or quasi-criminal proceeding. It is a civil penalty proceeding . . ."); *United States v. Mr. Z. Enters.*, 1 OCAHO 288, 1888 (1991) (concluding that "it is clear that this employer sanction proceeding is civil, not criminal, or even quasi-criminal in nature"); *see also* 8 C.F.R. §270.3(a) (1995) (stating, within §1324c's implementing regulations regarding penalties, that "[n]othing in section 274C of the Act shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in title 18, United States Code.").

Having determined that §1324c's purpose is *generally* remedial still leaves open the inquiry of whether its sanctions, as applied to the *particular* facts of this case, nonetheless serve the goals of punishment. *Halper*, 490 U.S. at 448. If so, then those sanctions are barred under the provisions of the Double Jeopardy Clause. If not, then the sanctions are valid. The Supreme Court has stated:

> We acknowledge that this inquiry will not be an exact pursuit. . . . it would be difficult if not impossible . . . to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment. . . .
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> . . . . *What we announce now is a rule for the rare case*, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: *Where* a defendant previously has sustained a criminal penalty and *the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment"* in the plain meaning of the word, *then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.*

Id. at 449–50.

The pertinent question is thus whether the government's requested penalty of $96,000 bears a rational relationship to the goal of compensating the INS for its loss, or whether respondent is that "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." *Id.* at 449. Thus, to ensure that respondent's penalty is rationally related to the government's costs, the requested penalty will first be examined in terms of prior 1324c case law to determine its propriety, and then be subjected to a second inquiry regarding double jeopardy in light of the government's costs in bringing this cause of action.

As to respondent's remaining contentions contained in his numerous motions, the undersigned will address only those remaining portions of his pleadings which relate to the assessment of a penalty, and will not address respondent's continued arguments regarding liability, which has already been established in the October 27, 1995 Order Denying Respondent's Motion for Extension of Time, Denying Respondent's Motion for Reconsideration of Order, Granting Complainant's Motion for Sanctions, Granting Complainant's Motion

for Summary Decision, and Denying Respondent's Cross-Motion for Summary Decision.

Assessment of an Appropriate Civil Money Penalty

Section 1324c and OCAHO Case Law

Section 1324c of IRCA provides:

> With respect to a violation of subsection (a) of this section, the order . . . shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—
>
> (A) not less than $250 and not more than $2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation . . .

8 U.S.C. §1324c(d)(3).

Respondent has been charged with 328 separate violations of IRCA, including having knowingly forged, counterfeited, altered and falsely made eight (8) temporary immigration documents, for which complainant seeks the maximum penalty of $2000 for each of those eight (8) violations, and having knowingly possessed some 320 forged, counterfeit, altered and falsely made documents, namely 298 U.S. Immigration and Naturalization Forms I–94, 21 U.S. Social Security cards, and one (1) U.S. Immigration and Naturalization Form I–151, for which complainant seeks the minimum civil money penalty of $250 for each of those 320 alleged violations.

In its Brief in Support of Civil Money Penalty, complainant correctly asserts that the penalty assessed for the 320 violations of §1324c(a)(2) contained in Count II of the Complaint is the statutorily-set minimum amount of $250 for each of the 320 violations. Because IRCA requires a minimum penalty of $250 for each violation of 8 U.S.C. §1324c, and does not provide for mitigation below that minimum fine, the undersigned has no discretion to lessen the penalty for those 320 violations. Thus, the mandated penalty for those 320 violations is appropriately set at $80,000.

The remaining penalties to be considered are those regarding the eight (8) infractions alleged in Count I. While §1324c does not provide any guidance as to how an appropriate penalty shall be determined for each violation, prior OCAHO case law has set forth "a judgmental approach under a reasonableness standard and consider[ation of] the factors set forth by Complainant, any relevant

mitigating factors provided by Respondent, and any other relevant information of record." *United States v. Diaz-Rosas*, 4 OCAHO 702, at 7–8 (1994); *United States v. Villatoro-Guzman*, 4 OCAHO 652, at 15 (1994). The undersigned shall follow that approach regarding the eight (8) violations alleged in Count I.

Complainant avers that it has considered the following factors:

1. respondent's age;

2. seriousness of the violation;

3. respondent's history of previous criminal and/or civil violations;

4. his immigration status;

5. purpose of document fraud; and

6. other aggravating factors.

Complainant's Br. Supp. Civil Money Penalty at 2; *see also United States v. Remileh*, 6 OCAHO 825, at 5–6 (1995); *United States v. Villatoro-Guzman*, 4 OCAHO 652, at 11 (1994) (earlier §1324c cases considering the same factors).

Regarding those six (6) factors which complainant argues should be considered, complainant offers the following bases for its civil money penalty assessment:

[1]. *Respondent's Age*: The respondent is a fifty-eight (58) year old male.

[2]. *Seriousness of the Violation*: The respondent was convicted on January 29, 1993, in the United States District Court, Southern District of California, for . . . Conspiracy to Possess Forged, Counterfeit, and False Documents. On May 10, 1993, the respondent was sentenced to eighteen (18) months custody of the Attorney General and imposed a fine of $20,000.00. The respondent conspired with Nancy L. PETTIT and Demetrio Mateo VALVERDE-Arvizu to knowingly forge, counterfeit and falsely make counterfeit temporary immigration documents. In furtherance of the conspiracy, the respondent and the co-conspirators did knowingly possess and provide eight of the counterfeit temporary immigration documents to Service Confidential Informants on or about May 29, 1992, June 26, 1992, July 24, 1992, August 6, 1993, November 4, 1992 and November 19, 1992, for a total [payment] of $1,125.00.

[3]. *History of Previous Criminal and/or Civil Violations:* . . . On January 10, 1983, in the United States District Court, Central District of California, the respondent was convicted of two counts for the violation of Title 18 U.S.C., Section 473—Transfer of Counterfeit Government Obligations, to wit, transferred [sic] delivered and sold six thousand dollars ($6,000.00) in counterfeit twenty dollar ($20.00) Federal Reserve Notes. For this offense,

the respondent was sentenced to six (six) [sic] months custody of the Attorney General and imposed a fine of $5,000.00.

. . . .

[4]. *Immigration Status*: The respondent is a permanent resident alien who immigrated into the United Stated [sic] on June 24, 1960, through the Calexico, California Port of Entry . . . respondent is amenable to deportation proceedings . . .

[5]. *Purpose of Document Fraud:* The respondent provided the counterfeit temporary immigration documents for monetary gain. The counterfeit documents were provided for the purpose of enabling illegal aliens to obtain employment in the United States in violation of law.

[6]. *Other Aggravating Factors*:

1. This investigation was initiated on December 6, 1991, alleging that one of the co-conspirators was engaged in the sales of fraudulent U.S. immigration documents in the Imperial Valley area of California. Through investigative techniques, the respondent was identified as the manufacturer of the fraudulent documents. It was discovered that the respondent was manufacturing the documents in Los Angeles, California and then forwarding the documents to his co-conspirators in the Imperial Valley.

   The investigation required many man hours and the assistance of numerous INS Special Agents from the San Diego and Los Angeles District Offices. It also required several travel days to the Los Angeles area, which resulted in significant government expense.

   On November 19, 1992, search warrants were executed on two premises and a vehicle owned by the respondent in the Los Angeles area. These searches resulted in the seizure of:

   a. Two hundred and ninety-eight (298) counterfeit U.S. INS Forms I–94 (Arrival-Departure Record);

   b. Fifteen (15) counterfeit certificates of live birth in the State of California;

   c. Twenty-one (21) counterfeit U.S. Social Security Cards;

   d.One counterfeit Form I–551 . . .

   e. One counterfeit "PROCESSED FOR I–551 . . . " Rubber Stamp Device;

   f. One counterfeit Department of Justice Dry Seal Embossing Device;

   g. Hundreds of blank Baptismal Certificates;

   h. Hundreds of counterfeit payroll checks;

   i. One typewriter;

   j. One roll of plastic laminate material;

   k. One laminate machine.

   . . . .

> 3. The respondent claims to be a landlord and owns substantial real estate in the Los Angeles and Imperial Valley areas. It is presently known that the respondent owns three (3) single family residences; two (2) multi-unit complexes and one store/residential combination building in the Los Angeles area. The respondent also owns at least two single family dwellings in Holtville, CA.

Complainant's Br. Supp. Civil Money Penalty at Ex. A (Mem. from INS Special Agent Kastner to File of 8/5/93, at 1–3). Complainant's contentions regarding respondent's alleged arrests and/or involvement in other criminal activities, without any supporting proof, are not only inappropriate but are also irrelevant to this inquiry, and shall not be considered.

Respondent, other than making numerous arguments as to why this proceeding should be dismissed, does not address the issue of his penalty. Respondent contends that, because the undersigned did not issue an order compelling the INS to respond to his discovery requests, he is unable to defend himself "as to [the] money penalty, and double jeoperdy [sic]" and states further that his "brief is filed under protest as the result of the prejedeous [sic] against respondent through this court [sic] failure to order discovery as well as other constitutional violations by the goverment [sic] and theirfore [sic] moves this court for a dismissal of this intire [sic] case with prejedeous [sic] against the goverment [sic]. Resp't's Dec. 11, 1995 Mot. at 5, 14. In an earlier motion, respondent argues that complainant's brief regarding civil money penalties "contain[s] known false missleading [sic] statements to justif[y] their outrageous demand for money damages, while at the same time refusing to provide respondent with any discovery, or answers to his admissions, making [it] impossible to defend himself . . . in a clear effort to steal respondent [sic] money under color of law, which now requires a congressional investigation into this whole case, as well as judicial review to protect civil and constitutional rights . . . " Resp't's Dec. 5, 1995 Mot. at 3–4. Rather than address the civil money penalties, as he was directed to do, respondent instead choose to repeat the same arguments regarding liability, which has already been resolved adversely to respondent and will not be re-addressed in this Order. *See* Oct. 27, 1995 Order.

Respondent disagrees with complainant's arguments in support of the proposed civil money penalty of $96,000, specifically stating that complainant's "brief in support of several money penalty is a compounding of the conspiracy to violate respondent's civil and constitu-

tional rights while acting under [sic] of law . . . and further [complainant] has perpetrated constructive frauds by summiting [sic] false and misleading statements about respondent and his case . . . which are as follows": complainant's purported legal search and seizure of evidence was illegal; that the evidence obtained was "accessible [sic] to incalculable numbers of individuals and organisations [sic] and could be the property of any unknown individuals"; that the alleged 298 allegedly counterfeit INS forms "were available to the public at and regularly used by independent immigration consultants when preparing paper work for lawfull [sic] immigration"; that blank birth certificates are not counterfeit; that "[t]he embossing device found . . . only had a picture of a bird on it[,] which are available from any stationary [sic] store." Resp't's Nov. 15, 1995 Mot. at 17–20.

Other than advancing unsupported aspersions regarding the INS's actions, respondent has failed entirely to convincingly establish any mitigating factors in his favor. He does not make any arguments regarding his age, seriousness of the violation, history of previous criminal or civil violations, immigration status, or the purpose of the document fraud. Respondent does not offer any other factors in support of mitigation.

Accordingly, strictly as to the first task of examining the proposed penalty in terms of prior 1324c case law to determine its suitability, the undersigned is forced to conclude that the civil money penalties assessed by complainant are reasonable. In light of respondent's maturity, his admittedly knowing participation in a conspiracy to provide fraudulent INS work authorization documents to illegal aliens, his prior criminal conviction of two (2) counts of Transfer of Counterfeit Government Obligations, and the sole motivation of monetary gain for his actions, it is difficult to imagine a more egregious set of circumstances. Thus, while complainant has sought the maximum penalty of $2000 for the eight (8) violations contained in Count I, the undersigned is compelled to agree that respondent's actions as to those eight (8) instances dictate imposition of the maximum penalty designated by Congress as suitable for a first-time offender.

Application of Double Jeopardy Case Law

The above determination does not, however, settle the matter. In addition to an examination of OCAHO case law to determine the

suitability of the assessed civil money penalties, respondent's penalty must now be subjected to a second inquiry of propriety given the government's costs in bringing this cause of action. If it is found that INS's $96,000 penalty "subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused," then it violates the Double Jeopardy Clause and must be reevaluated. If, however, the penalty sought bears a rational relation to the government's costs in bringing this action, then it does not violation the Fifth Amendment's prohibition against double jeopardy, and the penalty stands. "In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Halper*, 490 U.S. at 451.

In support of its costs in apprehending respondent and pursuing this action, complainant offers a memorandum signed by INS Special Agent Alejandro R. Kastner, from the INS Investigations Division, Calexico, California, addressed to the "File." That memorandum states in pertinent part:

> The following is an estimated amount of cost incurred during the investigation of the respondent who was in [sic] engaged in prohibited activity relating to violations of Title 8 U.S.C., section 1324c, Civil Document Fraud. . . .
>
> During an investigation, code named Operation "Carrot Queen," CAL 50/114.92–01, the respondent was identified as a manufacturer of counterfeit Alien Registration Receipt Cards. The respondent would manufacture the documents in the Los Angeles area and forward the finished products to co-conspirators in the Imperial Valley for sale to illegal aliens. This investigation was initiated on December 6, 1991, and culminated on December 12, 1992. The investigation resulted in the indictment of the respondent and his two co-conspirators for violations of conspiracy to possess and counterfeit false documents. . . . This investigation entailed several undercover meetings with the respondent and co-conspirators and the execution of search warrants on two premises owned by the respondent in the Los Angeles area for the acquisition of evidence. The investigation required many man hours from Special Agents from the San Diego and Los Angeles District Offices. The following chart reflects the estimated amount of hours spent by Special Agents during the course of the investigation, amount of funds spent for the purchase of evidence and reward for informants and the cost incurred during mandatory trips to the Los Angeles, CA.

Hours by Special Agents including Los Angeles District:	
1,825 at an average salary of $25.00 an hour:	$45,625.00
Monies spent for purchase of evidence:	$ 1,375.00
Monies spent for reward of informants:	$ 825.00
Travels to Los Angeles requiring lodging:	$ 770.00
Total:$	48,595.00

Complainant's Br. Supp. Civil Money Penalty at Ex. C (Mem. from INS Special Agent Kastner to File of 12/22/94, at 1).

Respondent contends that complainant is overestimating the amount of time and effort it expended on his apprehension: "The fact is that respondent was only investigation [sic] for a *few weeks*, and the court ruled that respondent was not a header or organizer in this case, and his codefendents were." Resp't's Nov. 15, 1995 Mot. at 20. Respondent further states:

> In regard to any alledge [sic] damages to the goverment [sic], respondent is unable to fully refute as the goverment [sic] and this court has refused to provide respondent with discovery and farther [sic] newly discover [sic] evidence was manufacture [sic] in the minds of the I.N.S. agents and this case, was the result of entrapment, the documents in question were not conterfiet [sic] and respondent did not use except [sic] or create conterfeit [sic] I.N.S. form as required to be fined by 8 U.S.C. 1324c.

Resp't's Dec. 11, 1995 Mot. at 10.

Respondent offers no court documents or additional evidence in support of his allegation that the judge in the criminal case against respondent determined that he was not a "header or organizer in this case." Indeed, the documents offered regarding that criminal charge indicate merely that respondent entered a plea of guilty to one (1) of the five (5) counts with which he was charged. Complainant's Br. Supp. Civil Money Penalty at Ex. B (United States District Court, Southern District of California Judgment at 1–5).

INS's estimates of the time spent on Operation "Carrot Queen" are substantial: for a year-long operation, a total of 1825 hours is equal to 35 hours per week. INS, however, indicates that the number of hours is a composite of many different Special Agents' time. Because

the wording of complainant's introductory paragraphs preceding its estimates states that "[t]he investigation resulted in the indictment of the respondent and his two co-conspirators," Complainant's Br. Supp. Civil Money Penalty at Ex. C, respondent argues that this estimate is not an accurate assessment of the INS's cost of apprehending him individually. Resp't's Dec. 5, 1995 Mot. at 7. However, the Supreme Court in *Halper* recognized that "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice." *Halper*, 490 U.S. at 449. The Court further "recognized that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." *Id.* It is difficult if not impossible to separate the costs of apprehending respondent from those of apprehending his co-conspirators. The fact that other individuals were apprehended and indicted in Operation "Carrot Queen" does not necessarily mean that an accurate assessment of the government's costs regarding respondent can be calculated by dividing its total costs by the number of individuals apprehended and indicted, as respondent appears to be suggesting. Similarly, the number of weeks spent exclusively on a certain individual, as opposed to the entire amount of time invested prior to focusing on a particular suspect, is also not necessarily an accurate measurement of the government's costs in a given case.

In addition, it is worth noting that additional, hidden costs of respondent's actions also exist which have not been considered. Had respondent not been apprehended, it is reasonable to conclude that the 328 fraudulent documents he had counterfeited and/or possessed, in violation of 8 U.S.C. §1324c(a)(1) and (a)(2), would have been sold to illegal aliens, who in turn would have used those documents to obtain unauthorized employment. Each job taken by an unauthorized alien effectively eliminates a job for an authorized alien, United States resident or U.S. citizen. Thus, the actual damages caused by respondent's actions are necessarily greater than the government's estimated costs, and while impossible to properly estimate, these costs arguably constitute part of "the costs of corruption," and should also be included. *Halper*, 490 U.S. at 450. Thus, INS's estimate that it spent a total of $48,595 apprehending and indicting respondent is assumed to be a reasonably acceptable, "rough" estimate.

Complainant seeks a total civil money penalty of $96,000, or less than twice the estimated cost of apprehending respondent. The factual scenario in *Halper* involved a penalty of $130,000; the District Court had estimated the government's expenses to be no more than $16,000. *Halper*, 490 U.S. at 452. The Supreme Court "agree[d] with the District Court that the disparity between its approximation of the Government's costs and Halper's $130,000 liability [was] sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy." *Id.* Stated differently, a penalty that was over eight (8) times the estimated costs to the government was held to be so out of proportion to the government's damages that it was not rationally related to the remedial purpose of reimbursing the government. *Id.*

This case, however, bears no numerical similarity to *Halper*. Because the Supreme Court has held that an ordinary "fixed-penalty-plus-double-damages provision[] can be said to do no more than make the Government whole," it is only reasonable to conclude that a civil money penalty totaling $96,000 in this instance does not constitute punishment, is rationally related to the government's expenditures associated with this proceeding, and thus does not violate the Double Jeopardy Clause.

Order

Accordingly, complainant's requested penalty of $2,000 for each of those eight (8) violations charged in Count I is hereby found to be reasonable, and its proposed minimum penalty of $250 for each of the 320 violations contained in Count II is also determined to be reasonable. Further, those penalties are found to be reasonably related to the government's estimated damages, and "can be said [in a rough sense] to do no more than make the Government whole." *Halper,* 490 U.S. at 449.

Finally, respondent is further ordered to cease and desist from future violations of 8 U.S.C. §1324c(a).

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§1324c(d)(4), 1324c(d)(5), and 28 C.F.R. §68.53 (1995).