PART II-C OF BITTNER: THE DARK LINING BEHIND THE SILVER CLOUD

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This morning, the Supreme Court issued what lawyers correctly regard as a taxpayer-friendly opinion in the case of *Bittner v. United States*.

In that case, by a vote of 5-4, the Court held the maximum penalty that the Government can impose upon a person who nonwillfully fails to file FinCEN Form 114, "Report of Foreign Bank and Financial Accounts", more commonly referred to as the "FBAR," to be $10,000 for each unfiled FBAR. Since the law requires filing of an FBAR on an annual basis, the Court's ruling generally means that the Government can impose a maximum nonwillful penalty of no more than $10,000 per year. The Court rejected the Government's argument that the maximum penalty should be $10,000 for each bank account that the person should have included on the unfiled FBAR. Thus, in the Government's view, a person who, during the year in question, held 17 foreign accounts but did not file an FBAR should be subject to a maximum nonwillful penalty of $170,000. The Court's ruling, however, caps the nonwillful penalty for that person at $10,000.

The case resulted in an unusual alignment of the Justices. Justice Gorsuch wrote the opinion for the

Court (technically, he "announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B and III"; more on that later). Chief Justice Roberts and Justices Alito, Kavanaugh and Jackson agreed on the no-more-than-$10,000-per-unfiled-form outcome. Justices Barrett, Thomas, Sotomayor and Kagan dissented, thereby siding with the Government's $10,000-per-account interpretation.

The 5 justices in the majority based their decision on a number of factors, including the text of the relevant statutes, the wording used in the past by the government to warn the public of the consequences of not filing the FBAR, legislative history, the purpose of the FBAR requirement, and the strange results that could occur were nonwillful FBAR non-filers subject to a $10,000-per-account penalty.

In Part II-C of his opinion, however, Justice Gorsuch provided another reason for the outcome, the "rule of lenity." That rule, which Justice Gorsuch called "a venerable principle," holds that "statutes imposing penalties are to be construed strictly against the government and in favor of individuals." Courts applying the rule of lenity do so most often in the context of interpreting a criminal statute. But, as Justice Gorsuch's opinion makes clear, the rule can apply to civil statutes as well. Justice Gorsuch argued in favor of applying the rule of lenity to FBAR penalties in order to give "a fair warning . . . to the world . . . of what the law intends to do if a certain line is passed," and because the question before the Court "has criminal as well as civil ramifications" in that nonfiling of an FBAR can lead to criminal prosecution, a fine and imprisonment.

Notably, however, only one of Justice Gorsuch's colleagues – Justice Jackson – joined in Part II-C of the opinion. The other 3 justices in the majority declined to join in Part II-C. Presumably, the 4 dissenting justices also disagreed with that part of Justice Gorsusch's opinion (Justice Barrett's dissent, joined by the other 3 dissenters, did not mention the argument). So, simple math suggests that by a 7 to 2 vote, the Supreme Court does not believe that the rule of lenity has a role to play in the determination that a nonwillful failure to file an FBAR should expose the nonfiler to a penalty less severe than that desired by the Government.

While generally happy with the outcome in *Bittner*, I find the implications for the rule of lenity to be disturbing. Based on casual observation and not rigorous research or analysis, I believe that courts today do not employ the rule of lenity with sufficient frequency in criminal cases, let alone in civil cases involving penalties. In that conclusion, I may have an ally in the late Justice Antonin Scalia. In 1998 Justice Scalia wrote, "In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application."*Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). In another case 16 years later Justice Scalia registered disgust that "he majority does not mention the rule of lenity apart from a footnote." *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting). Justice Scalia added, "If lenity has no role to play in a clear case such as this one, we ought to stop pretending it is a genuine part of our jurisprudence." *Id.* at 204.

I hope that the Court's reaction to Part II-C of Justice Gorsuch's opinion in *Bittner* does not represent

a step backward in the Court's approach to the rule of lenity and a harbinger of things to com