Willful FBAR Penalties: Appellate Update April 2025
by Melissa Briggs

Attorneys from our firm have written extensively about foreign bank account reporting (FBAR) penalties.[1] Fifteen years ago, Steven Toscher and Barbara Lubin raised the specter that willful FBAR penalties could violate the Eighth Amendment's Excessive Fines Clause in the article *When Penalties Are Excessive—The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty* in the Journal of Tax Practice & Procedure, December 2009–January 2010. Since then, our firm attorneys have updated their scholarship as litigants invoked the Eighth Amendment and courts began to grapple with the issue. *See* Steven Toscher and Michel R. Stein, *The Eighth Amendment Limits on FBAR Penalties—Common Sense Limitations Becomes a Legal Reality*, J. TAX PRACTICE & PROCEDURE, June–July 2018. This blog post does not seek to comprehensively cover the Excessive Fines Clause landscape as those articles did. Rather, this blog post seeks to supplement that scholarship and provide a snapshot update of appellate caselaw as of April 2025.

The Eighth Amendment provides that "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." A willful failure to report a foreign account can result in maximum penalty the greater of $100,000 or fifty percent of "the balance in the account at the time of the violation." 31 U.S.C. § 5321(a)(5)(C)(i), (D)(ii).[2]

The first court of appeals case to address whether willful FBAR penalties violated the Eighth Amendment's Excessive Fines Clause simply assumed that the penalties

---

[1] The FBAR reporting requirement is part of the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq*. For a detailed discussion of the FBAR reporting requirements, penalties, procedures and defenses, *see* Steven Toscher and Michel R. Stein *FBAR Enforcement Is Coming!* J. TAX PRACTICE & PROCEDURE, Dec. 2003–Jan. 2004; Steven Toscher and Michel R. Stein, *FBAR Enforcement— An Update*, J. TAX PRACTICE & PROCEDURE, Apr–May 2006; Steven Toscher and Michel R. Stein, *FBAR Enforcement—Five Years Later*, J. TAX PRACTICE & PROCEDURE, June–July 2008; Steven Toscher and Michel R. Stein, *FBAR Enforcement, Appeals and Collection Procedures in the Post-Amnesty World*, J. TAX PRACTICE & PROCEDURE, Dec.–Jan. 2012; and Steven Toscher and Michel R. Stein, *The Continuing Evolution of FBAR Enforcement*, J. TAX PRACTICE & PROCEDURE, Apr.–May 2016.

[2] The annual FBAR reporting requirements apply to United States citizens who have interest or authority over foreign accounts with $10,000 in aggregate balances. 31 U.S.C. § 5314(a); 31 C.F.R. §§ 1010.350, 1010.306. The FBAR penalty regime also provides for penalties for non-willful violations. 31 U.S.C. § 5321(a)(5)(B)(i). Non-willful penalties are limited to $10,000 per annual reporting violation. *Bittner v. United States*, 598 U.S. 85 (2023). In *Bittner*, the Supreme Court rejected the IRS's position that non-willful penalties of $10,000 could be assessed per unreported account no matter the balance in each account or number of accounts as a matter of statutory interpretation.

were fines subject to the Eighth Amendment's limitations. In *United States v. Bussell*, 699 F. App'x 695 (9th Cir. Oct. 25, 2017) the Ninth Circuit, in an unpublished opinion, reviewed a willful FBAR penalty of approximately $1.2 million. Bussell argued that the penalty violated the Eighth Amendment's prohibition on excessive fines. The Government did not argue that the penalties were not fines and Ninth Circuit did not even discuss whether a willful FBAR penalty was a "fine." *See* 2016 WL 7046939, at *30 (Brief of Appellee United States), 699 F. App'x at 696. The Court explained that Bussell bore the burden to show her constitutional rights had been violated—specifically, that the penalty imposed was "grossly disproportional to gravity of a defendant's offense." 699 F. App'x at 696 (*quoting United States v. Bajakajian*, 524 U.S. 321 at 334 (1998)). The Court held that the assessment against Bussell was "not grossly disproportional to the harm she caused because Bussell defrauded the government and reduced public revenues." *Id*. The Ninth Circuit did not attempt to calculate a reduction in "public revenue" tied to Bussell's failure to report her foreign bank account.

Since *Bussell,* the Government has argued in other courts of appeals that FBAR penalties are not fines falling within the purview of the Eighth Amendment's protections beginning with *Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 2019). *See* Corrected Brief of Appellee United States, 2019 WL 1110045 at *52-53. The Government also argued Norman had forfeited her Eighth Amendment argument. *Id*. at *50. Because the Federal Circuit agreed Norman had waived the Eighth Amendment argument, it did not determine whether the penalty was a fine. 942 F.3d at 1118.

In *United States v. Toth*, 33 F.4th 1 (1st Cir. 2022), the Government argued, and the First Circuit determined, that the willful FBAR penalty assessed against Toth was not a fine for Eighth Amendment purposes. The First Circuit explained that FBAR penalty was "not tied to any criminal sanction. Rather, it was imposed following an administrative tax audit in which the IRS determined that Toth had failed to report a foreign bank account. Nor has the government conceded any punitive purpose." *Id.* at 16. The Court distinguished FBAR penalties from punitive fines because FBAR penalties remediate fraud and loss. The Court also relied on First Circuit precedent, *McNichols v. Commissioner,* 13 F.3d 432, 434-35 (1st Cir. 1993), holding that tax penalties are not fines for Eighth Amendment purposes, despite the fact that FBAR penalties are not tax penalties contained in title 26 of the United States Code.

Although the First Circuit did not reach the issue of whether the fine was excessive in *Toth*, the Government's brief argued that the relevant amount to consider in determining excessiveness for Eighth Amendment purposes was not tax loss, but rather the balances in Toth's unreported accounts. *See* Brief of Appellee United States, 2021WL2916919. The Government explained that FBAR penalties are based

on account balances, not tax loss, and because the "full harm to the Government from hidden accounts—including the costs of uncovering them—may be difficult to ascertain, Congress reasonably chose to use a formula based on the account's balance." 2021WL2916919 at 66.

Toth sought *certiorari*, which was denied. *Toth v. United States*, 143 S.Ct. 552, 598 U.S. -- (2023). Justice Gorsuch dissented from the denial of the petition for certiorari, blasting the First Circuit's decision and expressly inviting another court of appeal to strike down FBAR penalties in the context of the Eighth Amendment.

Justice Gorsuch posited that the First Circuit's decision that the Excessive Fines Clause in the Eighth Amendment did not apply to the penalty assessed against Toth was "difficult to reconcile with our precedents." *Id*. at 553. Justice Gorsuch invoked the Excessive Fines Clause's lineage from the Magna Carta and contended that the protections against excessive fines as a fundamental protection are "deeply rooted" in American history. *Id.*

According to Justice Gorsuch, the First Circuit's decision impermissibly allowed constitutional protections to be evaded simply by labeling a penalty regime as civil rather than criminal. *Id.* at 553. ("The government did not calculate Ms. Toth's penalty with reference to any losses or expenses it had incurred. The government imposed its penalty to punish her and, in that way, deter others.") Because the penalty's purpose at least in part sought to punish the Excessive Fines Clause's protections applied. Per Justice Gorsuch, "[a]s things stand, one can only hope that other lower courts will not repeat [*Toth's*] mistakes." *Id.*

The Eleventh Circuit accepted Justice Gorsuch's invitation in *United States v. Schwarzbaum*, 127 F.4th 259 (11th Cir. 2025).[3] In *Schwarzbaum*, the Eleventh Circuit determined as a matter of first impression in that Circuit that FBAR penalties were fines within in the Eighth Amendment's Excessive Fines Clause. 127 F.4th at 268. The Court recounted the history of the clause's origin and case law interpreting it as applied to civil fines. It explained that under Supreme Court precedent the relevant inquiry to determine whether a penalty is a fine subject to the Excessive Fines Clause is whether the penalty '"is designed to punish the offender' and thus serves as 'punishment even in part."' *Id*. at 271 *quoting Bajakajian,* 524 U.S. at 332, 331 n.6. Looking first at the text of the FBAR statute, the Court determined that "the purpose of the FBAR penalty is—at least in part—punishment." *Id.* The Court rejected the Government's contention that the purpose of the penalty was to compensate the costs of "investigation and enforcement expenses" because the

[3] The original decision, 114 F.4th 1319 (11th Cir. 2024) was superseded after the Government filed a limited petition for panel rehearing. This post only discusses the Court's amended, final decision.

penalty calculations are not based on such amounts. Indeed, the Court noted the Government did not even make an argument that the millions of dollars in penalties were based on costs incurred. The Court stated it was aware of no other penalty like the FBAR willful penalty—noting it could be imposed per year in an amount equal to half of the account balance and consume the entire account balance. *Id.* at 272-73. The Court also looked to the legislative history which it determined demonstrated that Congress imposed and then increased the amounts of penalties available to deter reporting violations. The Court concluded that "[n]o matter how you cut it, it's apparent that this statute is designed to inflict punishment at least in part" and thus a fine for purposes of the Eighth Amendment's Excessive Fines Clause. *Id*. at 276.

The Court then turned to Schwarzbaum's claims that the penalties assessed against him were excessive, noting that the present case was not a facial challenge to the statute. It examined the penalties on a penalty-by-penalty basis, rather than in the aggregate, considering the proportionality of the penalties to the maximum balances in each account.[4] The Court determined that $100,000 penalties on three accounts with high balances all under $16,000 were all disproportional and accordingly, excessive. Although the other penalties were substantial, the Court found them one by one to be not disproportional. *See id.* 283-84. According to the Court, "[t]he very fact that Congress based the willful FBAR penalty on the account balance and not the tax loss reflects the judgment that, like fraud or theft, the harm Congress seeks to ameliorate increases with the size of the amount hidden from the Government. Furthermore, Congress's choice to tie the size of the penalty to the size of the account is particularly rational where, as here, a fundamental purpose of the penalty is deterrence." *Id*. at 280-81. The Court then went on to affirm the rest of the penalties at issue. But to be sure, the Court, in doing so, also noted the limits of its opinion to the facts of the case before it specifically noting it was only considering the as-applied challenge to each of Schwarzbaum's penalties—not the constitutionality "of any hypothetical fifty percent penalty applied year after year." *Id*. at 283.

In sum, according to *Schwarzbaum*: (1) FBAR penalties are fines subject to the Eighth Amendment's Excessive Fines Clause; and (2) the relevant comparison for proportionality is a fine-by-fine analysis based on the maximum amount of funds in the unreported account for the year at issue. The time to petition for *certiorari* in *Schwarzbaum* does not expire until April 23, 2025.

As of April of 2025, willful FBAR penalties:

[4] A single FBAR penalty was at issue in both *Bussell* and *Toth*. *See Bussell*, 596 F. App'x at 696; *Toth*, 33 F.3d at 4.

- are not fines in the First Circuit;
- are fines in the Eleventh Circuit with proportionality determined on a penalty-by penalty based on maximum account balance; and
- are assumed to be fines in an unpublished decision in the Ninth Circuit with proportionality determined based on harm to the Government from fraud and reduced public revenues.

Taxpayers advocating in favor of Eighth Amendment protections in Circuits without binding precedent holding that FBAR penalties are fines have strong language from both Justice Gorsuch's dissent from the denial of certiorari in *Toth* and *Schwarzbaum* on which to rely. To be sure, the deterrent purpose of FBAR penalties cannot reasonably be denied.

Appellate decisions to date are not consistent as to relevant indicia of harm to be considered in making the determination whether a penalty is disproportional for Eighth Amendment purposes. In *Bussell,* the Ninth Circuit tied proportionality to lost revenue. For many persons against whom FBAR penalties are imposed as there is often little to no tax loss in any particular year. Accordingly, citing *Bussell* and mentioning the absence of lost revenue bears mentioning in cases without tax loss.

The harm non-disclosure of an account in and of itself no matter what the balance has been a central focus of the Government's enforcement of the FBAR penalty regime. Pushing back on the Government to produce at least some evidence of these "difficult to ascertain" costs seem prudent. Without the proof of a single dollar of tax loss or enforcement costs, the proportionality considerations in determining the Eighth Amendment's protections could tip the balance towards taxpayers. One can easily imagine such a case with a truly sympathetic taxpayer having their life savings wiped out where the penalties were assessed based on voluntarily disclosed information with zero tax loss.

The Eleventh Circuit tied its proportionality analysis to account balances based on the Congressional focus on maximum account balances—the so-called "amounts concealed." And it affirmed substantial penalties that consumed much of Schwarzbaum's savings. But it also noted that the case before it was not a facial challenge to the statute and the potential for the statute to consume the entirety of an account. Pushing back on formulaic proportionality based on the maximum account balance seems warranted. While looking at account-by-account penalties may be useful, ignoring the aggregate penalties seems fatally flawed— which is perhaps why the Eleventh Circuit goes on to discuss the penalties in the aggregate. Otherwise, recognized constitutional limitations could simply be thwarted by imposing penalties over multiple years.

Finally, given Justice Gorsuch's strong language in his *Toth* dissent prior to the Circuit split created by *Schwarzbaum,* the Supreme Court may soon, whether in *Schwarzbaum* or a subsequent case, definitively determine the Eighth Amendment's limits on willful FBAR penalties.

Melissa Briggs *is a Principal of the law firm Hochman Salkin Perez P.C. where she represents clients in civil and criminal tax litigation as well as tax investigations. She has over twenty years of litigation experience, including over 16 years combined experience as an Assistant United States Attorney for the Central District of California, Tax Division, and an Appellate Attorney in the United States Department of Justice, Tax Division, Appellate Section.*