

## TILTING AT WINDMILLS

Andrew L. Frey\*

Prior to joining the Office of the Solicitor General in May 1972, at the age of 33, I had enjoyed a variety of experiences as a lawyer—D.C. Circuit law clerk, Counsel to the Governor of the Virgin Islands, associate in a law firm practicing principally before the now defunct Civil Aeronautics Board—but had argued only two appeals, each time as a court-appointed lawyer in a criminal case. Number three was to be a horse of a different color.

In order to reduce the pressure a new lawyer might feel, the practice in the SG's Office was to assign as a first argument a case of comparatively modest importance that was, regardless of the quality of the advocates' oral arguments, either a sure winner or a sure loser. There could be little doubt in which category my maiden effort fell. While the Court's opinion characterized the issue in *Bronston v. United States* as "narrow but important,"<sup>1</sup> there was no conflict in the circuits on the issue, which then as now was the main basis for granting review; nor was the issue of such nationwide significance as to require authoritative resolution by the Supreme Court. But in a few cases each Term, the Court would grant review because the ruling below simply seemed intolerably wrong. This appeared to be such a case.

*Bronston* was a perjury prosecution. The defendant was the principal of a movie production company that had filed for bankruptcy under Chapter XI, and the allegedly perjurious testimony was given in the course of the following examination by creditors:

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\* Andrew L. Frey, now a partner in the New York office of Mayer, Brown, Rowe & Maw, served for fourteen years in the Office of the Solicitor General, thirteen of those as Deputy Solicitor General responsible for the government's criminal cases in the Supreme Court. He has argued more than sixty cases in the Supreme Court.

1. 409 U.S. 352, 353 (1973).

Do you have any bank accounts in Swiss banks, Mr. Bronston?

No, sir.

Have you ever?

The company had an account there for about six months, in Zurich.

The second answer was literally true, but unresponsive to the question, which concerned Bronston's personal bank accounts. What Bronston "neglected" to say was that he had personally had a very substantial account in a Swiss bank for over five years. He was prosecuted for perjury on the theory that, though perhaps literally true, his statement was false by implication and intended to mislead. In affirming the conviction, a divided court of appeals held that

[f]or the purposes of [the perjury statute] an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury.<sup>2</sup>

When one of my first assignments as a rookie in the SG's Office was the merits brief in the *Bronston* case, it was clear that my first-argument destiny was sealed. In the process of writing the brief—defending the basic rationale of the court of appeals while at the same time attempting to articulate a limiting principle that would provide a basis for affirmance yet would not vastly overextend the reach of the perjury statute—I fell prey to the lawyer's common tendency to come to believe that the position he or she is advancing has considerable merit and could be embraced by a reasonable jurist. Indeed, in my most private moments I actually told myself that I might, just might, pull it off and somehow win this most unpromising specimen of a case. When I was being more realistic, the question was whether I could get any votes at all.

By the time I was formally assigned the *Bronston* argument, I had performed the first essential act of the government Supreme Court advocate—acquiring my argument outfit. Then as now, male counsel representing the government

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2. *U.S. v. Bronston*, 453 F.2d 555, 559 (2d Cir. 1971).

in the Supreme Court (and there were few women assigned that role in those days) were required to wear a morning suit with striped pants, a vest, and a silver-colored tie. In my youth, before I gained a fuller appreciation for the value of tradition and ritual, I thought this a silly practice; I showed my rebellion the only way I could: buying used trousers for \$5.00 and a used coat for \$25.00. I did not buy a vest, however, but borrowed one from a colleague in the Office. Unfortunately, the vest was pearl gray, not charcoal, and though it had been worn before by the fellow who loaned it to me, it was my appearance in the vest that prompted a call from the Chief Justice to the SG a few days after the argument cautioning that only a charcoal gray vest qualified as proper attire.

It is very difficult, at a remove of over thirty years, and with the intervention of sixty more Supreme Court arguments, to recall my preparations for the *Bronston* argument, or indeed the actual event. I can say that I have never enjoyed the process of preparing for oral arguments, though I almost always find the argument itself stimulating. For this argument, however, I was like a Class B minor league pitcher suddenly making a first start in the major leagues. The saying that best captures the feeling is that of Dr. Johnson (loosely paraphrased) about how wonderfully the prospect of one's public hanging concentrates the mind.

When the day came—November 15, 1972—I donned my regalia and headed for Court. I had by then seen a few arguments given by my colleagues, and in that respect had an edge over many another first-time Supreme Court advocate. Nevertheless, I was of course nervous; by no means overwhelmingly so, but nervous enough. Fortunately, the government was the respondent, so my adversary, prominent New York criminal lawyer Sheldon Elsen, went first. Sheldon did, as far as I recall, a fine job, but by the time the Chief Justice said, “Mr. Frey, you may proceed,” I was so charged up with the desire to refute his (to my advocate's mind, specious) claims that I entirely forgot that I was supposed to be nervous.

I had diligently prepared my argument in far more detail than I would today, practicing it before my mirror at home, timing it to make sure it didn't exceed my allotted thirty minutes, and indeed was short enough to allow time for

questions. I needn't have bothered. Although the Burger Court of that period was a far less outspoken and inquisitive bunch than today's Court, I was peppered with questions from almost the moment I had finished the ritual opening intonation, "Mr. Chief Justice and may it please the Court."

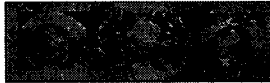
The Justices can be quite cagey in forming their questions, giving hypotheticals that test the advocate's theories without disclosing the Justice's own views. And often Justices ask questions designed to help the advocate whose position they support make the most effective points. On some occasions, however, the Justices make little pretext of having doubt about the proper outcome but simply pound the advocate with questions—often nothing more than the same question posed in different ways—that can in no circumstances be answered to the Justices' satisfaction.

This was the case in *Bronston*. Why, the Justices wished to know, did the examining counsel not ask a follow-up question upon receiving a non-responsive reply to the inquiry about Bronston's Swiss bank accounts? Don't we have an adversary system in which it's incumbent upon counsel to be thorough and precise in their examination of witnesses? And so on. And on. And on. My response—that the jury had found beyond a reasonable doubt that Bronston intended by his answers to deceive his creditors and conceal the personal accounts, and had in fact succeeded in this deception—was simply met with reiterations of the same question, followed each time by my obviously vain efforts to restate or reformulate my basic point. It was, the Justices all seemed to agree, counsel's job to pin the witness down. I didn't give up the effort, but they didn't recede from their positions either.

After this battering had come to a merciful end, I was consoled by the (seemingly sincere) statement by Deputy SG Larry Wallace (who himself holds the record for most Supreme Court arguments in the twentieth century) that my argument was the best he had ever heard in defense of an indefensible case. Whatever the merits of that critique, its premise was swiftly proved when, less than two months later, the Court handed down a unanimous decision, written by Chief Justice Burger, reversing Bronston's conviction. The Court did acknowledge the central premise of my argument in summing up its holding, stating:

It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with [the court of appeals dissenter] that any special problems arising from the literally true but unresponsive answer are to be remedied through the "questioner's acuity" and not by a federal perjury prosecution.<sup>3</sup>

In retrospect, the holding in *Bronston* seems quite unremarkable even to me. But the case did generate one especially interesting recent postscript. President Clinton's answer regarding the nature of his relationship with Monica Lewinsky exhibited characteristics that made it similar to the answers Bronston gave about his Swiss bank accounts. At least under one interpretation of the President's denial, his testimony, misleading as it doubtless was, could nevertheless be said to have been literally true. And, indeed, although no doubt other considerations were at play, he too escaped conviction for his testimony.



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3. *Bronston*, 409 U.S. at 362.

