COMMENT

RE-EXAMINING THE FALSE STATEMENTS ACCOUNTABILITY ACT

> *[H]ow one lives and how one should live that he who lets go that which is done for that which ought to be done learns his ruin rather than his preservation—for a man who wishes to profess the good in everything needs must fall among so many who are not good. Hence it is necessary for a prince . . . to learn to be able to be not good, and to use it and not use it according to the necessity.*[1]

1. NICCOLÒ MACHIAVELLI, THE PRINCE 93 (Leo Paul S. de Alvarez trans.,

I. INTRODUCTION

In the statement above, Machiavelli argued that political necessity, rather than moral doctrine, should govern one's actions.[2] Machiavelli asserted that, in a world of wrongdoers, the road to moral idealism paves itself with victimization. Interestingly, Machiavelli failed to recognize the circular nature of his logic because by employing immoral methods, one simply perpetrates more wrong, which in turn justifies the use of even more wrong by others. Thus, "necessity" becomes a selfish way of saying that moral abandonment for political expediency's sake equals its own justification. It remains quite clear, however, that once one abandons what should be done for necessity's sake or some other ultimate good,[3] the distinction between right and wrong becomes meaningless. Anything goes in this pursuit, and the once sacrosanct values that gave efficacy and coherence to the moral system soon become the proverbial doormat for what needs to be done.

The justice system is equally sensitive to such divergences. Its pronouncements of the highest order lie at the Constitution's feet. The system organizes itself in such a way that certain rules, procedures, and standards have been erected to protect liberty and promote justice. Yet occasionally, artifices expose chinks in this constitutional armor. Consequently, legislative subterfuge develops, which in turn undermines both the explicit protections provided by the founding charter and its uncodified yet implied sense of fair play. The False Statements Accountability Act[4] (the "Act") is often used with just this sense of Machiavellian purpose.

Waveland Press 1980).

2. *See id.* at 94. The philosopher further stated:

> [B]ecause one is not able to have or observe them [qualities held to be good] wholly, for human conditions do not allow it, it is necessary for him to be so prudent that he will know how to avoid the infamy of those vices which would lose him the state; and, if it is possible, to guard himself against those which will not take it away; but, if he cannot, he can with less concern let them go.

Id.

3. This Comment uses the term "ultimate good" subjectively. In this context, it exists as a relative term with no bearing as to actual right or wrong.

4. *See* 18 U.S.C. § 1001 (1994 & Supp. IV 1998); *see also* False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 1001, 110 Stat. 3459 (1996). The Act states in relevant part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or

The False Statements Act criminalizes any and all false statements made to a government investigator—oral or written, trivial or benign, sworn or unsworn.[5] Originally enacted to combat false claims and papers presented to the federal government,[6] the Act now subjects an individual to liability for any falsehood that might be uttered to a federal agent.[7] Not surprisingly, most federal appellate courts, in an attempt to limit the obvious, harsh effects of this sweeping statute, adopted the loosely named "exculpatory no" doctrine.[8]

This doctrine exempted negative responses to incriminating questions as either non-statements beyond the contemplation of the statute, or statements that brushed too close to the Fifth Amendment's privilege against self-incrimination.[9] Notwithstanding the acceptance of this doctrine in many lower courts, the Supreme Court in *Brogan v. United States*[10] determined that the "exculpatory no" exception had no basis in statutory interpretation or Fifth Amendment jurisprudence,[11] and thereby eliminated the only protection available against inevitable statutory abuse.

This Comment examines the Act's legislative and judicial evolution, explores the inherent problems with its breadth, and argues that the statute should be reexamined. Part II of this Comment begins with an examination of the legislative history and development of the False Statements Act. Part III explores the standard application of the statute. Part IV examines the

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representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001.

5. Refer to Part III *infra* (discussing the statute's application).

6. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863) (limiting the Act's reach to "any person in the land or naval forces . . . or in the militia").

7. *See* 18 U.S.C. § 1001 (stating that a person incurs criminal liability if he or she knowingly and willfully "makes any materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United Sates").

8. *See* Timothy I. Nicholson, Note, *Just Say "No": An Analysis of the "Exculpatory No" Doctrine*, 39 WASH. U. J. URB. & CONTEMP. L. 225, 232-49 (1991) (examining the adoption and use of the "exculpatory no" doctrine among each of the federal appeals courts).

9. *See id.* at 226-31 (discussing the history and limitations of the "exculpatory no" doctrine). Refer to Part IV.B.1 *infra* (discussing the "exculpatory no" doctrine and its justifications).

10. 522 U.S. 398 (1998).

11. *See id.* at 404-08 (concluding that "[b]ecause the plain language of § 1001 admits of no exception for an 'exculpatory no,' we affirm the judgment of the Court of Appeals [rejecting the doctrine]").

Supreme Court cases analyzing Section 1001 of the Act, including its recent decision in *Brogan*, which eliminated the "exculpatory no" doctrine. Part V comports the *Brogan* decision with traditional schemes of statutory interpretation and other intervening constitutional prerogatives. Part VI concludes by suggesting that Congress should consider adopting a new criminal statute that protects criminal suspects from unfair investigatory practices.

II. LEGISLATIVE HISTORY OF THE FALSE STATEMENTS ACT

The False Statements Act's history can be traced as far back as 1863 when Congress enacted a civil war bill making it illegal for persons in the armed forces to make or present false claims to the United States government.[12] The character of this early congressional enactment underwent various changes in the ensuing years.[13] For example, in 1918 Congress broadened the proscription against false statements to include those made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof."[14] Although the Supreme Court extended the

12. The Act stated in relevant part:

> That any person in the land or naval forces of the United States . . . who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent . . . shall be deemed guilty of a criminal offense . . . . And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (1863). Refer to note 6 *supra* and accompanying text (discussing the enactment of the civil war bill making it illegal for military personnel to make false claims to the government).

13. *See* United States v. Bramblett, 348 U.S. 503, 505-06 & n.2 (1955), *overruled by* Hubbard v. United States, 514 U.S. 695 (1995) (noting the progressive broadening of the Act's scope). Specifically, the Court noted that in 1874, Congress extended the statute beyond military personnel to include "every person." *See id.* at 506 n.2. The Court also detailed how the Act of May 30, 1908 changed the penalties and how in 1909 the section changed from section 5438 to section 35. *Id.*; *see also* Act of May 30, 1908, ch. 235, § 5438, Pub. L. No. 175, 35 Stat. 555 (1908). Section 35 was revised in 1918. *See Bramblett*, 348 U.S. at 506 n.2; *see also* Act of Oct. 23, 1918, ch. 194, § 35, Pub. L. No. 228, 40 Stat. 1015 (1918). The Court stated that Congress broadened the false claims provision's reach to corporations in which the United States held an interest in stock, and included statements with the intent to cheat, swindle, or defraud the U.S. government. *See Bramblett*, 348 U.S. at 506 n.2.

14. *See* § 35, 40 Stat. at 1015; *see also* United States v. Cohn, 270 U.S. 339, 345-47 (1926) (limiting the statute to cheating the government out of property or money).

statute's language to include defrauding the government, the Court limited defrauding to misappropriations of property or money.[15] However, the 1918 Act's restrictive scope turned problematic when courts began to realize that the statute did not cover numerous New Deal programs.[16] Regulatory agencies often relied heavily upon self-reporting to ensure compliance with their programs. It became apparent that self-reporting could be circumvented with impunity by simply filing false reports.[17] In such a case, important government interests would be subverted although the government had not been deprived of any property or money.[18] In 1934, Congress filled this statutory gap by amending the statute to expand its reach.[19]

Prior to the 1934 Amendment, the Act prohibited making false claims and statements to any United States agency.[20] It also required that the false statement be related to a monetary claim against the United States.[21] Ultimately, the 1934 amendment's effect broadened the Act's coverage to include "any matter within the jurisdiction of any department or agency of the United States."[22] Secretary of Interior Harold Ickes was largely responsible for the 1934 revision.[23] In particular, Secretary Ickes

15. *See Cohn*, 270 U.S. at 346-47.

16. *See* United States v. Yermian, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting).

17. *See* Brogan v. United States, 522 U.S. 398, 412 (1998) (Ginsburg, J., concurring in the judgment).

18. *See id.* (Ginsburg, J., concurring in the judgment) (relying, generally, upon United States v. Gilliland, 312 U.S. 86, 93-95 (1941)).

19. *See* Act of June 18, 1934, ch. 587, § 35, Pub. L. No. 394, 48 Stat. 996 (1934) (amending Act of Oct. 23, 1918, ch. 194, § 35, Pub. L. No. 228, 40 Stat. 1015 (1918)). The Act stated in relevant part:

> [W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder . . . .

Id. (emphasis added); *see also* United States v. Bramblett, 348 U.S. 503, 506 (1955), *overruled by* Hubbard v. United States, 514 U.S. 695 (1995) (stating that the amendment deleted all words as to purpose and inserted the above-italicized phrase beginning with "'in any matter'"). In fact, the Supreme Court asserted that "the italicized phrase was inserted simply to compensate for the deleted language as to purpose—to indicate that not all falsifications but only those made to government organs were reached." *Id.* at 507-08.

20. *See* United States v. Stark, 131 F. Supp. 190, 200 (D. Md. 1955).

21. *See* United States v. Cohn, 270 U.S. 339, 345-46 (1926) (stating that the statute remained limited to "cheating the Government out of property or money").

22. *See* § 35, 48 Stat. at 996.

23. *See* Hubbard v. United States, 514 U.S. 695, 707 (1995) ("We have

sought to enforce laws relating to the transportation of hot oil,[24] as well as the presentation of false documents and statements to the Department of Interior[25] and the Public Works Administration.[26] The fact that no law existed to prosecute the "'the presentation of false papers'" fueled the Secretary's motivation.[27] As a result, Congress codified the 1934 amendment into a statute, making non-monetary frauds actionable under the Act.[28] Surprisingly, after the 1934 amendment the False Statements Act would undergo only slight changes. These included the changes made in 1948, whereby Congress separated the false claims and false statements provisions,[29] and in 1996, when Congress renamed the statute the False Statements Accountability Act of 1996—making minor changes and additions.[30]

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repeatedly recognized that the 1934 Act was passed at the behest of 'the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of Interior . . . .'" (quoting United States v. Gilliland, 312 U.S. 86, 93-94 (1941))).

24. *See* United States v. Gilliland, 312 U.S. 86, 93-94 (1941); *see also* Donald D. Oliver, Note, *Prosecutions for False Statements to the Federal Bureau of Investigation—The Uncertain Law*, 29 SYRACUSE L. REV. 763, 765 n.8 (1978). The author states in part that:

> Various states and state regulatory agencies set limits on the amount of oil that could be extracted from within the state. Much of the "contraband oil" extracted in excess of the prescribed limits was later transported in interstate commerce. The use of false documents that stipulated lower amounts of oil than were actually extracted made such transportation possible. These false documents could not serve as a basis for prosecution under the Act prior to 1934 because they worked no monetary loss on the government.

Id.

25. *See* United States v. Bramblett, 348 U.S. 503, 507 (1955), *overruled by* Hubbard v. United States, 514 U.S. 695 (1995). The Senate Committee authors indicated that the amendment's purpose reached cases involving the shipment of "hot oil" and the false papers presented with such frauds. *See id.*

26. *See* United States v. Yermian, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting) (noting that the practice in the Public Works Administration concerned the Secretary of the Interior).

27. *See Gilliland*, 312 U.S. at 94 (quoting a letter from the Secretary of the Interior to the Chairman of the Judiciary Committee of the Senate dated February 7, 1934); 78 CONG. REC. 2859 (1934).

28. *See Bramblett*, 348 U.S. at 507-08.

29. *See* Act of June 25, 1948, ch. 645, § 285, Pub. L. No. 772, 62 Stat. 698 (1949) (delineating that whoever takes or uses papers relating to a claim against the United States subjects himself to a fine or imprisonment); § 1001, 62 Stat. at 749 (noting that whoever makes fraudulent statements to an agency or United States department subjects herself to penalties).

30. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (1997) (codified as 18 U.S.C. § 1001 (1994 & Supp. IV 1998)) (offering a "judicial exception" for statements made in judicial proceedings and making materiality an express element of subsection (a)(2)—the false statements provision).

III. APPLICATION OF THE FALSE STATEMENTS ACT

In order to fully comprehend the Act's ramifications, it is necessary to understand how the Act is generally applied. Under Section 1001 of the False Statements Act ("Section 1001"), the government must prove five elements: (1) the defendant made a statement; (2) the statement was false; (3) the statement was material; (4) the statement was made with the intent to deceive or mislead; and (5) the statement falls within the purview of a government agency.[31]

In general, Section 1001 covers all kinds of statements: oral or written, sworn or unsworn, voluntary or otherwise.[32] Indeed, the statute's application to such a wide variety of situations remains overwhelming. The statute has been used to prosecute false statements made on government documents or other similar

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31. *See, e.g.*, United States v. Shah, 44 F.3d 285, 289 (5th Cir. 1995). Questions arose as to whether or not materiality was actually an element of the False Statements Act. *See* United States v. Gaudin, 515 U.S. 506, 524 (1995) (Rehnquist, C.J., concurring). In concurrence Chief Justice Rehnquist stated:

> [C]urrently, there is a conflict among the Courts of Appeals over whether materiality is an element of the offense created by the second clause of § 1001 . . . . The Court does not resolve that conflict; rather, it merely assumes that materiality is, in fact, an element of the false statement clause of § 1001.

Id. (Rehnquist, C.J., concurring).

Chief Justice Rehnquist's comment does not follow the Court's analysis because the Court would not have granted certiorari to discuss the materiality element if it already assumed the court of appeals was correct. *See id.* at 522-23 (holding that not allowing the jury to pass on materiality infringed upon Gaudin's rights). Indeed, the United States Court of Appeals for the Second Circuit was the only non-materiality Circuit left in the United States. Specifically, the court in *United States v. Elkin*, 731 F.2d 1005 (2d Cir. 1984), stated that "[i]t is settled in this Circuit that materiality is not an element of the offense of making a false statement in violation of § 1001." *Id.* at 1009. The United States Court of Appeals for the Second Circuit resolved this decision by announcing that "the [*Gaudin*] Court's focus on the constitutional role of the jury to decide whether the offending statements are material [was] premised on its implicit view that materiality is indeed an element of the offense." United States v. Ali, 68 F.3d 1468, 1475 (2d Cir. 1995) (noting that "*Elkin* and [its] kindred decisions are no longer good law on this point"). Of course, this is now a moot point because the 1996 amendment codified the materiality element. Refer to note 30 *supra* (discussing changes made to the Act after the 1996 amendment).

32. *See, e.g.*, United States v. Des Jardins, 772 F.2d 578, 580 (9th Cir. 1985) (declaring that Section 1001 can punish oral unsworn statements); United States v. Fitzgibbon, 619 F.2d 874, 878 (10th Cir. 1980) (finding that Section 1001 has been interpreted to "apply to statements not required by law, not under oath, and not in writing made in the exercise of routine governmental administrative duties and which do not involve the possibility of self-incrimination"); United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967) (explaining that "the word 'statement' has been construed to include statements not required to be made by law, not under oath, and not in writing").

claim forms,[33] checks and credit card applications,[34] and applications used to obtain passports and birth certificates.[35] It also criminalizes false statements made to federal customs and border patrol agents[36] or federal investigators.[37] Section 1001 also extends to affirmative acts of concealment, despite the fact that no actual statement has been made.[38] Concealment includes silence when a duty exists to speak or when silence serves to mislead.[39]

33. *See, e.g.*, United States v. Leal, 30 F.3d 577, 584 (5th Cir. 1994) (holding that false statements on invoices made to the Small Business Administration regarding business expenses violate Section 1001); United States v. Kneen, 889 F.2d 770, 773 (8th Cir. 1989) (deciding that false statements made to the IRS regarding travel expense reports and backup invoices violate Section 1001).

34. *See, e.g.*, United States v. Worthington, 822 F.2d 315, 318-19 (2d Cir. 1987) (stating that checks which actively mislead, such as those that name a false drawee, fall within the ambit of Section 1001).

35. *See, e.g.*, United States v. Scott, 915 F.2d 774, 775-77 (1st Cir. 1990) (finding that the use of a false identity to obtain a passport, in order to avoid prosecution for child molestation, falls within Section 1001's purview); United States v. Lopez, 728 F.2d 1359, 1362-63 (11th Cir. 1984) (concluding that making false statements on permanent resident forms violates Section 1001); United States v. Montemayor, 712 F.2d 104, 106 (5th Cir. 1983) (holding that Section 1001 covers applications for state issued birth certificates because federal agencies use these documents in their proceedings).

36. *See, e.g.*, United States v. Bailey, 34 F.3d 683, 688 (8th Cir. 1994) (declaring that an "indictment charging violations of [S]ection 1001 by statements made to the Customs Service agent is therefore not barred by [a] prior ruling on materiality under [a] perjury [charge]"); United States v. Wales, 977 F.2d 1323, 1325 (9th Cir. 1992) (upholding a conviction that a false statement on a customs declaration form denying that the defendant carried more than $10,000—a Section 1001 violation); United States v. Champegnie, 925 F.2d 54, 55-56 (2d Cir. 1991) (affirming a conviction that a false statement given to the Immigration and Naturalization Service constituted a Section 1001 violation); United States v. Rodriguez-Rodriguez, 840 F.2d 697, 700-01 (9th Cir. 1988) (holding that a false statement to a border patrol agent concerning the citizenship of the occupants in a car violated Section 1001).

37. *See, e.g.*, United States v. Rodgers, 466 U.S. 475, 477 (1984) (concluding that a false tip to an FBI agent violates Section 1001); United States v. Edmonds, 103 F.3d 822, 825 (9th Cir. 1996) (finding sufficient evidence to uphold a conviction for a false statement made by a narcotics informant to a DEA agent); United States v. Inserra, 34 F.3d 83, 87-88 (2d Cir. 1994) (deciding that a false statement made to a federal probation officer existed within Section 1001's scope); United States v. Vetter, 895 F.2d 456, 457-58 (8th Cir. 1990) (affirming that a false statement made to an FBI agent regarding the destruction of bank loan collateral violates Section 1001).

38. *See* United States v. Shannon, 836 F.2d 1125, 1129-30 (8th Cir. 1988) (stating that the government must show an affirmative act involving the concealment of a material fact to establish a Section 1001 violation). *See, e.g.*, United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 502-03, 506-07 (2d Cir. 1991) (noting that an attorney's failure to identify clients paying their fees with over $10,000 in cash violated Section 1001); United States v. Richeson, 825 F.2d 17, 20 (4th Cir. 1987) (holding that a Section 1001 violation occurred when the defendants structured bank transactions so as to avoid reporting requirements).

39. *See, e.g.*, United States v. Leal, 30 F.3d 577, 585 (5th Cir. 1994) (supporting

On its face, the second element—falsity—is met when a declarant makes a false representation or conceals a material fact.[40] Thus, Section 1001 has often been called a "catch-all" provision because it applies even when another statute does not specifically prohibit the statements.[41] However, for prosecutions dealing with the concealment of information, the United States Courts of Appeals have often held that the government must prove that the defendant had a legal duty to disclose the material facts allegedly concealed.[42]

The 1996 amendment explicitly included the statute's third element, materiality, which has been a topic of disagreement among some of the circuits.[43] Courts have considered a statement to be material if it had a natural tendency or capacity to influence a decision or a federal agency function.[44] It is not necessary that the statement actually influence anyone.[45] Indeed,

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a finding that the defendant made a false and fraudulent misrepresentation to the Small Business Administration when he remained silent about payments to a consultant); United States v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981) (stating that a blank response can be a false statement when a duty to answer exists).

40. *See* United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994) (finding that Section 1001 proscribed both false statements and the concealment of material facts, although the proof needed to prosecute each offense differs).

41. *See* United States v. Kappes, 936 F.2d 227, 231-32 (6th Cir. 1991) (citing United States v. Olson, 751 F.2d 1126, 1128-29 (9th Cir. 1985) and explaining how Section 1001 provides a catch-all for false statements that impair basic agency functions but are not prohibited by other statutes); *see also* United States v. Corsino, 812 F.2d 26, 31 (1st Cir. 1987) (holding that Section 1001 applied to false signatures intended to influence a Housing of Urban Development investigation even though the agency did not require the signatures to be filed); United States v. Diaz, 690 F.2d 1352, 1358 (11th Cir. 1982) (stating that Section 1001 covered a defendant who kept false records that could impair the Food and Drug Administration from carrying out its responsibilities even though regulations did not impose a duty to keep records at all).

42. *See, e.g., Curran*, 20 F.3d at 566-67 (holding that the defendant could not be guilty of concealment because no duty existed to disclose the source of contributions to the Federal Elections Commission); United States v. Gimbel, 830 F.2d 621, 624 n.2 (7th Cir. 1987) (concluding that the defendant lacked the legal capacity to violate Section 1001 because he had no duty to inform the Treasury Department of his structured transactions).

43. Refer to note 31 *supra* and accompanying text (discussing the controversy surrounding the materiality element).

44. *See* Kungys v. United States, 485 U.S. 759, 770 (1988) (stating that "[t]he most common formulation of that understanding [of the materiality concept] is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed").

45. *See, e.g.*, United States v. Edgar, 82 F.3d 499, 510 (1st Cir. 1996) (declaring that "the standard is not whether there was actual influence, but whether it would have a tendency to influence"); United States v. Trent, 949 F.2d 998, 999 (8th Cir. 1991) (proclaiming that no proof of reliance requirement exists because materiality only demands the ability to influence government operations).

the threshold for establishing materiality remains quite low, and explicit evidence showing how a statement influenced a governmental agency is unnecessary.[46]

The fourth element of the statute is intent, which the government proves by showing that the suspect statement was made "knowingly and willfully."[47] Under the statute, one must intend to deceive, mislead, or induce belief in false information.[48] As in other criminal cases, the jury can infer intent.[49] Furthermore, because intent modifies only falsity, rather than materiality or jurisdiction, a defendant may be liable under the statute for unknowingly making a statement to a government agency.[50]

The last element mandates that a federal agency have jurisdiction over the matter, which, incidentally, Congress enlarged to include the "executive, legislative, or judicial branch of the Government of the United States."[51] Furthermore, Congress amended the statute's jurisdictional element,[52] broadening the Supreme Court's 1995 decision in *Hubbard v. United States*.[53] *Hubbard* exempted Congress and the federal judiciary from the statute's reach.[54] In any event, a department or agency has jurisdiction in a matter if it has authority over the

46. *See, e.g.*, United States v. Grizzle, 933 F.2d 943, 948 (11th Cir. 1991).

47. *See* United States v. Heuer, 4 F.3d 723, 732 (9th Cir. 1993) ("To willfully make a false statement under § 1001, the defendant must have the specific intent to make a false statement. Specific intent does not require evil intent, but only that the defendant act 'deliberately and with knowledge.'" (citation omitted)).

48. *Cf.* United States v. Tracy, 108 F.3d 473, 477 (2d Cir. 1997) (holding that the defendant's false statements "were designed to mislead or defraud" the United States Attorney's Office).

49. *See* United States v. Gafyczk, 847 F.2d 685, 692 (11th Cir. 1988); *see also* United States v. Bardsley, 884 F.2d 1024, 1028-29 (7th Cir. 1989) (allowing the jury to infer intent when the defendant made false statements enabling him to steal funds and lied to further obfuscate the illegal actions).

50. *See* United States v. Yermian, 468 U.S. 63, 69-70 (1984) (finding that "knowingly and willfully" did not apply to the defendant's knowledge concerning the ultimate federal agency jurisdiction); *see also* United States v. Herring, 916 F.2d 1543, 1547-48 (11th Cir. 1990).

51. *See* 18 U.S.C. § 1001 (1994 & Supp. IV 1998).

52. *See id.* (noting that before the 1996 amendment, the text read:"'Whoever, in any matter within the jurisdiction of any department or agency of the United States . . . .'").

53. 514 U.S. 695 (1995).

54. *See id.* at 715 (holding that federal courts did not lie within Section 1001's jurisdiction); H.R. REP. NO. 104-680, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3459) 3935-36 (stating that the court in *Hubbard* "held that [S]ection 1001 did not apply to the judicial branch, and by implication, to the legislative branch" and that the amendment's purpose ensured Section 1001 applied to all three branches).

matter.[55] Jurisdiction exists even if the government has not lost any money or property.[56] Moreover, jurisdiction attaches even if the defendant does not make the statement directly to the government.[57] In a nutshell, this broadly worded statute demands honesty when dealing with any government agency or its agents regarding any material statements.

IV. THE SUPREME COURT'S INTERPRETATION OF SECTION 1001 OF THE FALSE STATEMENTS ACT

A. Before the Brogan *Decision*

Although some of the Supreme Court's central holdings concerning the False Statements Act have been overruled or affirmed *de facto* through subsequent statutory amendments,[58] many still provide a legitimate source of information concerning how the court has, and possibly should, interpret the statute's terms, scope, and application.

1. The Supreme Court: 1941-1969. In the years 1941 to 1969, the Court concerned itself with determining the general applicability of the Act's obvious terms. This section will discuss the first three cases decided by the Supreme Court concerning the modern False Statements Act, each of which involves broad applicability issues. This trend is probably indicative of the statute's limited use throughout this time period.[59] In any event, the Court found no problem with increasing the statute's breadth and application.

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55. *See* United States v. F.J. Vollmer & Co., 1 F.3d 1511, 1518 (7th Cir. 1993) (concluding that a department or agency had jurisdiction only when it possessed the power to exercise authority in a particular situation); *see also* United States v. Oren, 893 F.2d 1057, 1064-65 (9th Cir. 1990) (noting that a statement made to the National Park Service relating to management and land acquisition remained subject to Section 1001 because those matters reside within the National Park Service's authority).

56. *See* United States v. Gilliland, 312 U.S. 86, 93 (1941).

57. *See* United States v. Wright, 988 F.2d 1036, 1038 (10th Cir. 1993).

58. *See* Nicholson, *supra* note 8, at 229-31 (explaining that courts have focused on the statute and limited its breadth, but that Congress has refused to follow these limitations).

59. It should be noted that the courts did not really begin to focus on the Act and its corresponding inequities until the "exculpatory no" exception's development in the late 1950s and 1960s. *See id.* at 225-26 (noting that the statute's breadth initiated a movement by the courts to narrow the statute's reach, which in turn created the "exculpatory no" doctrine). Refer to notes 136-46 *infra* and accompanying text (discussing the district court's initial disdain at the Act's broad proscriptions against false statements).

The Supreme Court's first encounter with the modern False Statements Statute occurred in 1941 with *United States v. Gilliland*.[60] The case involved the submission of false reports concerning the amount of petroleum produced by certain oil wells.[61] The issue centered on whether the statute should be narrowly construed so as to cover only certain types of crimes.[62] The Court concluded, after analyzing the statute's legislative history, that the Act was no longer limited to cases involving governmental pecuniary or property loss and saw no reason why it should frustrate Congress's intent to protect the authorized government agencies' functions.[63] Thus, the Court's initial brush with the statute ended with a broad statutory construction.

In 1955, the Supreme Court again found itself deciphering the False Statements Act's scope in *United States v. Bramblett*.[64] In *Bramblet*, a congressman had falsely represented to the House of Representatives' Disbursing Office a particular woman's entitlement to compensation as his official clerk.[65] The question before the Court revolved around whether the false representation fell within the statute's broad language.[66] More broadly, the question was whether a falsification made to the legislative branch fell within the Act's jurisdiction, or was the Act simply limited to falsifications made to executive departments.[67] The Court, after examining the pertinent legislative history, concluded that "Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section show[ed] that 'department,' as used in this context, was meant to describe the executive, legislative and judicial branches of the Government."[68] As before, the Court had

60. 312 U.S. 86 (1941).

61. *See id.* at 89.

62. *See id.* at 91 (stating that the "[d]efendant's contention . . . [was] that the broad language of the statutory provision here involved should be restricted by construction so as to apply only to matters . . . in which the Government ha[d] some financial or proprietary interest").

63. *See id.* at 93 (referring to the Act's 1934 amendment, the Court stated that "there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.").

64. 348 U.S. 503 (1955), *overruled by* Hubbard v. United States, 514 U.S. 695 (1995).

65. *See id.* at 504.

66. *See id.* at 506.

67. *See id.* at 509.

68. *See id.* 509-10 (noting that the proposition mandating that statutes be construed strictly did not mean application to every criminal statute, especially when it would disregard the Act's legislative purpose).

no problem with using legislative intent to broaden the Act's reach to include all governmental branches.

In 1969, the Supreme Court again revisited the Act in *Bryson v. United States*.[69] The petitioner argued that the Court should set aside a conviction involving a false denial of affiliation with the Communist Party, which he asserted in an affidavit filed with National Labor Relations Board pursuant to Section 9(h) of the National Labor Relations Act (NLRA).[70] The Court held a subsequent amendment to the Act unconstitutional, and the defendant claimed that the entire NLRA, which required him to file the affidavit in the first place, was also unconstitutional.[71]

Justice Harlan summarily rejected this defense by holding that "the question of whether § 9(h) was constitutional or not [was] legally irrelevant to the validity of petitioner's conviction under § 1001."[72] Justice Harlan also dismissed the argument that the affidavit requirement did not reside within the Board's "jurisdiction" merely because of section 9(h)'s unconstitutionality.[73] His conclusion is most noteworthy, however, in that it provided the source of reasoning that the Court would later adopt in *Brogan*.[74] Justice Harlan stated:

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.[75]

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69. 396 U.S. 64 (1969).

70. *See id.* at 65-66.

71. *See id.* at 66-67. To put it simply, the petitioner had lied about his affiliation with the communist party in an affidavit submitted to the government. *See id.* at 67. He now claimed that his answer was irrelevant because, under the First Amendment, the government should not have forced him to answer these types of questions. *See id.* at 67-68.

72. *See id.* at 68-70 (dismissing the petitioner's contention that section 9(h) had violated his First Amendment and Due Process rights).

73. *See id.* at 70. The Court concluded:

> Because there is a valid legislative interest in protecting the integrity of official inquiries, . . . we think the term "jurisdiction" should not be given a narrow or technical meaning for purposes of § 1001 . . . . A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001.

Id. (citations omitted).

74. *See* Brogan v. United States, 522 U.S. 398, 404 (1998) (discussing Justice Scalia's conviction that no privilege to lie existed).

75. *Bryson*, 396 U.S. at 72 (footnote omitted).

2. The Supreme Court: 1984-1995. Although experiencing somewhat of a lull in cases construing the False Statements Act's actual language during this decade, the Supreme Court nevertheless faced a flurry of cases demanding resolution of certain loose ends with respect to the Act's scope.[76] This phenomenon, of course, probably indicated a prime example of the rash of new cases being prosecuted under Section 1001.[77] The Court found itself increasingly enmeshed in statutory details that Congress had failed to clearly articulate.

This immersion began in 1984 when the Supreme Court addressed two Section 1001 cases. The first was *United States v. Rodgers*.[78] In *Rodgers*, the government charged the defendant with lying to the FBI and the Secret Service, specifically for falsely reporting that his wife had been kidnapped and for alleging her involvement in a plot to kill the President.[79] Rodgers argued that these matters did not lie "within the jurisdiction" of the respective agencies as required by Section 1001.[80] Justice Rehnquist began by first questioning the strained interpretation that had been reached by the United States Court of Appeals for the Eighth Circuit, which had decided that only government agencies that awarded monetary awards or made regulatory decisions fell within the Act's reach.[81] After quoting the relevant section,[82] the Court noted that "[a] criminal investigation surely falls within the meaning of 'any matter,' and the FBI and the Secret Service equally surely qualify as 'department[s] or agenc[ies] of the United States.' The only possible verbal vehicle for narrowing the sweeping language Congress enacted is the word 'jurisdiction.'"[83] Again, the issue remained one of statutory interpretation, because the statute did not define the word "jurisdiction."[84]

76. *See* Nicholson, *supra* note 8, at 232 n.37 (claiming that "[f]ifteen petitions for writs of certiorari" were offered addressing the exculpatory no doctrine).

77. *See id.*

78. 466 U.S. 475 (1984).

79. *See id.* at 477.

80. *See id.* at 476-77.

81. *See id.* at 478-79 (describing how the Eighth Circuit had taken a restrictive approach in interpreting the word "jurisdiction" to include only those agencies with the power to make monetary awards or grants or regulatory decisions).

82. *See id.* at 479 (quoting Section 1001 as "expressly embrac[ing] false statements made 'in *any* matter within the jurisdiction of *any* department or agency of the United States'" (alteration in original)).

83. *Id.* (alterations in original) (refusing to believe, however, that the term "jurisdiction" deserved the narrow construction given to it by the Court of Appeals).

84. *See id.* at 478-79 (explaining that Congress broadened the statute's scope "to include false statements made 'in any matter within the jurisdiction of any department or agency of the United States'").

In its analysis, the Court assumed that the ordinary meaning of the words used expressed the statute's legislative purpose.[85] Accordingly, the ordinary meaning of "jurisdiction" involved "the power to exercise authority in a particular situation."[86] Therefore, the Court stated, "the phrase 'within the jurisdiction' merely differentiate[d] the official, authorized functions of an agency or department from matters peripheral to the business of that body."[87] Because the statute authorized the FBI and the Secret Service to investigate Rodgers' false reports,[88] and because Congress used broad and inclusive language when enacting the statute,[89] the Court held: "The statutory language clearly encompasse[d] criminal investigations conducted by the FBI and the Secret Service, and nothing in the legislative history indicate[d] that Congress intended a more restricted reach for the statute."[90]

In its conclusion, perhaps in response to the Eighth Circuit's narrow reading, the Court demonstrated that policy rarely augments the analysis of statutory interpretation by stating:

> Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress. Its decision that the perversion of agency resources and the potential harm to those implicated by false reports of crime justifies punishing those who "knowingly and willfully" make such reports is not so "absurd or glaringly unjust," . . . as to lead us to question whether Congress actually intended what the plain language of § 1001 so clearly imports.[91]

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85. *See id.* at 479 (citing Richards v. United States, 369 U.S. 1, 9 (1962)). "The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department." *Id.*

86. *See id.* (noting that WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1227 (1996) defines jurisdiction as "'the limits or territory within which any particular power may be exercised: sphere of authority'").

87. *See id.* at 479-80 (conceding that narrower meanings of the word "jurisdiction" existed, but ultimately disagreeing with the Court of Appeals' constrictive use of the term).

88. *See id.* at 481 (acknowledging the FBI's authorization to prosecute crimes against the United States as well as the Secret Service's mandate to protect the President).

89. *See id.* at 482 ("If the statute referred only to courts, a narrower construction of the word 'jurisdiction' might well be indicated; but referring as it does to 'any department or agency' we think that such a narrow construction is simply inconsistent with the rest of that statutory language.").

90. *See id.* at 477, 480 (arguing that a narrow reading of the word "jurisdiction" failed to "embrace some of the myriad governmental activities that we have previously concluded § 1001 was designed to protect").

91. *Id.* at 482-84 (citation omitted).

This statement offered firsthand insight into the importance the Court would attach to subsequent problems the statute engendered.[92]

United States v. Yermian[93] was the second relevant case decided by the Court in 1984. In this case, Gulton Industries, a defense contractor, hired Esmail Yermian.[94] In order to secure his new position, Yermian first needed to obtain a security clearance through the Department of Defense.[95] The clearance required Yermian to fill out a "Worksheet For Preparation of Personnel Security Questionnaire" for Gulton's security officer.[96]

In responding to the questionnaire, Yermian failed to disclose his 1978 mail fraud conviction.[97] He also falsely stated that he had worked for "two companies that had in fact never employed him."[98] After Gulton received the questionnaire, a security officer typed Yermian's responses onto a form entitled "Department of Defense Personnel Security Questionnaire."[99] The Security officer then returned the form to Yermian to review for errors.[100] Upon reviewing the form, Yermian "signed a certification stating that his answers were 'true, complete, and correct to the best of [his] knowledge' and that he understood 'that any misrepresentation or false statement . . . may subject [him] to prosecution under [S]ection 1001 of the United States Criminal Code.'"[101] Government investigators subsequently discovered that Yermian had falsely answered questions regarding his criminal record and employment history.[102] When approached with the discovery, Yermian admitted his wrongdoing and was accordingly charged with, and later convicted of, three counts of Section 1001 violations.[103]

92. *See* Brogan v. United States, 522 U.S. 398, 401-04 (1998) (noting that "[t]here [was] considerable variation among the Circuits concerning [the scope of Section 1001]" and that a court cannot "restrict the unqualified language of a statute").

93. 468 U.S. 63 (1984).

94. *See id.* at 65.

95. *See id.* (noting the necessity of such security clearance because of Yermian's access to classified material).

96. *See id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *See id.*

101. *Id.* (alterations in original) (pointing out that the Gulton officer witnessed the respondent's signature and mailed the typed form to the "Defense Industrial Security Clearance Office for processing").

102. *See id.* at 65-66.

103. *See id.*

The central issue focused on Yermian's defense that he made the false statements without actual knowledge that they would be transmitted to a federal agency.[104] This defense assumed that the statutory terms "'knowingly and willfully'" not only modified the conduct of making false statements but also required Yermian to have actual knowledge that he was making the statements "'in any matter within the jurisdiction of [a federal agency].'"[105] Clearly, this "require[d] the Government to prove that [the] false statements were made with actual knowledge of federal agency jurisdiction."[106]

Section 1001 stated: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined . . . ."[107] Seemingly as a matter of fact, the Court held that Congress had not intended the terms "knowingly and willfully" to establish a culpability standard for Section 1001's jurisdictional element because the language appeared in a separate phrase and because the statutory history supporting a contrary interpretation remained unpersuasive.[108] Although the dissent did not discount the majority's statutory reading as being wrong per se, it did argue that the statute's inherent ambiguity, lack of clear legislative intent, and great potential for unfairness required that the statute be "'resolved in favor of lenity.'"[109]

This argument responded to the majority's summary dismissal of the statute's potential use as a "trap for the unwary," whereby criminal sanctions could be imposed even though a person had no idea of federal involvement.[110] Indeed, the Court

104. *See id.* at 66 & n.2 ("[R]espondent testified that he had not read the form carefully before signing it and thus had not noticed either the words 'Department of Defense' on the first page or the certification printed above the signature block.").

105. *Id.* at 66-67 (alterations in original) (quoting 18 U.S.C § 1001 (1994 & Supp. IV 1998)).

106. *See id.* at 68 & n.5 (framing the issue as one of statutory interpretation and deciding if the "reasonably foreseeable" language employed by the trial court fit within Section 1001's meaning).

107. *See id.* at 68 (quoting the relevant language in Section 1001 and noting that "[i]ts primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern").

108. *See id.* at 68-70 (stating that "'the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute'").

109. *Id.* at 76-84 (Rehnquist, J., dissenting) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971) and contending that the language and legislative history of Section 1001 provided "'no more than a guess as to what Congress intended'").

110. *See id.* at 74 (declaring that Yermian's "'trap for the unwary'" argument was "not sufficient to overcome the express statutory language of § 1001").

emphasized that "[i]n the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it [was] for Congress and not this Court to amend the criminal statute."[111]

In 1985, the Supreme Court revisited Section 1001 in *United States v. Woodward*.[112] Mr. Charles Woodward, while passing through Customs at Los Angeles International Airport, was handed a form asking if he or any of his family carried over $5000.[113] In response, Mr. Woodward checked the "no" box.[114] Customs officials elected to search Mr. Woodward and his wife after a brief questioning period.[115] While being escorted to the search room, he confessed to custom officials that he and his wife concealed over $20,000 in cash.[116] The federal government subsequently charged and convicted Mr. Woodward with making a false statement under Section 1001 and "willfully failing to report that he was carrying in excess of $5000 into the United States."[117]

The issue in this case revolved around whether Congress had intended the False Statements Act to apply cumulatively with sections 1058 and 1101 of Title 18.[118] The United States Court of Appeals for the Ninth Circuit reversed the felony conviction for making a false statement under the rule set forth in *Blockburger v. United States*.[119] The Supreme Court, however, ruled that the Ninth Circuit "misapplied the *Blockburger* rule . . . [because] proof of a currency reporting violation [did] *not* necessarily include proof of a false statement offense."[120]

111. *Id.* at 75. It should be noted that the Court restricted the issue to whether actual knowledge had to be proved, declining to consider whether the statute injected some lesser culpability requirement into the jurisdictional phrase. *See id.* at 75 n.14 ("[I]t is unnecessary for us to decide whether . . . a culpability requirement [was erroneously read] into the jurisdictional phrase.").

112. 469 U.S. 105 (1985) (per curiam).

113. *See id.* at 106.

114. *See id.*

115. *See id.*

116. *See id.* (noting that Woodward had secreted approximately $12,000 in his boot and $10,000 "in a makeshift money belt concealed under his wife's clothing").

117. *See id.* at 106-07 (explaining that the trial court sentenced Woodward to "six months in prison on the false statement count, and a consecutive 3-year term of probation on the currency reporting count").

118. *See id.* at 107-08.

119. *See* United States v. Woodward, 726 F.2d 1320, 1323 (9th Cir. 1983), *rev'd in part*, 469 U.S. 105 (1985). The *Blockburger* rule asked "whether each provision [of a statute] require[d] proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).

120. *Woodward*, 469 U.S. at 108 ("A traveler who enters the country and passes through Customs prepared to answer questions truthfully, but is never asked

Furthermore, the Court found no evidence that Congress had not intended the two statutes to be applied together, noting that the two statutes were "'directed to separate evils.'"[121]

In 1995, the Court decided the last two cases during this period, *United States v. Gaudin*[122] and *Hubbard v. United States*.[123] In *Gaudin*, the Court analyzed Section 1001's "materiality" element.[124] The question presented to the Court involved the constitutionality of a trial judge's refusal to submit the materiality question to the jury.[125] Preceding the Court's decision in *Gaudin*, some disagreement existed as to whether Section 1001 even required materiality.[126] The Court ultimately resolved this issue and held that the materiality question remained one of fact and that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."[127]

Hubbard was the last False Statements Act case the Supreme Court decided before *Brogan*. This case, later overruled by the 1996 amendment to Section 1001,[128] represented an interesting turn of events. Hubbard's conviction rested on the making of false statements during a judicial proceeding, for incorrectly stating that he had turned over all requested records in response to a discovery motion, and for falsely denying a portion of the opposing party's complaint.[129] Furthermore, because the misrepresentations had been made in a bankruptcy proceeding, the issue existed of whether the judiciary constituted a "'department or agency of the United States.'"[130] The Court

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whether he is carrying over $5,000 in currency, might nonetheless be subject to conviction under 31 U.S.C. § 1058 . . . for willfully transporting money without filing the required currency report.").

121. *See id.* at 109 (quoting Albernaz v. United States, 450 U.S. 333, 343 (1981)). The Court added: "It is clear that in passing the currency reporting law, Congress' attention was drawn to 18 U.S.C. § 1001, but at no time did it suggest that the two statutes could not be applied together." *Id.*

122. 515 U.S. 506 (1995).

123. 514 U.S. 695 (1995).

124. *See Gaudin*, 515 U.S. at 507.

125. *See id.*

126. Refer to note 31 *supra* (detailing this disagreement).

127. *Gaudin*, 515 U.S. at 519-20, 522-23 (overruling Sinclair v. United States, 279 U.S. 263 (1929) and holding that materiality resided as a fact question).

128. *See* False Statements Act, 18 U.S.C. § 1001 (Supp. III 1997) (codifying an exception to the statute's broad application when the statements are made in a court proceeding).

129. *See* Hubbard v. United States, 514 U.S. 695, 697-98 (1995).

130. *See id.* at 699-700 (quoting the relevant portion of Section 1001 and stating that "[s]ection 1001 criminalize[d] false statements and similar misconduct occurring 'in any matter within the jurisdiction of any department or agency of the

found it difficult to reconcile the statute's plain language with the Court's own prior interpretation of the word "department" in *Bramblett*.[131] *Bramblett* held that Section 1001's predecessor included the executive, legislative, and judicial branches of government as departments of the United States.[132] Unable to reconcile the conflict, the Court concluded that the *Bramblett* Court had erred in its interpretation of Section 1001's statutory history.[133] Justice Stevens, writing for the majority, noted the following about statutory construction:

> [W]e believe the Bramblett Court committed a far more basic error in its underlying approach to statutory construction. Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term.[134]

Thus, the Court expressly overruled *Bramblett*, holding that "a federal court [was] neither a 'department' nor an 'agency' within the meaning of § 1001."[135]

B. The "Exculpatory No" Doctrine and Brogan v. United States

1. The "Exculpatory No" Doctrine. The opinion in *United States v. Levin*[136] expressed dismay at the False Statements Act's sweeping grant of authority to federal law enforcement agencies.[137] In *Levin*, the government indicted the defendant for

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United States'").

131. *See id.* at 701-03 (pointing out the flaw in the *Bramblett* decision and noting that the "*Bramblett* Court made no attempt to reconcile its interpretation with the usual meaning of 'department'").

132. Refer to notes 64-68 *supra* and accompanying text (discussing the *Bramblett* case).

133. *See Hubbard*, 514 U.S. at 708.

134. *Id.*

135. *Id.* at 715 (recognizing the importance of *stare decisis* but overruling "*Bramblett*'s erroneous construction of § 1001" because "[l]imiting the coverage of § 1001 to the area plainly marked by its text . . . preserve[s] the interpretation of § 1001").

136. 133 F. Supp. 88 (D. Colo. 1953) The *Levin* court stated:

> There are numerous decisions that have upheld prosecutions under this section. Substantially, all of them have to do with false documents, and generally they are cases involving claims against the United States. No decision has been found which holds that the failure to tell the truth to an agent or representative of a department or agency of the United States by a person under no legal obligation to speak, is a violation of Section 1001.

Id. at 89.

137. *See id.* at 90.

making a false statement to the FBI concerning whether he had relayed certain information in his possession to someone else.[138] In granting the defendant's motion to dismiss, the district court explained that:

> If the statute is to be construed as contended for here by the United States, the results would be far-reaching. The age-old conception of the crime of perjury would be gone . . . . In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath.[139]

Indeed, other district courts reiterated this same sentiment.[140] Initially, however, various federal appellate courts diluted these decisions' authority by holding to the contrary.[141] This changed in 1962, however, when the United States Court of Appeals for the Fifth Circuit introduced the now defunct "exculpatory no" doctrine in *Paternostro v. United States*.[142]

In *Paternostro*, the government prosecuted a New Orleans Police Department lieutenant for making false statements to an IRS agent concerning police corruption.[143] While answering the agent's questions under oath, the defendant gave a number of "essentially 'No' or negative" answers that later proved to be false.[144] After examining the leading district court cases up to

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138. *See id.* at 88 (explaining that the defendant stated to the FBI that he never conveyed any information to anyone regarding the identity of the owner of an emerald ring when in fact he had conveyed to a person that he knew the identity of the owner).

139. *Id.* at 90 (citation omitted) (contending that Congress clearly did not intend this incongruous result).

140. *See* United States v. Davey, 155 F. Supp. 175, 177 (S.D.N.Y. 1957) ("Whether or not a simple 'no' is a statement from the standpoint of grammar and syntax, [we] do not construe it to be a statement within the contemplation of Section 1001."); United States v. Stark, 131 F. Supp. 190, 207 (D. Md. 1955) ("It seems quite inconsistent with our fundamental concepts of due process in the administration of criminal justice to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein . . . .").

141. *See* Marzani v. United States, 168 F.2d 133, 135, 141-42 (D.C. Cir. 1948) (affirming Marzani's conviction for making false statements to the FBI and the Civil Service Commission concerning his Communist Party membership); *see also* Knowles v. United States, 224 F.2d 168, 169, 172 (10th Cir. 1955) (confirming Knowles' conviction for making fraudulent statements to IRS agents concerning the correctness of his tax returns); Cohen v. United States, 201 F.2d 386, 389, 394 (9th Cir. 1953) (upholding Cohen's conviction for lying to Treasury agents concerning his financial affairs).

142. 311 F.2d 298 (5th Cir. 1962).

143. *See id.* at 300 & n.3 (explaining that Paternostro's conviction resulted from his making false statements under Section 1001 and for committing perjury before the United States Grand Jury).

144. *See id.* at 300-02 & n.3.

that point and distinguishing contrary appellate rulings,[145] the Fifth Circuit concluded that "the 'exculpatory no' answer without any affirmative, aggressive or overt misstatement on the part of the defendant [did] not come within the scope of . . . § 1001."[146] Over the next thirty years, a majority of the other federal circuits adopted the doctrine in various forms.[147] In 1994, however, the Fifth Circuit revisited the question of the "exculpatory no" doctrine in *United States v. Rodriguez-Rios*.[148]

In this case, a United States customs agent spotted Rodriguez exiting an airplane in Santa Teresa, New Mexico.[149] After exiting the plane, Rodriguez placed a suitcase in an automobile trunk and entered the passenger side of the car.[150] He and a female companion then proceeded to the Bridge of Americas Port Entry, which divided El Paso, Texas from Juarez, Mexico.[151] Customs agents followed Rodriguez and stopped him before he could cross the border into Mexico.[152] A customs agent told Rodriguez that he was conducting a "routine export examination."[153] The agent then asked how much money Rodriguez carried and Rodriguez responded, "'[a]bout a thousand dollars.'"[154]

The agent next asked Rodriguez whether anything in the trunk belonged to him.[155] In response, Rodriguez asked the agent's purpose, "whereupon [the agent] repeated that it was a routine export examination."[156] After asking Rodriguez more background information, the agent again asked how much money

145. *See id.* at 300-06. The Fifth Circuit significantly relied on previous district court cases, including *Stark*, *Levin*, and *Davey*. *See id.* at 301-03. The court also distinguished the *Knowles* and *Cohen* cases, as involving false written statements voluntarily and deliberately prepared. *See id.* at 305 (noting that "[s]uch statements constitute[d] affirmative, aggressive, voluntary, deliberate action and [were] definitely calculated to mislead, and to nullify the legitimate functions of Government"). Refer to notes 136-41 *supra* (discussing *Knowles*, *Stark*, *Levin*, *Davey*, and *Cohen*).

146. *Paternostro*, 311 F.2d at 309 (explaining that because the IRS agent worked for the government, Paternostro's statement remained "unquestionably an 'exculpatory no'").

147. *See* Nicholson, *supra* note 8, at 232-248 (examining the adoption and use of the "exculpatory no" doctrine by various federal circuits).

148. 14 F.3d 1040, 1041 (5th Cir. 1994).

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.* (noting that the agent removed $1400 from the defendant's pocket).

155. *See id.*

156. *Id.*

Rodriguez possessed.[157] This time Rodgriguez made no reply.[158] When asked again if anything in the trunk belonged to him, Rodriguez responded "'[t]hat depends on why you are asking.'"[159] When asked for the third time how much money he had, "Rodriguez answered that he did not know."[160]

The agents took Rodriguez into the customs office and advised him in Spanish that it was not illegal to leave the country with more than $10,000, but that one must first complete a special customs form declaring a sum greater than that amount.[161] The customs inspector asked Rodriguez if he carried more than $10,000 and if "he had filled out the required form."[162] Rodriguez did not respond to these questions.[163]

While agents continued their questioning, two narcotics dogs inspected the car and the packages in the trunk.[164] The dogs alerted the agents to the suitcase and a shoebox wrapped with duct tape; the agents opened both, revealing about $598,000 in U.S. currency.[165]

Meanwhile, the agents asked Rodriguez to fill out the customs form declaring any money in excess of $10,000.[166] The customs inspector again assured Rodriguez that he could take any money out of the country provided he declared it in writing.[167] After completing the form, Rodriguez placed it on the counter, but quickly changed his mind and put it in his pocket "saying he did not wish to give it to [the customs inspector]."[168] However, the inspector noticed that the form declared an amount of $530,000 before Rodriguez could retract it.[169]

After agents informed the inspector that they had discovered large amounts of cash in the car, the inspector arrested Rodriguez, "who refused to speak . . . until he could consult with an attorney."[170] Rodriguez later changed his mind and agreed to talk to the agents.[171] The agents gave Rodriguez a second

157. *See id.* at 1041-42.
158. *See id.* at 1042.
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.*
171. *See id.*

opportunity to complete the cash-reporting form and this time Rodriguez stated that he had attempted to export $500,000.[172] After reviewing these facts, a grand jury returned a two-count indictment.[173]

The first count charged Rodriguez with failing to file the necessary report for transporting currency in excess of $10,000.[174] The second count charged Rodriguez with making a "fraudulent statement"—specifically, when he stated that he carried no more than $1000—a violation of 18 U.S.C. § 1001.[175] After a bench trial, the judge dismissed the first count due to insufficient evidence, but found Rodriguez guilty on the second count regarding the Section 1001 violation.[176] Rodriguez appealed and argued that the "exculpatory no" exception applied to his case.[177] The Fifth Circuit panel agreed with Rodriguez, acknowledging its adherence to its own precedent.[178] At the urging of Judge Higginbotham,[179] however, the entire Fifth Circuit granted a rehearing en banc to reexamine the validity of "exculpatory no" exception.[180]

Ironically, upon reexamining the doctrine en banc, the Fifth Circuit overruled the same doctrine it created some thirty years earlier in *Paternostro*.[181] By the time of the *Rodriguez* decision, seven other circuits had embraced some form of the "exculpatory no" exception[182] and one only had "eschewed" it.[183] The court acknowledged that one justification for the doctrine lay in "that a

172. *See id*.

173. *See id*.

174. *See id*.

175. *See id*.

176. *See id*.

177. *See id*.

178. *See id*. (citing United States v. Rodriguez-Rios, 991 F.2d 167, 170 (5th Cir. 1993)).

179. *See* United States v. Rodriguez-Rios, 991 F.2d 167, 170-71 (5th Cir. 1993) (Higginbotham, J., concurring).

180. *See Rodriguez*, 14 F.3d at 1040.

181. *See id*. at 1041, 1043 & n.2 (explaining that since 1962, the Fifth Circuit had regarded a brief denial of guilt to a federal investigating officer as not punishable under Section 1001).

182. *See id*. at 1043 & n.4 (listing the cases that had addressed the "exculpatory no" exception and citing United States v. Taylor, 907 F.2d 801, 804 (8th Cir. 1990); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Medina de Perez, 799 F.2d 540, 545 (9th Cir. 1986); United States v. Tabor, 788 F.2d 714, 717-19 (11th Cir. 1986); United States v. Fitzgibbon, 619 F.2d 874, 879-80 (10th Cir. 1980); United States v. King, 613 F.2d 670, 674-75 (7th Cir. 1980); and United States v. Chevoor, 526 F.2d 178, 184 (1st Cir. 1975)).

183. *See id*. at 1043 n.6 (citing United States v. Steele, 933 F.2d 1313, 1320 (6th Cir. 1991), which rejected the "five-step test adopted by the Ninth and Fourth Circuits").

literal interpretation [of the statute] would come 'uncomfortably close to the Fifth Amendment.'"[184] Nevertheless, the court concluded "that § 1001 should not be limited to those statements that pervert governmental functions but should be determined by the text and not by a judicial reconstruction of its purpose."[185] Finding no basis for the exception in the statutory text and no Fifth Amendment conflicts, the court reversed the panel and upheld Rodriguez's conviction.[186]

However, after *Rodriguez*, a legitimate split persisted in the Circuit Courts of Appeals concerning the "exculpatory no" doctrine's validity.[187] Thus, in 1998, the Supreme Court heard for the first time arguments concerning the "exculpatory no" doctrine—despite the doctrine's more-than-thirty-year existence.[188]

2. Brogan v. United States. The pertinent facts of *Brogan* are brief. Two federal agents from the Department of Labor and the Internal Revenue Service paid an unannounced visit to James Brogan's home.[189] The agents possessed evidence that Brogan, a union officer, had received cash from a company that employed members from Brogan's union.[190] The agents asked Brogan whether he had received any money or gifts from the company while working as a union officer.[191] Brogan responded that he had not.[192] The agents asked no more questions and told him that they possessed records indicating the falsity of his answers and that lying to federal agents in the course of an investigation constituted a crime.[193] Ultimately, the government charged and convicted Brogan for unlawfully accepting cash payments from an employer and for making a false statement in

184. *See id.* at 1043 & n.3 (quoting United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (en banc)).

185. *Id.* at 1045.

186. *See id.* at 1041, 1045 ("Finding no such reason to deviate from the plain language of § 1001, we now discard the 'exculpatory no' doctrine in this circuit.").

187. *See* Brogan v. United States, 522 U.S. 398, 401 (1998).

188. *See id.* at 399, 401.

189. *See id.* at 399; *see also id.* at 409 (Ginsburg, J., concurring in the judgment) (noting that the investigators issued no advance warning "to retain the element of surprise").

190. *See id.* at 409 (Ginsburg, J., concurring in the judgment); *see also id.* at 399 (explaining that investigators sought Brogan's cooperation and urged him to have his attorney "contact the U.S. Attorney's Office").

191. *See id.* at 409 (Ginsburg, J., concurring in the judgment).

192. *See id.* (Ginsburg, J., concurring in the judgment).

193. *See id.* at 409-10 (Ginsburg, J., concurring in the judgment) (noting that "when the interview ended, a federal offense had been completed—even though, for all we can tell, Brogan's unadorned denial misled no one").

violation of Section 1001.[194] The United States Court of Appeals for the Second Circuit affirmed the convictions,[195] and the United States Supreme Court granted certiorari on the "exculpatory no" issue.[196]

Justice Scalia delivered the seven-to-two opinion, abrogating the "exculpatory no" doctrine and affirming Brogan's conviction under the False Statements Act.[197] Justice Souter and Justice Ginsburg each concurred in the judgment and offered separate opinions.[198] Justice Stevens offered a dissenting opinion that Justice Breyer joined.[199]

Justice Scalia began the Court's analysis with a literal statutory reading.[200] The 1988 version of Section 1001 provided:

> Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.[201]

The Court next addressed whether the word "no" in response to a question constituted a statement under Section 1001.[202] Using a standard dictionary definition of the word "statement,"[203] Justice Scalia concluded that the word "no" constituted a statement.[204]

Conversely, Brogan argued that the Court should adopt the "exculpatory no" doctrine and depart from a literal reading of the

194. *See id.* at 400.

195. *See id.*

196. *See id.*

197. *See id.* at 399; *id.* at 408 (stating that "we find nothing to support the 'exculpatory no' doctrine except the many Court of Appeals decisions that have embraced it . . . and [c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so").

198. *See id.* at 408 (Souter, J., concurring in part and concurring in the judgment) (Ginsburg, J., concurring in the judgment).

199. *See id.* at 418 (Stevens, J., dissenting).

200. *See id.* at 400.

201. 18 U.S.C. § 1001 (1988). The 1988 statute does not materially differ from the statute now in force. *See* 18 U.S.C. § 1001 (1994 & Supp. IV 1998).

202. *See Brogan*, 522 U.S. at 400 (noting that, "[b]y its terms, 18 U.S.C. § 1001 covers 'any' false statement—that is, a false statement 'of whatever kind[']" (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997))).

203. *See id.* at 400-01.

204. *See id.* The Court stated: "In fact, [Brogan] concedes that under a 'literal reading' of the statute he loses." *Id.* at 401.

statute.[205] Thus, the Court examined the doctrine itself and explained that the "central feature of this doctrine is that a simple denial of guilt does not come within the statute."[206] The Court also acknowledged the Second Circuit's finding that, under the present case, Brogan's denial would have constituted a "'true "exculpatory n[o]" as recognized in other circuits.'"[207] The Court, however, questioned the validity of such an exception.[208]

The Court first criticized Brogan's argument that Section 1001 did not criminalize "simple denials of guilt to Government investigators."[209] Brogan's argument assumed that Section 1001 only criminalized statements "that 'pervert governmental functions.'"[210] The Court attacked this premise by stating that "the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function."[211] With respect to Brogan's first argument to adopt the "exculpatory no" doctrine, the Court concluded that "[t]here is no inconsistency whatever between the proposition that Congress intended 'to protect the authorized functions of governmental departments and agencies from the perversion which might result' and the proposition that the statute forbids *all* the 'deceptive practices described.'"[212]

Brogan's second "exculpatory no" doctrine defense involved the Fifth Amendment.[213] Brogan argued that a literal statutory reading violated the "'spirit'" of the Fifth Amendment by putting the suspect in a "'cruel trilemma' of admitting guilt, remaining silent, or falsely denying guilt."[214] The Court, however, also

205. *See id.* at 401.

206. *Id.* (citing numerous appellate court decisions concerning the doctrine). The Court also noted that "[t]here [was] considerable variation among the Circuits concerning . . . what degree of elaborate[] tale-telling carrie[d] a statement beyond simple denial." *Id.*

207. *See id.* (quoting Brogan v. United States, 96 F.2d 35, 37 (1996)).

208. *See id.* at 403 (declaring that when Congress attempts to remedy a "particular evil," a court cannot restrict a statute's unqualified language).

209. *Id.* at 401.

210. *See id.*

211. *Id.* at 402. Justice Scalia further stated:

> It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard of.

Id.

212. *Id.* at 403-04.

213. *See id.* at 404.

214. *Id.*

disposed of this Constitutional argument and stated: "This 'trilemma' is wholly of the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary . . . ."[215] The Court defined the Fifth Amendment's scope in terms of a suspect's right to remain silent.[216] Justice Scalia also dryly intoned that in order to validate the "exculpatory no" doctrine, the right to remain silent would have to be elevated to, and seen as, a cruelty itself—the right to remain silent, of course, marked "the *liberation* from the original trilemma."[217] Justice Scalia, finding no reason to engage in "compassion inflation," stated emphatically that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie."[218] Justice Scalia also remained skeptical of the petitioner's contentions that a suspect may fear his silence will be used against him, or be unaware that he may remain silent.[219]

Brogan's final argument centered around the idea that the "exculpatory no" doctrine alleviated the possibility of prosecutorial abuse.[220] Brogan feared that the provision could be used to construct additional offenses.[221] However, Justice Scalia dismissed this concern as a grievance that should be mounted on the legislature and not the prosecutors or the Court.[222] He also noted the paucity of evidence illustrating a history of prosecutorial abuse, or the "exculpatory no" doctrine's ability to combat such abuse.[223]

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215. *Id.* (continuing that "even [an] honest and contrite guilty person will not regard the third prong of the 'trilemma' (the blatant lie) as an available option").

216. *See id.* (explaining that the "'cruel trilemma' first appeared in Justice Goldberg's opinion in Murphy v. Waterfront Commission of N.Y. Harbor, 378 U.S. 52 (1964), where it was used to explain the importance of a suspect's Fifth Amendment right to remain silent when subpoenaed to testify in an official inquiry").

217. *See id.* (noting that, absent the right to silence, the suspect's choices remained "'self-accusation, perjury, or contempt'").

218. *See id.* Justice Scalia went on to state: "[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely." *Id.* (quoting United States v. Apfelbaum, 445 U.S. 115, 117 (1980)).

219. *See id.* at 405 ("And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized 'Miranda' warnings, that is implausible.").

220. *See id.*

221. *See id.* (stating the mere denial of wrongdoing resulted in a more severe punishment than the underlying offense would require).

222. *See id.*

223. *See id.* at 405-06 (noting that the "exculpatory no" doctrine did not solve the problem of prosecutorial overreaching because "[i]t [was] easy enough for an interrogator to press the liar from the initial simple denial to a more detailed fabrication that would not qualify for the exemption").

At the end of the opinion, Justice Scalia added a final word in response to the dissent's assertion that the Court may interpret a statute more narrowly than on its face.[224] He stated that "[i]t is one thing to acknowledge and accept such well defined (or even newly enunciated), generally applicable, background principles of assumed legislative intent. It is quite another to espouse the broad proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions."[225] Justice Scalia argued that such a doctrine would become a "user-friendly judicial rule" that could be invoked at anytime without knowing when or how it should be invoked.[226] According to Justice Scalia, the fact that the punishment for the offense seemed harsh was not reason enough to adopt a narrow statutory reading.[227] He noted that the Court may ignore harsh penalties only when permitted by the United States Constitution.[228] As to *how* the statute should be read more narrowly, Justice Scalia argued that the dissent resolved this question in an equally arbitrary manner.[229]

Accordingly, having found no support for the "exculpatory no" doctrine, except that many courts of appeals' decisions had embraced it, the Court extinguished the doctrine and affirmed Brogan's conviction.[230] The Court reiterated that Section 1001's plain language provided no exception for an "exculpatory no."[231]

Justice Souter concurred in the judgment, but did not join in the Court's response regarding potential prosecutorial abuse and instead joined Justice Ginsburg's opinion on that point.[232] Justice

224. *See id.* at 406 (finding that in some of the cases supporting the proposition, "the Court did *not* purport to be departing from a reasonable reading of the text[ ]. In the others, the Court applied what it thought to be a background interpretive principle of general application" (citations omitted)).

225. *Id.*

226. *See id.* at 406-07.

227. *See id.* at 407.

228. *See id.* (citing U.S. CONST. art. I, § 9; *id.* art. III, § 3; *id.* amend. VIII; *id.* amend. XIV, § 1).

229. *See id.* Justice Scalia argued that:

> There is no reason in principle why the dissent chooses to mitigate the harshness by saying that § 1001 does not embrace the "exculpatory no," rather than by saying that § 1001 has no application unless the defendant has been warned of the consequences of lying, or indeed unless the defendant has been put under oath.

Id.

230. *See id.* at 408 (stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread").

231. *See id.*

232. *See id.* (Souter, J., concurring in part and concurring in the judgment).

Ginsburg concurred in the judgment affirming the conviction, but wrote separately "to call attention to the extraordinary authority Congress, perhaps unwittingly, [had] conferred on prosecutors to manufacture crimes."[233]

Justice Ginsburg's concurrence focused on Section 1001's application to informal encounters between agents and their targets, during which the target was not sufficiently alert to the fact that making a false statement may lead to a felony conviction.[234] Justice Ginsburg elaborated further:

> Because the questioning occurs in a noncustodial setting, the suspect is not informed of the right to remain silent. Unlike proceedings in which a false statement can be prosecuted as perjury, there may be no oath, no pause to concentrate the speaker's mind on the importance of his or her answers. As in Brogan's case, the target may not be informed that a false "No" is a criminal offense until after he speaks.
>
> At oral argument, the Solicitor General forthrightly observed that § 1001 could even be used to "escalate completely innocent conduct into a felony." . . . If the statute of limitations has run on an offense—as it had on four of the five payments Brogan was accused of accepting—the prosecutor can endeavor to revive the case by instructing an investigator to elicit a fresh denial of guilt. Prosecution in these circumstances is not an instance of Government "punishing the denial of wrongdoing more severely than the wrongdoing itself," it is, instead, Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable.[235]

Justice Ginsburg also noted that the lower courts had not resolved some of the issues still surrounding the statute.[236] For example, the United States Court of Appeals for the Second Circuit left open the question of whether a person must know that it is in fact unlawful to make a false statement to trigger Section 1001 liability.[237] Justice Ginsburg further quoted from

233. *Id.* (Ginsburg, J., concurring in the judgment) (noting, "how far removed the 'exculpatory no' is from the problems Congress initially sought to address").

234. *See id.* at 410-11 (Ginsburg, J., concurring in the judgment).

235. *Id.* at 411-12 (Ginsburg, J., concurring in the judgment) (citations and footnote omitted).

236. *See id.* at 416 (Ginsburg, J., concurring in the judgment).

237. *See id.* (Ginsburg, J., concurring in the judgment) (stating that "nothing that [the Second Circuit] or this Court said suggest[ed] that 'the mere denial of criminal responsibility would be sufficient to prove such [knowledge]'" (quoting United States v. Wiener, 96 F.3d 35, 40 (2d Cir. 1996))).

the Second Circuit's opinion in *Brogan* and stated that "'a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent.'"[238] Justice Ginsburg also stated that "under the statute currently in force, a false statement must be 'materia[l]' to violate § 1001."[239]

Throughout her concurrence, Justice Ginsburg maintained her objection that the controls now in place did not resolve the basic issue—the "sweeping generality" of Section 1001's language.[240] She pointed out that, as a result, "the prospect remains that an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false denial."[241] Despite her reservations, Justice Ginsburg concluded that the legislature's silence did not ratify the "exculpatory no" doctrine,[242] and thus concurred in the majority's judgment.[243]

Justice Stevens, joined by Justice Breyer, dissented.[244] Justice Stevens first expressed his agreement with Justice Ginsburg's concurrence and then his dissent from the majority's choice of ignoring a well-settled statutory interpretation without providing sufficient reason for doing so.[245] He pointed out the normality for the Court "to conclude that the literal text of a criminal statute [was] broader than the coverage intended by Congress."[246]

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238. *Id.* (Ginsburg, J., concurring in the judgment).

239. *Id.* (Ginsburg, J., concurring in the judgment) (citing the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996)).

240. *See id.* (Ginsburg, J., concurring in the judgment).

241. *Id.* (Ginsburg, J., concurring in the judgment) (asserting, however, that only Congress could provide the appropriate instruction).

242. *See id.* at 418 (Ginsburg, J., concurring in the judgment) ("I do not divine from the Legislature's silence any ratification of the 'exculpatory no' doctrine advanced in lower courts.").

243. *See id.* at 408, 418 (Ginsburg, J., concurring in the judgment) (explaining that "[t]he extensive airing this issue has received, however, may better inform the exercise of Congress' lawmaking authority").

244. *See id.* at 418 (Stevens, J., dissenting).

245. *See id.* at 418-19 (Stevens, J., dissenting) ("The mere fact that a false denial fits within the unqualified language of 18 U.S.C. § 1001 is not, in my opinion, a sufficient reason for rejecting a well-settled interpretation of that statute.").

246. *Id.* at 419 (Stevens, J., dissenting) (citing as examples Staples v. United States, 511 U.S. 600, 605, 619 (1994); United States v. X-Citement Video, Inc., 513 U.S. 64, 68-69 (1994); Williams v. United States, 458 U.S. 279, 286 (1982); Sorrells v. United State, 287 U.S. 435, 448 (1932); and United States v. Palmer, 3 Wheat. 610, 631 (1818)).

Justice Stevens used undercover narcotics agents as an example.[247] He noted, "[a]lthough the text of § 1001, read literally, makes it a crime for an undercover narcotics agent to make a false statement to a drug peddler, I am confident that Congress did not intend any such result."[248] According to Justice Stevens, "it seem[ed] equally clear that Congress did not intend to make every 'exculpatory no' a felony."[249] Justice Stevens argued, even if this point was not clear, the Court should have shown greater deference to the "virtually uniform understanding of the bench and the bar that persisted for decades with . . . the approval of this Court as well as the Department of Justice."[250] Justice Stevens completed his dissenting opinion by quoting Sir Edward Coke's maxim: "'it is the common opinion, and *communis opinio* is of good authoritie in law.'"[251]

V. STATUTORY INTERPRETATION AND THE *BROGAN* DECISION

A thorough analysis of the *Brogan* decision is properly made on two levels. The first involves understanding the mainstay of the arguments both for and against a particular statutory reading. The second involves a more detailed analysis that addresses each argument and issue separately, including those not specifically decided by the Court. This analysis develops in such a way as to support the ultimate arguments put forth by this Comment. First, that the "exculpatory no" doctrine

247. *See id.* (Stevens, J., dissenting).

248. *Id.* at 419-20 (Stevens, J., dissenting).

249. *Id.* at 420 (Stevens, J., dissenting). In an accompanying footnote, Justice Stevens quoted *Behrens v. Pelletier*, 516 U.S. 299, 324 (1996) (Breyer, J., dissenting) as follows: "[M]eaning in law depends upon an understanding of purpose. Law's words, however technical they may sound, are not magic formulas; they must be read in light of their purposes, if we are to avoid essentially arbitrary applications and harmful results." *See id.* at 420 n.1 (Stevens, J., dissenting) (alteration in original).

250. *Id.* at 420 (Stevens, J., dissenting) (citation omitted).

251. *Id.* at 420-21 (Stevens, J., dissenting). *Communis opinio* is defined as "common opinion; general professional opinion." BLACK'S LAW DICTIONARY 280 (6th ed. 1990). "According to Lord Coke (who places it on the footing of observance and usage), common opinion is good authority in law." *Id.* In an accompanying footnote, Justice Stevens also criticized the majority's usage of the maxim *communis error facit jus*, which means "[c]ommon error, repeated many times, makes law." *See Brogan*, 522 U.S. at 421 n.4 (Stevens, J., dissenting); *see also* BLACK'S LAW DICTIONARY, *supra*, at 279. He further quoted in response, Lord Ellenborough in *Isherwood v. Oldknow*, 3 Maule & Selwyn 382, 396-97 (K.B. 1815):

> "It has been sometimes said, *communis error facit jus*; but I say *communis opinio* is evidence of what that law is; not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the ground-work and substratum of practice."

Brogan, 522 U.S. at 421 n.4 (Stevens, J., dissenting).

legitimately narrows the statute's breadth. Second, now that the "exculpatory no" doctrine has been eliminated, Congress should make prosecution under Section 1001 dependent upon the investigatory agency divulging to an individual that he or she can be subject to prosecution for providing false information.

Justice Scalia began his analysis in the majority opinion of *Brogan* with an examination of the statute's plain language.[252] Under traditional schemes of statutory interpretation, the statute's plain language generally controls.[253] The caveat to this statement remains that the discourse on statutory interpretation and the use of legislative history have by no means been resolved.[254] Still, the strongest argument in favor of any statutory interpretation will rely upon the text's plain language itself. In the case of the False Statements Act, such broad and sweeping language has been employed such that Section 1001 covers practically all false statements made to a federal investigator or agent.[255] Although an argument can be made concerning the

252. *See Brogan*, 522 U.S. at 400.

253. *See, e.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

254. In *Watt v. Alaska*, 451 U.S. 259 (1981), the Court made several comments regarding the general rules of statutory interpretation:

> We agree with the Secretary that "[t]he starting point in every case involving construction of a statute is the language itself." But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.

Id. at 265-66 (citations omitted) (alteration in original); *see also* Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989). The Court in *Public Citizen* stated:

> [A]s Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Id. at 454-55 (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)). *But see* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1296-98 (1990) (noting that Justice Scalia has challenged the Court, since his appointment, to look at the statutory text as the only legitimate source of interpretive guidance).

255. Refer to notes 233-41 *supra* and accompanying text (discussing Justice Ginsburg's convictions that the False Statements Act's sweeping language created opportunities for prosecutors to manufacture crimes based upon almost any

scope of the word "statement," its plain definition does not comport to a narrow reading. Thus, Justice Scalia's swift analysis concerning the statute's interpretation along these lines ends rather quickly and correctly.[256] Justice Scalia then went on to address the three main issues presented by the petitioners concerning the "exculpatory no" doctrine.[257] It is important to first discuss two corollary arguments that usually accompany statutory interpretation, but were not targeted by Justice Scalia.

An alternative avenue used to constrain a statute's broad interpretation, although not raised in this case, centers on legislative history.[258] In this situation, Congress did not pass an amendment explicitly codifying the "exculpatory no" doctrine,[259] nor did anything exist in the many modifying legislative enactments that suggests Congress wanted to limit the statute's scope.[260] Finally, congressional indifference to the "exculpatory no" doctrine would hardly be an argument that such an exception

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statements made by a suspect).

256. Refer to notes 200-04 *supra* and accompanying text (discussing Justice Scalia's literal statutory analysis and definition of the word statement).

257. *See Brogan*, 522 U.S. at 401-02 (noting petitioner's arguments in favor of the "exculpatory no" doctrine as: (1) § 1001 should only criminalize statements made which "'pervert governmental functions,'" (2) "simple denials of guilt . . . d[id] not pervert governmental functions," (3) "§ 1001 d[id] not criminalize simple denials of guilt").

258. *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 731 (1989) (examining congressional intent concerning the 1866 and 1871 Civil Rights Acts' remedial provisions); Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 405-06 (1987) (examining the McFadden Act's legislative history to determine whether or not Congress intended to restrict national banking activities). *But see* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998). Professor Schacter stated:

> Justice Scalia, legislative history's most conspicuous critic, vigorously challenges the legitimacy of legislative history as an "authoritative indication" of statutory meaning. Because Scalia and others claim that the judicial search for legislative intent in general, and the use of legislative history as evidence of that intent in particular, is inconsistent with the constitutionally prescribed roles of both the courts and Congress . . . .

Id. at 3 (footnotes omitted).

259. *See Brogan*, 522 U.S. at 417 (Ginsburg, J., concurring in the judgment). Justice Ginsburg declared:

> Legislation to revise and recodify the federal criminal laws, reported by the Senate Judiciary Committee in 1981 but never enacted, would have established a "defense to a prosecution for an oral false statement to a law enforcement officer" if "the statement was made 'during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense.'"

Id. (Ginsburg, J., concurring in the judgment) (quoting S. REP. NO. 97-307, at 407 (1981)).

260. Refer to Part II *supra* (discussing legislative expansion of the Act's scope).

had been codified implicitly, unless, of course, such a doctrine had been adopted by the Supreme Court itself.[261] Therefore, absent any clear legislative intent otherwise, this argument cannot hold merit.

Another issue not raised by the petitioners in *Brogan* was the absurd result principle.[262] This principle remains a major exception to the plain meaning rule[263] and was articulated and explicitly adopted by the Supreme Court in the case of *United States v. Kirby*.[264] In *Kirby*, the Court stated:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.[265]

Still, no exacting definition of the rule has ever been proffered.[266] Arguably, the False Statements Act produces unjust,

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261. On the other hand, however, considering the doctrine's long existence and virtual unanimous adoption by the courts of appeal, one could argue that Congress saw no need to codify the exception. Unfortunately, there exists no judicial recognition of this position, unless, of course, the Supreme Court proffered such an interpretation and the re-enactment's legislative history showed that Congress agreed with that interpretation. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 961 (1994) (Stevens, J., separate opinion) ("[W]hen Congress reenacts a statute with knowledge of its prior interpretation, that interpretation is binding on the Court.").

262. Refer to notes 205-23 *supra* and accompanying text (examining the arguments put forth by the petitioners).

263. *See* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 127-28 (1994) (stating that "[t]he absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according to its plain meaning").

264. 74 U.S. 482 (1868).

265. *Id.* at 486-87. The Court continued:

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt."

Id. at 487; *see also* Rowland v. California Men's Colony, 506 U.S. 194, 200 & n.3 (1993) (noting the common mandate of statutory construction to avoid absurd results); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (rejecting a literal interpretation of Federal Rule of Evidence 609 (a)(1) under the aegis of the absurd result principle).

266. *See* Dougherty, *supra* note 263, at 128 (stating that "[c]ases using or

oppressive results when used to prosecute people for basically saying "not guilty." As Judge Ferguson wrote in his dissent in *United States v. Goldfine*:[267]

> [I]f an agent for the F.B.I. questions a suspect and the suspect falsely denies guilt, the suspect cannot be properly charged under § 1001. That section does not usher a heads we win—tails you lose philosophy into the criminal justice system. ("If you tell our version of the truth, we will call it an admission and use it against you on the substantive offense; If you tell us something which materially varies from our version of the truth, we will charge you with a § 1001 felony"). *Bedore* stands for the proposition that an accused may plead not guilty, in or out of court, without fear of additional criminal sanctions.[268]

The absurd result principle should not be extended to such a degree that it becomes an excuse for creating arbitrary judicial exceptions. Using a statute in such a way that it takes advantage of a person's legal ignorance and punishes him for doing something equivalent to pleading "not guilty" results in absurdity.[269] As a general matter, it remains difficult to imagine that Congress meant the False Statements Act to be used as a substitute for a legitimate, substantive criminal offense or as a

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referring to the principle do not define absurdity, nor do they specify the kinds of situations where the principle should be applied").

267. 538 F.2d 815 (9th Cir. 1976).

268. *Id.* at 821-22 (Ferguson, D.J., concurring and dissenting).

269. One argument for this position is that the term "absurd" represents those values embodied in "rule of law" principles and thus checks statutory law. *See* Doughtery, *supra* note 263, at 133.

> Two common components of rule of law principles . . . are: (1) the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security; and (2) the coherence of the legal system as a whole (that is, that one standard of law will not contradict another).

Id. Textualists emphasize the first principle as an argument for a statutory interpretation predicated solely on the statute's plain language because such an interpretation allows statutory law to be predictable and ensures that people can rely upon the statute's wording. *See id.* at 133-34. The absurd results principle tempers strict literalism in this regard because strict literalism can sometimes undermine the second component of the rule of law principles, i.e., a particular interpretation may undermine the coherence and legitimacy of the legal system at large. *See id.* at 134. As applied to the False Statements Accountability Act, a textualist's statutory interpretation fails to satisfy either component of the rule of law. It fails the first component because of its premise on the target's ignorance of the law. A statute, the efficacy of which depends upon ignorance of its legal effect clearly undermines the goals of reliance or predictability. It fails the second component because the statute works against system coherence. The Act's extremely broad application circumvents constitutional guarantees and criminalizes normatively innocent conduct. Therefore, a textualist's statutory interpretation cannot be justified.

method of manufacturing crimes out of arguably innocent conduct, which brings the justice system's integrity into question.[270] Unfortunately, because this issue was not raised in *Brogan*, Justice Scalia addressed only the first argument put forth by the petitioners—that the court should depart from the statute's literal reading.[271]

The petitioner based his first argument upon dictum from *Gilliland*, in which the Court declared that the "exculpatory no" doctrine criminalizes only those statements that "pervert governmental functions."[272] Putting aside for a moment Justice Scalia's remarks that false statements can do nothing but pervert government functions,[273] he found no basis for the premise that Section 1001 criminalizes only those falsehoods that pervert governmental functions.[274] This finding was based upon the statute's unqualified language, and, according to Scalia, even if Congress had intended to address only a particular problem, "[i]t is not, and cannot be, [the Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy."[275] Here, Justice Scalia obviously foisted his own theories of statutory analysis into the record. The Supreme Court has never fully accepted a statutory analysis model based exclusively upon a statute's unqualified language.[276]

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270. Justice Scalia would probably retort with the same argument he made in response to Justice Stevens's dissent—namely, that any judicially created exception is inherently arbitrary. Refer to notes 224-26 *supra* and accompanying text (arguing that Justice Stevens's dissent would narrow the False Statements Act without providing a doctrinal foundation as to "when" and "how" this exception should be applied). Yet this retort lies in the perverse when read against the full breadth and application of False Statements Act. Indeed, this explanation would be expected from a district court judge, whose ultimate mandate remains to enforce the law, but it is hardly an explanation for a Supreme Court Justice to argue—that in spite of a questionable application of a law, an exception should not be espoused nor adopted because it lacks clear and strict parameters. This is an excuse for judicial abdication (or "it's not my job to care" diatribes), not a legal argument against the particular merits of the "exculpatory no" exception.

271. *See* Brogan v. United States, 522 U.S. 398, 401 (1998).

272. *See id*. at 402-03; United States v. Gilliland, 312 U.S. 86, 93 (1941) (stating that "there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.").

273. Refer to notes 234-51 *supra* and accompanying text (discussing how any falsehood relating to subject of investigation perverts government functions).

274. *See* Brogan v. United States, 522 U.S. 398, 402 (1998).

275. *Id*. at 403.

276. *See* R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37, 37-40 (1997) (discussing the delineation of the Supreme Court Justices along four different doctrinal approaches). Professor Kelso states:

Despite Justice Scalia's opinion, the petitioner did not argue that the statute should be narrowly tailored to deal with one particular type of evil, rather the petitioner argued that Congress did not intend for the statute to apply to situations in which it would be impossible to pervert governmental functions.[277]

It is one thing to mislead federal agents with wild tale-telling, when the suspect purposefully undermines the course of a legitimate investigation. It is quite another for federal agents to trap a suspect, induce a false denial to an incriminating question, and prosecute the suspect for a statement that federal investigators had no intention of relying upon. Facially, the statute's intent protects the integrity of federal investigations. It is hard to imagine that federal investigators with substantial evidence in tote, would march up to a criminal target and ask incriminating questions only to induce a lie from the suspect. Furthermore, difficulty remains in imagining how an "exculpatory no" in this instance could have anything to do with protecting a federal investigation's integrity. If federal agents want the *truth*, why not warn the suspects of the grave consequences that will attach should they try to manufacture some sort of fib? The most troubling aspect of Justice Scalia's analysis resided not in his new textualist mantra, but in the disingenuous way he framed the statute and the accompanying issues to buttress his analysis.

For example, Justice Scalia remarked that false statements inherently pervert government functions.[278] Although Justice

> Justice Scalia's "New Textualism" approach . . . focuses almost exclusively on the plain meaning of the statute's text, augmented by consideration of the text of related statutes (statutes *in pari materia*), and by consideration of traditional canons of statutory construction . . . . During the 1980s, Justice Scalia's New Textualism approach gained some support, particularly among Chief Justice Rehnquist and Justices O'Connor and Kennedy. Justice Thomas has also indicated strong support for Justice Scalia's New Textualism model of statutory interpretation.
>
> Over the last five years, support has waned for Justice Scalia's New Textualism model of statutory interpretation. Only Justice Thomas has remained a consistently faithful ally. Justices Stevens, Souter, Ginsburg, and Breyer clearly reject the New Textualism model of statutory interpretation. Although initially sympathetic to Justice Scalia's approach, Chief Justice Rehnquist and Justices O'Connor and Kennedy, typically reject it now as well.

Id. at 38-40 (footnotes omitted).

277. *See Brogan*, 522 U.S. at 401.

278. *See id.* at 402. The Court stated:

> We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the

Scalia's simplistic syllogism as an abstract generality may be correct,[279] the issue revolves around whether or not the "exculpatory no" exception falls within the ambit of congressional intent, not whether lies are bad. The exception seems to fit the bill because it does not purport to include anything but simple negative statements used to exculpate oneself.[280] In an informal setting, without any formal warning concerning criminal liability, arguing that federal agents expect incriminating questions to be answered truthfully can be laughable—especially when no oath has been given. If one accepts that such statements do not realistically pervert government functions—except in the most banal "angels on a pin-head" form of discourse—then the "exculpatory no" exception also helps prevent agents and prosecutors from unduly misapplying the statute contrary to its clear purpose.[281] In other words, the exception tends to make it slightly more difficult for agents to manufacture crimes against

> truth, any falsehood relating to the subject of the investigation perverts that function.

Id.

279. This is a classic strawman argument. For example, one might posit something analogous or more general to the issue being debated and try to draw a conclusion that seems to contradict the original argument being made. Although this technique may provide a different perspective on an issue, it does not have the logical force that Justice Scalia tries to import. Rather, it exists only as a debating technique that tries to get an opponent to make a concession regarding a different, but closely related proposition, which seems on its face to incorporate the original issue of contention. Whether or not the syllogism has any relevance at all *must* first be independently substantiated and proved; otherwise, the argument remains a strawman—an oversimplified argument inherently framed against the original issue—put forth to take attention away from the contention.

280. *See Brogan*, 522 U.S. at 413 (Ginsburg, J., concurring in the judgment) (finding the history of Section 1001 demonstrated that Congress intended to "'protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities'" (quoting Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962))).

281. Outside the issue of legislative intent (although this Comment takes the position that this is a non-issue because of the presumption of congressional interest in protecting the integrity of federal investigations, not providing a means to manufacture crimes), Justice Scalia would probably retort (as he did against basically the same argument made by the petitioner in *Brogan*) that "[i]t is easy enough for an interrogator to press the liar from the initial simple denial to a more detailed fabrication that would not qualify for the exemption." *Brogan*, 522 U.S. at 405-06. It does not follow that because investigators can get targets to lie more than the exception excuses *for any reason*, the argument crumbles under any form of analysis. The inherent *effectiveness* of the exception lies not in the issue of any way, shape, or form. Justice Scalia arguably wanted to have it both ways: one, fault the exception because of its narrowness and question the ease that agents can circumscribe it, or two, if the Court expands the exception, question its basis on another set of grounds.

an individual—a practice not only offensive to the statute, but to the justice system at large.[282]

The second argument the Court addressed revolved around the idea that a literal statutory reading violated the "spirit" of the Fifth Amendment, or the privilege against compulsory self-incrimination.[283] The Fifth Amendment's privilege against self-incrimination grants the right to remain silent, not a privilege to lie.[284] Still, the larger question is better framed around whether the Fifth Amendment privilege should also demand that criminal targets be apprised of the possibility of criminal liability.[285] This is an even more basic question than whether or not criminal subjects should be apprised of their Fifth Amendment right to remain silent. Although legal ignorance remains inexcusable, it should not be the basis of legitimate criminal prosecutions.

The Fifth Amendment privilege contemplates that criminal targets might be compelled through intimidation and coercion to confess to certain crimes—making statements whose reliability one might legitimately call into question.[286] Thus, the privilege in part, turns on the confessions' credibility, which in turn ensures the conviction's reliability.[287] The issue is different in the case of an "exculpatory no" because in such an instance, the issue does not involve the confessions' admissibility with respect to the very wrongdoing forming the basis of the initial investigation or whether a privilege to lie exists in that context. Such a characterization inappropriately frames the issue. Instead, the issue should center around whether agents can induce a lie that forms the basis of a separate crime itself.[288]

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282. *See id.* at 420 (Stevens, J., dissenting) (arguing that "it seems equally clear that Congress did not intend to make every 'exculpatory no' a felony").

283. *See id.* at 404 (noting petitioner's argument that a literal reading of § 1001 "places a 'cornered suspect' in the 'cruel trilemma' of admitting guilt, remaining silent, or falsely denying guilt").

284. *See id.*

285. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) (establishing the requirement that not only should the suspect be told of his right to remain silent, but also that anything he says can be used against him in a criminal proceeding).

286. *See In re* Gault, 387 U.S. 1, 47 (1967) (stating that "[t]he privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth").

287. *See* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 115 (1967) (noting that the primary reason for the prohibition of compelled admissions remains "the belief that coercion affects the reliability of certain kinds of responses").

288. *See* Nicholson, *supra* note 8, at 227 (providing a hypothetical in which a suspect can be subject to harsh criminal penalties for seemingly innocuous behavior).

In other words, the world of highly dramatized *Miranda* warnings that Justice Scalia alluded to is not the issue addressed here—the so-called right to remain silent.[289] The question remains whether the "exculpatory no" exception exists as a legitimate corollary of the Fifth Amendment privilege's inherent disdain for police coercion.[290] The issue's nuances do not lend themselves to any plain articulation—yet they are hardly illusory.[291] How else can one explain why a majority of the circuits decided to adopt a doctrine along these same lines until the *Brogan* decision came along?[292]

The final issue raised by the petitioner involved the use of the "exculpatory no" doctrine as a means to minimize the risk of Section 1001 functioning as an instrument of prosecutorial abuse.[293] Justice Scalia responded by stating simply that the petitioner's remedy lay with Congress, not the Court.[294] In and of itself, Justice Scalia was correct on this point. Policy—without some nexus to larger constitutional or doctrinal prerogatives—generally does not lay the proper basis for making judicial decisions,[295] unless an absolute unresolved egregious pattern of injustice is present.[296] This, of course, is not the case here.[297]

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289. *See Brogan*, 522 U.S. at 405. Justice Scalia further stated:

> And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized "Miranda" warnings that is implausible. Indeed, we found it implausible (or irrelevant) 30 years ago, unless the suspect was "in custody or otherwise deprived of his freedom of action in any significant way."

Id. (quoting Miranda v. Arizona, 384 U.S. 436, 445 (1966)).

290. *See generally* Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.").

291. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) ("The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.").

292. *See* Nicholson, *supra* note 8, at 232-49 (detailing the adoption and use of the "exculpatory no" doctrine among the "Federal Circuit[s]").

293. *See Brogan*, 522 U.S. at 405 ("The supposed danger is that overzealous prosecutors will use this provision as a means of 'piling on' offenses—sometimes punishing the denial of wrongdoing more severely than the wrongdoing itself.").

294. *See id.* ("The objectors' principal grievance on this score, however, lies not with the hypothetical prosecutors but with Congress itself, which has decreed the obstruction of a legitimate investigation to be a separate offense, and a serious one. It is not for us to revise that judgment.").

295. *See id.* at 408 (stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so").

296. *See generally* Maryland v. United States, 460 U.S. 1001, 1006 (1983) (citing United States v. Muskrat, 219 U.S. 346 (1911), in support of the proposition that policy questions should not be submitted to judicial determination, and even if Congress imposes "such a duty on the federal courts, [the courts] may not perform

Still, this policy argument has merit when subsumed within the first two issues raised by the petitioner. Policy—in this instance a code word for consequences—remains a legitimate concern when coupled with the correct constitutional or statutory analysis. The issue's gravity is quite important in this regard. In this case, the issue encompasses more than just the possibility that the False Statements Act may punish the denial of wrongdoing more harshly than the wrongdoing itself. It resides in the fact that the Act categorically punishes all falsehoods whether or not any initial wrongdoing exists and despite the possibility that the subject of the falsehood may involve only innocent conduct.[298] The constitutional significance lies in the statute's use to circumvent traditional Fifth Amendment protections and the fact that a violation of the False Statements Act is punished equally as that of perjury (despite the fact that perjury is made in open court under oath). Policy, or consequences, should govern the issue's resolution in light of the controlling interpretive doctrine.[299] Altogether, this issue can be legitimately incorporated with the other two arguments presented by the petitioner, as well as Justice Stevens's dissent concerning the majority's failure to consider the statute's common understanding.[300] In sum, these arguments show clearly that the Supreme Court should have more seriously considered upholding the narrowly tailored "exculpatory no" exception in light of the False Statements Act's breadth and possible contravening application by investigators and prosecutors.

VI. CONCLUSION: REDRAFTING THE FALSE STATEMENTS ACT

The False Statements Act is an example of how statutes can evolve piecemeal, enacted to address one need and then developing into something completely different—taking small steps over the span of many years—with no one noticing the encompassing breadth that has ultimately accrued. As this

it").

297. *See Brogan*, 522 U.S. at 415 (Ginsburg, J., concurring in the judgment) (finding that the Justice Department's hesitation in applying Section 1001 to "exculpatory no" situations indicated "the dubious propriety of bringing felony prosecutions for bare exculpatory denials informally made to Government agents").

298. *See id.* at 411-12 (Ginsburg, J., concurring in the judgment) (lamenting the "Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable").

299. Refer to Part V *supra* (discussing the usual rule that a statute's plain meaning controls its interpretation).

300. *See Brogan*, 522 U.S. at 419-20 (Stevens, J., dissenting) (noting that there existed a "well-settled interpretation of [the] statute" that had "persisted for decades," which the Court rejected).

Comment has shown, the False Statements Act should be amended to include a provision permitting criminal prosecution only if the target has been warned that any lie can be a breach of federal law. The "exculpatory no" doctrine originally existed as a narrow and carefully tailored judicial attempt to limit the statute's reach in a small minority of cases. However, the defect in the Act now presents issues that can only be addressed through the codification of a warning provision, or at the very least, the re-instatement of the "exculpatory no" exception. Congress should re-examine the False Statements Act and resolve this problem by requiring a warning provision or codifying the "exculpatory no" doctrine.

Michael Gomez