UNITED STATES V. BROGAN: THE REJECTION OF THE EXCULPATORY NO DOCTRINE

I. INTRODUCTION

The United States Code contains a broad criminal statute that prohibits making false statements to the Government.[1] The statute currently criminalizes three types of conduct: 1) falsifying, concealing or covering up a material fact by trick, scheme or device; 2) making any materially false, fictitious, or fraudulent statement or representation; or 3) making or using a writing or document which contains a materially false statement.[2] The statute's language is broad, and in general its judicial interpre-

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1. 18 U.S.C. § 1001 (1994).

2. 18 U.S.C.A. § 1001 (West Supp. 1998). The current version of the statute reads:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully
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> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
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> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
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> (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.
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> (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
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> (c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—
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> (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
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> (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

Id.

tation has been generous.[3] In fact, the most significant limitation imposed during the statute's history has been directed toward the second type of prohibited conduct and has been expressed through the exculpatory no doctrine.[4] The parameters of the exculpatory no doctrine have varied among the circuits, but the gist has remained the same: 18 U.S.C. § 1001 (hereinafter § 1001) does not reach exculpatory denials made in response to government agents in a situation where a truthful answer would have incriminated the declarant.

Courts adopting the exculpatory no doctrine generally have justified its application on three grounds. First, turning to the legislative history, courts have concluded that Congress did not intend for the statute to reach exculpatory denials of guilt and have suggested that only affirmative falsehoods capable of perverting government functions are at issue with § 1001.[5] Second, courts have defended the exculpatory no doctrine on the ground that a literal application of § 1001 comes "uncomfortably close" to a Fifth Amendment violation.[6] Finally, the exculpatory no exception also has arisen from courts' discontent with the possibility of prosecutorial abuse if § 1001 were applied literally.[7]

The exculpatory no defense originated at the district court level in the 1950s in *United States v. Levin*[8] and *United States v. Stark*.[9] In 1962, the Fifth Circuit in *United States v. Paternostro*[10] was the first circuit to officially adopt the doctrine.[11] Although varying in the degree of acceptance, a majority of circuits subsequently followed suit.[12] Ironically, in 1994

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3. *See, e.g.*, United States v. Gilliland, 312 U.S. 86, 93-94 (1941) (§ 1001 is not limited to situations in which Government has a pecuniary interest); United States v. Rodgers, 466 U.S. 475, 479-80 (1984) (§ 1001 applies to criminal investigations); United States v. Yermian, 468 U.S. 63, 75 (1984) (§ 1001 does not require proof that the defendant had knowledge the statement was made to the Government).

4. The only other significant limitation occurred in 1918 when Congress included an intent requirement. *See infra* note 26.

5. United States v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972); United States v. Stark, 131 F. Supp. 190, 205 (D. Md. 1955).

6. United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974).

7. *Stark*, 131 F. Supp. at 207 (noting that § 1001 was meant "to operate as a shield for defense rather than as a sword for attack").

8. 133 F.2d 88, 90-91 (D. Colo. 1953).

9. *Stark*, 131 F. Supp. at 205.

10. 311 F.2d 298 (5th Cir. 1962).

11. *Paternostro*, 311 F.2d at 309.

12. Moser v. United States, 18 F.3d 469, 473-74 (7th Cir. 1994); United States

the Fifth Circuit in *United States v. Rodriguez-Rios*[13] was the first to explicitly reject the doctrine.[14] The Fifth Circuit essentially found that its prior decisions were misguided, and that neither the legislative history nor the Fifth Amendment warrants a departure from the language of the statute.[15] Later in 1996, the Second Circuit in *United States v. Wiener*,[16] a circuit which had neither officially adopted nor rejected the doctrine, rejected the application and the reasoning of the exculpatory no defense.[17]

With the tide turning among the circuits, the United States Supreme Court granted certiorari to determine the viability of the exculpatory no exception to § 1001.[18] Finding that nothing supported the exculpatory no exception other than the fact that many courts of appeals had adopted it, the Supreme Court in *Brogan v. United States*[19] rejected the doctrine that had operated for approximately four decades.[20]

Part I of this Article provides a brief history of § 1001 and examines the exculpatory no doctrine, its underlying justifications, and its variations among the circuits. In addition, Part I discusses the trend in the circuits to question the reasoning of the doctrine prior to *Brogan v. United States*. Part II examines *Brogan*, the Supreme Court's rejection of the doctrine, and its disposition of the arguments that have long supported the exception. Finally, Part III illustrates that while *Brogan's* rejection of the exculpatory no exception to § 1001 is not surprising, the concerns that led a majority of circuits to embrace the doctrine are still present after *Brogan*. Thus, Part III questions how courts, defendants, and Congress will now address the broad

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v. Taylor, 907 F.2d 801, 805 (8th Cir. 1990); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Tabor, 788 F.2d 714, 717-19 (11th Cir. 1986); United States v. Fitzgibbon, 619 F.2d 874, 880-81 (10th Cir. 1980); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978); United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975).

13. 14 F.3d 1040 (5th Cir. 1994) (en banc).

14. *Rodriguez-Rios*, 14 F.3d at 1049-50.

15. *Id.* at 1044-50.

16. 96 F.3d 35 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998).

17. *Wiener*, 96 F.3d at 39-40.

18. United States v. Brogan, 117 S. Ct. 2430 (1997).

19. 118 S. Ct. 805 (1998).

20. *Brogan*, 118 S. Ct. at 811-12.

reading of § 1001 mandated by *Brogan*.

II. BEFORE *BROGAN*

A. The History of 18 U.S.C. § 1001

Responding to a "spate of frauds upon the Government" instigated by military personnel during the Civil War era, Congress enacted the progenitor of 18 U.S.C. § 1001 in 1863.[21] The original version of the statute prohibited only false claims against the United States.[22] From 1873-1909 Congress modified the statute by altering the language to cover "every person" not just military personnel,[23] amending the penalty provisions,[24] and redesignating the statute.[25] In 1918, Congress again modified the statute by inserting a purpose requirement: to violate the statute one had to intend to cheat or swindle the Government.[26] However, as a result of the urging of the Secretary of the Interior and at the foot of enforcement problems of the New Deal era, Congress deleted the intent requirement in 1934.[27] The Secretary of the Interior initiated the 1934 amendment by notifying Congress that persons were presenting false papers about the shipment of "hot oil" to regulatory agencies.[28] After the 1934 amendment, the changes to the false statement portion of the statute were minimal until 1996.[29]

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21. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696, 696; *see also* United States v. Bramblett, 348 U.S. 503, 504 (1955) (describing the circumstances surrounding the enactment of the Act of Mar. 2, 1863).

22. *Bramblett*, 348 U.S. at 504. In 1948, Congress separated the false claim and the false statement portions of the statute. *See infra* note 29.

23. Act of Dec. 1, 1873, ch. 5, § 5438, 18 Stat. 1054, 1060.

24. Act of May 30, 1908, ch. 235, § 5438, 35 Stat. 555, 555-56.

25. Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088.

26. Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015, 1015-16. This amendment was interpreted as meaning that § 1001 did not apply unless the falsity caused pecuniary or property loss to the Government. *See* United States v. Cohn, 270 U.S. 339, 346-47 (1926).

27. United States v. Yermian, 468 U.S. 63, 71-74 (1984).

28. United States v. Gilliland, 312 U.S. 86, 93-94 (1941).

29. In 1938, the statute, which at the time was designated at § 35, was subdivided into different parts. Act of April 4, 1938, ch. 69, § 35, 52 Stat. 197, 197-98; *see also* United States v. Bramblett, 348 U.S. 503, 508 n.8 (1955). In 1948, the false statements and the false claims portions of the statute were divided. *See Bramblett*,

The 1996 amendment was a reaction to the Supreme Court's 1995 decision in *Hubbard v. United States*,[30] which held that § 1001 did not apply to false statements made in judicial proceedings.[31] The issue in *Hubbard* was whether the jurisdictional language "in any matter within the jurisdiction of any department or agency of the United States" covered statements made in such a setting.[32] The Court faced both an earlier decision in *United States v. Bramblett*[33] which stated "'department' . . . was meant to describe the executive, legislative, and judicial branches of the Government"[34] and lower courts' attempts to limit this language through the judicial function exception.[35] The judicial function exception provided that only false statements made within a court's administrative or "housekeeping" context were subject to criminal liability under § 1001; those made during adjudicative functions were excepted.[36] The Court in *Hubbard* had the choice of accepting the judicially created exception or overruling *Bramblett*.[37] Finding the statutory language could support neither the judicial function exception nor the language of *Bramblett*, the Court placed its first significant restriction on § 1001 and held that the statute does not apply to *any* statement made to a federal court.[38]

Congress reacted almost immediately to *Hubbard* and, in essence, codified the judicial function exception.[39] The 1996 amendment changed the jurisdictional language of the statute by explicitly providing that § 1001 applied to false statements made "in any matter within the jurisdiction of the executive,

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348 U.S. at 508. The false claim provision became 18 U.S.C. § 287, and the false statements portion became 18 U.S.C. § 1001. Act of June 25, 1948, ch. 645, 62 Stat. 683; *see also Bramblett*, 348 U.S. at 508. There were also unimportant textual changes. *See* United States v. Rodriguez-Rios, 14 F.3d 1040, 1047 n.16 (5th Cir. 1994) (en banc) (corporation language deleted and "in any matter" clause moved).

30. 514 U.S. 695 (1995).
31. *Hubbard*, 514 U.S. at 715.
32. *Id.* at 698-99.
33. 348 U.S. 503 (1955).
34. *Bramblett*, 348 U.S. at 509.
35. *Hubbard*, 514 U.S. at 708.
36. *Id.* at 698-99.
37. *Id.* at 712-13.
38. *Id.* at 715.
39. Act of Oct. 11, 1996, Pub. L. No. 104-292, 110 Stat. 3459 (codified as amended at 18 U.S.C.A. § 1001 (West Supp. 1998)).

legislative, or judicial branch of the Government."[40] However, Congress excluded statements made by a party or his/her counsel in a judicial proceeding.[41] Because the amendment essentially reinstated the law as applied pre-*Hubbard*,[42] § 1001 did not, in practice, become broader after 1996. However, the statute's language is now as broad as it has ever been.

B. The Exculpatory No Doctrine

1. The Birth of the Exculpatory No Doctrine.—Congress made no comment on the exculpatory no doctrine with the enactment of the 1996 amendment. Likewise, despite the fact that the language of § 1001 became even more inclusive after the amendment, the creation of the exculpatory no doctrine actually arose from courts' distaste with the statute's breadth after the 1934 amendment.

The first glimpse of this distaste arose in the 1950s. In *United States v. Levin*,[43] the court held that to avoid "flagrant injustices" a defendant's unsworn false statement to an F.B.I. agent that he did not have information concerning the identity of a ladies dinner ring could not violate § 1001.[44] The court noted that such a reading would subject one to greater criminal liability under § 1001 than one who perjured himself.[45] Only two years later, another district court in *United States v. Stark*[46] hesitated to apply the broad language of § 1001 to responses to F.B.I. agents based on another, although related, theory.[47] In *Stark*, the defendant denied making bribes to em-

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40. *Id.*

41. *Id.*

42. Notice that the 1996 version of § 1001 places essentially the same limitations on the statute that the judicial function exception accomplished; i.e., § 1001 does not apply in the "adjudicative" context, but does apply in an "administrative" context. *See supra* note 2.

43. 133 F. Supp. 88 (D. Colo. 1953).

44. *Levin*, 133 F. Supp. at 90.

45. *Id.* The Supreme Court, however, has found the difference between the penalty provisions of § 1001 and perjury statutes irrelevant. *See* United States v. Rodgers, 466 U.S. 475, 482 (1984); United States v. Gilliland, 312 U.S. 86, 95 (1941).

46. 131 F. Supp 190, 206 (D. Md. 1955).

47. *Stark*, 131 F. Supp. at 191.

ployees of the Federal Housing Administration which financed mortgages of his construction projects.[48] After reviewing the legislative history of the statute, the court found the false denials outside the purview of the statute because the statements were not volunteered or made for the purpose of making a claim upon or inducing improper action on the part of the Government.[49]

In 1962, the Fifth Circuit addressed the general discomfort with the breadth of § 1001 in *United States v. Paternostro*.[50] In *Paternostro*, the defendant denied that he solicited or received any money from an operator of an illegal business.[51] The court held that his negative answers to questions propounded by I.R.S. agents did not constitute "statements" within that word's meaning in § 1001 because they were not the sort of statements the legislative history demonstrates the statute was meant to address.[52] Particularly, the court noted that Paternostro's statements were not related to a claim against the Government and that he did not deliberately initiate any positive or affirmative statements calculated to pervert the legitimate functions of the Government.[53]

Essentially, these cases illustrate what appears to be the fundamental concern with applying § 1001 literally, that is applying the statute to *any* false statement: it is somehow unfair to "felonize" a responsive unsworn denial of guilt, often consisting of a mere "no" and usually in a situation where a *Miranda* warning is not required.[54] Thus, the exculpatory no defense is an attempt to deal with this perceived unfairness. In other words, courts characterized the defense as merely giving a citizen the opportunity to plead "not guilty" outside of the courtroom without fear of criminal prosecution.[55]

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48. *Id.*
49. *Id.* at 206.
50. 311 F.2d 298 (5th Cir. 1962).
51. *Paternostro*, 311 F.2d at 300.
52. *Id.* at 305.
53. *Id.*
54. However, the I.R.S. did place Paternostro under oath. *Id.* at 300.
55. *See* United States v. Goldfine, 538 F.2d 815, 822 (9th Cir. 1976) (Ferguson, J., dissenting).

2. The Legislative History Justification.—Paternostro and *Stark* also demonstrate one of the most common justifications for the exculpatory no doctrine; courts have looked to the legislative history of the statute and have determined that exculpatory denials were not the type of false statements Congress intended § 1001 to criminalize.[56] The notation in *Paternostro* that the defendant's statements were unrelated to a claim against the Government is a recognition of the fact that § 1001 was originally an attempt to curtail false claims against the Government.[57] Furthermore, by looking to the 1934 amendment, both the *Paternostro* and *Stark* courts concluded that Congress intended for § 1001 to reach only affirmative, positive statements which have the potential to pervert government functions.[58]

This second conclusion, upon which many courts in favor of the exculpatory no exception have relied, is derived from language found in *United States v. Gilliland*.[59] In *Gilliland*, the defendant argued that because the statute is limited only to matters in which the Government has some financial or proprietary interest, § 1001 did not criminalize his false statements concerning the amount of petroleum produced from certain wells.[60] The Supreme Court disagreed and stated that the 1934 amendment which eliminated the words "cheating" and "swindling" ensured that § 1001 reaches not only false statements made to support monetary claims against the Government, but non-monetary frauds as well.[61] The Court went on to state that the congressional intent of the 1934 amendment was "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."[62]

Thus, taking the language of *Gilliland*, courts have concluded that the kind of statements the statute proscribes are only those which might support fraudulent claims against the Government and those which potentially pervert government func-

56. *Paternostro*, 311 F.2d at 305; *Stark*, 131 F. Supp. at 205.
57. *See supra* note 22.
58. *Paternostro*, 311 F.2d at 305; *Stark*, 131 F. Supp. at 206.
59. 312 U.S. 86 (1941).
60. *Gilliland*, 312 U.S. at 91.
61. *Id.* at 93.
62. *Id.*

tions.[63] These courts conclude further that an "exculpatory no" is not that sort of statement.[64]

The argument that Congress did not intend to criminalize false denials of guilt when enacting § 1001 may be the strongest offered in support of the exculpatory no exception. In fact, a responsive exculpatory denial is almost opposite to the sort of false statements made on regulatory reports which prompted the statute.[65] Certainly, the statute's "broad language reaches far beyond [its] original concern."[66]

Furthermore, there is some evidence, although inconclusive, that Congress specifically rejected an application of § 1001 to responsive, oral statements. For example, during the 1934 amendment debate, a concerned Representative McKeown stated: "It is an unheard-of proposition to try to convict a man for a mere statement unless he has testified under oath."[67] Likewise, the Senate also appeared to be concerned with more affirmative types of false statements and "understood that the purpose of the legislation was to deter those individuals 'hovering over every department of the Government like obscene harpies, like foul buzzards' . . . ."[68] These statements certainly do not settle the issue of congressional intent, but they do indicate that Congress was much more concerned with false statements actively submitted to the government rather than passive, responsive denials.

In addition, an analysis of the legislative history would be incomplete without a discussion of what Congress has *not* done concerning § 1001. Since the official creation of the doctrine in 1962, a majority of courts have embraced the exception while

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63. *See* United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972); *see also* United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974) (en banc) ("Perversion of a governmental body's function is the hallmark of a § 1001 offense.").

64. *Bedore*, 455 F.2d at 1111; *Lambert*, 501 F.2d at 946.

65. *See supra* text accompanying notes 21-25. *But cf. Gilliland*, 312 U.S. at 95 (noting that § 1001 is not limited by the fact that the Secretary of the Interior initiated the legislation); *see also* United States v. Rodgers, 466 U.S. 475, 480 (1984) (stating that § 1001 was designed to protect "myriad governmental activities").

66. Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273, 1274 (1990).

67. 78 CONG. REC. 3724 (1934).

68. United States v. Yermian, 468 U.S. 63, 81 (1984) (citing 78 CONG. REC. 2858 (1934)).

Congress has remained silent for almost four decades.[69] While it may be presumptuous to characterize congressional silence as ratification of the doctrine,[70] in light of the 1996 amendment, congressional silence may be telling. Just like the exculpatory no doctrine, Congress failed to comment on the judicial function exception until the Court rejected it in *Hubbard*.[71] Thus, the rejection of the exculpatory no doctrine in *Brogan* may, too, open another chapter of the statute's legislative history.[72]

3. The Fifth Amendment Justification.—In addition to the legislative history justification for the exculpatory no exception, some courts have argued that § 1001 read literally comes "uncomfortably close" to a Fifth Amendment violation.[73] Recognizing that the Fifth Amendment does not give one a privilege to lie,[74] many courts have asserted there is an inherent tension with applying § 1001 to false denials of guilt.[75] In fact, some courts have even declared that the exculpatory no exception applies only when a truthful answer would have incriminated the declarant.[76]

The tension often results from the circumstances in which many exculpatory no's are made. For example, in many cases defendants are informally interviewed by government agents who do not warn citizens of their right to remain silent or the possibility of criminal prosecution if they choose to lie.[77] In ad-

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69. Erica S. Perl, United States v. Rodriguez-Rios: *The Fifth Circuit Says "Adios!" to the "Exculpatory No" Doctrine*, 66 TUL. L. REV. 621, 630 (1994).

70. Brogan and the National Association of Criminal Defense Lawyers argued that congressional silence amounted to ratification of the doctrine. Brief for Petitioner at 20-25, Brogan v. United States, 118 S. Ct. 805 (1998) (No. 96-1579); Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners at 11-18, Brogan v. United States, 118 S. Ct. 805 (1998) (No. 96-1579). The concurrence in *Brogan* rejected this proposition. Brogan v. United States, 118 S. Ct. 805, 816-17 (1998) ("I do not divine from the Legislature's silence any ratification of the 'exculpatory no' doctrine advanced in lower courts.") (Ginsburg, J., concurring).

71. *See supra* Part I.A.

72. *See infra* Part III.

73. United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1947) (en banc).

74. Bryson v. United States, 396 U.S. 64, 72 (1969).

75. United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Medina de Perez, 799 F.2d 540, 547 (9th Cir. 1986).

76. United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978).

77. *See, e.g.*, United States v. Dempsey, 740 F. Supp. 1299, 1306 (N.D. Ill. 1990); United States v. Armstrong, 715 F. Supp. 242, 245 (S.D. Ind. 1989).

dition, because defendants may not even be informed that they are the subject of an investigation, thus making their awareness of a Fifth Amendment privilege unlikely, and because silence is an unnatural response to an accusation, courts find a literal application of § 1001 in conflict with the spirit of the Fifth Amendment.[78]

For example, in *United States v. Russo*,[79] recognizing that the Fifth Amendment does not confer a privilege to lie, the court suggested that the Fifth Amendment counsels for a realistic approach.[80] In *Russo*, without knowledge that he was under investigation for insurance fraud, the defendant was informally interviewed at work and was asked to relate facts he had previously reported in a police report.[81] The court noted that "[a]n individual confronted with a federal inquiry, prior to notice that he is the subject of a criminal investigation, may well neither confess nor remain silent."[82] Likewise, in *United States v. Armstrong*[83] the defendant made a false statement to an FBI agent but only in an informal interview where he was repeatedly assured that he was not the subject or the target of an investigation.[84] Thus, while the *Russo* and *Armstrong* courts did not propose that the Fifth Amendment compels the application of the exculpatory no doctrine, they asserted that the situations in which exculpatory no's arise at least implicate its principle.

Nonetheless, the "Fifth Amendment never protects falsehoods, even if an incriminating response is apparently required by law."[85] Ultimately, therein lies the fatal problem with the Fifth Amendment justification for the exculpatory no doctrine. Maybe then, the complaint with a literal application of § 1001 should be more accurately characterized as tension with principles of fundamental fairness in an adversarial system of justice,

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78. United States v. Russo, 699 F. Supp. 1344, 1346-47 (N.D. Ill. 1988).

79. 699 F. Supp. 1344 (N.D. Ill. 1988).

80. *Russo*, 699 F. Supp. at 1346-47.

81. *Id.* at 1345; *cf.* United States v. King, 613 F.2d 670, 675 (7th Cir. 1980) (holding that the exculpatory no defense is unavailable when defendant was provided *Miranda* warnings, and he knew that he was under investigation).

82. *Russo*, 699 F. Supp. at 1346.

83. 715 F. Supp. 242 (S.D. Ind. 1989).

84. *Armstrong*, 715 F. Supp. at 245.

85. Birch, *supra* note 66, at 1286 (citing Bryson v. United States, 396 U.S. 64, 72 (1969)).

not specifically with the Fifth Amendment. Justice Ferguson capsulated this principle in his dissent in *United States v. Goldfine* by writing, "Americans traditionally have assumed that without fear of sanctions they could deny guilt and wait for the government to prove otherwise."[86] Thus, the argument is that a literal application of § 1001 tips the scales in favor of the Government, almost displacing the burden of proof of guilt on the defendant.

4. The Prosecutorial Abuse Justification.—In the same vein, some courts became distressed by the powerful tool a literal application of § 1001 provided prosecutors. Thus, many courts recognizing the exculpatory no exception relied on the potential for prosecutorial abuse as an additional justification for the doctrine.[87]

One concern is that § 1001 read literally would allow the Government to manufacture convictions.[88] For example, in order to obtain a § 1001 conviction, a government agent could take advantage of a citizen's ignorance of his or her Fifth Amendment privilege by asking questions to which he or she already knows the answer.[89] This sort of abuse occurred in *United States v. Tabor*[90] where an I.R.S. agent questioned a notary public.[91] The agent knew that two signatures on a particular document were forged, and neither person appeared before Tabor; however, he continued to question her on the issues.[92] When she denied wrongdoing, she was prosecuted under § 1001.[93] The exculpatory no defense, however, saved her from criminal liability. The court held that the exculpatory no doctrine particularly applied where the agent "acting in a police role, aggressively sought a statement from a person under suspicion and not warned."[94]

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86. United States v. Goldfine, 538 F.2d 815, 822 n.2 (9th Cir. 1976).
87. Birch, *supra* note 66, at 1275-78.
88. *Id.*
89. *Id.* at 1278.
90. 788 F.2d 714 (11th Cir. 1986).
91. *Tabor*, 788 F.2d at 715-16.
92. *Id.*
93. *Id.* at 716.
94. *Id.* at 719.

5. The Status of the Exculpatory No Doctrine Before Brogan.—

a. The Parameters of the Exception

Prior to *Brogan*, a majority of circuits had adopted the exculpatory no doctrine in some form or another. In fact, while varying in application and degree of acceptance, the doctrine had been recognized by the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[95] The Eleventh, Ninth, Eighth, and Fourth Circuits were most committed to the doctrine in that they *explicitly* adopted an exculpatory no exception.[96] In fact, the Ninth Circuit enumerated a five-part test,[97] which the Fourth[98] and Eighth[99] Circuits subsequently adopted, to determine if a defendant's statement falls within the exception. This test finds that a false statement does not violate § 1001 when: (1) it was not made in pursuit of a claim to a privilege or a claim against the Government; (2) it was made in response to inquiries initiated by a federal agency or department; (3) it did not pervert the basic functions entrusted by law to the agency; (4) it was made in the context of an investigation rather than a routine exercise of administrative responsibility; and (5) it was made in a situation in which a truthful answer would have incriminated the declarant.[100]

Falling short of explicit adoption, the First, Seventh, and Tenth Circuits also indicated support for the exception in dicta. For example, the First Circuit in *United States v. Chevoor*[101] did not have the opportunity to review whether statements made to FBI agents escaped liability under the exculpatory no doctrine since prosecutors charged the defendant under 18 U.S.C. § 1623 for repeating those statements to a grand jury.[102] However, the court indicated that the earlier statements would

95. *See* cases cited *supra* note 12.

96. United States v. Taylor, 907 F.2d 801, 805-06 (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, 544 (9th Cir. 1986); *Tabor*, 788 F.2d at 719.

97. *Medina de Perez*, 799 F.2d at 544-46 & n.5.

98. *Cogdell*, 844 F.2d at 183.

99. *Taylor*, 907 F.2d at 805-06.

100. *Medina de Perez*, 799 F.2d at 544-46 & n.5.

101. 526 F.2d 178 (1st Cir. 1975).

102. *Chevoor*, 526 F.2d at 183-84.

have been protected by the exculpatory no exception by placing emphasis on the fact that Chevoor did not initiate government contact and he only denied knowledge of criminal activity in an informal interview.[103] In *United States v. King*,[104] the Seventh Circuit also embraced the doctrine in dicta but appeared to require a defendant to meet an additional factor not set out in the Ninth Circuit test.[105] In particular, the court suggested that to come within the exception, the declarant must be unaware that he or she is under investigation at the time of making the false statement.[106] The Tenth Circuit also recognized the exception in *United States v. Fitzgibbon*,[107] but declined to apply it to the defendant stating that his situation did not fit within the "mold" of the doctrine.[108] Specifically, the court appeared to require that the false statement be made in a non-administrative context and a truthful answer be incriminating.[109] Fitzgibbon failed in both respects because he falsely stated on a customs form, an administrative transaction, that he was not bringing more than $5,000.00 into the United States, and a truthful response would not have incriminated him.[110]

The Third, Sixth, and D.C. Circuits had neither rejected nor adopted the exception prior to *Brogan*.[111] Of these circuits, the District of Columbia Circuit appeared the most likely to approve the exculpatory no exception,[112] while the Sixth Circuit appeared the least likely to adopt the doctrine.[113] Until the Second Circuit's decision in *United States v. Wiener*[114] which sent *Brogan* to the Supreme Court, the Fifth Circuit had been the only circuit expressly to reject the doctrine. In *United States v.*

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103. *Id.*
104. 613 F.2d 670 (7th Cir. 1980).
105. *King*, 613 F.2d at 674.
106. *Id.*
107. 619 F.2d 874 (10th Cir. 1980).
108. *Fitzgibbon*, 619 F.2d at 880.
109. *Id.* at 880-81.
110. *Id.*
111. United States v. LeMaster, 54 F.3d 1224, 1229-30 (6th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996); United States v. Barr, 963 F.2d 641, 647 (3d Cir. 1992); United States v. White, 887 F.2d 267, 273 (D.C. Cir. 1989).
112. *See White*, 887 F.2d at 273-74.
113. *See* United States v. Steele, 933 F.2d 1313, 1320 (6th Cir. 1991).
114. 96 F.3d 35 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998).

Rodriguez-Rios,[115] the Fifth Circuit overruled *Paternostro* by squarely addressing the justifications for the doctrine and opting to remain true to the plain language of the statute.[116] The court stated that the exception defies the legislative history because the statute's history demonstrated that "'when Congress wish[es] to restrict the scope of § 1001, . . . it [does] . . . so explicitly.'"[117] The court noted further that the Fifth Amendment justification fails because "an outright lie is not protected."[118]

b. The Trend to Reject the Doctrine: United States v. Wiener

The above section demonstrates that there were differences in the doctrine's application even before *Brogan*.[119] In addition to the varying degrees of acceptance among the courts, there appeared to be a trend within the circuits to reject the doctrine altogether.

Only two years after the Fifth Circuit's rejection in *Rodriguez-Rios*, the Second Circuit rejected the doctrine in *United States v. Wiener* and ultimately sent the issue to the Supreme Court.[120] In *Wiener*, Roman and Brogan were union officers who received cash payments in 1988 from JRD Corporation, a real estate company whose employees were represented by the union.[121] In 1993, federal agents of the Department of Labor and the Internal Revenue Service came to the defendants' homes to question them.[122] During the visit to his home, the agents told Brogan that they were seeking his cooperation in an investigation and if he chose to cooperate, he should retain an attor-

115. 14 F.3d 1040 (5th Cir. 1994) (en banc).

116. *Rodriguez-Rios*, 14 F.3d at 1049.

117. *Id.* at 1048 (citation omitted).

118. *Id.* at 1049.

119. In addition to the Seventh Circuit's requirement that a declarant be unaware that he is under investigation, some courts implicitly held that to fall within the exception the statement must be oral and unsworn. United States v. Chevoor, 526 F.2d 178, 184 (1st Cir. 1975); United States v. Armstrong, 715 F. Supp. 242, 243 (S.D. Ind. 1989). Furthermore, the fifth factor of the Ninth Circuit's test has been inconsistently applied. Jennifer C. Bier & David Hibey, *False Statements*, 34 AM. CRIM. L. REV. 567, 579 n.69 (1997).

120. 96 F.3d 35, 38-40 (2d Cir. 1996).

121. *Wiener*, 96 F.3d at 36.

122. *Id.*

ney.[123] After eliciting background information, the agents asked him whether he had received any cash or gifts from JRD, and Brogan responded, "no."[124] An agent testified that after this answer, they informed Brogan that lying to federal agents in the course of an investigation was a crime and that they had obtained records of JRD indicating that his answer was false.[125] The interview concluded without Brogan modifying his answers, and the account of Roman's interview was similar.[126] Both defendants were convicted of making false statements within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001.[127] Brogan claimed that his false statements fell within the exculpatory no exception to § 1001.[128] The Second Circuit, while agreeing that Brogan's statements fell within the exception as recognized by other circuits, held that the exculpatory no doctrine is not a viable defense under § 1001.[129] The court dismissed the doctrine much like the Fifth Circuit did in *Rodriguez-Rios* finding that neither the legislative history nor the Fifth Amendment supported an exception to the statute.[130]

Addressing the legislative history justification, the court stated that the history of § 1001 does not demonstrate congressional intent to narrow the scope of the statute; instead, "the long-term trend is one of expansion."[131] The court also rejected *Paternostro*'s tailoring of § 1001 only to false statements that pervert government functions.[132] The court stated such a "con-

123. *Id.*
124. *Id.*
125. *Id.*
126. *Wiener*, 96 F.3d at 36.
127. *Id.*
128. *Id.*
129. *Id.* at 37. Before *Wiener*, the Second Circuit had neither rejected nor accepted the doctrine. *Id.* Instead, the court previously found the doctrine inapplicable to the facts before it. *See, e.g.*, United States v. Ali, 68 F.3d 1468, 1474 (2d Cir. 1995) (defendant offered more than a denial in his knowing and affirmative misrepresentation); United States v. Cervone, 907 F.2d 332, 343 (2d Cir. 1990) (defendant's denial made "in the context of a wide-ranging and discursive interview with agents who had identified themselves"); United States v. Capo, 791 F.2d 1054, 1069 (2d Cir. 1986) (defendant's response was "affirmative misrepresentation"), *rev'd in part on other grounds*, 817 F.2d 947 (2d Cir. 1987) (en banc). In *Wiener*, however, the court emphatically declared, "[o]ur flirtation with the 'exculpatory no' doctrine is over." *Wiener*, 96 F.3d at 37.
130. *Wiener*, 96 F.3d at 37-39.
131. *Id.* at 39.
132. *Id.* at 38; *see Paternostro*, 311 F.2d 298, 305 (5th Cir. 1962); *see also supra*

struction[] amount[s] to little more than a preference for a narrower over broader statute" which lies within the discretion of Congress.[133]

The court also declared that the Fifth Amendment fails to "lend[] [any] weight" to the exculpatory no doctrine.[134] With little discussion, the court simply stated that "the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent."[135]

However, the court pointed out that its rejection of the exculpatory no doctrine does not mandate that every exculpatory "no" violate § 1001. In particular, the court emphasized that § 1001 still requires one to knowingly and willfully make a false statement.[136] Concerning the willfulness requirement, the court noted *United States v. Ratzlaf*,[137] in which the Supreme Court held that the word "willfully" under 31 U.S.C. § 5322(a), which deals with structuring cash transactions to avoid a reporting requirement, requires one to act with knowledge that his conduct was illegal.[138] Although the court stated that it was not declaring knowledge of unlawfulness an element of § 1001, it implied that there might be circumstances where a "mere denial of criminal responsibility would be [in]sufficient to prove" willfulness.[139] Likewise, the court also left open the possibility that a jury could conclude that an exculpatory denial made under conditions "indicating surprise or other lack of reflection" did not violate § 1001 because the requisite criminal intent may not be present.[140]

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text accompanying note 58 (discussing *Paternostro*).

133. *Wiener*, 96 F.3d at 39.

134. *Id.*

135. *Id.*

136. *Id.* at 40.

137. 510 U.S. 135 (1994).

138. *Wiener*, 96 F.3d at 40 (citing *Ratzlaf*, 510 U.S. at 137).

139. *Id.* (citing United States v. Grotke, 702 F.2d 49, 52 (2d Cir. 1983)). *But see* United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.21 (5th Cir. 1994) (en banc) (distinguishing § 1001 and 31 U.S.C. § 5322(a) because the latter requires not only willfulness, but purpose of evading reporting requirements).

140. *Wiener*, 96 F.3d at 40.

III. THE SUPREME COURT'S RULING IN *BROGAN*

Thus, with two circuits rejecting the exculpatory no doctrine, the Supreme Court granted certiorari to Brogan's appeal to determine if an exception for criminal liability exists under 18 U.S.C. § 1001 when the false statement consists of a mere denial of wrongdoing.[141] Justice Scalia, writing for the majority in *Brogan v. United States*, declared that the plain language of § 1001 does not permit the exculpatory no exception.[142] Scalia wrote, "Courts 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."[143]

A. Disposition of the Legislative History Justification

While the Court did not address the legislative history justification head on,[144] it did address a similar argument proposed by Brogan. First, Brogan argued that § 1001 only prohibits false statements that pervert governmental functions.[145] Second, Brogan asserted that an "exculpatory no" does not rise to a level of perversion.[146] The Court took issue with both premises and quickly dismissed the second argument: an exculpatory denial cannot pervert the investigative function of the Government.[147] It stated that "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."[148]

At the same time, the Court addressed the third factor of the Ninth Circuit's five-part test which parallels Brogan's argument and requires that the statement not pervert the basic

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141. *See* Brogan v. United States, 118 S. Ct. 805, 807-08 (1998).

142. *Brogan*, 118 S. Ct. at 811-12.

143. *Id.*

144. The Court has extensively reviewed the legislative history in other contexts and has found that there is no apparent congressional intent to restrict the statute. *See, e.g.*, United States v. Yermian, 468 U.S. 63, 70-75 (1984); United States v. Bramblett, 348 U.S. 503, 504-07 (1955); United States v. Gilliland, 312 U.S. 86, 90-94 (1941).

145. *Brogan*, 118 S. Ct. at 808.

146. *Id.*

147. *Id.* at 808-09.

148. *Id.* at 809

Government functions.[149] The Ninth Circuit has suggested that an "exculpatory no" does not impair or pervert investigative functions because "good" investigators will not rely on an exculpatory denial of guilt.[150] The Court responded that this assumption would require that the existence of a crime depend on the astuteness of a government investigator.[151]

More importantly, the Court rejected entirely the idea that § 1001 punishes only false statements that pervert Government functions. Like many courts adopting the exculpatory no doctrine, Brogan relied on the statement in *Gilliland* that the purpose of the 1934 amendment was "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."[152] The Court asserted that Brogan was attempting to elevate this dictum to a holding; and even if that were the purpose of the statute, "the reach of a statute often exceeds the precise evil [sought] to be eliminated."[153]

B. The Disposition of the Fifth Amendment Justification

The Court, like the lower court in *Wiener*, also dismissed the argument that the spirit of the Fifth Amendment required an application of the exculpatory no doctrine.[154] Brogan argued that a literal application of § 1001 places "a cornered suspect" in "a cruel trilemma" of incriminating himself, being charged with a § 1001 felony, or remaining silent when his silence would be considered a tacit admission of guilt and later used against him at trial.[155] Brogan also stated that the silence option was often

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149. *Id.; see also supra* text accompanying note 100 (discussing the Ninth Circuit's test).

150. *See* United States v. Medina de Perez, 799 F.2d 540, 546 (9th Cir. 1986) (indicating that the Ninth Circuit applies this rationale only in a post-arrest situation). *But see* United States v. Equihua-Juarez, 851 F.2d 1222, 1226 (8th Cir. 1988) (stating that the "'exculpatory no' exception . . . is not limited to situations where an individual is being formally interrogated").

151. *Brogan*, 118 S. Ct. at 809.

152. United States v. Gilliland, 312 U.S. 86, 92 (1941).

153. *Brogan*, 118 S. Ct. at 809.

154. *Id.* at 810.

155. Brief for Petitioner at 9-10, Brogan v. United States, 118 S. Ct. 805 (1998) (No. 96-1579).

"illusory" because a citizen may not even know that he has the right to remain silent.[156] The court stated that although the predicament may "tug[] at the heart," the Fifth Amendment only confers the privilege to remain silent, not to lie.[157] In addition, the court noted that the fear that silence may be later used against a person, either as substantive evidence or merely for impeachment purposes, "does not exert a form of pressure that exonerates an otherwise unlawful lie."[158] The Court also found implausible the argument that one does not know of his or her right to remain silent in this day and age.[159]

C. Disposition of Potential for Prosecutorial Abuse

The Court disposed of the last justification for the exculpatory no doctrine, the potential for prosecutorial abuse, in a rather cursory fashion. The majority alluded only to the possibility that prosecutors could "pile on" offenses, that is "punishing the denial of wrongdoing more severely than the wrongdoing itself."[160] The Court noted that even if the statute is harsh and permits overreaching, the enactment of such a statute lies within the province of Congress.[161] Furthermore, the Court asserted that Brogan was "unable to demonstrate [] any history of prosecutorial excess," and that it is unlikely that the exculpatory no exception would correct such overreaching.[162]

Ironically, as Justice Ginsburg's concurrence demonstrates, the potential for prosecutorial abuse under § 1001 may have been the issue which gave her the most trouble in rejecting the doctrine.[163] While she also determined that the broad language of § 1001 could not sustain an exculpatory no exception, she wrote separately "to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to

156. *Id.*
157. *Brogan*, 118 S. Ct. at 810.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Brogan*, 118 S. Ct. at 810.
163. *Id.* at 814-15 (Ginsburg, J., concurring).

manufacture crimes" and to note how "far removed" an exculpatory no is from the type of falsehoods § 1001 originally sought to prohibit.[164]

Ginsburg focused on the potential for the Government to manufacture crimes either by questioning a defendant on an issue to which agents already know the answer or by eliciting a false denial of guilt even when the statute of limitations has run on the underlying conduct.[165] Ginsburg then went on to provide examples, most notably *United States v. Tabor*,[166] where prosecutors arguably abused the statute by engaging in these tactics.[167] Ginsburg even noted that Brogan's situation was illustrative.[168]

In addition, while not emphatically embracing the proposition that § 1001 only reaches those false statements that "pervert" government functions, the concurrence also noted that false denials of guilt made during informal interviews are far removed from the type of false statements toward which the 1934 amendment of § 1001 was directed.[169]

Ginsburg also made clear that the majority did not hold that all exculpatory denials of guilt made to government investigators are criminalized by § 1001.[170] In fact, she mentioned some of the possibilities that the Second Circuit originally mentioned, namely, whether willfulness requires that one must know that it is unlawful to make such a false statement and whether a mere exculpatory denial is sufficient to prove knowledge.[171] Finally, she noted that after the 1996 amendment, a false statement must be material to fall within § 1001's reach.[172]

The concurrence, in essence, is a wake-up call to Congress. Even with the knowledge, willfulness, and materiality require-

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164. *Id.* at 812.
165. *Id.* at 812-14.
166. 788 F.2d 714 (11th Cir. 1986).
167. *Brogan*, 118 S. Ct. at 812-13 (citing United States v. Goldfine, 538 F.2d 815, 820 (9th Cir. 1976); United States v. Stoffey, 279 F.2d 924, 927 (7th Cir. 1960); United States v. Dempsey, 740 F. Supp. 1299, 1306 (N.D. Ill. 1990)).
168. *Id.* at 812.
169. *Id.* at 814.
170. *Id.* at 815.
171. *Id.; see supra* text accompanying notes 136-40.
172. *Brogan*, 118 S. Ct. at 816 (citing False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459).

ments of the statute, Ginsburg appears to remain concerned that an overzealous prosecutor could abuse the statute.[173] Ginsburg almost invites swift action by pointing out Congress's almost immediate reaction to the *Hubbard* decision.[174]

Justices Stevens and Breyer's dissent shared the concern for prosecutorial abuse and offered another reason to embrace the exculpatory no doctrine.[175] Stevens avoided defending the traditional justifications for the exculpatory no doctrine and simply stated that it was certainly within the Court's power and rules of statutory construction to avoid a literal interpretation of a statute.[176] Stating "communis opinio is of good authoritie in law" from Sir Edward Coke, Stevens counseled for a greater respect for the majority of circuits which had embraced the doctrine for decades.[177]

IV. THE CONSEQUENCES OF *BROGAN*

Brogan's rejection of the exculpatory no doctrine should come as no surprise. The Court consistently read § 1001 broadly and has refused to place any meaningful restrictions on the statute.[178] In doing so, the Court has relied heavily on the statutory language of § 1001,[179] and the statute clearly states that it covers "any" false statement.[180] This adherence to the statutory language appears to be of primary importance; one must remember that in *United States v. Hubbard*[181] the Court was willing, according to the dissent, to "disrespect[] the traditionally stringent adherence to stare decisis"[182] in order to hold that

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173. *Id.* at 815-16.

174. *See id.* at 816.

175. *See id.* at 817-18 (Stevens & Breyer, JJ., dissenting).

176. *Id.* at 817.

177. *Brogan*, 118 S. Ct. at 817-18.

178. *See* cases cited *supra* note 3; *see also* Bryson v. United States, 396 U.S. 64, 72 (1969) (holding that § 1001 applies to one who makes a false statement even if the question prompting the response was illegally propounded).

179. *See* United States v. Rodgers, 466 U.S. 475, 476 (1984).

180. 18 U.S.C.A. § 1001(a)(2) (West Supp. 1998); *see also* United States v. Gonzales, 520 U.S. 1, 5 (1997) (stating that § 1001 covers false statements of whatever kind).

181. 514 U.S. 695 (1995).

182. *Hubbard*, 514 U.S. at 718 (Rehnquist, C.J., & O'Connor & Souter, JJ., dissenting).

statute meant what it said, i.e., the statute only reaches government agencies or departments.[183]

Further, the Court has remained unpersuaded by policy arguments in favor of restricting the statute's reach. For example, in *Yermian* the Court expressed little sympathy concerning the defendant's argument that absent actual knowledge of government jurisdiction, § 1001 becomes a "trap for the unwary."[184] Further, the court disregarded the dissent's suggestion that the *Yermian* holding would make criminal "false statements privately made to a neighbor if the neighbor then uses those statements in connection with his work for a federal agency."[185]

Thus, while *Brogan*'s holding may have been expected, the decision remains unsettling. In fact, the *Brogan* dissent raises an interesting point. While the trend among the circuits did seem to be turning, a majority of courts still applied the exception in some form prior to *Brogan*.[186] Furthermore, while illustrating the fatal flaws of the doctrine, *Brogan* does not address the ultimate policy concern at the heart of the exculpatory no doctrine: it is unfair to "felonize" a denial of guilt made in response to government investigators in a situation where the person is not entitled to a *Miranda* warning or a warning that such conduct is criminal.[187] While such conduct may be immoral and undesirable, it is still understandably human.[188] Certainly, even after *Brogan*, that concern is still present in the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[189]

So the question then becomes, "Now what?" Some of the possibilities for dealing with the policy concerns of a literal application of § 1001 have previously been introduced. For example, just as the concurrence in *Brogan* and the Second Circuit pointed out in *Wiener*, a defendant may be able to argue that

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183. *Id.* at 715.

184. United States v. Yermian, 468 U.S. 63, 74-75 (1984).

185. *Yermian*, 468 U.S. at 82.

186. *Brogan*, 118 S. Ct. at 817 (Stevens & Breyer, JJ., dissenting).

187. *See id.* at 814-15.

188. *Id.* at 812 (Ginsburg, J., concurring) (discussing United States v. Tabor, 788 F.2d 714, 716-19 (11th Cir. 1986)).

189. *See* cases cited *supra* note 12.

because of the type of interview conducted by a government investigator, such as a surprise visit at the defendant's home as in Brogan's case, his or her exculpatory no was made without due reflection to meet the knowledge element of a § 1001 offense.[190]

There is also the possibility for a *Ratzlaf*[191] argument: willfulness under § 1001 requires that one know that falsely denying guilt to the Government is criminal. However, even with Ginsburg's mention of this argument, this avenue seems unlikely. *Ratzlaf* dealt with 31 U.S.C. § 5322(a), which requires banks and financial institutions to file reports with the Government whenever a cash transaction exceeds $10,000.[192] Under 31 U.S.C. § 5324, it is illegal to structure transactions to avoid this reporting requirement, and under § 5322 one must "willfully" violate the antistructuring law to be subject to criminal liability.[193] The *Ratzlaf* Court held that to act willfully under the statute a person has to do more than purposely structure his or her transactions; rather, he or she has to know that such structuring is illegal.[194]

However, the Court's reasoning in *Ratzlaf* likely will be found inapplicable in the § 1001 context. In *Ratzlaf*, the Court grounded its requirement of specific intent to commit an illegal act on the fact it is "not inevitably nefarious" to structure one's currency and then went on to give examples of situations in which a person with no ill will might do so.[195] Thus, unpersuaded that structuring cash transactions in less than $10,000 increments is "inherently 'bad,'"[196] the Court stated that "the 'willfulness' requirement mandates something more."[197] However, unlike financial structuring, lying is inherently bad. Even if a defendant is unaware that lying to a government agent during an investigation is a criminal act, he or she is on notice that such conduct is immoral. Thus, a *Ratzlaf* defense may prove

190. *Brogan*, 118 S. Ct. at 815; *see* United States v. Wiener, 96 F.3d 35, 40 (2d Cir. 1996).

191. United States v. Ratzlaf, 510 U.S. 135, 149 (1994).

192. *Ratzlaf*, 510 U.S. at 136.

193. *Id.* at 136.

194. *Id.* at 146.

195. *Id.* at 144-45.

196. *Id.* at 146.

197. *Ratzlaf*, 510 U.S. at 136-37.

difficult under § 1001.

The materiality requirement may, however, evolve to be more important for defendants after the rejection of the exculpatory no exception and in light of the 1996 amendment. The 1996 amendment expressly included the materiality requirement in all three types of conduct prohibited under § 1001.[198] Before 1996, only the first type of conduct, falsifying, concealing or covering up a fact by trick, scheme or device, contained an express materiality requirement.[199] Nonetheless, every circuit except the Second held that to constitute "making a false statement" under the statute, the statement had to be material.[200] These courts have defined materiality as having the "'natural tendency to influence, or [being] capable of affecting or influencing'" the Government.[201] No actual influence or reliance on the Government's part is necessary; the Government need only prove that the statement had the potential to influence its actions or decisions.[202] With such an expansive rule of materiality, a defendant making an exculpatory no may have difficulty asserting that his statement is immaterial; but in situations in which "prosecutorial abuse" is present, the materiality requirement might become helpful. For example, if the Government already knows the answer to the question posed and is merely trying to elicit a false denial of guilt to obtain a § 1001 conviction, there is no way the defendant's answer, whether true or false, could influence a Government agency. A similar sort of argument could be offered if the Government is merely trying to "revive" an offense for which the statute of limitations has already run.

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198. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459; *see also supra* note 2.

199. *See* 18 U.S.C. § 1001 (1976).

200. United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987); United States v. Greber, 760 F.2d 68, 72 (3d Cir. 1985); United States v. David, 83 F.3d 638, 640 (4th Cir. 1996); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 (5th Cir. 1994); United States v. Steele, 933 F.2d 1313, 1318-19 (6th Cir. 1991); United States v. Brantley, 786 F.2d 1322, 1326 (7th Cir. 1986); United States v. Voorhees, 593 F.2d 346, 349 (8th Cir. 1979); United States v. Talkington, 589 F.2d 415, 416 (9th Cir. 1978); Gonzales v. United States, 286 F.2d 118, 122 (10th Cir. 1960); United States v. White, 27 F.3d 1531, 1534 (11th Cir. 1994).

201. *Corsino*, 812 F.2d at 30 (quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976)).

202. *Id.* at 31.

The last possible consequence of the Court's rejection of the exculpatory no doctrine lies within the discretion of Congress. If it is true that Congress could not have "intended § 1001 to cast so large a net,"[203] then congressional reaction to *Brogan* is possible. In fact, as noted earlier, Justice Ginsburg invites such action.[204]

Furthermore, there is no doubt Congress is aware of the doctrine. As Justice Ginsburg noted, while no changes to the statute concerning the exculpatory no doctrine have been enacted, "an array of recommendations has been made to refine § 1001."[205] For example, in 1980 the House Judiciary Committee proposed that the false statement provision only apply if the statements are in writing or are recorded with the speaker's knowledge.[206] In addition, under this proposal, unsworn oral statements would not be criminalized unless they entailed misprision of a felony, false accusations of another, or concerned an emergency.[207] Also in 1981, the Senate Judiciary Committee also reported proposed changes to § 1001.[208] These changes would have essentially recognized a limited version of the exculpatory no defense.[209] The defense would have been available to those who falsely denied guilt to a law enforcement officer, with no other affirmative falsehoods, during the course of an investigation.[210] While it may have been due to the lack of necessity in light of the popularity of the doctrine among the circuits, neither proposal was enacted.[211]

Now, will Congress react to *Brogan*? Possibly, but considering the statute has not been restricted in any significant manner since 1918, it is questionable that Congress will severely limit § 1001 even if it directs attention to the statute. Then again, as demonstrated by the 1996 amendment, Congress does not shy

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203. Brogan v. United States, 118 S. Ct. 805, 813 (1998) (Ginsburg, J., concurring).

204. *Brogan*, 118 S. Ct. at 815-16 (Ginsburg, J., concurring); *see also supra* text accompanying notes 173-74.

205. *Id.* at 816.

206. *Id.* (citing H.R. REP. No. 96-1396, at 181-83 (1980)).

207. *Id.*

208. *Id.* (citing S. REP. No. 97-307, at 407 (1981)).

209. *Brogan*, 118 S. Ct. at 816 (Ginsburg, J., concurring).

210. *Id.*

211. *Id.*

away from what it considers an incorrect interpretation of § 1001. So if the dissenting Justice Stevens is correct, and "Congress did not intend to make every 'exculpatory no' a felony,"[212] then § 1001's legislative history is far from over.

V. CONCLUSION

After thirty-six years of operation, the exculpatory no doctrine no longer remains a viable defense under § 1001. Americans can no longer assume without fear that they may deny guilt and wait for the Government to prove otherwise. While *Brogan* has dismantled and exposed flaws in the arguments that have supported the doctrine, a literal application of § 1001 still appears objectionable. It may be immoral to lie, but should a denial of guilt made in response to an incriminating question during an informal interview be a felony? As a policy matter, fundamental fairness and a true balance of an adversarial system of justice cautions one to answer "no."

Admittedly, this is amorphous ground for the Supreme Court of the United States to stand upon. Therefore, *Brogan* was inevitable. But while the Court may have had "nothing to support the 'exculpatory no' doctrine except the many Court of Appeals decisions that have embraced it,"[213] this "nothing" at least demonstrates that as a policy matter many think that Brogan should have had a defense. Now, such a defense will not lie with the courts.[214] "Congress alone can provide the appropriate instruction."[215]

Lisa Michelle Darnley

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212. *Id.* at 817 (Stevens & Breyer, JJ., dissenting).

213. *Id.* at 811.

214. Crooks v. Harrelson, 282 U.S. 55, 60 (1930) ("Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.").

215. *Brogan*, 118 S. Ct. at 816.