Brogan v. United States “No” Means “No Defense”: Brogan's Elimination of the “Exculpatory No” Doctrine

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**Brogan v. United States** "No" Means "No Defense": **Brogan's Elimination of the "Exculpatory No" Doctrine**

I. INTRODUCTION

On January 26, 1998 President Clinton made a declaration which would be broadcast across the nation: “I did not have sexual relations with that woman . . . . I never told anybody to lie.” These statements would later be criticized as largely untrue. Nonetheless, a recent poll showed that 65 percent of Americans did not think such self-protective lies were a sufficient reason to punish the President with removal from office. This seems to support the notion that many Americans believe it is human nature to lie when accused of wrongdoing, and that people should not be held legally accountable for lies that are merely self-protective in nature. However, this view is not held by the United States Supreme Court.

On the same day President Clinton was telling his “little white lie” to the public, the Supreme Court, ironically, made the “white lie” illegal. Until the Court’s decision in Brogan v. United States, mere denials of wrongdoing were excluded from the reach of the False Statements Statute (hereinafter “section 1001”) in many jurisdictions.

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2. See id. In fact, the President would later publicly admit to being sexually involved with “that woman,” Monica S. Lewinsky. He was the subject of an impeachment trial, in part because of allegations that he encouraged Lewinsky to lie about their relationship in an affidavit in a federal civil suit. See id.
4. See Fresh Air (National Public Radio broadcast, Aug. 12, 1998) (interview with Jeffrey Rosen). “The impulse to lie is human.” Id. “[N]o one really believes these self-protective lies.” Id. “[I]f the lie [is] merely self-protective and [doesn’t] mislead anyone in any other way . . . that shouldn’t be punished.” Id.
6. See id. (“The United States Supreme Court this week outlawed the little white lie.”).
8. 18 U.S.C. § 1001 (Supp. 1998). Section 1001 makes it a crime to:
   knowingly and willfully (1) falsify[, conceal[]], or cover[] up by any trick, scheme, or device a material fact; (2) make[] any materially false, fictitious, or fraudulent statement or
However, in *Brogan*, the Supreme Court rejected over three decades of precedence set by a majority of circuit courts by eliminating this exception, known as the "exculpatory no" doctrine.  

This note will examine the *Brogan* decision and discuss its potential effects. Part II discusses the historical development of section 1001 and the exculpatory no doctrine through case law and public policy. Part III provides a statement of the facts in *Brogan*. Part IV gives a critical analysis of the majority, concurring, and dissenting opinions. Part V will examine the likely impact of the Court's decision on Congress, federal law enforcement procedures, future adjudication, and individuals. The article will briefly conclude in Part VI.

II. HISTORICAL BACKGROUND

A. The Development of Section 1001

The False Statements Statute, originally known as the Act of March 2, 1863, began as an attempt by the government to penalize fraudulent claims made by soldiers after the Civil War. The law prohibited the filing of false claims and using representation; or (3) make[] or use[] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry . . . .

*Id.* § 1001(a). The section applies to "any matter within the jurisdiction of the executive, legislative, or judicial branch of the [g]overnment," including "administrative matters," such as, 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 . . . any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with the applicable rules of the House or Senate.

*Id.* § 1001(a),(c). Only judicial proceedings are excepted from its wide scope. See *id.* § 1001(b), "Subsection (a) does not apply to a party in 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." *Id.* § 1001(b).


10. *Id.*
11. See infra notes 16-72 and accompanying text.
12. See infra notes 73-82 and accompanying text.
13. See infra notes 83-137 and accompanying text.
14. See infra notes 138-156 and accompanying text.
15. See infra Part VI.
17. This statute made it a crime for, any person in the land or naval forces of the United States . . . [to] make . . . or present . . . for payment or approval to . . . 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, or any department or
falsified documents to file a claim with the government, but was limited to claims which caused "‘pecuniary or property loss' to the government."18 However, in 1934 Congress amended the statute,19 significantly broadening its scope to "embrace false and fraudulent statements . . . where these were knowingly and willfully used in documents or affidavits ‘in any matter within the jurisdiction of any department or agency of the United States.'"20 This sweeping construction, as noted by the Court in Gilliland, supported Congress's intent to protect not only the government's pecuniary and property interests, but also "the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."21 Although this amendment substantially extended the statute's scope, section 1001 was still limited primarily to statements made to the executive branch.22

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19. See Act of June 18, 1934, Pub. L. No. 73-394, 48 Stat. 996 (codified as amended at 18 U.S.C. § 35 (1934)). This Act was the predecessor to section 1001. See United States v. Bramblett, 348 U.S. 503, 506-07 (1955) (discussing the amendment). The statute was revised to read, in pertinent part, who...ever 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 . . . in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States . . . is a stockholder . . .
20. See 18 U.S.C. § 35 (1934) (emphasis added). Although it should be noted that the statute was amended again in 1948, the minor administrative changes are of no consequence to this article. See generally Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 683 (1948).
21. See Gilliland, 312 U.S. at 93 (quoting 18 U.S.C. § 35). The Secretary of the Interior instigated the changes to the statute as a way of enforcing the "Hot Oil" Act, Act of Feb. 22, 1935, 49 Stat. 30, 31 (1935) (codified at 15 U.S.C. § 715 (1935)), a law which regulated interstate transportation of oil. See Gilliland, 312 U.S. at 90. The amendment made it illegal to make false statements on reports filed to the Interior Department; prior to the amendment, false reporting was not a punishable offense. See id.; see also Hillyer, supra note 9, at 135 & n.11.
22. See Gilliland, 312 U.S. at 93. The Court reasoned that Congress evinced a will to stretch the statute beyond application to instances of pecuniary or property loss by deleting the words "cheating and swindling" from the statute, and amending it to include "false and fraudulent statements" made "in any matter within the jurisdiction of any department . . . of the United States . . . ." See id. at 92-93; see also Hillyer, supra note 9, at 136.
23. See 18 U.S.C. § 6 (Supp. 1998) (defining Title 18 terms). "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of government." Id.
Two decades later, however, the Court in *United States v. Bramblett* expanded the application of the statute to include the legislative and judicial branches of government. *Bramblett* involved false statements made to the House of Representatives Disbursing Office by former Congressman Bramble. Bramble contended that section 1001 did not apply because, under strict construction, section 1001 only applied to executive functions, not false statements to a congressional office. Rejecting this interpretation, the Court looked to the legislative history behind the statute to justify inclusion of all three branches within its scope. The Court determined that the context of section 1001 "call[ed] for an unrestricted interpretation," claiming that it would "do violence to the purpose of Congress to limit the section to falsifications made to the executive departments." Such a broad interpretation of section 1001 apparently did not sit well with some courts. Only fourteen days after the *Bramblett* decision, a federal district court narrowed the scope of section 1001 by excluding statements made in response to government questioning. In *United States v. Stark*, a man being questioned by the FBI was charged under section 1001 for denying that he bribed Federal Housing Authority employees, when he, in fact, had done so. The court determined that the defendant’s exculpatory response to government questioning did not violate section 1001 because the statute was only designed to protect the government from statements which would "pervert[] its normal proper activities." It reasoned that statements solicited by the government, in contrast to "affirmative... and voluntary" words or claims, did not victimize the government, and thus did not trigger section 1001. This argument is one of several which would be later raised in support of the exculpatory no doctrine.

In 1984, the Supreme Court once again interpreted the statute broadly when it

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24. See id. at 509.
25. See id. at 503-04. The claim directed a salary to be paid to a woman whom the Congressman falsely alleged to be his clerk. See id.
26. See id. at 509.
27. See id.
28. See id.
30. Id. at 191.
31. See id. at 205.
32. See id.
33. At the time of *Stark*, the term exculpatory no had not yet been used. See Hillyer, supra note 9, at 139. However, the *Stark* case, as well as *Bramblett* and *Gilliland*, paved the way for the exception to emerge. See id. at 140.

None of [these] cases... specifically created the 'exculpatory no' exception. The significance of the holding in each was its role in the ultimate development of the exception. It was the Supreme Court's extension of [section] 1001 to situations other than those involving pecuniary loss to the government (Gilliland), and its application of [section] 1001 to all branches of government (Bramblett), coupled with the Maryland District Court's limiting of [section] 1001's applicability (Stark), that opened the door for the creation of the "exculpatory no." Id. at 139.
ruled in *United States v. Rodgers* that FBI investigations fell within the jurisdiction of section 1001. This liberal construction survived for over a decade, until the Court reversed its stance by overruling *Bramblett* in *Hubbard v. United States*. In *Hubbard*, the defendant was charged with making false statements in a bankruptcy proceeding. The Court, exhibiting its policy of strict, textual interpretation, determined that the plain meaning of section 1001, as supported by Title 18 definitions in section 6, could not be construed to apply to judicial proceedings. Rather than accept a "judicial function exception," which would exclude judicial proceedings from *Bramblett's* broad sweep, the Court chose to overrule *Bramblett* entirely.

In response to *Hubbard*, Congress amended the statute in 1996 to include all three branches of government, with an exception provided for judicial proceedings. According to the current statute, section 1001 now applies to any defendant who 1) makes a statement, 2) which is false, 3) which is material, and 4) which was

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35. See id.
37. See id. at 697-98.
39. See 18 U.S.C. § 6 (Supp. 1998) (defining Title 18 terms). "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government." *Id.*
40. See *Hubbard*, 514 U.S. at 703-05.
41. The judicial function exception limited section 1001 application to "'administrative' or 'housekeeping' functions" of the judiciary, not court proceedings. See *id.* at 709 (quoting Morgan v. United States, 309 F.2d 234 (D.C. Cir. 1962). This exception was carved out to "impose limits on Bramblett's expansive reading of [section] 1001." *Id.* at 708.
42. See *id.* at 713. "We think the text of [section] 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception." *Id.* at 714.
44. See 18 U.S.C. § 1001 (Supp. 1998); see also supra note 8 (containing the statute's current language).
45. See Terri L. Combs & Anna M. Thorensen, *Lying to the SEC: The Basics of the False Statements Statute*, SC73 ALI-ABA 89, 92-93 (1998). The term "statement," as applied to section 1001, encompasses a broad range of deceptive conduct, ranging from false entries of government forms and applications to misrepresentations to government investigators, the judiciary, or Congress. The statute applies to unsworn as well as sworn statements, and those that are made voluntarily, as well as those required to be made by law or regulation. See *id.* at 93.
46. See *id.* at 94.

In order to serve as the basis for a [s]ection 1001 conviction, a statement must be false under any reasonable interpretation. If a question or form is fundamentally ambiguous, a jury is not allowed to speculate as to whether the defendant's understanding of the question rendered his
knowingly and willfully made 48 to any agent or representative within the executive, legislative, or judicial branches of the federal government. 49

B. The Emergence of the Exculpatory No Doctrine

The considerable breadth of section 1001 led to the development of an exception for denials of guilt in the face of investigative questioning. 50 The rationale for this exception has been two-fold: 1) the legislative history of section 1001 indicates that Congress did not intend such a broad application, and 2) charging a defendant with violating section 1001 for mere exculpatory denials to interrogation borders on an infringement of a defendant's Fifth Amendment rights. 51 Because this exception, known as the exculpatory no doctrine, has such a long history in the circuit courts, 52

or her answer false at the time it was made.

Id.

47. See id.

To be material within the meaning of section 1001, a false statement must have a natural tendency to influence or be capable of influencing a decision of the government body to which it was addressed. It is not necessary for the government to have actually believed or relied on the false statements, nor is it necessary for the government to have suffered financial loss.

Id.

48. See id. at 94-95.

To establish a violation of section 1001, the government must prove that the statement was made intentionally and with the knowledge that it was false. A reckless disregard for the truth, with a conscious purpose to avoid learning the truth, is considered the equivalent of knowledge of falsity. It is not necessary that the speaker specifically intend to defraud the government, or even that he understands he is speaking to the government at the time the false statement is made.

Id.

49. See id. "Jurisdiction" covers "all matters confided to the authority" of one of the three branches of government. See id. A government entity has jurisdiction, in this sense, "when it has the power to exercise authority in a particular situation." See id. (quoting United States v. Rodgers, 466 U.S. 475, 479-80 (1984)). Combs notes that although Hubbard overruled the cases, such as Rodgers, which held that the legislative and judicial branches shared section 1001 jurisdiction with the executive branch, "the 'three-branch' jurisdictional cases pre-dating Hubbard remain instructive... [b]ecause Congress reinstated pre-Hubbard case law by statute in 1996...." See id. at n.30.

50. The exception has come to be known as the exculpatory no doctrine. See generally Hillyer, supra note 9, for a discussion of the development of this exception.

51. See Scott D. Pomfret, Note, A Tempered 'Yes' to the 'Exculpatory No,' 96 Mich. L. Rev. 754, 782 (1997) (arguing in favor of the exception because of its consistency with section 1001's intended purpose and its prevention of Fifth Amendment violations). But see Stephen Michael Everhart, Can You Lie to the Government and Get Away With It? The Exculpatory-No Defense Under 18 U.S.C. § 1001, 99 W. Va. L. Rev. 687, 719. (1997) (discussing these two prevailing arguments in favor of the exculpatory no). Everhart notes the development of the doctrine as a result of judicial "distaste for an application of the statute that is uncomfortably close to the Fifth Amendment." See id. at 692 n.25 (quoting United States v. Medina De Perez, 799 F.2d 540, 547 (9th Cir. 1986)). The Fifth Amendment provides that "[no person] shall... be compelled in any criminal case to be a witness against himself..." U.S. Const. amend. V.

52. See Hillyer, supra note 9, at 144 ("Every federal circuit has faced the issue in some form or another. Only one circuit has clearly rejected it.") (citing United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)).
an overview of its development is significant to understanding the impact of its demise in the Supreme Court.

In 1962, an exception to section 1001 was born in the Second and Fifth Circuits for mere denials to federal questioning.\(^{53}\) In *United States v. McCue*,\(^{54}\) the Second Circuit first coined the term "exculpatory no."\(^{55}\) Although the conviction in that case was ultimately upheld, the court laid the groundwork for future cases to apply the exception.\(^{56}\) Looking to the intent of the statute, the McCue court recognized that section 1001 was intended to apply to false statements which interfered with or obstructed its government functions.\(^{57}\) The court distinguished application of section 1001 in the *McCue* case, however, where the defendants, charged with making false statements to the Internal Revenue Service, voluntarily appeared under oath before the Treasury Department and were thus prepared to answer questions, from application of the rule in cases where a person makes an exculpatory denial to a police officer who unexpectedly stops and questions that person.\(^{58}\)

In *Paternostro*,\(^{59}\) the exculpatory no was made official when the Fifth Circuit reversed the section 1001 conviction of a defendant who gave false denials to questions from IRS agents.\(^{60}\) Applying the reasoning of *Stark*, the court determined that, under the statute, a "statement" required some affirmative action on the part of the defendant before section 1001 would be triggered.\(^{61}\) Because the defendant merely answered questions, his response was not considered a statement under

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53. See infra notes 53-58 and accompanying text, (discussing United States v. McCue, 301 F.2d 452 (2d Cir. 1962), which first used the term exculpatory no); see also infra notes 59-63 and accompanying text (discussing Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), the first case to apply the exception).

54. 301 F.2d 452 (2d Cir. 1962).

55. See id. at 455. On the origin of the term "exculpatory no." Hillyer noted that "[a]lthough the court in *McCue* placed quote marks around the words exculpatory no and immediately cited to United States v. Davey, and United States v. Stark, neither of those courts actually used the term in their opinions." Hillyer, supra note 9, at 139 n.38 (citations omitted).

56. See McCue, 301 F.2d at 456. See, e.g., Paternostro, 311 F.2d at 309 ("Undoubtedly, the *McCue* case left open the question of the 'exculpatory no' answer to the policeman... .").

57. See McCue, 301 F.2d at 455.

58. See id. at 454-55. "The case of a citizen who replies to a policeman with an 'exculpatory no' can be left until it arises." Id. at 454 (citing United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957); United States v. Stark, 131 F. Supp. 190 (D. Md. 1955)).

59. 311 F.2d 298 (5th Cir. 1962). In *Paternostro*, a member of the New Orleans Police Force was questioned, under oath, by an Internal Revenue Service agent about illegal "graft money" he and other officers had allegedly received. See id. at 300-01. The officer falsely answered "no" to the questions. See id. The court looked to the rationale of *Stark* and its progeny to determine that section 1001 did not apply to the defendant, because his answers to the agent were "mere negative responses to questions propounded to him by an investigating agent ... not initiated by the [defendant]." See id. at 305.

60. See id. at 309.

61. See id. at 305.
section 1001. The court also determined its holding to be consistent with McCue, because the investigating IRS agent was analogous to the hypothetical police officer who arguably created an exception under McCue. After Paternostro, the exculpatory no doctrine took root and gained wide acceptance. Since 1962, seven circuits have embraced the doctrine, and, until recently, no circuit had clearly opposed it. However, because each circuit has varied in its approach to applying the

62. See id.
63. See id. at 309. Responding to the appellee’s claim that the ruling contradicted McCue, Judge Gewin stated:

[W]e do not consider the McCue case to be essentially in conflict with our opinion. Undoubtedly, the McCue case left open the question of the exculpatory no answer to the policeman . . .

Under the facts and circumstances of this case, the Internal Revenue agent who initiated the interview was performing essentially the functions of a ‘policeman’ or investigative agent for the Government. The statement attributed to the defendant Paternostro is unquestionably an “exculpatory no.”

Id.

64. See infra note 65 (discussing the exception’s adoption in seven circuits since 1962).
65. Several Circuits have embraced the doctrine. See United States v. Tabor, 788 F.2d 714, 718 (11th Cir. 1986) (applying exculpatory no where defendant made a mere denial of wrongdoing, and was not warned of the consequences of lying); United States v. Taylor, 907 F.2d 801, 805-06 (8th Cir. 1990) (applying the five-part test developed by the Ninth Circuit in Medina De Perez); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988) (following the Ninth Circuit’s five-part test developed in Medina De Perez); United States v. Medina De Perez, 799 F.2d 540, 545 (9th Cir. 1986) (developing a five-part test limiting application of the doctrine to mere denials to investigative questions where an affirmative answer would be inculpatory); United States v. Fitzgibbon, 619 F.2d 874, 880 (10th Cir. 1980) (addressing the exculpatory no doctrine as a “policy consideration” protecting Fifth Amendment rights, even though the defendant’s case did not meet the exception); United States v. King, 613 F.2d 670, 674 (7th Cir. 1980) (providing a narrow application of the doctrine); United States v. Chevoor, 526 F.2d 178, 183-85 (1st Cir. 1975) (accepting the exculpatory no doctrine even though it could not be applied to the defendant, and discussing at length the origins of § 1001 and the development of the exception). These cases provide only representative examples of the positions taken by each of the circuit courts. For a comprehensive list of the cases decided on this issue, see 102 A.L.R. FED. 742 (1997).
66. Ironically, the two circuits giving rise to the exception were the only two to expressly reject it. In 1995, the Fifth Circuit made a clear departure from its own precedent and patently rejected the exculpatory no doctrine in United States v. Rodrigues-Rios, 14 F.3d 1040, 1050 (5th Cir. 1995), overruling Paternostro v. United States, 311 F.2d 298, 298 (5th Cir. 1962). In 1996, the Second Circuit followed suit when it decided United States v. Wiener, the lower court precursor to Brogan. See United States v. Wiener, 96 F.3d 35, 37 (2d Cir. 1996) (“Our flirtation with the ‘exculpatory no’ doctrine is over.”). The Third, Sixth, ad District of Columbia Circuits remain uncommitted on the issue. The Third Circuit, in United States v. Barr, 963 F.2d 641, 647 (3rd Cir. 1991), considered the exception as applied in other circuits and concluded that the defendant “would not be able to invoke this doctrine . . . .” Id. The Sixth Circuit, in United States v. LeMaster, 54 F.3d 1224, 1229 (6th Cir. 1995), left the issue open when the court held that the defendant’s statements, which went beyond a simple denial, could not be excepted by the doctrine. See id. The District of Columbia Circuit, in United States v. White, 887 F.2d 267, 273-74 (D.C. Cir. 1989), also declined to take a position on the statute’s validity, claiming that the defendant was responding to administrative rather than investigative questions. See id. For a comprehensive list of the cases decided on this issue, see 102 A.L.R. FED. 742 (1997).
doctrine, there has been a substantial amount of uncertainty about its parameters. The Ninth Circuit tried to clarify application of the doctrine in United States v. Medina De Perez by delineating a five-part test that created a narrowly-tailored exception for a false statement. Although this test was adopted by other circuits, the various elements were applied incongruously, thus increasing the divergence between the circuits. Finally, in 1997, the Supreme Court granted certiorari in Brogan v. United States to decide the issue conclusively.

III. STATEMENT OF FACTS

On the evening of October 4, 1993, two federal agents, one from the Department of Labor and one from the Internal Revenue Service, went to the home of James Brogan to investigate a charge that Brogan accepted bribes while he was a Local Union 32E officer. The agents told Brogan they were investigating JRD Management Corporation ("JRD"), a group which employed members of Local 32E, as well as certain individuals, and that Brogan would need a lawyer if he wanted to


68. 799 F.2d 540 (9th Cir. 1986).

69. See id. at 544. The test excluded a mere exculpatory denial from section 1001 prosecution 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 of a routine exercise of administrative responsibility; and (5) it was made in a situation in which a truthful answer would have incriminated the declarant. See id. at 544 (discussing the criteria announced in United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978), and United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972)).

70. See Birch, supra note 67, at 1287 (discussing the test and its perpetuation of arbitrary application of section 1001); Everhart, supra note 51, at 688-89 n.8 ("Even among those Courts of Appeals adopting the Ninth Circuit test, there is a divergence as to how liberally or narrowly the elements of the test should be applied."). See generally John E. Davis & Michael K. Forde, Tenth Survey of White Collar Crime: False Statements, 32 Am. Crim. L. Rev. 323, 331 n.1 (Winter 1995) (discussing the differences between the Fourth and Ninth Circuit’s method of applying the five-part test). See, e.g., United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988) (adopting the Medina De Perez test); United States v. Taylor, 907 F.2d 801, 805-06 (8th Cir. 1990) (adopting the Medina De Perez test).


72. Supra id. at 808.

cooperate.\text{74} Brogan was unaware that the investigators already had proof of his receipt of payments from JRD.\text{75} The agents then asked him "whether he had ever accepted cash or gifts from JRD" as a union delegate, to which Brogan answered "no."\text{76} The agents informed Brogan that they had evidence to the contrary, and that it was a crime to lie to federal investigators during an official inquiry, but Brogan did not repudiate his denial.\text{77}

Brogan was charged with violating 29 U.S.C. sections 186(b)(1), (a)(2), and (d)(2), which prohibit a union officer from accepting money from employers of union workers, and of "making a false statement" to federal investigators in violation of section 1001.\text{78} He was found guilty after a trial in federal district court for the Southern District of New York.\text{79}

Brogan appealed his section 1001 conviction, advancing the exculpatory no defense.\text{80} The Second Circuit Court of Appeal upheld his conviction, refusing to recognize the defense as valid.\text{81} Due to a split in the circuits, the United States Supreme Court granted certiorari to determine the validity of the exculpatory no doctrine.\text{82}

\textbf{IV. THE COURT OPINIONS}

\textbf{A. Justice Scalia’s Majority Opinion}

Justice Scalia delivered the opinion of the Court.\text{83} After briefly describing the facts of the case, Justice Scalia, in what would come to represent the tenor of his entire opinion,\text{84} quoted the literal language of section 1001.\text{85} He used Webster’s

\begin{flushright}
74. See Brogan, 118 S. Ct. at 807.
75. See id. at 808.
76. See id. at 807-08.
77. See id. at 808.
78. See id.
79. See id.
80. See Wiener, 96 F.3d at 36, 37.
81. See id. at 37 ("Our flirtation with the ‘exculpatory no’ doctrine is over. We agree with . . . Brogan that [his] statement[s] [a] true ‘exculpatory no’ as recognized in other circuits, and we therefore consider whether the doctrine is a defense to Section 1001 liability in this circuit. We hold that it is not.").
82. See Brogan, 118 S. Ct. at 808.
83. See id. at 807. He was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas. Justice Souter joined in part. See id.
84. See id. at 808. Justice Scalia began and ended his opinion by pointing to the plain language of the statute. His first words were "[a]t the time petitioner [sic] falsely replied ‘no’ to the Government investigators’ question, 18 U.S.C. § 1001 (1988 ed.) provided: . . . ." Id. His last words were: "[b]ecause the plain language of § 1001 admits of no exception for an ‘exculpatory no,’ we affirm the judgment of the Court of Appeals." See id. at 812.
85. See id.
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Dictionary to evince that the word ‘no’ is indeed a statement, and asserted that a literal interpretation of the statute provided no justification for excepting an exculpatory no, pointing out that even the defendant conceded his claim would fail under a strict construction of the statute.

Justice Scalia then addressed the first of the two major arguments raised by Brogan: that congressional intent is consistent with an exculpatory no exception because legislative history reveals that the law’s original purpose was to punish only those statements to government agents which “pervert governmental functions.”

Justice Scalia rejected this argument on two bases. First, he found fault in the premise that “simple denials of guilt to government investigators do not pervert governmental functions.” Any false statement, he contended, would thwart the functioning of a legitimate governmental “investigation of wrongdoing.”

Justice Scalia further refused to endorse the claim that an investigation would not be perverted if the agent knew the declarant’s denial was false. “[M]aking the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar),” he claimed, “would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard-of.”

Second, Justice Scalia rejected the defendant’s proposition that “only those falsehoods that pervert governmental functions are covered by section 1001.” Although, as noted in Gilliland, Congress indicated an intent to protect the integrity of governmental functions when it broadened the statute to include “any matter within the jurisdiction of any department or agency of the United States,”

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86. See id. (“The word ‘no’ in response to a question assuredly makes a ‘statement,’ see e.g., Webster’s New International Dictionary 2461 (2d ed. 1950) (def. 2: ‘That which is stated; an embodiment in words of facts or opinions’)).
87. See id.
88. See id. This argument, as Justice Scalia later indicates, is derived from United States v. Gilliland, 312 U.S. 86 (1941). See id. at 809; see also supra notes 31-33 and accompanying text.
89. See Brogan, 118 S. Ct. at 808.
90. See id. at 808-09 (“We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert governmental function.”).
91. See id. at 809.
92. See id.
93. Id. “The government need not show that because of the perjured testimony, the grand jury threw in the towel . . . . Grand jurors . . . are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer.” Id. at 809, n.1 (quoting United States v. Abrams, 568 F.2d 411, 421 (5th Cir. 1978)).
94. See id. at 809.
95. See id. (quoting United States v. Gilliland, 312 U.S. 86, 93 (1941)).
Scalia refused to leap to the premise that Congress therefore must have intended to exclude from section 1001 those statements which do not "pervert governmental functions."\textsuperscript{96}

Having dismissed Petitioner's first argument, Justice Scalia addressed the second defense of the exculpatory no doctrine; Brogan's claim that an exception to section 1001 for mere denials protects a declarant's Fifth Amendment right against compelled self-incrimination.\textsuperscript{97} Justice Scalia found that the Fifth Amendment is not violated by a broadly-interpreted section 1001 in circumstances such as Brogan's which were distinguishable from the classic "cruel trilemma."\textsuperscript{98} Brogan had argued that a choice between section 1001 charges, self-incrimination, or silence which may be construed as inculpatory, was a form of the cruel trilemma.\textsuperscript{99} Justice Scalia observed that the cruel trilemma was originally defined as the choice a suspect must make between contempt-fostering silence, perjury, or self-incrimination.\textsuperscript{100} He noted that the accused could avoid the classic trilemma by remaining silent,\textsuperscript{101} and refused to consider "the right to remain silent," which he called "a liberation from the original trilemma," as something that triggered the need for constitutional protection.\textsuperscript{102} He concluded, "whether or not the predicament of the wrongdoer run to ground tugs at the heart strings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie."\textsuperscript{103}

Justice Scalia avoided squarely addressing Petitioner's argument that the exculpatory no protects against prosecutorial abuse and deferred that issue to
Congress, the drafters of the law. Moreover, Justice Scalia noted that Petitioner did not present evidence of prosecutorial misconduct, and doubted whether the exception would solve a problem if it existed.

Justice Scalia summarily dismissed Petitioner’s claim that silence is not a realistic alternative for an accused who fears that his failure to answer will be used to inculpate him, stating “[i]t is well established that the fact that a person’s silence can be used against him . . . does not exert a form of pressure that exonerates an otherwise unlawful lie.” Justice Scalia further rejected the notion that a person being questioned would not know of his right to silence, calling it “implausible” when Miranda warnings are so “frequently dramatized.”

After addressing Petitioner’s arguments, Justice Scalia confronted Justice Stevens’ dissenting argument that the long judicial history of interpreting congressional intent to exclude an exculpatory no from the reach of section 1001 justifies a statutory construction which is more narrow than its literal wording. Justice Scalia found the fact that a number of lower courts had adopted the doctrine to be irrelevant because no reasonable reading of the statute could support such an exception. Without textual support for judicial construction of exceptions, he claimed, application of a statute would become too uncertain. Justice Scalia rejected Justice Stevens’ assertion of the common law doctrine that popular opinion is good legal authority because such a principle is never applied consistently. Justice Scalia held

104. See id. Justice Scalia does not address Petitioner’s further argument that “[w]hen Congress reenacted section 1001 in 1996, it ratified the exculpatory no doctrine by declining to accept a proposed limitation upon it, while at the same time adopting other significant judicial interpretations of the statute . . . .” See Brief for Petitioner at 23, Brogan (No. 96-1579) (noting that the Court “repeatedly stated its reliance upon congressional reenactment of a statute without relevant change as indicating Congress’ knowledge and approval of the prevailing interpretation of the judiciary.”).

105. See Brogan, 118 S. Ct. at 810. Justice Scalia remarked, “it is hard to see how the doctrine of the ‘exculpatory no’ could solve [the problem]. It 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.” Id. It is not difficult to see how the doctrine would provide some relief, however, because its application would have, at the least, solved Mr. Brogan’s problem.

106. See id. Petitioner claimed silence could be used “[e]ither as substantive evidence of guilt or to impeach him if he takes the stand.” See id.

107. Id. (citing United States v. Knox, 396 U.S. 77 (1969)).

108. See id. at 810.

109. See id. at 810-13.

110. See id.

111. See id. at 811. (“The problem with adopting such an expansive, user-friendly judicial rule, is that there is no way of knowing when, or how, the rule is to be invoked.”).

112. See id. (quoting E. Coke, Institutes (15th Ed. 1794): “communis opinio is of good authoritie in law.”) Justice Scalia reminded Justice Stevens that he rejected such a policy himself in an earlier case, quoting Stevens’ own words in Hubbard:

[T]he dissent does not propose, and its author has not practiced, consistent application of the
the exculpatory no doctrine to be invalid, concluding "[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."¹³

B. Justice Souter’s Opinion, Concurring in Part and Concurring in the Judgment

Justice Souter “join[ed in] the opinion of the Court except for its response to petitioner’s [sic] argument premised on the potential for prosecutorial abuse of [section 1001].”¹¹⁴ “On that point,” he stated, “I have joined Justice Ginsburg’s opinion espousing congressional attention to the risks inherent in the statute’s current breadth.”¹¹⁵

C. Justice Ginsburg’s Concurring Opinion¹¹⁶

Justice Ginsburg agreed with Justice Scalia that the current wording of the statute could not to support the interpretation that Congress had adopted the exculpatory no doctrine.¹¹⁷ However, she departed from the majority opinion by asserting that section 1001 is so broad that it allows investigators to manipulate unsuspecting guilty parties into denying an accusation, and then use the section 1001 violation as prosecutorial leverage.¹¹⁸

To support her claim that section 1001 is overbroad, Justice Ginsburg pointed to the various controls that have been implemented to limit its application, such as the adoption by the Department of Justice of a policy against prosecuting mere denials under section 1001.¹¹⁹ She argued that such a policy “indicate[s], at the least, the dubious propriety of bringing felony prosecutions for bare exculpatory principle, see, e.g.,[sic] Hubbard v. United States,[sic]... (STEVENS, J.)(sic) ("We think the text of § 1001[sic] forecloses any argument that we should simply ratify the body of cases adopting the judicial functions exception") ...Chapman v. United States,[sic]... (STEVENS, J., dissenting)[sic] (disagreeing with the unanimous conclusions of the courts of appeals that interpreted the criminal statute at issue); thus it becomes yet another user-friendly judicial rule to be invoked ad libitum."). See Brogan, 118 S. Ct. at 811 (citations omitted).

¹¹³. See id. at 811-12.
¹¹⁴. Id. at 812 (Souter, J., concurring in part).
¹¹⁵. Id. (Souter, J., concurring in part).
¹¹⁷. See id. at 816 (Ginsburg, J., concurring).
¹¹⁸. See id. at 813-17 (Ginsburg, J., concurring). “I write separately... to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes.” Id. at 812 (Ginsburg, J., concurring).
¹¹⁹. See id. at 815 (Ginsburg, J., concurring) (referencing United States Attorneys’ Manual, ¶ 9-42.160 (Dep’t Justice 1996)) ("It is the Department’s policy that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government.").
denials informally made to Government agents." She continued by citing *Nunley v. United States*, in which a section 1001 conviction was vacated by the Court because the prosecution was unapproved and contrary to procedure. She noted that even the Court’s decision in this case, affirming the Second Circuit’s decision, fell short of “sanction[ing] prosecution . . . under [section] 1001 in all instances,” because it refrained from deciding whether, to violate section 1001, a person must first know it is a crime to make a false statement. According to Justice Ginsburg, however, these measures were insufficient to protect against an overzealous prosecutor who would manufacture a crime by tricking an unwary suspect into a “false denial.” Refusing to interpret previous congressional silence as “ratification of the ‘exculpatory no’ doctrine,” she appealed to Congress to respond to the

120. *See Brogan, 118 S. Ct. at 815* (Ginsburg, J., concurring). She went on to state that “[a]lthough today’s decision holds that such prosecutions can be sustained under the broad language of [section] 1001, the Department of Justice’s prosecutorial guide continues to caution restraint in each exercise of this large authority.” *Id.* (Ginsburg, J., concurring).


122. *See Brogan, 118 S. Ct. at 815* (Ginsburg, J., concurring) (“Permission was ‘normally refused’ in cases like Nunley’s . . . [where the statements] essentially constituted mere denials of guilt.”) (quoting Memorandum for United States at 7, Nunley v. United States, 434 U.S. 962 (1977) (No. 77-5069)). “Since Nunley, the Department of Justice has maintained a policy against bringing [section] 1001 prosecutions for statements amounting to an ‘exculpatory no.’” *Brogan, 118 S. Ct. at 815* (Ginsburg, J., concurring). *Compare* United States Attorneys’ Manual, ¶ 9-42.160 (Dep’t Justice 1988) (the strict wording of the Department of Justice’s policy at the time Brogan was arrested directed that “[w]here the statement takes the form of an ‘exculpatory no,’ 18 U.S.C. § 1001 does not apply regardless of who asks the question.”), and United States Attorneys’ Manual ¶ 9-42.160 (1996) (following the rejection of the exculpatory no doctrine in United States v. Rodrigues-Rios, 14 F.3d 1040, 1040 (1994), the Department of Justice gave more prosecutorial discretion under section 1001: “It is the Department’s policy that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government.”) (emphasis added). *But see* United States Attorneys’ Manual ¶ 9-42.160 (1997) (providing that the newest guidelines are a bit stricter: “It is the Department’s policy not to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government.”). *See generally Brogan, 118 S. Ct. at 815* (Ginsburg, J., concurring) (discussing the changes in the Department of Justice’s section 1001 guidelines).


124. *See Brogan, 118 S. Ct. at 815* (Ginsburg, J., concurring). She noted that the Second Circuit “left open the question whether to violate section 1001, a person must know that it is unlawful to make such a false statement.” *See id.* She continued, nothing that court or this Court said suggests that the mere denial of criminal responsibility would be sufficient to prove such [knowledge].” Moreover, “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,” and a jury could be instructed that it would be permissible to draw such an inference. *Id.* (Ginsburg, J., concurring) (quoting *Wiener, 96 F.3d at 40*).

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

126. *See id.* (Ginsburg, J., concurring).
Court’s decision by revising the law, and raised two possible models Congress could follow. The first was a narrow exception presented by the Senate Judiciary Committee in 1981; the other was a broader exclusion adopted by the Model Penal Code. Justice Ginsburg suggested that these recommendations, as well as the “‘the extensive airing this issue has received,” should serve to initiate revision of section 1001 by legislators.

D. Justice Stevens’ Dissenting Opinion

Justice Stevens, joined by Justice Breyer, adopted the arguments of Justice Ginsburg. He admonished the majority for “totally ignor[ing]” the issues Justice Ginsburg raised. However, Justice Stevens went one step further than Justice Ginsburg by finding sufficient support for the exculpatory no doctrine to sustain it, notwithstanding the majority’s textualistic reading of the statute. He urged that it was not the intent of Congress to “make every ‘exculpatory no’ a felony,” and refused to override the “well-settled interpretation of [the] statute” by a majority of circuits, claiming authority to construe a statute more narrowly than written when a literal interpretation would implicate people Congress did not intend to punish. Citing to his own opinion from a previous case, Justice Stevens stood by his policy

128. See Brogan, 118 S. Ct. at 816 (Ginsburg, J., concurring) (citing S.REP. No 97-307, at 407 (1981)). The proposed 1981 amendment to the statute would have “covered more than an ‘exculpatory no,’ ... [it would have criminalized false oral statements to law enforcement officers only ‘where the statement is either volunteered (e.g., a false alarm or an unsolicited false accusation that another person has committed an offense) or is made after a warning, designed to impress on the defendant the seriousness of the interrogation and his obligation to speak truthfully.” See id. (Ginsburg, J., concurring) (quoting S.REP. No. 97-307, at 408 (1981)) (emphasis added).
129. See id. (Ginsburg, J., concurring). This approach, also proposed in 1971 by a “congressionally chartered law reform commission, would excise unworn oral statements from § 1001 altogether.” See id. (Ginsburg, J., concurring) (citing MODEL PENAL CODE §§ 241.3-.5 (1980); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, Final Report §§ 1352 & 1354 (1971)). Justice Ginsburg noted that this version was proposed by the House Judiciary Committee in 1980: “It would have applied the general false statement provision only to statements made in writing or recorded with the speaker’s knowledge.” See id. (Ginsburg, J., concurring) (citing H.R. REP. No. 96-1396, at 181-83 (1980)).
130. See id. at 816-17 (Ginsburg, J., concurring).
131. See id. at 817 (Stevens, J., dissenting).
132. See id. (Stevens, J., dissenting).
133. See id. (Stevens, J., dissenting).
134. See id. (Stevens, J., dissenting).
135. See id. (Stevens, J., dissenting).
of respecting and upholding long-standing lower court precedent.  

V. IMPACT

A. Legislative

Justice Ginsburg’s concurring opinion, supported by Justice Souter, sent a message to Congress that the Court could not be relied upon to provide protection to those prosecuted under an overbroad statute. However, this fervent appeal seems unlikely to persuade Congress to narrow the scope of section 1001. With other prophylactic measures in place, such as the Department of Justice’s procedures, Congress may not view the threat of unjust prosecution as being significant enough to justify limiting the reach of a statute that it has historically broadened.

In fact, Congress may find it beneficial to refrain from narrowing the statute because of the added leverage the statute provides Congress in conducting its own matters. An example of this is the recent congressional tobacco hearings, where section 1001 may be used to prosecute false testimony by tobacco industry executives appearing before Congress.


Although I do not find the disposition of this case as troublesome as the decision in McNally, this comment is nevertheless apt:

"Perhaps the most distressing aspect of the Court’s action today is its casual-almost summary-rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present. The quality of this Court’s work is most suspect when it stands alone, or virtually so, against a tide of well-considered opinions issued by state or federal courts. In these cases I am convinced that those judges correctly understood the intent of the Congress that enacted this statute. Even If I were not so persuaded, I could not join a rejection of such a longstanding, consistent interpretation of a federal statute."

Brogan, 118 S. Ct. at 818 n.3 (quoting McNally, 438 U.S. at 376-77 (Stevens, J., dissenting)).  

138. See Brogan, 118 U.S. at 814 (Ginsburg, J., concurring) ("Even if the encompassing language of § 1001 precludes judicial declaration of an ‘exculpatory no’ defense, the core concern [of prosecutorial overreaching] persists."")

139. As of January 29, 1999, one year after the Brogan decision, no bills or acts have been proposed in either the House or the Senate to amend the statute.

140. See generally supra note 122 (discussing the Department of Justice’s guidelines).


142. See id.
B. Prosecutorial

The Department of Justice currently has a policy of not arresting suspects under section 1001 for mere exculpatory denials.\textsuperscript{143} However, the Supreme Court's abandonment of the exculpatory no doctrine may be seen by federal prosecutors as a license to use section 1001 more aggressively.\textsuperscript{144}

Should this occur, and if Congress fails to amend section 1001, an increase in manipulation of suspects and coerced confessions may result from the added prosecutorial tool of an unrestricted section 1001. However, as discussed below, courts are likely to develop other remedies should prosecutorial abuse of the statute become apparent.

C. Judicial

The Courts of Appeal, by supporting the exculpatory no doctrine, have exhibited a reluctance to apply section 1001 broadly. Without the exculpatory no doctrine, it is likely that alternative affirmative defenses to exculpatory denials may be pursued by attorneys defending manipulated clients. One such example is an "induced lie" defense, which would protect a defendant from prosecution if it could be shown that his false statement was the result of law enforcement trickery or manipulation.\textsuperscript{145} Another may be found in the Brogan Court's failure to decide the fate of section 1001 convictions in cases where the defendant was not aware of the criminal liability attached to an exculpatory denial.\textsuperscript{146} Justice Scalia himself raised two possible alternatives which would provide the same type of protection as the "exculpatory no;" a requirement that the accused be "warned of the consequences of lying," and a requirement that the defendant be "put under oath."\textsuperscript{147} A defendant may also

\textsuperscript{143} See United States Attorneys' Manual, § 9-42.160 (Dep't Justice 1997) ("It is the Department's policy not to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government.")

\textsuperscript{144} Notwithstanding the Department of Justice policy of not prosecuting mere denials of guilt, discussed supra note 143, federal investigators did indeed prosecute under these circumstances in Brogan. It is therefore not unreasonable to imagine an increase in these cases now that the exculpatory no is not a barrier. See id. at 812 (Ginsburg, J., concurring) (acknowledging that the Brogan case itself "is illustrative" of how the breadth of section 1001 "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies.").

\textsuperscript{145} See Birch, supra note 67, at 1274 (discussing the possibility of an induced lie defense when a suspect making an exculpatory denial is not warned beforehand that lying is a felony).

\textsuperscript{146} See Brogan, 118 S. Ct. at 815 (Ginsburg, J., concurring) (noting that the lower court in Brogan "left open the question whether 'to violate Section 1001, a person must know that it is unlawful to make such a false statement.'") (quoting United States v. Wiener, 96 F.3d 35, 40 (1996)). "[N]othing that court or this Court said suggests that 'the mere denial of criminal responsibility would be sufficient to prove such [knowledge].'" Brogan, 118 S. Ct. at 815.

\textsuperscript{147} See id. at 811 (arguing that there is no difference between the protection offered by the exculpatory no and that of warning the defendant "of the consequences of lying," or requiring the defendant to first take an oath.).
attempt to carve an exception out of the unresolved ambiguities in the statute. In addition, limited success has been achieved with such defenses as "running of statute of limitations," a "good faith belief that a false statement was not a binding obligation," and "duress." Other defenses which have yet to be successful include "entrapment, collateral estoppel, good faith reliance on expert advice, 'active misleading' by past governmental conduct, good faith reliance on custom, and "literally true" answers that actively mislead the government." Lower courts which previously relied on the exculpatory no doctrine to protect victimized defendants may be more willing to consider these alternate arguments as a way to curb the harshness resulting from section 1001 application.

D. On Individuals

Individuals may now run a greater risk of being strong-armed and manipulated into self-incrimination when they are under investigation. As a backlash to this threat, individuals who are aware of the law and are under regular administrative review by federal agents might be less likely to speak or cooperate with investigators for fear that any mistaken denial during questioning will subject them to prosecution. In fact, editorials published shortly after the Brogan decision advised

148. See Preissel, supra note 141, at 702 (discussing the possibility of an "ambiguity defense," which would require the prosecution to prove that there are "no other reasonable interpretations that would make the defendant's statement factually correct."); see also Federal Statutes and Regulations, 112 HARV. L. REV. 345, 351-54 (1997) (arguing that the unresolved ambiguity of the word "statement" in section 1001 leaves room for future debate in court).
149. See Preissel, supra note 141, at 704 & n.97 (noting that the statute of limitations for section 1001 is five years).
150. Id. at 704 & n.98 (discussing United States v. Whittington, 783 F.2d 1210, 1217 (5th Cir. 1986), in which a section 1001 charge was dismissed when the trier of fact believed the defendant, in good faith, thought his statement did not legally bind him.)
151. See id. at 704 & n.99 (discussing several cases which were dismissed when a defendant could prove duress beyond a preponderance of evidence).
152. See id. at 704.
153. See id. at 812 (Ginsburg, J., concurring). Justice Ginsburg acknowledges that the Brogan case itself is illustrative of how the breadth of section 1001 "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt. See id. (Ginsburg, J., concurring).
154. See, e.g. Janet Novack, Just Say "No Comment," FORBES, Feb. 23, 1998, at 48 (warning of the dangers of lying to federal agents, even if not under oath, and advising silence to those being questioned); Alvin C. Harrell, Recent Developments of Interest, 52 CONSUMER FIN. L.Q. REP. 2, at 128-29 (Winter 1998) ("[T]hose who avoid dealing with federal institutions whenever possible may now feel they have yet another reason for doing so.").

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individuals to say as little as possible if questioned by agents of the government. Should stonewalling occur it may well result in the very "perversion of governmental function" that section 1001 seeks to prevent.

VI. CONCLUSION

So long as the impulse to deny wrongdoing remains a part of human nature, criminal prosecution based on nothing more than a denial to surprise questioning is unlikely to be considered fair and just. The Supreme Court may have put an end to the exculpatory no doctrine, but with the long history of disagreement caused by the broad scope of section 1001, the debate seems far from over. If Congress fails to take its cue from Justice Ginsburg and amend the statute, the future will bring other exceptions, because people, in general, are not ready for "no" to really mean "no."

KAREN CHAPMAN

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155. See Robert Gellem, Guard Words To Avoid False Statement Charges, GOV'T COMPUTER NEWS, Jun. 22, 1998 at 22. I want to give some nonlegal, layman’s advice on how to deal with the [Brogan] ruling.... First, if possible, refuse to talk to federal auditors or investigators.... Second, if you cannot evade the investigators, put them off. Insist on going over all the groundrules with them.... Reflect the heat. Third, send them to your boss. Let him or her take the risk. Fourth, ask your agency lawyer for a written explanation of the bounds of the false statement crime. Meet with an agency lawyer to discuss it. That should kill a couple of weeks. Fifth, ask for an agency lawyer to be present when you are interviewed. Leave the room after each question to consult with your lawyer. Take your sweet time here. One slip and you could go to jail. Maybe you can bore the investigators to death so they will leave you alone. Finally, if you have to answer questions, be as vague as possible. If enough people gum up the investigatory process by insisting on full protections for their constitutional rights, maybe Congress will narrow [section 1001] so that it is not a trap for the unwary and a tool for overzealous prosecutors to manufacture crimes out of nothing.

Id. 156. See Brogan, 118 S. Ct. at 805 (noting “the congressional intent to protect the authorized functions of governmental departments and agencies from perversion which might result from the deceptive practices described.”) (quoting United States v. Gilliland, 312 U.S. 86, 93 (1941)).

157. We see it everywhere from the proverbial child with her hand in a cookie jar to the President of the United States.

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