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No Exception for No: Rejection of the Exculpatory No Doctrine

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NO EXCEPTION FOR "NO": REJECTION OF THE EXCULPATORY NO DOCTRINE

Brogan v. United States, 118 S. Ct. 805 (1998)

I. INTRODUCTION

In *Brogan v. United States*,[1] the Supreme Court held that there was no exception to criminal liability under 18 U.S.C. § 1001 for a false statement that constituted a mere denial of guilt. Seven circuits had recognized the exception, termed the "exculpatory no" doctrine.[2] James Brogan was convicted in the District Court for the Southern District of New York for making a false statement to federal agents in violation of 18 U.S.C. § 1001.[3] When asked about whether he had accepted bribes from an employer, Brogan falsely responded with a simple "no."[4] The Court of Appeals for the Second Circuit affirmed Brogan's conviction under 18 U.S.C. § 1001, joining the Fifth Circuit in rejecting the "exculpatory no" doctrine.[5] The Supreme Court granted certiorari[6] to resolve the split among the circuits regarding the validity of the doctrine.

This Note argues that although the Court properly concluded that the plain language of 18 U.S.C. § 1001 admits no exception for an "exculpatory no," the Court ignored serious policy concerns regarding the adequacy of controls on prosecutorial abuse. This Note then discusses how the holding in *Brogan* is consistent with the textualist movement on the Court, led by Justice Antonin Scalia. The Court's rejection of the judicially

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[1] 118 S. Ct. 805 (1998).

[2] *See infra* Part II.C.

[3] *Brogan*, 118 S. Ct. at 808.

[4] *Id.* at 807-08.

[5] United States v. Wiener, 96 F.3d 35, 37-38, 40 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998); *see* United States v. Rodriguez-Rios, 14 F.3d 1040, 1041 (5th Cir. 1994) (en banc).

[6] Brogan v. United States, 117 S. Ct. 2430 (1997).

crafted "exculpatory no" doctrine was predictable in light of the Court's increased emphasis on statutory "plain meaning." However, this Note argues that *Brogan* may not be a significant victory for texualists, since the Court was not asked to ignore compelling legislative history. Finally, this Note concludes that Congress is not likely to overrule *Brogan* by codifying the "exculpatory no" doctrine.

II. BACKGROUND

A. LEGISLATIVE HISTORY

Federal law makes it a felony to "knowingly and willfully . . . [make] any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any department or agency of the United States."[7] In other words, § 1001 prohibits lying to the federal government.[8] The statute criminalizes a sweeping range of deceptive behavior, including lying on government forms as well as lying directly to federal agents.[9]

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[7] 18 U.S.C. § 1001 (1988). The full text of the statute reads:

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

Id. As amended by the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, the relevant part of 18 U.S.C. § 1001 now 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
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001.

[8] Terri L. Combs & Ahna M. Thoresen, *Lying to the SEC: The Basics of the False Statements Statute*, SC73 A.L.I.-A.B.A. 89, 92 (1998).

[9] *Id.* at 93.

The phrase "knowingly and willfully" only requires that the statement or misrepresentation be deliberately made with knowledge that it is untrue.[10] It is not necessary that the speaker know that it is illegal to make the false statement.[11] Moreover, the phrase "any matter within the jurisdiction of any department or agency of the United States" confers jurisdiction on all three branches of government.[12] Therefore, jurisdiction exists as long as the matter relates to the authorized function of a government entity.[13]

Congress enacted the statutory progenitor[14] of § 1001 in 1863 "in the wake of a spate of frauds upon the Government."[15] The original act bears little resemblance to the current statute.[16] For example, the false statement provision in the 1863 Act prohibited only those false statements that were related to the filing

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[10] *Id.* at 94.

[11] *Id.* at 94-95. However, under the current statute, a false statement must also be "material." *Brogan*, 118 S. Ct. at 815-16 (1998) (Ginsburg, J., concurring); *see supra* note 7. To be "material," 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." Combs & Thoresen, *supra* note 8, at 94 (citing United States v. Gaudin, 515 U.S. 506, 509 (1995)).

[12] Combs & Thoresen, *supra* note 8, at 95. In 1995, the Court overruled long-standing precedent that "any agency or department of the United States" covered all three branches of government. *See* Hubbard v. United States, 514 U.S. 695 (1995) (overruling United States v. Bramblett, 348 U.S. 503 (1955)). However, Congress promptly responded by amending § 1001 to again reach "the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." *See supra* note 7. *See also infra* Part V.C.

[13] Combs & Thoresen, *supra* note 8, at 95.

[14] Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

[15] *Bramblett*, 348 U.S. at 504.

[16] *Hubbard*, 514 U.S. at 705. The statutory progenitor of 18 U.S.C. § 1001 made it a criminal offense for any person to:

> make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent ....

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The original enactment also prohibited false statements, but only those statements made "for the purpose of obtaining, or aiding in obtaining the approval or payment of [a false] claim ...." *Id.*

of fraudulent claims against the government.[17] This original provision remained "essentially unchanged for 55 years."[18] Then, in 1918, Congress amended the statute "to cover other false statements made 'for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States.'"[19] History suggests that the purpose of the 1918 amendment was to protect the new government corporations that emerged during World War I.[20] Despite the amendment's somewhat broader language, the Supreme Court, in *United States v. Cohn*, held that the statute was still limited to "cheating the Government out of property or money."[21]

The Court's interpretation of the statute in *Cohn* "became a serious problem with the advent of the New Deal programs in the 1930's."[22] The government realized that its political interests could be undercut even if it did not lose any property or money.[23] For example, the government sought to limit petroleum use by restricting the amount shipped in interstate commerce.[24] However, some petroleum producers began falsely reporting the amount produced and shipped from certain oil wells.[25] Even though the Government was not losing money as a result of the false reports,[26] the petroleum producers effectively undercut the government's interest in reducing the consumption of oil. In order to regain control, Congress responded with

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[17] Brogan v. United States, 118 S. Ct. 805, 813 (1998) (Ginsburg, J., concurring) (citing Act of Mar. 2, 1863, ch. 67, 12 Stat. 696); *see Hubbard*, 514 U.S. at 705.

[18] *Hubbard*, 514 U.S. at 705.

[19] *Brogan*, 118 S. Ct. at 813 (Ginsburg, J., concurring) (quoting Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015-16).

[20] *Hubbard*, 514 U.S. at 706. Government corporations are "created and participated in by the United States for the achievement of governmental objectives." Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386 (1995). The "first large-scale use of Government-controlled corporations came with the First World War," when Congress created the United States Grain Corporation, the United States Emergency Fleet Corporation, and the United States Spruce Production. *Id.* at 388.

[21] 270 U.S. 339, 346 (1926).

[22] United States v. Yermian, 468 U.S. 63, 80 (1984).

[23] *Brogan*, 118 S. Ct. at 814 (Ginsburg, J., concurring).

[24] United States v. Gilliland, 312 U.S. 86, 90 (1941).

[25] *Id.* at 89.

[26] *See* Sandra L. Turner, *Would I Lie To You? The Sixth Circuit Joins the "Exculpatory No" Controversy in* United States v. Steele, 81 Ky. L.J. 213, 217 n.38 (1992-1993).

a dramatic amendment to the statute in 1934.[27] It amended the statute to prohibit the making of "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 of America is a stockholder . . . ."[28] The relevant part of this statute remains substantially the same today.[29]

B. THE FIFTH AMENDMENT

Some courts found that the application of 18 U.S.C. § 1001 came "uncomfortably close" to infringing upon Fifth Amendment rights.[30] The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself . . . ."[31] This clause embodies the privilege against self-incrimination.[32] The Court has held that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[33] Thus, the privilege is limited in nature because while an accused may refuse to testify at trial, he may not withhold "real or physical evidence."[34]

On the other hand, the privilege is not strictly limited to refusing to take the stand at trial. It may extend to analogous situations where the State has compelled a guilty suspect to talk[35]

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[27] Hubbard v. United States, 514 U.S. 695, 706-07 (1995) ("The differences between the 1934 Act and its predecessors are too dramatic to evidence a congressional intent to carry forward any features of the old provision."); *Gilliland*, 312 U.S. at 93 (1934 Amendment removed restriction to matters in which government has financial or proprietary interest).

[28] Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996.

[29] *See supra* note 7.

[30] *See, e.g.*, United States v. Medina De Perez, 799 F.2d 540, 547 (9th Cir. 1986).

[31] U.S. CONST. amend. V.

[32] 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, 693 (1997).

[33] *Id.* at 694 (citing Pennslyvania v. Muniz, 496 U.S. 582, 589 (1990)).

[34] *Id.*

[35] The Court has repeatedly held that the privilege "is not triggered unless there is a compulsion to talk . . . ." *Id.* at 693 (quoting Fisher v. United States, 425 U.S. 391, 397 (1976)).

and has forced him to confess or lie.[36] When an accused is effectively "boxed-in" in this way, his Fifth Amendment rights are invoked.[37] The Court has held that the privilege of self-incrimination is "founded on our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, lying, or punishable silence."[38] Some courts were uncomfortable finding § 1001 liability when a suspect had faced a similar trilemma.

C. THE SPLIT AMONG THE CIRCUITS

Concerned that prosecutors would use the broad language of § 1001 to punish minor criminal activity or even lawful activity, some courts responded by adopting an exception for the mere denial of guilt.[39] This exception became known as the "exculpatory no" doctrine.[40] Under this doctrine, a protected response must generally be exculpatory and limited to simple words of denial.[41] First, a response is exculpatory "if it conveys false information in a situation in which a truthful reply would have incriminated the interrogee."[42] Second, simple words of denial cover statements like "'No, I did not,' 'none,' or 'never,'" but do not cover more elaborate stories of fabrication.[43] For example, if an FBI agent questioned a suspect about receiving ille-

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[36] *Id.* at 694.

[37] *Id.* An example of a "boxed-in" witness is one who, under a grant of legislative immunity, is ordered to testify or face contempt. *Id.* at 694 n.32 (citing South Dakota v. Neville, 459 U.S. 553, 562-63 (1983)).

[38] *Id.* at 694 (quoting Muniz, 496 U.S. at 597).

[39] Giles A. Birch, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273, 1279 (1990).

[40] Although the actual term "exculpatory no" was first used in *United States v. McCue*, 301 F.2d 452 (2d Cir. 1962), the exception to § 1001 liability was first articulated in a Maryland district court in 1955 and in the Fifth Circuit in 1962. *See* Lt. Col. Bart Hillyer & Maj. Ann D. Shane, *The "Exculpatory No": Where Did It Go?*, 45 A.F.L. Rev. 133, 139-41 (1998) (citing United States v. Stark, 131 F. Supp. 190 (D. Md. 1955); Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962)).

[41] *See* Scott D. Pomfret, *A Tempered 'Yes' to the 'Exculpatory No,'* 96 MICH. L. REV. 754, 755 (1997) (citing Tim A. Thomas, Annotation, *What Statements Fall Within Exculpatory Denial Exception to Prohibition, Under 18 U.S.C.S. § 1001* [sic], *Against Knowingly and Willfully Making False Statement Which is Material to Matter Within Jurisdiction of Department or Agency of United States*, 102 A.L.R. FED. 742 (1991)).

[42] *Id.* at 755-56.

[43] *Id.* at 756-57.

gal income and that suspect falsely responded, "No, I did not," then the suspect would qualify for an exception to § 1001 liability under the "exculpatory no" doctrine.[44] The suspect's response would be a simple denial of guilt made in a situation where the truth would have been incriminating.[45] Prior to *Brogan v. United States*,[46] the Supreme Court had never examined the "exculpatory no" doctrine, even though lower courts had wrestled with the doctrine for decades.[47] In fact, the circuits divided sharply over the validity of the "exculpatory no" doctrine.[48]

Seven circuits have adopted the "exculpatory no" doctrine in order to limit criminal liability under § 1001.[49] Although the circuits approached the doctrine differently,[50] each basically held "that Section 1001 is generally not applicable to false statements that are essentially exculpatory denials of criminal

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[44] *Id.* (citing Paternostro v. United States), 311 F.2d 298 (5th Cir. 1962), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994) (en banc)).

[45] *Id.* at 756.

[46] 118 S. Ct. 805 (1998).

[47] *See* Hillyer & Shane, *supra* note 40, at 133, 149.

[48] *Compare* Moser v. United States, 18 F.3d 469 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801 (8th Cir. 1990); United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988); United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988); United States v. Tabor, 788 F.2d 714 (11th Cir. 1986); United States v. Fitzgibbon, 619 F.2d 874 (10th Cir. 1980); *and* United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), *with* United States v. Wiener, 96 F.3d 35 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United, 118 S. Ct. 805 (1998); *and* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994) (en banc) (overruling Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962)).

[49] The First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the "exculpatory no" doctrine. *See Moser*, 18 F.3d at 473-74; *Taylor*, 907 F.2d at 805; *Equihua-Juarez*, 851 F.2d at 1224; *Cogdell*, 844 F.2d at 183; *Tabor*, 788 F.2d at 717-19; *Fitzgibbon*, 619 F.2d at 880-81; *Chevoor*, 526 F.2d at 183-84.

[50] The scope of the doctrine has been limited by courts in various ways, including one or more of the following: (1) The statement must be a mere denial of guilt and not an affirmative misrepresentation; (2) A truthful answer must have incriminated the declarant; (3) The declarant must be unaware that he is under investigation; (4) The nature of the government inquiry must be investigative and not administrative; (5) The false statement must not impair the basic functions of the government agency; (6) The false statement must be unrelated to a privilege or a claim against the government; (7) The false statement must be oral and unsworn; (8) The false statement must be a response to an inquiry initiated by a federal agency or department. *See* Thomas, *supra* note 41, at §§ 3-10 (1991).

activity."[51] Courts adopting the "exculpatory no" doctrine were concerned with legislative intent and Fifth Amendment values.[52] First, these courts held that Congress did not intend for § 1001 to criminalize a false statement that constituted an "exculpatory no."[53] Second, these courts had a "distaste for an application of the statute that is uncomfortably close to the Fifth Amendment" privilege against self-incrimination.[54]

In contrast, the Second and Fifth Circuits have expressly rejected the "exculpatory no" doctrine.[55] Both circuits argued that the plain language of § 1001 does not admit an exception for a mere denial of guilt.[56] Their method of statutory interpretation differed from proponents of the "exculpatory no" doctrine in that they "approached the statute by looking not at its purpose, but at its plain language."[57] Although the Fifth Circuit agreed that the purpose of § 1001 was to prohibit perversions of governmental functions, it refused to limit the statute to that purpose, "not because the rationale was an inaccurate characterization of the statute's purpose, but because such a limitation would conflict with its text."[58] The Second Circuit found that the legislative history of § 1001 was inconclusive and, therefore, had no effect on the interpretation of the statute's plain language.[59] These circuits also rejected the claim that

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[51] Kara L. Preissel & Peter P. Rahbar, *False Statements*, 35 AM. CRIM. L. REV. 687, 699 (1998) (quoting United States v. Wiener, 96 F.3d 35, 37 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998)).

[52] *See id.*; Birch, *supra* note 39, at 1281.

[53] *See* Preissel & Rahbar, *supra* note 51, at 699-700 (citing United States v. Taylor, 907 F.2d 801, 804 (8th Cir. 1990); United States v. Cogdell, 844 F.2d 179, 182 (4th Cir 1988)).

[54] United States v. Medina De Perez, 799 F.2d 540, 547 (9th Cir. 1986); *see also supra* Part II.B.

[55] United States v. Wiener, 96 F.3d 35, 39-40 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998); United States v. Rodriguez-Rios, 14 F.3d 1040, 1050 (5th Cir. 1994) (en banc) (overruling Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962)).

[56] *Wiener*, 96 F.3d at 38; *Rodriguez-Rios*, 14 F.3d at 1044.

[57] *Rodriguez-Rios*, 14 F.3d at 1047.

[58] *Id.* at 1047 n.17.

[59] *Wiener*, 96 F.3d at 39 (citing Hubbard v. United States, 514 U.S. 695, 708 (1995) ("Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress.")).

Fifth Amendment values justify the "exculpatory no" doctrine.[60] They reasoned that the Fifth Amendment does not allow a person to lie instead of remaining silent.[61] Therefore, they concluded that "[t]he Fifth Amendment's privilege against self-incrimination . . . lends no weight whatever to the 'exculpatory no doctrine.'"[62]

Finally, "the Third, Sixth, and D.C. Circuits have neither adopted nor rejected the 'exculpatory no' doctrine."[63] While the doctrine has been raised in these circuits as a defense, the courts avoided adopting or rejecting the doctrine by holding that the exception, if there were one, would not apply to the facts of the given case.[64] Therefore, none of these circuits ever reached the merits of the doctrine.[65]

III. FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

James Brogan was a member of Local 32E, Service Employees International Union, AFL-CIO.[66] He had been a member since 1951 and was a union officer in 1987 and 1988.[67] JRD Management Corporation ("JRD") was a real estate company that employed members of the union.[68] During his term as a union officer, Brogan accepted several cash payments from JRD.[69] The last payment, $150, was accepted on December 14, 1988.[70]

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[60] *See id.* at 39; *Rodriguez-Rios*, 14 F.3d at 1049.

[61] *See Wiener*, 96 F.3d at 39; *Rodriguez-Rios*, 14 F.3d at 1049.

[62] *Wiener*, 96 F.3d at 39; *see Rodriguez-Rios*, 14 F.3d at 1049.

[63] *Wiener*, 96 F.3d at 37 (citing United States v. LeMaster, 54 F.3d 1224, 1229-30 (6th Cir. 1995); 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)).

[64] *See* Hillyer & Shane, *supra* note 40, at 145, 146, 148 (citing United States v. LeMaster, 54 F.3d 1224, 1229-30 (6th Cir. 1995); United States v. Barr, 963 F.2d 641, 647 (3d Cir. 1992); United States v. White, 887 F.2d 267, 273-74 (D.C. Cir. 1989)).

[65] *Id.*

[66] *Wiener*, 96 F.3d at 36.

[67] *Id.*

[68] *Id.*; Brogan v. United States, 118 S. Ct. 805, 807 (1998).

[69] Brogan accepted four or five cash payments. *Compare* Brogan v. United States, 118 S. Ct. 805, 813 (Ginsburg, J., concurring) (accused of accepting five cash pay-

Federal agents from the Department of Labor and the Internal Revenue Service investigated JRD.[71] The agents searched JRD's headquarters and removed records that showed Brogan had accepted bribes from the company.[72] On the evening of October 4, 1993, the agents surprised Brogan at his home.[73] At that time, the agents possessed documentary evidence that Brogan had accepted several cash payments from JRD.[74] The agents identified themselves and asked Brogan for his "cooperation in an investigation of JRD and various individuals." [75] Brogan was not advised of his right to remain silent,[76] nor was he told that it was a crime to make a false statement to a federal agent until after he responded to questioning.[77] The agents only told Brogan that he would need an attorney to cooperate in the investigation.[78] They told him "that if he wished to cooperate, he should have an attorney contact the U.S. Attorney's Office, and that if he could not afford an attorney, one could be appointed for him."[79]

At that point, the agents asked Brogan if he would be willing to answer some of their questions.[80] He agreed to questioning and was asked "whether he had ever received any cash or gifts from JRD when he was a union officer," to which he simply answered "no."[81] One of the agents testified that they next told Brogan that they had searched JRD headquarters and had documents in their possession showing that he had, in fact, accepted cash from JRD.[82] Then, they told him that "lying to fed-

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ments) *with* Petitioner's Brief at 2-3, *Brogan* (No. 96-1579) (accused of accepting four cash payments).

[70] Petitioner's Brief at 2, *Brogan* (No. 96-1579).

[71] *Brogan*, 118 S. Ct. at 807.

[72] *Wiener*, 96 F.3d at 36.

[73] Petitioner's Brief at 2, *Brogan* (No. 96-1579).

[74] *Id.* at 4.

[75] *Brogan*, 118 S. Ct. at 807.

[76] Petitioner's Brief at 3 n.1, *Brogan* (No. 96-1579).

[77] *Id.* at 4.

[78] United States v. Wiener, 96 F.3d 35, 36 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998).

[79] *Brogan*, 118 S. Ct. at 807.

[80] *Id.*

[81] *Id.* at 807-08.

[82] *Wiener*, 96 F.3d at 36.

eral agents in the course of an investigation was a crime."[83] Brogan did not change his answers or say anything further on the issue.[84] Moments later the interview ended.[85]

B. PROCEDURAL HISTORY

Brogan and several co-defendants were tried before a jury in the United States District Court for the Southern District of New York.[86] The jury found Brogan guilty of accepting unlawful cash payments from an employer and of making a false statement to a federal agent.[87] He was fined $4000 and sentenced to nine months imprisonment followed by two years of supervised release.[88] The court stayed execution of the sentence.[89]

Brogan and his co-defendants appealed.[90] Brogan claimed that his conviction under § 1001 should be reversed because his false statement qualified as an "exculpatory no."[91] He pointed out that many circuits excluded an "exculpatory no" from § 1001 criminal liability.[92] However, the United States Court of Appeals for the Second Circuit refused to adopt "the so-called 'exculpatory no' doctrine,"[93] and consequently affirmed Brogan's conviction.[94]

Like the Third, Sixth, and D.C. Circuits, the Second had neither adopted nor rejected the "exculpatory no" doctrine.[95] The doctrine had been argued as a defense before the court,

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[83] *Brogan*, 118 S. Ct. at 808.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* (violating 29 U.S.C. §§ 186(b)(1), (a)(2), (d)(2) and 18 U.S.C. § 1001). At trial, the payments that Brogan accepted prior to December 14, 1998, were not admissible as evidence of his accepting bribes because the statute of limitations had run. However, the payments were admitted to show that he made a false statement. Petitioner's Brief at 3, *Brogan* (No. 96-1579).

[88] Petitioner's Brief at 2, *Brogan* (No. 96-1579).

[89] *Id.*

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

[91] *Id.* at 36-37.

[92] *Id.* at 37.

[93] *Id.* at 36, 37.

[94] *Id.* at 36, 40.

[95] *Id.* at 37.

but the court "always found it inapplicable to the facts of a given case."[96] The court noted that seven courts of appeals[97] had created a "judicially-crafted" exception to § 1001 liability for a mere denial of guilt.[98] It agreed that, in these circuits, Brogan's simple "no" would not be criminal.[99] Nevertheless, the court refused to adopt the doctrine.[100]

The Second Circuit found no support for the "exculpatory no" doctrine in § 1001's plain language, the statute's legislative history, or the Fifth Amendment.[101] First, the court found that the statute's language was clear.[102] Then, it noted that "'as a matter of common sense and plain meaning, the word 'no' is indeed a statement.'"[103] Since § 1001's plain language was clear, the court criticized other courts of appeals for creating "judicial gloss" on the text.[104] The court implied that those courts of appeals exceeded their authority because § 1001 was not ambiguous and did not yield absurd results.[105]

Second, the Court found nothing in § 1001's legislative history to support creating an exception for an "exculpatory no."[106] The court briefly reviewed the statute's history of amendments

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[96] *Id.*; *see, e.g.*, United States v. Ali, 68 F.3d 1468, 1474 (2d Cir. 1995); United States v. Cervone, 907 F.2d 332, 343 (2d Cir. 1990); United States v. Capo, 791 F.2d 1054, 1069 (2d Cir. 1986), *rev'd in part on other grounds*, 817 F.2d 947 (2d Cir. 1987); United States v. McCue, 301 F.2d 452, 455 (2d Cir. 1962).

[97] The First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the "exculpatory no" doctrine. *Wiener*, 96 F.3d at 37. However, the circuits differ concerning the content or scope of the doctrine. *Id.* at 37, 40; *see generally* John E. Davis & Michael K. Forde, *Tenth Survey of White Collar Crime: False Statements*, 32 AM. CRIM. L. REV. 323, 331 nn.37-42 (1995); Timothy I. Nicholson, Note, *Just Say "No": An Analysis of the "Exculpatory No" Doctrine*, 39 WASH. U.J. URB. & CONTEMP. L. 225, 232-49 (1991); Thomas, *supra* note 41 at 751-96.

[98] *Wiener*, 96 F.3d at 37.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 39-40.

[102] *Id.* at 38.

[103] *Id.* (quoting United States v. Rodriguez-Rios, 14 F.3d 1040, 1044 (5th Cir. 1994) (en banc)).

[104] *Id.* (quoting Moser v. United States, 18 F.3d 469, 473 (7th Cir. 1994)).

[105] *Id.* (citing Hubbard v. United States, 514 U.S. 695, 702-03 (1995); Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)).

[106] *Id.*; *see* Thomas, *supra* note 41, at 748-49 (describing legislative history as alleged basis for "exculpatory no" doctrine).

and recodifications, concluding that "the long-term trend [was] one of expansion."[107] The court questioned why other courts of appeals had limited liability in the face of this "trend of expansion."[108] It reasoned that only Congress could narrow the liability of an unambiguous statute,[109] especially when the legislative history is inconclusive.[110]

Third, the court found that Fifth Amendment concerns about § 1001 were unfounded.[111] Although some courts of appeals claimed that "Fifth Amendment values" supported adopting the "exculpatory no" doctrine, it simply and firmly stated that "the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent."[112] An individual has no constitutional right to lie.[113] Therefore, the court held that the Fifth Amendment was irrelevant to the validity of the "exculpatory no" doctrine.[114]

Since the Court of Appeals for the Second Circuit found no support for the doctrine in § 1001's literal text, its legislative history, or in the Fifth Amendment, the court refused to join the majority of circuits that had adopted the "exculpatory no" doctrine.[115] In rejecting the doctrine, the court rejected Brogan's

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[107] *Wiener*, 96 F.3d at 38-39.

[108] *Id.*

[109] *Id.* The court found it compelling that Congress refused to pass at least two bills that would have narrowed § 1001 liability. *Id.* (citing United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 n.19 (5th Cir. 1994) (en banc) (citing Criminal Code Revision Act of 1980, H.R. 6915, 96th Cong., 2d Sess., § 1742 (1980); Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. § 1343(a)(1)(A) (1981))).

[110] *Wiener*, 96 F.3d at 38-39. The court heeded the Supreme Court's instruction "'not to rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress.'" *Id.* (quoting Hubbard v. United States, 514 U.S. 695, 708 (1995)).

[111] *Id.* at 39-40.

[112] *Id.* at 39.

[113] *Id.* (citing United States v. Steele, 933 F.2d 1313, 1320-21 (6th Cir. 1991) (en banc)).

[114] *Id.*

[115] *Id.* at 39-40. However, the court left open the question of whether a defendant must *know* that making a false statement is criminal in order to violate § 1001. *Id.* at 40. Also, the court did not decide whether a defendant would have the requisite criminal intent if he were surprised, or had inadequate time to reflect, when he denied guilt. *Id.*

defense to § 1001 false statement charges.[116] Therefore, Brogan's conviction was affirmed.[117]

The United States Supreme Court granted certiorari[118] on June 9, 1997 to resolve a split among the circuits regarding the validity of the "exculpatory no" doctrine.

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

In an opinion written by Justice Scalia,[119] the Supreme Court affirmed the Second Circuit's rejection of an "exculpatory no" exception to § 1001 criminal liability.[120] While rejecting the "exculpatory no" doctrine, the Court noted that is was overruling the law in seven circuits.[121] These circuits had ruled that a mere denial of guilt fell outside the scope of § 1001.[122] However, the Court found no support for this judicially crafted exception.[123]

The Court first looked at the relevant text of § 1001,[124] which "covers 'any' false statement—that is, a false statement 'of whatever kind.'"[125] The word "no" by itself is a statement, albeit unelaborated, that can be contextually false.[126] Relying on a dic-

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[116] *Id.* at 36-37.

[117] *Id.* at 40.

[118] Brogan v. United States, 117 S. Ct. 2430 (1997).

[119] Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined Justice Scalia in the majority opinion. Justice Souter joined in part. Brogan v. United States, 118 S. Ct. 805, 807 (1998).

[120] *Id.* at 812.

[121] The First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits had explicitly adopted the "exculpatory no" doctrine. *Id.* at 808.

[122] However, even among the circuits that had adopted the doctrine, there was substantial divergence concerning the content of the "exculpatory no" doctrine. *Id.* For example, the circuits had developed different tests for whether a particular statement qualified as a mere denial of guilt. *Id.* (citing Thomas, *supra* note 41, at 742).

[123] *Id.* at 811-12.

[124] *Id.* at 808; *see supra* note 7 for relevant text of § 1001.

[125] *Brogan*, 118 S. Ct. at 808 (quoting United States v. Gonzales, 520 U.S. 1 (1997)).

[126] Brogan actually conceded that his simple "no" response to the federal agents' questioning would be criminal under a literal reading of § 1001. *Id.*; *see* Petitioner's Brief at 5, *Brogan* (No. 96-1579).

tionary definition of the word "statement,"[127] the Court summarily concluded that § 1001 literally covers an "exculpatory no."[128]

Next, the Court criticized[129] proponents of the "exculpatory no" doctrine for relying too heavily on a dictum in *United States v. Gilliland*.[130] In *Gilliland*, the Court was asked to interpret the predecessor to § 1001.[131] In dicta, the Court stated that the 1934 amendment indicated "'congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described'" in the statute.[132] However, the Court in *Brogan* explained that although it identified congressional intent in *Gilliland*, it did not hold that the congressional intent limited the scope of § 1001.[133] The Court was adamant that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy . . . ."[134] Therefore, the Court rejected Brogan's argument that § 1001 covers only those statements made to federal agents that pervert governmental functions.[135] More generally, the Court rejected "the broad proposition that criminal

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[127] *Brogan*, 118 S. Ct. at 808 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2461 (2d ed. 1950) (def. 2: "That which is stated; an embodiment in words of facts or opinions")).

[128] *Id.*

[129] *Id.* at 809.

[130] 312 U.S. 86 (1941).

[131] *Id.* at 89-90.

[132] *Brogan*, 118 S. Ct. at 809 (quoting United States v. Gilliland, 312 U.S. 86, 93 (1941)).

[133] *Id.*

[134] *Id.*

[135] *Id.* The Court rejected Brogan's limitation, but it identified some specific instances when a statute's reach may be limited. *Id.* at 810-11. First, the Court may interpret a statute narrowly when it "[does] not purport to be departing from a reasonable reading of the text." *Id.* at 810-11 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 77-78 (1994); Williams v. United States, 458 U.S. 279, 286-87 (1982)). Second, it may apply a "background interpretive principle of general application." *Id.* at 811 (citing Staples v. United States, 511 U.S. 600, 619 (1994) (reading in a mens rea requirement); Sorrells v. United States, 287 U.S. 435, 446 (1932) (exempting violations induced by entrapment); United States v. Palmer, 3 Wheat. 610, 631 (1818) (not applying statute extraterritorially to noncitizens)). Third, "[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law." *Id.*; *see* 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 142(a), at 121 (1984).

statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions."[136] It explained that this broad judicial rule could not be applied consistently or predictably.[137]

Even assuming that § 1001 criminalizes only those false statements that pervert governmental functions, the Court found that Brogan's "exculpatory no" perverted a proper government function.[138] Brogan was under criminal investigation for accepting bribes from union officials.[139] A criminal investigation is clearly a function of the federal government.[140] Furthermore, the purpose of every investigation is to find the truth.[141] The Court concluded that any false statement in the course of an investigation would serve to frustrate the government's purpose in uncovering the truth.[142]

The Court considered the corollary argument that an investigation is not perverted if the investigators do not believe the false statement.[143] However, the inquiry then becomes not whether the false statement was made, but whether the lie was convincing.[144] By analogy to the crime of perjury,[145] the Court rejected the defense that Brogan's false statement was not believed.[146]

Next, the Court found that a literal reading of § 1001 would not offend the spirit the Fifth Amendment.[147] The Fifth Amendment confers the right to remain silent upon criminal

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[136] *Brogan*, 118 S. Ct. at 811.

[137] *Id.*

[138] *Id.* at 808-09.

[139] *See supra* Part III.A.

[140] *Brogan*, 118 S. Ct. at 809.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] It is no defense to a charge of perjury that the jurors did not believe and were not influenced by the false testimony. *Id.* at 809 n.1 (citing United States v. Abrams, 568 F.2d 411, 421 (5th Cir. 1978); 70 C.J.S. *Perjury* § 13 at 260-61 (1987)).

[146] *Id.* at 808-09.

[147] *Id.* at 810; *see supra* note 31 and accompanying text for the relevant text of the Fifth Amendment.

defendants.[148] The Court concluded that "[i]n the modern age of frequently dramatized 'Miranda' warnings," it was "implausible" that a person under investigation may be unaware of this right.[149] Furthermore, the Court emphasized that there is no excuse to lie, just because silence can be used against a person.[150] Therefore, the Court rejected the contention that silence was not a realistic option.[151]

The Court had little tolerance for liars. It stated, "[w]hether 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."[152] The Court was critical of, not sympathetic towards, the guilty suspect who must chose between admitting guilt, remaining silent, or lying.[153] The guilty suspect can lawfully remain silent.[154] But, his "exculpatory no" would be a lie.[155] The Court found no support in the Fifth Amendment for a privilege to lie.[156]

Lastly, the Court dismissed popular concern that § 1001 will be abused by prosecutors.[157] The concern is that prosecutors will use § 1001 to manufacture crime or to punish a simple de-

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[148] *Brogan*, 118 S. Ct. at 810.

[149] *Id.* In *Miranda v. Arizona*, the Court found that unless a suspect was "in custody or otherwise deprived of his freedom of action in any significant way," it was implausible that the suspect was unaware of his right to remain silent. 384 U.S. 436, 445 (1966).

[150] *Brogan*, 118 S. Ct. at 810 (citing United States v. Knox, 396 U.S. 77, 81-82 (1969)).

[151] *Id.*

[152] *Id.*

[153] *Id.* Borrowing the term from *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964), Brogan labeled the situation of a guilty suspect a "cruel trilemma." Petitioner's Brief at 11, *Brogan* (No. 96-1579). The Court responded that a guilty person has only himself to blame for creating the difficult situation. *Brogan*, 118 S. Ct. at 810 (citing Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1016 (1996) (arguing that the innocent person lacks even a "lemma")). The Court also criticized Brogan for manipulating the term in order to validate the "exculpatory no" doctrine. *Id.* at 810. Originally, in *Murphy*, the Court recognized "the cruel trilemma of self-accusation, perjury or contempt." 378 U.S. at 55.

[154] *Brogan*, 118 S. Ct. at 810.

[155] *Id.*

[156] *Id.*

[157] *Id.*

nial of guilt more harshly than the underlying crime.[158] The Court indicated that no evidence was presented to show past abuse or a future threat of abuse.[159] Moreover, even if prosecutors could abuse § 1001, adopting the "exculpatory no" doctrine would not solve the problem.[160] The Court suggested that investigators would simply pressure the suspect into a more detailed response than the simple "no."[161] Regardless, it said that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so . . . ."[162]

After reviewing *Gilliland*, the Fifth Amendment, and policy concerns, the Court concluded that the only support for the "exculpatory no" doctrine was that seven circuits had adopted it.[163] Unlike the dissent, the Court did not place much weight on common opinion.[164] Thus, it was not persuaded to depart from a literal reading of the text.[165] Since the plain language of § 1001 did not support the "exculpatory no" doctrine, the Court affirmed the judgment of the Court of Appeals for the Second Circuit.[166]

B. JUSTICE SOUTER'S CONCURRENCE

In a brief concurrence,[167] Justice Souter stated that he joined the majority opinion except for its discussion of whether prosecutors could potentially abuse § 1001 as now written.[168] On that issue, he joined Justice Ginsburg's concurrence "espousing

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[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 811-12. The Court agreed with Justice Stevens' dissent that a felony conviction for a simple "no" may seem harsh. *Id.* at 811. However, the Court stated that it would not ignore harsh penalties unless specifically instructed to do so by the Constitution of the United States. *Id.*; *see* U.S. CONST. art. I, § 9; U.S. CONST. art. III, § 3; U.S. CONST. amend. VIII; U.S. CONST. amend. XIV, § 1.

[163] *Brogan*, 118 S. Ct. at 811.

[164] The Court stated that since common opinion is not consistently followed, "it becomes yet another user-friendly judicial rule to be invoked ad libitum." *Id.*

[165] *Id.* at 812.

[166] *Id.*

[167] Justice Souter concurred in part and concurred in the judgment. *Id.*

[168] *Id.* (Souter, J., concurring).

congressional attention to the risks inherent in the statute's current breadth."[169]

C. JUSTICE GINSBURG'S CONCURRENCE

Concurring in the judgment,[170] Justice Ginsburg wrote separately "to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes."[171] Although she admitted that § 1001's plain language covered an "exculpatory no,"[172] she warned that federal agents could abuse the broad language.[173]

First, Justice Ginsburg summarized the facts of both the present case[174] and *United States v. Tabor*.[175] She suggested that these cases are not rare.[176] In *Tabor*, during the course of a criminal investigation, IRS agents discovered that a notary public had notarized a deed without having the signatory appear in front of her.[177] The notary public had violated Florida state law in doing so.[178] Knowing this, the IRS agents went to her home and questioned her about the deed.[179] The agents did not tell her that she was under investigation or that making a false statement was a felony.[180] When she lied to the agents, saying that the signatory had signed the deed before her, the agents charged her with a § 1001 violation.[181] Justice Ginsburg commented, "an IRS

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[169] *Id.* (Souter, J., concurring).

[170] Justice Souter joined Justice Ginsburg's concurrence. *Id.*

[171] *Brogan*, 118 S. Ct. at 812 (Ginsburg, J., concurring).

[172] In fact, Justice Ginsburg concurred in the judgment because the broad language of § 1001 covered Brogan's simple "no." *Id.* at 812 (Ginsburg, J., concurring).

[173] *Id.* at 812 (Ginsburg, J., concurring).

[174] *Id.* (Ginsburg, J., concurring); *see also supra* Part III.A.

[175] *Brogan*, 118 S. Ct. at 812-13 (Ginsburg, J., concurring); *see* United States v. Tabor, 788 F.2d 714 (11th Cir. 1986) (invoking the "exculpatory no" doctrine to reverse a § 1001 conviction).

[176] *Brogan*, 118 S. Ct. at 813 (Ginsburg, J., concurring); *see* 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).

[177] *Brogan*, 118 S. Ct. at 812 (Ginsburg, J., concurring); *see Tabor*, 788 F.2d at 715-16.

[178] *Brogan*, 118 S. Ct. at 812 (Ginsburg, J., concurring); *see Tabor*, 788 F.2d at 716.

[179] *Brogan*, 118 S. Ct. at 812 (Ginsburg, J., concurring); *see Tabor*, 788 F.2d at 716.

[180] *Brogan*, 118 S. Ct. at 812 (Ginsburg, J., concurring); *see Tabor*, 788 F.2d at 716.

[181] *Brogan*, 118 S. Ct. at 812 (Ginsburg, J., concurring); *see Tabor*, 788 F.2d at 716.

agent thus turned a violation of state law into a federal felony by eliciting a lie that misled no one."[182]

Justice Ginsburg argued that these casual investigations catch suspects off guard.[183] Not only are the suspects often not put under oath, but they are not "Mirandized" and not warned that giving a false statement is felony.[184] For example, Brogan was told only after he spoke that his "exculpatory no" was a criminal offense.[185]

In the above examples § 1001 effectively punished the lie more harshly than the underlying criminal act.[186] Justice Ginsburg also identified two ways in which § 1001 may be abused to "escalate completely *innocent* conduct into a felony."[187] First, if the prosecutors fail to prove all the elements of a crime, a suspect should be found not guilty. However, Justice Ginsburg noted that if the prosecutors can get the suspect to lie about one fact they know to be true from the investigation, then they could bring a § 1001 charge in place of the charge they cannot prove.[188] Second, sometimes the statute of limitations has tolled, as it did on four out of five of the bribery charges against Brogan.[189] Justice Ginsburg suggested that investigators could get the suspect to lie about the wrongdoing in order to "revive" the charges.[190] In either example, the government is using § 1001 to manufacture crime.[191]

Justice Ginsburg then reviewed the legislative history of § 1001 and concluded that "it is doubtful Congress intended § 1001 to cast so large a net."[192] The relevant part of the statute

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[182] *Brogan*, 118 S. Ct. at 812-13 (Ginsburg, J., concurring).

[183] *Id.* at 813 (Ginsburg, J., concurring).

[184] *Id.* (Ginsburg, J., concurring).

[185] *Id.* (Ginsburg, J., concurring).

[186] *Id.* (Ginsburg, J., concurring).

[187] *Id.* (Ginsburg, J., concurring) (quoting Tr. of Oral Arg. 36) (emphasis added). Justice Ginsburg uses the phrase "innocent conduct" here to refer both to blameless conduct and to blameworthy conduct that the State cannot prove.

[188] *Id.* (Ginsburg, J., concurring).

[189] *Id.* (Ginsburg, J., concurring).

[190] *Id.* (Ginsburg, J., concurring).

[191] *Id.* (Ginsburg, J., concurring).

[192] *Id.* at 813-14 (Ginsburg, J., concurring);

has remained the same since 1934.[193] The history tends to show that Congress amended the statute in 1934 in order to "protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions."[194] Justice Ginsburg admitted that the plain language of the statute says nothing about criminalizing only those false statements that pervert governmental functions.[195] However, she found it "noteworthy" that the statute is currently being invoked in situations that differ greatly from those Congress sought to remedy in 1934.[196]

Justice Ginsburg also found it compelling that since the Court's decision in *Nunley v. United States*,[197] it has been the policy of the Department of Justice not to prosecute the mere denial of guilt under § 1001.[198] The United States Attorney's Manual firmly declared this policy both at the time charges were filed against Brogan[199] and while the case was pending before the Court.[200] Justice Ginsburg stated that this policy indicates "the dubious propriety of bringing felony prosecutions for bare exculpatory denials informally made to Government agents."[201]

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[193] *Id.* at 814 (Ginsburg, J., concurring); *see supra* Part II.A.

[194] *Brogan*, 118 S. Ct. at 814 (Ginsburg, J., concurring) (quoting Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962)).

[195] *Id.* (Ginsburg, J., concurring).

[196] *Id.* (Ginsburg, J., concurring).

[197] 434 U.S. 962 (1977). In *Nunley*, the Court vacated a § 1001 conviction at the government's urging, because the Department of Justice "normally refused" permission to prosecute an "exculpatory no" statement under § 1001. *Brogan*, 118 S. Ct. at 815 (citing Memorandum for United States at 7, *Nunley* (No. 77-5069)).

[198] *Brogan*, 118 S. Ct. at 814-15 (Ginsburg, J., concurring). The Sentencing Guidelines articulate a similar policy. *Id.* at 815 n.7 (Ginsburg, J., concurring) (citing U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt., n.1 (1997)).

[199] When charges were filed against Brogan, the Manual read: "Where the statement takes the form of an 'exculpatory no,' 18 U.S.C. § 1001 does not apply regardless who asks the question." *Id.* at 815 (Ginsburg, J., concurring) (quoting United States Attorneys' Manual ¶ 9-42.160 (Oct. 1, 1988)).

[200] While the case was pending, the Manual read: "It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government." *Id.* at 815 (Ginsburg, J., concurring) (quoting United States Attorneys' Manual ¶ 9-42.160 (Feb. 12, 1996)).

[201] *Id.* (Ginsburg, J., concurring).

She counseled lower courts not to interpret the Court's opinion as encouraging § 1001 prosecutions for exculpatory nos.[202]

Justice Ginsburg feared that the policy outlined in the United States Attorneys' Manual was an inadequate control.[203] She concluded her concurrence by urging Congress to limit the reach of § 1001.[204] Justice Ginsburg reviewed the recommendations that were made some years ago to revise § 1001.[205] She suggested that although these recommendations were never adopted, the present case should revive the issue.[206]

D. JUSTICE STEVENS' DISSENT

Justice Stevens dissented[207] because he believed that the Court rashly rejected a doctrine that had wide-based support.[208] He agreed that an "exculpatory no" would fall under the broad language of § 1001, but he argued that the Court could interpret a criminal statute more narrowly than it is written.[209] As evidence, he reviewed case law where the Court had limited the plain language of the text.[210] Justice Stevens noted that al-

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[202] *Id.* (Ginsburg, J., concurring).

[203] *Id.* at 815-16 (Ginsburg, J., concurring). Justice Ginsburg implied that other inadequate controls include, the "knowingly and willfully" requirement in statute's plain language and the new "materiality" requirement added in the 1996 revision of statute. *Id.*

[204] *Id.* at 815 (Ginsburg, J., concurring).

[205] In 1981, the Senate Judiciary Committee proposed revising the statute to include a defense for mere denial of involvement in the crime. *Id.* at 816 (Ginsburg, J., concurring) (citing S. Rep. No. 97-307, p. 407 (1981)). However, the 1981 Senate Bill would have still made it illegal either to volunteer a false statement or to make a false statement after an adequate warning. *Id.* (Ginsburg, J., concurring) (citing S. Rep. No. 97-307, p. 408 (1981)). The 1980 House Judiciary Report would have written an exception into § 1001 for oral statements not made under oath. *Id.* (Ginsburg, J., concurring) (citing H.R.Rep. No. 96-1396, pp. 181-83 (1980)). Finally, the 1971 law reform commission would have excluded all information given during an investigation unless the suspect was under a legal duty to speak. *Id.* (Ginsburg, J., concurring) (citing Nat'l Commission on Reform of Federal Criminal Laws, Final Report § 1352(3)).

[206] *Id.* at 816-17 (Ginsburg, J., concurring).

[207] Justice Breyer joined Justice Stevens' dissent. *Id.* at 817.

[208] *Brogan*, 118 S. Ct. at 817 (Stevens, J., dissenting).

[209] *Id.* (Stevens, J., dissenting).

[210] *Id.* (Stevens, J., dissenting) (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 68-69 (1994); Staples v. United States, 511 U.S. 600, 605, 619 (1994); Williams

though the literal text of § 1001 reached federal agents as well as criminal suspects, he was confident that Congress did not intend to make it a crime for law enforcement officials to speak falsely to suspects.[211] Similarly, he was confident that Congress did not intend to criminalize a suspect's mere denial of guilt.[212] Justice Stevens stated that a literal reading of § 1001 would yield "essentially arbitrary applications and harmful results."[213]

Additionally, Justice Stevens criticized the Court for ignoring "the virtual uniform understanding of the bench and the bar . . . ."[214] Seven circuits had adopted the "exculpatory no" doctrine with approval of the Court and the Department of Justice.[215] Justice Stevens fully supported the proposition that "communis opinio[216] is of good authority in law."[217]

V. ANALYSIS

The Supreme Court, in *Brogan v. United States*,[218] properly concluded that the plain language of § 1001 covers mere denials of guilt and is therefore inconsistent with the "exculpatory no" exception that had been adopted in seven circuits. Every justice conceded that the literal text of § 1001 was unambiguous.[219] Moreover, congressional intent was unclear[220] and policy con-

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v. United States, 458 U.S. 279, 286 (1982); Sorrells v. United States, 287 U.S. 435, 448 (1932); United States v. Palmer, 3 Wheat. 610, 631 (1818)).

[211] *Brogan*, 118 S. Ct. at 817 (Stevens, J., dissenting).

[212] *Id.* (Stevens, J., dissenting).

[213] *Id.* at 817 n.1 (Stevens, J., dissenting) (quoting Behrens v. Pelletier, 516 U.S. 299, 423 (1996) (Breyer, J., dissenting)).

[214] *Id.* at 817 (Stevens, J., dissenting).

[215] *Id.* (Stevens, J., dissenting); *see* Nunley v. United States, 434 U.S. 962 (1997) (containing a lengthy discussion of cases that have endorsed the "exculpatory no" doctrine); *see also* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 192-98 (1994) (Stevens, J., dissenting); McNally v. United States, 483 U.S. 350, 362-364, 376 (1987) (Stevens, J., dissenting).

[216] Common opinion.

[217] *Brogan*, 118 S. Ct. at 817-18 (Stevens, J., dissenting) (quoting 1 EDWARD COKE, INSTITUTES 186a (15th ed. 1794)); *see also* United States v. The Reindeer, 27 F. Cas. 758, 762, No. 16, 145 (C.C.D.R.I. 1848); Isherwood v. Oldknow, 3 Maule & Selwyn 382, 396-97 (K.B. 1815).

[218] 118 S. Ct. 805 (1998).

[219] *Brogan*, 118 S. Ct. at 808, 812 (Ginsburg, J., concurring), 817 (Stevens, J., dissenting).

[220] *Id* at 809, 814 (Ginsburg, J., concurring).

cerns articulated by Justice Ginsburg, although worthy of serious consideration, had not materialized in circuits where the "exculpatory no" defense is not recognized.[221] Although the *Brogan* decision was not consistent with the common opinion of the courts of appeals,[222] the decision was consistent with the "revival of textualist statutory interpretation on the Court."[223] *Brogan* has already been generally cited in support of relying on statutes' "plain meaning;"[224] thus, the decision has implications beyond § 1001.

A. *BROGAN* WAS CORRECTLY DECIDED

If one accepts the "new textualist" approach,[225] then the Court's holding that the "exculpatory no" doctrine cannot be reconciled with the plain language of § 1001 is straightforward and justified. The statute's language is clear: Section 1001 criminalizes "any false statement."[226] The grammar is not confusing and the words are not complex. Nevertheless, some scholars have found that the language is "neither plain nor simple." [227] They argue that the text contains terms that are ambiguous, such as "willfully," "false," and "statement."[228] Some courts have, in fact, struggled with the definition of "statement," ultimately finding that a simple "no" is nonassertive and therefore not a "statement." [229] However, the Court properly rejected

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[221] *Id.* at 810.

[222] *Id.* at 817-18 (Stevens, J., dissenting).

[223] Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527 (1998).

[224] *See, e.g.*, United States v. Singleton, 144 F.3d 1343, 1344-45 (10th Cir. 1998) (citing Brogan v. United States, 118 S. Ct. 805 (1998)), *vacated and reh'g en banc granted* (July 10, 1998); Carlson v. Ferguson, 9 F. Supp. 2d. 654, 657 (S.D.W. Vir. 1998) (citing Brogan v. United States, 118 S. Ct. 805 (1998)).

[225] *See infra* Part V.B.

[226] *Brogan*, 118 S. Ct. at 808; *see supra* Part II.A. for full text of § 1001.

[227] Promfret, *supra* note 41, at 763 (citing United States v. Yermian, 468 U.S. 63, 76-77 (1984) (Rehnquist, J., dissenting) ("[T]he language . . . of § 1001 can provide 'no more than a guess as to what Congress intended.'") (quoting Ladner v. United States, 358 U.S. 169, 178 (1958))).

[228] *Id.* at 765.

[229] *See* Hillyer & Shane, *supra* note 40, at 141-42 (citing Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962); United States v. Stark, 131 F. Supp. 190, 205 (D. Md. 1955); United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953)).

the argument that the language is ambiguous.[230] In fact, all nine Justices agreed that the "unqualified language" of § 1001 covers a statement consisting of an exculpatory no.[231]

Additionally, the Court was correct in finding that, under the facts of this case, the unambiguous statutory language trumped both congressional intent and adverse policy implications.[232] The legislative history of § 1001 was inconclusive.[233] Although there was evidence that Congress expanded § 1001 in 1934 in order to prohibit the "perversion of governmental functions,"[234] there was no indication that Congress intended to limit the prohibition to this purpose.[235] Certainly, in 1934 Congress may never have imagined that § 1001 would be used to prosecute an "exculpatory no."[236] But subsequent cases have used the statute in this manner and, despite numerous opportunities to amend § 1001, Congress has never done so.[237] Furthermore, the Court should not be required to correct the careless drafting of Congress unless the intent of Congress is very clear.[238]

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[230] *Brogan*, 118 S. Ct at 808. The Court relied on a dictionary definition of the word "statement" in concluding that the statute's language covered a simple "no" in response to a question. *Id.*

[231] *Id.* at 812 (Ginsburg, J., concurring), 817 (Stevens, J., dissenting).

[232] *Id.* at 813; *see* Everhart, *supra* note 32, at 708, 713 ("[W]hile the exculpatory-no defense may be suggested by some of the old statutory history of § 1001, the plain language of § 1001 and Supreme Court precedent trumps that old statutory history.").

[233] *Brogan*, 118 S. Ct. at 809; *cf. id.* at 814 (Ginsburg, J., concurring).

[234] United States v. Gilliland, 312 U.S. 86, 93 (1941); *see Brogan*, 118 S. Ct. at 814 (Ginsburg, J., concurring) (quoting Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962)); *see also* Promfret, *supra* note 41, at 759-62 (arguing congressional intent to protect government from deception and interference with its functions).

[235] *Brogan*, 118 S. Ct. at 809.

[236] *Id.* at 814 (Ginsburg, J., concurring); *see* Birch, *supra* note 39, at 1279-80 (justifying "exculpatory no" doctrine because Congress could not have intended use of § 1001 against suspects who merely denied guilt).

[237] Id. at 816 (Ginsburg, J., concurring); see Everhart, *supra* note 32, at 707-08 (arguing Congress considered but failed to pass bills that would have codified the "exculpatory no" doctrine); *but see* Promfret, *supra* note 41, at 762 (rejecting argument that Congress's failure to codify the doctrine is evidence of its rejection of the doctrine).

[238] *Brogan*, 118 S. Ct. at 816 (Ginsburg, J., concurring) ("Congress alone can provide the appropriate instruction."); *cf.* Alvin C. Harrell, *Recent Developments of Interest*, 52 CONSUMER FIN. L.Q. REP. 2, 128-29 (1998) ("[T]he Supreme Court will no longer routinely protect the country from the ill-effects of loosely-drafted federal legislation.").

Proponents of the "exculpatory no" doctrine argue that, in *United States v. Gilliland*,[239] the Court found that Congress amended § 1001 in order to protect the government from perversion of its legitimate functions.[240] Their argument is unconvincing because, as the Court pointed out in *Brogan*, the statement in *Gilliland* is merely a dictum.[241] Moreover, Justice Ginsburg conceded in her concurrence that even if history suggests Congress amended § 1001 with a specific purpose in mind, nothing shows that it meant to limit the statute to this purpose.[242]

However, Justice Ginsburg properly alerted Congress to the discrepancy between the original purpose of § 1001 and the current use of the statute to punish the mere denial of guilt in the course of informal investigations.[243] She found it "doubtful that Congress intended § 1001 to cast so large a net,"[244] but nevertheless agreed that the Court should not adopt the "exculpatory no" exception in the face of unambiguous text.[245] In his dissent, Justice Stevens disagreed, arguing essentially for judicial activism.[246] He stated that it was clear "Congress did not intend to make every 'exculpatory no' a felony" and that the Court should not use the literal text as an excuse for leaving the merits of the "exculpatory no" doctrine to Congress.[247]

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[239] 312 U.S. 86 (1941).

[240] *See* Promfret, *supra* note 41, at 759 (citing United States v. Gilliland, 312 U.S. 86, 93 (1941)).

[241] *Brogan*, 118 S. Ct. at 809.

[242] *Id.* at 809, 814 (Ginsburg, J., concurring).

[243] *Id.* at 812, 814 (Ginsburg, J., concurring).

[244] *Id.* at 813 (Ginsburg, J., concurring).

[245] *Id.* at 812 (Ginsburg, J., concurring).

[246] One definition of "judicial activism" is:

> Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor [of] progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and *occasionally these decisions represent intrusions into legislative and executive matters.*

BLACK'S LAW DICTIONARY 847 (6th ed. 1990) (emphasis added).

[247] *Brogan*, 118 S. Ct. at 817 (Stevens, J., dissenting); *see* Promfret, *supra* note 41, at 765 ("It is simply untrue that courts do not go beyond the plain language in making their decisions. In fact, broad statutory language may represent a delegation of

Without reaching the issue of whether the Court should intrude on legislative matters, Justice Stevens' argument fails because congressional intent simply was not as clear as he stated.[248] If the Court does go beyond the literal text, it must at least have a solid basis for doing so.[249] Justices Ginsburg and Stevens had no evidence that Congress intended to limit that scope of § 1001 liability. And, even if Congress did have that intent, Congress may have chosen to rely on the discretion of a prosecutor to limit the potential reach of the statute.[250] In that case, it would be improper for the Court to "re-write a statute simply because [it] is discomforted by the manner in which Congress chose to structure its enforcement . . . ."[251]

Additionally, Justice Ginsburg presented no evidence that prosecutors have abused § 1001 in circuits where the "exculpatory no" doctrine has been rejected.[252] She argued that prosecutors would abuse the unrestricted language of § 1001 to manufacture crime or severely punish minor misconduct.[253] However, the Court did not find this argument convincing, because no evidence showed "any history of prosecutorial excess, either before or after widespread judicial acceptance of the 'exculpatory no.'"[254] In any case, the Court stated that, "Courts may not create their own limitations on legislation, no matter how alluring the policy argument for doing so."[255]

Nevertheless, Justice Stevens had a valid point in his dissent that the Court ignored some serious concerns.[256] While there

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power from Congress to the courts.") (citing United States v. Katz, 271 U.S. 354, 362 (1926)); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 367-70 (1994)).

[248] *Brogan*, 118 S. Ct. at 817 (Stevens, J., dissenting).

[249] However, Justice Scalia and other new textualists would argue that it is never appropriate to go beyond the literal text. *See infra* Part V.B.

[250] *See* Turner, *supra* note 26, at 231-32.

[251] *Id.* at 231.

[252] *Brogan*, 118 S. Ct. at 810, 812-13 (Ginsburg, J., concurring).

[253] For example, if an investigator can get a suspect to deny guilt regarding involvement in minor criminal activity, he can escalate the minor misconduct to a felony under § 1001. *Id.* at 812-13 (Ginsburg, J., concurring); *see supra* Part IV.C. for additional factual examples of prosecutorial abuse.

[254] *Id.* at 810; *see also* Everhart, *supra* note 32, at 718.

[255] *Brogan*, 118 S. Ct at 811-12.

[256] *Id.* at 817 (Stevens, J., dissenting).

was no evidence of actual abuse in circuits where the "excupatory no" doctrine is not recognized, the controls in place to protect against abuse may still be inadequate. First, since *Nunley v. United States*,[257] the Department of Justice (DOJ) has maintained an established policy against prosecuting an "exculpatory no" under § 1001.[258] This policy is clearly stated in the United States Attorneys' Manual.[259] In *Nunley*, the Supreme Court vacated a § 1001 conviction, because the DOJ had not given prior approval for the prosecution.[260] In vacating the conviction, the Court noted that the DOJ "'normally refused'" permission to prosecute under § 1001 for simple denials of guilt.[261] Nevertheless, scholars have challenged the effectiveness of the DOJ's policy.[262] They argue that prosecutors are not required to get approval from the DOJ before pressing charges so nothing prevents them from prosecuting exculpatory nos.[263] Furthermore, in addition to stating the DOJ's policy, the United States Attorneys' Manual states that the policy will be "rarely used" and "narrowly construed."[264] The suggestion that the DOJ does not enforce its policy explains how cases like *Brogan* have arisen and will arise in the future.[265]

Second, the Fifth Amendment confers a privilege to remain silent.[266] The Court stressed that Brogan had the right to say nothing at all and rejected the argument that remaining silent was not a practical option.[267] The Court found that it was "implausible" that a person could be unaware of his right to remain

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[257] 434 U.S. 962 (1977).

[258] *Id* at 814-15 (Ginsburg, J., concurring).

[259] *See* United States Attorneys' Manual ¶ 9-42.160 (Oct. 1, 1988); *See supra* notes 199-200.

[260] *Brogan*, 118 S. Ct. at 815 (Ginsburg, J., concurring).

[261] *Id.* (Ginsburg, J., concurring) (quoting Memorandum for United States at 8, *Nunley* (No. 77-5069)).

[262] *See* Jonathon S. Feld, *Knowing When to Say 'No': Lessons From the* Brogan *Ruling*, 5 No. 2 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 5, 6 (1998).

[263] *Id.*

[264] *Id.*

[265] *Cf. id.* ("The absence of any approval process within the DOJ reinforces the likelihood of "exculpatory no" prosecutions.)

[266] *See supra* Part II.B.

[267] *Brogan*, 118 S. Ct at 810.

silent in "the modern age of frequently dramatized 'Miranda' warnings."[268] But, Miranda warnings are not often dramatized in relation to informal investigations, such as unannounced visits to private homes, because these investigations do not require Miranda warnings.[269] Thus, it *is* plausible that a person could be unaware of his right to remain silent, especially during informal investigations.[270] Even if a person knows that he can remain silent, he may not invoke the privilege because he is not aware that speaking falsely to an investigator is a serious crime.[271] The casual nature of the questioning may "'not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction.'"[272]

Third, the Eight Amendment prohibits "extreme punishment for minor misconduct."[273] In *Coker v. Georgia*,[274] the Supreme Court held that "the Eighth Amendment's prohibition of cruel and unusual punishment bars not only punishments that are barbaric, but also those that are excessive or are grossly out of proportion to the severity of the crime."[275] Therefore, in theory, Eight Amendment rights could be invoked if a suspect is convicted of a § 1001 felony for falsely denying very minor misconduct.[276] However, the Court in *Brogan* never addressed the Eighth Amendment, suggesting that in practice courts do not view § 1001 convictions as "cruel and unusual punishment." After all, Congress made it a separate crime to make a false state-

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[268] *Id.*

[269] Interrogations do not require Miranda warnings unless the witness is in custody or the functional equivalent of custody. Everhart, *supra* note 32, at 698-99.

[270] *Id.* at 698 n.118 ("Without formal cues, the interrogee seems unlikely to be thinking in the language of rights.") (citing Donald D. Oliver, Note, *Prosecutions for False Statements to the Federal Bureau of Investigation—The Uncertain Law*, 29 SYRACUSE L. REV. 763, 775 (1978)).

[271] *See* Birch, *supra* note 39, at 1276-77.

[272] *Brogan*, 118 S. Ct. at 813 (Ginsburg, J., concurring) (quoting United States v. Ehrlichman, 379 F. Supp. 291, 292 (D.D.C. 1974)).

[273] Everhart, *supra* note 32, at 713. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[274] 433 U.S. 584 (1977).

[275] *Id.* at 592.

[276] Everhart, *supra* note 32, at 713.

ment and the punishment under § 1001 reflects Congress's view that lying to the government is a serious crime.[277]

B. IMPLICATIONS BEYOND § 1001: *BROGAN* IS CONSISTENT WITH THE TEXTUALIST MOVEMENT ON THE SUPREME COURT

The Court's decision in *Brogan* shut the door on a doctrine that had existed for over forty years.[278] Seven circuits had adopted the "exculpatory no" doctrine[279] and only two circuits had rejected it.[280] Interestingly, the Court refused to follow the majority view among the circuits.[281] Yet, its decision is not surprising if one considers the current attitude on the Court regarding statutory interpretation.[282]

In 1986, President Reagan appointed Justice Antonin Scalia to the Supreme Court.[283] Since his appointment, Justice Scalia has "aggressively challenged the Court's approach to statutory interpretation."[284] He has repeatedly criticized the Court for placing too much weight on legislative history.[285] Instead, he has pushed the Court to rely more heavily on a statute's "plain meaning."[286]

Justice Scalia's approach to statutory interpretation has been termed "new textualism" by Professor William Eskridge.[287] Textualists believe that statutory interpretation should not be based on congressional intent, but rather should be based on the statute's "plain meaning," as determined by an ordinary

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[277] *Brogan*, 118 S. Ct. at 810 (1998).

[278] *See* Pomfret, *supra* note 41, at 757 (stating "exculpatory no" doctrine first articulated in 1955) (citing United States v. Stark, 131 F. Supp. 190 (D. Md. 1955)).

[279] The First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits explicitly adopted the "exculpatory no" doctrine. *See supra* Part II.C.

[280] The Fifth and Second Circuits rejected the "exculpatory no" doctrine. *See supra* Part II.C.

[281] *Brogan*, 118 S. Ct. at 811-12.

[282] *See* Harrell, *supra* note 238, at 128-29 (1998) (arguing decision in *Brogan* is consistent with Court's current emphasis on plain meaning of statutory language).

[283] *See* Mank, *supra* note 223, at 527.

[284] Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 401 (1994).

[285] *Id.*; *Cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions.").

[286] *Cardoza-Fonseca*, 480 U.S. at 453.

[287] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

reader of the statute.[288] They generally claim "that a statute's text alone provides the best evidence for interpretation."[289] "New Textualists" like Justice Scalia are careful to review the entire statute, taking into account the canons of statutory construction and the statute's overall structure and similarity to other legislation from the same time period.[290]

Although Justice Scalia has "not yet revolutionized the Court's approach" to statutory interpretation, his influence is nevertheless felt on the Court.[291] During the last decade there has been a noticeable "'new textualist' movement on the Court."[292] As a result of Justice Scalia's influence, none of the Court's recent decisions have "relied upon legislative history as a determinative factor."[293] This new movement is positive in so far as it deemphasizes legislative history and focuses on the literal text of the statute.[294] Although nontextualists "contend that we should interpret a statute by determining what the legislature intended the statute to mean,"[295] intentions are not law and therefore are arguably not relevant.[296] Plus, intentions are difficult to determine, especially the intentions of a large and diverse group of legislators.[297] However, there are also problems with relying on a statute's literal text. For example, because words or phrases often have several meanings, it can be difficult to define the single "plain meaning" of the statute.[298] As a result, the text of a statute may be interpreted too broadly or some-

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[288] *See* Mank, *supra* note 223, at 533-34 (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing statutory meaning is "most in accord with context and ordinary usage")).

[289] *Id.* at 534.

[290] *Id.*

[291] Karkkainen, *supra* note 284, at 401-02; *see also* Mank, *supra* note 223, at 533.

[292] Mank, *supra* note 223, at 533; *see also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351, 363 (1994). Justice Thomas, and to a lesser extent Justice Kennedy, have endorsed textualism. *Id.*

[293] Mank, *supra* note 223, at 533

[294] *See* Eskridge, *supra* note 287, at 690.

[295] Karkkainen, *supra* note 284, at 415.

[296] *Id.* at 417 ("Only those provisions expressed in the statutory text itself have the authoritative status of law.")

[297] *Id.* at 415-16.

[298] *See* Mank, *supra* note 224\3, at 540 (citing Clark D. Cunningham, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994)).

times too narrowly in a way that frustrates the intentions of Congress.[299]

On the other hand, an advantage of textualism is that "[o]nce the statutory text is unencumbered by evidence of original legislative expectations, it is free to evolve dynamically," assuming that Congress enacts later statutes that have implications on the textual interpretation of the first.[300] Textualism is also intuitively appealing because the ordinary person takes notice of the literal text, not of legislative intent.[301] Finally, the movement on the Court towards textualism will have the positive effect of making Congress draft statutes more carefully. Although Justice Stevens has argued that "Congress is much more likely to override the Court's statutory interpretations if it ignores a statute's legislative history,"[302] it follows that eventually Congress would draft statutes with more explicit intentions.

The Court's decision in *Brogan* is consistent with the "new textualist" movement.[303] The Court was ripe to reject a doctrine that had no basis in the statute's "plain meaning."[304] And the "exculpatory no" doctrine clearly had no basis in the statutory language of § 1001.[305] In fact, § 1001 was so clear that nontextualist members of the Court[306] could not easily challenge its "plain meaning."[307] Moreover, Justice Scalia's influence has made the Court "somewhat less willing to refer to legislative history when the statutory text has a plain meaning."[308] The deci-

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[299] *Id.* at 540-41.

[300] Eskridge, *supra* note 287, at 667-68.

[301] *Id.* at 667.

[302] Mank, *supra* note 223, at 541 (citing West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 112-16 (1991) (Stevens, J., dissenting)).

[303] *See* Eskridge, *supra* note 287, at 621 (describing the "new textualist" movement on the Court).

[304] *Id.*

[305] *Brogan*, 118 S. Ct. at 808.

[306] Justice Stevens is the most prominent nontextualist, while Chief Justice Rehnquist and to a lesser extent all other Justices besides Justices Scalia and Thomas have also favored nontextualist views. *See* Merrill, *supra* note 292, at 364-65.

[307] Brogan, 118 S. Ct. at 812 (Ginsburg, J., concurring) (agreeing that the unrestricted statutory language admitted no exception for "exculpatory no"), 817 (Stevens, J., dissenting) (same).

[308] Eskridge, *supra* note 287, at 656.

sion in *Brogan* reflects this trend, since the Court deemphasized the legislative history of § 1001 because its plain meaning was clear. The majority opinion did not examine the history of § 1001 amendments and recodifications. [309] In fact, the legislative history was not a decisive factor in *Brogan*.[310]

The decision in *Brogan* may be evidence that Justice Scalia's views are gaining support on the Court. After all, Justice Scalia authored the opinion of the Court,[311] which unabashedly supported reliance on the statute's "plain meaning."[312] However, *Brogan* was an easy case factually. The contested language in § 1001, "any false statement," was very clear [313] and the legislative history was not compelling. Although some lower courts found that Congress intended § 1001 to prohibit the perversion of governmental functions,[314] the statute's history of amendments showed, if anything, intent to broaden the scope of the statute.[315] Whether Congress intended to limit the scope of § 1001 was inconclusive.[316] A true victory for Justice Scalia would have been for the Court to have ignored compelling legislative history.[317] So, although *Brogan* has already been cited in support of the "primacy of statutory plain language,"[318] *Brogan* should only be persuasive in factually similar situations.[319]

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[309] *Brogan*, 118 S. Ct. at 808-09. *Cf.* id. at 813-14 (Ginsburg, J., concurring).

[310] *Brogan*, 118 S. Ct. at 812 (plain language of § 1001 was decisive factor in Court's holding).

[311] Often, Justice Scalia concurs only in the judgment because the majority includes a review of legislative history. *See* Mank, *supra* note 223 at 533.

[312] *Brogan*, 118 S. Ct. at 812 ("Because the plain language of § 1001 admits of no exception for an "exculpatory no," we affirm the judgment of the Court of Appeals.").

[313] *Id.* at 808.

[314] *Id.* at 814 (Ginsburg, J., concurring).

[315] *Id.* at 812-14 (Ginsburg, J., concurring) (summarizing history of § 1001's amendments and recodifications); *see* United States v. Wiener, 96 F.3d 35, 39 (2d Cir. 1996), *aff'd sub nom.* Brogan v. United States, 118 S. Ct. 805 (1998) (finding that "the long-term trend [of § 1001 amendments] is one of expansion").

[316] *Brogan*, 118 S. Ct. at 814 (Ginsburg, J., concurring).

[317] Textualists, like Justice Scalia, believe that it is improper for judges to analyze legislative history to any extent, especially when the statute's text has a clear meaning. *See* Mank, *supra* note 223, at 535 (citing INS v. Cardoza-Fonesca, 480 U.S. 421, 452-53 (1987)).

[318] *See* United States v. Singleton, 144 F.3d 1343, 1344-45 (10th Cir. 1998) (citing Brogan v. United States, 118 S. Ct. 805 (1998)), *vacated and reh'g en banc granted* (July

C. CONGRESS LIKELY WILL NOT RESPOND TO *BROGAN*

As a result of the holding in *Brogan*, Congress must now decide whether to overrule the Court by codifying the "exculpatory no" doctrine. Since Congress has the sole law making authority, it may revise a statute to correct the defect that led to the Court's misinterpretation.[320] Although Congress just recently passed legislation amending § 1001[321] in response to the Supreme Court's decision in *Hubbard v. United States*,[322] Congress likely will not revise § 1001 again in light of *Brogan*.

Three years ago, in *Hubbard*, the Supreme Court held that § 1001 criminalized only false statements made to the executive branch of government.[323] At that time the relevant text prohibited false statements made "in any matter within the jurisdiction of *any department or agency* of the United States."[324] The Supreme Court interpreted this same language forty years ago in *United States v. Bramblett*, holding that § 1001 covered false statements made to all three branches of government.[325] Although the *Hubbard* decision overruled Supreme Court precedent in *Bramblett*, Congress promptly responded by overruling *Hubbard*.[326] In 1996, Congress amended § 1001 to reach "the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[327]

10, 1998); Carlson v. Feguson, 9 F. Supp. 2d. 654, 657 (S.D.W. Vir. 1998) (citing Brogan v. United States, 118 S. Ct. 805 (1998)).

[319] Namely, where the statute is unambiguous and does not yield absurd results, the legislative history is not compelling, and the policy concerns have not materialized in circuits where the exception is not recognized. *See supra* Part V.A.

[320] *See* Christopher E. Dominguez, Note, *Congressional Response to* Hubbard v. United States*: Restoring the Scope of 18 U.S.C. § 1001 and Codifying the "Judicial Function" Exception*, 46 CATH. U. L. REV. 523, 523-24 (1997) (citing generally James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994)).

[321] *See supra* note 7 for the current text of § 1001 as amended by the False Statements Accountability Act of 1996.

[322] 115 S. Ct. 1754 (1995).

[323] *See* Feld, *supra* note 262, at 5.

[324] *See* Dominguez, *supra* note 320, at 526.

[325] 348 U.S. 503 (1955) *overruled by* Hubbard v. United States, 115 S. Ct. 1754 (1995).

[326] *See* Feld, *supra* note 262, at 5.

[327] False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459.

Several differences in the *Hubbard* and *Brogan* decisions suggest that Congress will not change § 1001 after *Brogan.* First, *Hubbard* overruled forty years of Supreme Court precedent, while *Brogan* rejected a doctrine that was not even uniformly recognized in the circuits that had adopted it.[328] Second, *Hubbard* imposed a limitation on the scope of § 1001, whereas the holding in *Brogan* rejected a limitation.[329] Third, unlike *Hubbard,* extrinsic controls were in place to limit the potential for abuse under *Brogan*'s interpretation of § 1001.[330] Although the adequacy of these controls has been justly challenged, they do exist.[331] The Department of Justice has an established policy against prosecuting "exculpatory nos" under § 1001 and the Fifth Amendment confers a right to remain silent during investigations.[332] Therefore, Congress is not likely to codify a narrow exception for an "exculpatory no," unless perhaps, after further investigation, it finds evidence of actual abuse.

VI. CONCLUSION

In an opinion written by Justice Scalia, the Court in *Brogan v. United States* properly concluded that 18 U.S.C. § 1001 does not admit an exception for a false statement that constitutes a mere denial of guilt.[333] The Court acted consistently with its recent emphasis on statutory "plain meaning" by refusing to create a narrow exception in otherwise unrestricted text.[334] Although Congress may never have intended to criminalize a mere denial of guilt, it did draft a broad statute. Congress may elect to revise the statute in light of the holding in *Brogan,*[335] but

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[328] *Compare* Dominguez, *supra* note 320, at 526 (discussion of *Hubbard* strong precedent) *with supra* Part II.C. (discussion of *Brogan* weak precedent).

[329] *Compare* Dominguez, *supra* note 320, at 527-30 (discussion of *Hubbard* limitation) *with supra* Part V.A. (discussion of *Brogan* limitation rejection).

[330] *See supra* Part V.A.

[331] *See supra* Part V.A.

[332] *See supra* Part V.A.

[333] 118 S. Ct. 805, 812 (1998).

[334] *See* Harrell, *supra* note 238, at 128-29.

[335] *Brogan,* 118 S. Ct. at 816 (Ginsburg, J., concurring) (arguing that after the decision in *Brogan,* "Congress may advert to the 'exculpatory no' doctrine.").

it likely will not respond unless, after initiating a thorough investigation, it finds evidence of actual prosecutorial abuse.

Although the Court rejected the "exculpatory no" doctrine because the plain language of 18 U.S.C. § 1001 did not admit it, *Brogan* should not be cited as a full endorsement of textualism.[336] The Court was not forced to chose between "plain meaning" and compelling legislative history. If congressional intent had been clearer, *Brogan* may have been decided differently, notwithstanding the statute's "plain meaning."

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[336] *See* Eskridge, *supra* note 287, at 621 (defining "new textualism").