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NOTES

Would I Lie to You? The Sixth Circuit Joins the "Exculpatory No" Controversy in *United States v. Steele*

Robert Steele sold two parcels of land to Thomas Duerr, who paid for the land with proceeds from drug sales.[1] To protect Duerr from Internal Revenue Service investigation concerning the source of his income, Steele agreed to record on the sales records a purchase price of $40,000 instead of the actual price of $80,000.[2] When an IRS agent contacted Steele and requested copies of the documents, Steele sent them—false information unchanged.[3] When Duerr subsequently disclosed the misrepresentation to the IRS, Steele was charged and later convicted under 18 U.S.C. § 1001,[4] for submitting false information to a federal agency.[5]

In a 2-1 decision,[6] the United States Court of Appeals for the Sixth Circuit reversed Steele's conviction, stating that Steele's actions fell within the "exculpatory no" exception to section 1001.[7] In other words, the court held that Steele's actions were taken in response to a fear of self-incrimination within the context of a criminal investigation and were therefore not punishable under section 1001.[8]

The reversal was short-lived. The Sixth Circuit granted an en banc rehearing[9] and vacated its earlier decision,[10] refusing to adopt

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[1] *See* United States v. Steele, 896 F.2d 998, 999 (6th Cir.) [hereinafter *Steele I*], *vacated*, 933 F.2d 1313 (6th Cir. 1990).

[2] *Id.* at 999.

[3] *Id.* at 1000.

[4] 18 U.S.C. § 1001 (1976); *see infra* text accompanying note 22.

[5] *Steele I*, 896 F.2d at 1000.

[6] Judges Krupansky and Brown were in the majority; Judge Ryan dissented.

[7] *Steele I*, 896 F.2d at 1005.

[8] *Id.* The exculpatory no exception removes certain actions from the scope of section 1001. *See infra* notes 48-126 and accompanying text.

[9] United States v. Steele, 909 F.2d 862 (6th Cir. 1990).

[10] *See* United States v. Steele, 933 F.2d 1313 (6th Cir.) [hereinafter *Steele II*], *cert. denied*, 112 S. Ct. 303 (1991).

the exculpatory no doctrine under which Steele's prior conviction had been overturned[11] and reinstating his section 1001 conviction.[12] However, the exculpatory no doctrine did not exactly "go out like a lamb"; there were two concurring opinions and three dissents.[13]

The disagreement among the Sixth Circuit judges parallels the disagreement among the federal circuit courts that have interpreted section 1001. The breadth of this statute has sparked concern about the potential for government abuse,[14] yet some courts believe that separation of powers prohibits them from placing limits where Congress chose to create none.[15] Therefore, inconsistency and controversy have arisen as courts attempt to strike a balance between the power and intention of Congress to protect government agencies and the role of the judiciary in the interpretation of legislation and protection of constitutional rights.

This Note analyzes the exculpatory no doctrine in light of the *Steele II* decision. It first examines the language and history of section 1001, the breadth of which is the source of the dilemma.[16] Next, the origins, applications and variations of the exculpatory no doctrine are discussed.[17] Finally, *Steele II* is critically analyzed to show the most reasonable response to the judicial dilemma in the shadow of congressional silence.[18]

I. SECTION 1001—THE SOURCE OF CONTROVERSY

Because the language and history of section 1001 weighed heavily in the *Steele II* court's decision to reject the exculpatory no doctrine,[19] an analysis of the statutory language and its legislative history is critical.

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[11] *Steele II*, 933 F.2d at 1321.

[12] *Id.* at 1322.

[13] Concurring opinions were written by Judges Nelson and Wellford; Chief Judge Merritt and Judges Brown and Martin each wrote dissenting opinions.

[14] *See, e.g.*, United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972) (stating that if section 1001 were read literally, "virtually any false statement . . . could be penalized as a felony"); *see also* Giles A. Birch, Note, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990) (discussing abuse of section 1001 by federal police in post-arrest interrogations).

[15] *See Steele II*, 933 F.2d at 1321; United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974).

[16] *See infra* notes 19-47 and accompanying text.

[17] *See infra* notes 48-127 and accompanying text.

[18] *See infra* notes 128-54 and accompanying text.

[19] The court discusses both at length. *See Steele II*, 933 F.2d at 1317-19.

A. *Statutory Language*

It is well-recognized that the plain meaning of a statute controls its interpretation, unless such interpretation would result in an application "demonstrably at odds with the intentions of the drafters."[20] The language of section 1001 is incredibly broad,[21] and its plain meaning consequently sets rather wide parameters:

> 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.[22]

The statute does not discriminate among agencies or agency functions; it applies to *any* matter within the jurisdiction of *any* agency or department. Therefore, an application of section 1001 based solely on its plain meaning will inevitably be expansive. The Supreme Court, as *Steele II* points out, has recognized the sweeping effect of the statutory language of section 1001.[23] Yet, when given the opportunity to limit the reach of section 1001, the Court has consistently refused. In *United States v. Rodgers*,[24] the Court in addressing section 1001 stated that "[r]esolution of . . . whether a statute should sweep broadly or narrowly is for Congress."[25] The Court further noted that although the language of section 1001 is broad, it is neither ambiguous nor unjust.[26]

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[20] United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

[21] Whether such a broad plain meaning creates results "at odds with the intentions of the drafters" will be discussed in the context of the statute's legislative history. *See infra* note 46 and accompanying text.

[22] 18 U.S.C. § 1001 (1976) (emphasis added).

[23] *See Steele II*, 933 F.2d at 1317 (citing United States v. Rodgers, 466 U.S. 475 (1984)).

[24] 466 U.S. 475 (1984).

[25] *Id.* at 484.

[26] *See id.* The *Rodgers* Court also rejected an attempt by the Eighth Circuit to limit section 1001 through a narrow interpretation of the term "jurisdiction" in the statute. The Court held that the term should not be given "a narrow or technical meaning." *Id.* at 480 (quoting Bryson v. United States, 396 U.S. 64, 70 (1969)); *see also* United States v. Gilliland, 312 U.S. 86, 91 (1941) (construing 18 U.S.C. § 80 (1940)—the precursor to section 1001—and concluding that the statute was not invalid for indefiniteness); Timothy I. Nicholson, Note, *Just Say "No": An Analysis of the "Exculpatory No" Doctrine*, 39 WASH. U. J. URB. & CONTEMP. L. 225, 232 n.37 (1991) ("Fifteen petitions for writs of certiorari have been denied without a single dissenting rationale offered in cases where the defendant raised the 'exculpatory no' defense.").

It has also been argued that section 1001 is a criminal statute and should therefore be interpreted narrowly.[27] The Sixth Circuit refused to adopt this narrow approach, responding that the rule of construction does not purport to rewrite the statute "in complete disregard of the purpose of the legislature."[28]

B. Legislative Evolution

Courts often look beyond the express language of a statute to determine the purpose of the legislature, necessitating an inquiry into the legislative history of the statute.[29] Here, a thorough examination of the legislative history of section 1001 supports the contention that Congress' purpose in drafting the current statute was not a narrow one.

The history of section 1001 has been one of constant expansion,[30] its parameters having been continually broadened since its 1863 origin.[31] The 1863 Act was created by Congress to deter false claims against the government by military personnel.[32] The Act prohibited the making of any "false, fictitious, or fraudulent" claim against the government "or any department or officer thereof."[33] The Act also punished those military personnel making false statements in relation to these claims, defining them as:

> any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, cer-

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[27] *See Steele II*, 933 F.2d at 1317 (recognizing the existence of the argument); *see also* United States v. Bramblett, 348 U.S. 503, 509 (1955) (stating that the canon requiring strict interpretation of criminal statutes is a "proposition which calls for the citation of no authority").

[28] *Steele II*, 933 F.2d at 1317 (quoting *Bramblett*, 348 U.S. at 510).

[29] *See infra* notes 30-47 and accompanying text.

[30] The history of section 1001 was traced in *Bramblett*, 348 U.S. at 504-08.

[31] *Id.* (citing Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (original false claims act)).

[32] In *Bramblett*, the Court observed that under the 1863 Act, it was unlawful for

> any person in the land or naval forces of the United States . . . [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.

Id. at 504-05 (quoting 12 Stat. 696).

[33] *Id.* at 505 (quoting 12 Stat. 696).

> tificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry.[34]

In 1874, the Act was expanded to include "every person" rather than just military personnel.[35] Various other amendments added between 1874 and 1934 further broadened the Act:[36]

> The false claims provision was extended to cover corporations in which the United States held stock; and false statements were proscribed if made "for the purpose and with the intent of cheating or defrauding the Government of the United States" as well as if made for the purpose of obtaining payment of a false claim.[37]

In 1934, in response to the Secretary of the Interior's concern with "hot oil frauds,"[38] the "false statements" portion of the statute was significantly expanded.[39] Congress struck the "cheating" and "defrauding" language of the old statute and enlarged the statute to reach false statements or representations "in any matter within the jurisdiction of any department or agency of the United States."[40] According to the Supreme Court, this amendment "indicated the congressional intent to protect the authorized functions of governmental departments and agencies."[41]

The statute acquired its present form[42] in 1948. The false claims provision was severed[43] and the false statements provision became 18 U.S.C. § 1001. The statute retained virtually the same form as the false statements section of the 1934 statute, with only minor changes.[44]

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[34] *Id.*

[35] *Id.* (citing Act of Dec. 1, 1873, approved June 22, 1874, R.S. § 5438 (2d ed. 1878)).

[36] *See id.* at 506 n.2.

[37] *Id.* (citing Act of May 30, 1908, ch. 235, 35 Stat. 555).

[38] "Hot oil frauds" are frauds perpetrated by petroleum producers by falsifying interstate shipping documents. United States v. Gilliland, 312 U.S. 86, 90 (1941). Such frauds did not fall within the purview of the statute prior to 1934 because there was no resulting pecuniary loss to the government, i.e., the government was not being "cheated" or "swindled" as the statute required. *Id.* at 92-93.

[39] *Id.* at 93-94.

[40] Act of June 18, 1934, ch. 587, 48 Stat. 996.

[41] *Gilliland*, 312 U.S. at 93.

[42] *See supra* note 22.

[43] False claims are now punishable under 18 U.S.C. § 287 (1988 & Supp. 1992).

[44] The statute no longer refers to "corporations in which the United States is a stockholder," and the phrase "in any matter" was moved to the beginning. The *Bramblett* Court refers to these as "housekeeping changes." 348 U.S. at 508.

Hence, from its 1863 origin, no restrictive language was ever added to section 1001. In fact, the *Bramblett* Court, in analyzing the 1934 amendment, concluded that the congressional records in no way expressed any desire to limit the statute:[45] "In light of this Congressional intent, a broad reading of section 1001 would not arrive at a result 'demonstrably at odds' with congressional intent; to the contrary, the Court has consistently indicated that the statute should be construed broadly."[46] Thus, under either theory of statutory interpretation, a broad reading of section 1001 is warranted, and all indications are that such a reading is precisely what Congress intended.[47]

Nevertheless, some courts, alarmed by the potential reach of the statute, have limited the application of section 1001 through what is now known as the exculpatory no doctrine. Unfortunately, the application of the doctrine has been anything but uniform, and its inconsistent application among the federal circuits has resulted in unpredictability, conflict and judicial legislation.

II. THE EXCULPATORY NO DOCTRINE

The exculpatory no doctrine first appeared in 1955 in a federal district court in Maryland.[48] Since then, the doctrine has taken on multiple forms. Some courts have remained true to the roots of the doctrine,[49] while others have developed much more complex configurations.[50] Sadly, the more complex the doctrine has become, the more it has been manipulated. Not only is there disagreement as to the appropriate form of the exculpatory no doctrine, but also as to the proper application of the doctrine. This conflict presents a disturbing inconsistency that demands clarification.

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[45] *Id.* at 507 (referring to S. REP. No. 1202; H.R. REP. No. 1463, 73d Cong., 2d Sess. (1934); congressional debates at 78 CONG. REC. 8136, 11,270, 11,513 (1934)).

[46] *Steele II*, 933 F.2d at 1318 (citing *Bramblett*, 348 U.S. at 503).

[47] Not only does the legislative history of section 1001 support this theory of congressional purpose, but subsequent actions by Congress are consistent as well. For example, parts of the language of section 1001 have been "borrowed" for use in other statutes. Amendments to the Grand Jury Disclosure Act, for example, included the clause "for use in the matter within the jurisdiction of an agency." This language was selected because it had "already been broadly interpreted in cases involving 18 U.S.C. § 1001 and was [therefore] selected to avoid listing every conceivable agency proceeding." 131 CONG. REC. 24,476, 24,478 (1985). For further examples, see Nicholson, *supra* note 26, at 231 n.34.

[48] *See* United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).

[49] *See infra* notes 116-27 and accompanying text.

[50] *See infra* notes 72-115 and accompanying text.

A. The Origins of the Doctrine

1. *United States v. Stark*

Albert Stark was a construction contractor employed on projects supported by the Federal Housing Administration ("FHA").[51] When he and his partner, Harry Bart, were investigated by the FBI concerning their connections to the FHA,[52] they made a series of false statements in the form of denials while under oath.[53] Consequently, Stark and Bart were indicted for violation of section 1001.[54]

The central issue was whether the representations made by the men were in fact "statements" within the meaning of section 1001.[55] The court concentrated on the legislative history of the statute, particularly the 1934 amendment, in reaching its decision.[56] The court concluded that while the "false pecuniary claims" language was edited in 1934, the 1934 amendment merely expanded the statute to "protect governmental agencies from perversion of their normal functioning."[57] The court stated:

> *The purpose seems to be to protect the government from the affirmative or aggressive and voluntary actions of persons who take the initiative*, or, in other words, to protect the government from being the victim of some positive statement, whether written

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[51] *Stark*, 131 F. Supp. at 191.

[52] The FBI agents were "lawfully detailed . . . to investigate irregularities and misconduct of . . . employees . . . employed in the Baltimore insuring office of the FHA . . . and attempts to defraud the Government in the functioning of the Maryland office of the FHA." *Id.*

[53] *Id.* Stark and Bart denied giving any money or other type of payments to any FHA employees; they also denied knowledge of a $500 payment made to an FHA inspector and returned to either Stark or Bart. *Id.*

[54] *Id.* at 192.

[55] *Id.* at 198. The court also dealt with the issue of whether or not the answers given to the FBI were "in a matter within the jurisdiction of the Agency." *Id.* at 206. The court held that, even though the FBI had the power to investigate this matter, they had no authority to adjudicate, and therefore the matter was not within the "jurisdiction" of the agency under section 1001. *Id.* at 206-07.

The notion that "jurisdiction" requires the power to adjudicate was overturned by the Supreme Court in United States v. Rodgers, 466 U.S. 475, 480 (1984). *See supra* note 26. Therefore, this section of the opinion is no longer persuasive. However, the remainder of the *Stark* decision—the exculpatory no defense—remains valid.

[56] *See Stark*, 131 F. Supp. at 199-202. For a detailed examination of the language of the statute before and after the 1934 amendment, see *supra* notes 34-45 and accompanying text.

[57] *Id.* at 205.

> or oral, which has the tendency and effect of perverting its normal proper activities.[58]

The court ruled that the representations made by the defendants were not "statements" within the meaning of the statute. In the court's view, Congress never intended to punish statements that were made involuntarily or made for purposes other than "inducing improper action by the government against others."[59]

The *Stark* court also expressed Fifth Amendment concerns regarding section 1001, as well as some fears of governmental abuse.[60] The defendants had originally been indicted under charges of bribery and perjury,[61] but these charges were subsequently dismissed for error.[62] Rather than amend the indictments, the government abandoned the bribery and perjury charges and sought section 1001 indictments based on the defendants' prior denials of guilt.[63] The court felt that these actions, while not squarely within the purview of the Fifth Amendment, were nonetheless "inconsistent" with the spirit of that constitutional provision.[64]

> It seems quite inconsistent with our fundamental concepts of due process in the administration of criminal justice to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein, as a different separate substantive criminal offense under section 1001. *The clear purpose of the section was to operate as a shield for defense rather than as a sword for attack.*[65]

Thus, the defendants' false statements, which were merely denials, were excepted from conduct constituting a violation of section 1001 because "[t]he sweeping generality of the language of section 1001 . . . requires caution in applying it to particular situa-

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[58] *Id.* (emphasis added).

[59] *Id.* at 206. In its interpretation of the term "statement," the court linked it closely with the term "representations," also used in the statute, which "connotes the kind of a statement that is intended to be acted on by the person to whom made." *Id.* at 205.

[60] *Id.* at 207.

[61] *Stark*, 131 F. Supp. at 207.

[62] *Id.* The indictments were dismissed due to error in the pleading and misjoinder of persons.

[63] *Id.*

[64] *Id.* "The Fifth Amendment provides that no person shall be compelled to be a witness against himself in criminal cases. . . . I cannot think that such an application [of section 1001] could have been within the intent of Congress." *Id.*

[65] *Id.* (emphasis added).

tions."[66] This "caution" exercised by the *Stark* court has been followed in a series of subsequent judicial opinions in the form of the exculpatory no doctrine.

2. *Paternostro v. United States*

The exculpatory no doctrine was ushered into the courts of appeals by the Fifth Circuit in the case of *Paternostro v. United States*.[67] Paternostro was accused of making false statements to an IRS agent investigating unreported income from police graft.[68] After an extensive review of previous district court cases addressing the issue,[69] the Fifth Circuit held that Paternostro's statements did not fall within the parameters of section 1001 because (1) they were not related to any claim against the government, (2) he did not initiate any statement, and (3) his representations were not calculated to prevent the legitimate functions of Government.[70] The

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[66] *Id.*

[67] 311 F.2d 298 (5th Cir. 1962).

[68] *Id.* at 300.

[69] The Fifth Circuit looked first to *Stark*, but also analyzed the following cases:

United States v. Philippe, 173 F. Supp. 582 (S.D.N.Y. 1959). Defendant gave a false, oral denial to an Internal Revenue Agent. The court held that section 1001 did not apply because the statement could not possibly have "perverted the authorized function" of the agent, which is exactly what the statute is designed to protect:

> While the Special Agent may have been disappointed that defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in any way perverted. The only possible effect of exculpatory denials however false, received from a suspect such as defendant is to stimulate the agent to carry out his function.

Paternostro, 311 F.2d at 303-04 (quoting *Philippe*, 173 F. Supp. at 584).

United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957). The court held that false denials made to the FBI under oath were not chargeable under section 1001. However, the court also added:

> But can it be said that when an accused person, a potential defendant, a suspect, grants an agent of the Federal Bureau of Investigation an interview and, in reply to an incriminating question, knowingly makes a negative answer, when truth and morality, but not the law, requires an affirmative reply, such answer perverts the authorized function of the Bureau?

Paternostro, 311 F.2d at 303 (quoting *Davey*, 155 F. Supp. at 178).

United States v. Levin, 133 F. Supp. 88 (D. Colo. 1956). Levin denied having information as to the identity of a dinner ring when questioned by an FBI agent. The court held that the denial was not a "statement" under section 1001. The court reasoned that such a strict interpretation of the statute would subject anyone who told a lie during interrogation to a possible five-year prison term. The court also noted that, even though section 1001 did not require that the defendant be under oath when the statement was made, the penalty under section 1001 was greater than the penalty for perjury. Therefore, to interpret section 1001 strictly "would weaken the force and purpose of the perjury statute . . . Congress could not have intended such results." *Paternostro*, 311 F.2d at 302-03.

[70] *Paternostro*, 311 F.2d at 305.

court concluded that the indictment against Paternostro should be dismissed, holding that "the 'exculpatory no' answer without any affirmative, aggressive or overt misstatement on the part of the defendant does not come within the scope of the statute."[71]

The Fifth Circuit's basis for its conclusion was not complex; the court merely interpreted section 1001, remaining within the bounds of the section's language and legislative purpose, and concluded that the statute was not intended to punish mere "exculpating" denials. The reasoning of the court was similar to that of the *Stark* court, and the resulting exculpatory no exception defined by both courts was a very narrow one. Some courts have remained within the boundaries of *Paternostro*. Others, including the Fifth Circuit itself, have been unpersuaded by the pressure to remain within these original guidelines, and have taken the exculpatory no doctrine far beyond anything that reasonable minds could have imagined based on the decisions in *Stark* or *Paternostro*.

B. *Judicial Manipulation of the Doctrine*

1. *The Fifth Circuit*

Although *Paternostro* has never been overturned, its spirit is certainly extinct in the Fifth Circuit. The exception to section 1001 set forth in *Paternostro* was based on the defendant's mere exculpatory denial that was not designed to pervert any agency function.[72] However, in a recent decision dealing with the issue, the Fifth Circuit, while purporting to follow *Paternostro*, far exceeded the limits of that prior decision. In *United States v. Hajecate*,[73] the defendants were indicted for a violation of section 1001 after submitting false information on income tax returns.[74] On the part of the form that required disclosure of any interest in foreign bank accounts, the defendants checked "No," even though they had an interest in an account in the Cayman Islands.[75] The court held that "'[m]ere negative responses to questions . . . by an investigating agent . . . not initiated by the appellant' are not actionable under 1001."[76] The court dismissed the section 1001 indictment on the

[71] *Id.* at 309.
[72] *See supra* notes 70-71 and accompanying text.
[73] 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).
[74] *Id.* at 896.
[75] *Id.* at 896, 899.
[76] *Hajecate*, 683 F.2d at 899 (quoting *Paternostro*, 311 F.2d at 305).

ground that the defendants' answer was a mere negative response *to an investigative question.*[77] The court reasoned that the particular question on the tax form was unlike the remainder of the form and that its true purpose was investigative.[78]

Even assuming that the question was investigative in nature, the Fifth Circuit failed to acknowledge one very important factor: the defendants' sole purpose in placing the false entry on the form was to protect their own assets and, consequently, to pervert an agency function. The representation was not designed to exculpate; the Hajecates could not have feared self-incrimination as a result of a truthful answer, because a truthful answer would in no way have incriminated them.[79] Thus, while the court claimed to have followed *Paternostro*, that claim is deceptive. The answer was a mere denial, but it was a denial intended to pervert an agency function. Under *Paternostro*, the *Hajecate* defendants would not have been entitled to the exculpatory no exception. The dismissal of this indictment by the Fifth Circuit flies in the face of the congressional intent behind section 1001, which is to protect the authorized functions of government.[80] The act committed by the defendants was the very type of act that section 1001 was designed to prevent.

The Fifth Circuit made another questionable decision in *United States v. Bush*.[81] Defendant Bush signed two false sworn affidavits during an investigation by IRS agents and was consequently charged with a section 1001 violation.[82] The court held that the factual situation was "identical to the one in *Paternostro* . . . . Bush was

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[77] *Id.* at 900, 901.

[78] The court examined the statute authorizing the question, 31 U.S.C. § 1121 (1976) (current version at 31 U.S.C. § 5314 (1988)) and the accompanying regulation, 31 C.F.R. § 103.24 (1982), in reaching its conclusion. The statute allows the Secretary of the Treasury to obtain reports concerning foreign financial affairs from any citizen or resident of the United States. The regulation enables the Secretary to do this through federal income tax returns. Because this reporting system is part of the Bank Secrecy Act of 1970, whose purpose in keeping these records is their "'usefulness in criminal, tax or regulatory investigations or proceedings,'" the court declared that the question on the form was investigative. *Hajecate*, 683 F.2d at 900-01.

[79] The Government raised the incrimination issue in its argument. They pointed to the Supreme Court's classification of tax form questions as "neutral on their face," since they apply equally to everyone and do not involve "compulsion to incriminate." *Id.* at 900 (citing Garner v. United States, 424 U.S. 648, 660-61 (1976)).

[80] Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962) (quoting United States v. Gilliland, 312 U.S. 86, 93 (1941)).

[81] 503 F.2d 813, 818 (5th Cir. 1974), *reh'g denied*, 511 F.2d 1402 (1975).

[82] *Id.* at 814.

approached by the Internal Revenue Service, the interview was initiated by the Internal Revenue Service, the essence of Bush's statements were [sic] an exculpatory no to the questions asked by the agent."[83] Citing Fifth Amendment concerns of self-incrimination,[84] the court held that section 1001 did not apply to Bush's statements and reversed the trial court, remanding the action for dismissal.[85]

The court's decision in *Bush* is disturbing; while the court claims to follow *Paternostro*, its application of the case is manipulative. The "statements" made by Bush, which the court determined were "essentially denials," were in the form of an affidavit—replete with affirmative misrepresentations—signed by Bush.[86] To reach the conclusion that a full typewritten page of statements was nothing more than a denial required some stretching of this criterion by the court. Such result-oriented action is nothing more than judicial legislation masked as interpretation.

2. *The Ninth Circuit*

The Ninth Circuit is no less guilty of doctrinal manipulation than is the Fifth Circuit. In *United States v. Bedore*,[87] the court reversed the conviction of defendant Bedord,[88] holding that his misrepresentation did not fit within the class of statements that section 1001 was intended to reach.[89] When a process server came to his home, Bedord identified himself as "Tom Halstead."[90] The court held that because Bedord's statements (1) were not related to any claim against the government, (2) were given in response to

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[83] *Id.* at 818.

[84] This court is . . . well aware . . . of the Fifth Amendment . . . which says, "No person . . . shall be compelled in any criminal case to be a witness against himself, ..." If, then, under the facts before us we allow Bush's conviction to stand, Bush will have been convicted by his own words given to an investigating officer of the United States government . . . .

Id. (citing United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957)).

[85] *Id.* at 819.

[86] Bush signed two separate affidavits, the first of which he was not indicted upon because the statute of limitations had run. Bush was indicted for statements made in the second affidavit, signed a year later. A copy of the second affidavit is reproduced in the opinion. *See Bush*, 503 F.2d at 816-17.

[87] 455 F.2d 1109 (9th Cir. 1972).

[88] Bedord was evidently known under two names—Bedore and Bedord. Both are used in the case. *See id.* at 1109-10.

[89] *Id.* at 1111.

[90] *Id.* at 1110.

a government inquiry, and (3) did not substantially impair any agency function, his actions were not punishable under section 1001.[91]

The factors cited by the Ninth Circuit were essentially those mentioned by the *Paternostro* court,[92] except for a substantial variation of the third criterion. The first two factors were correctly applied by the court. Bedord's statement was not related to any claim; he was seeking nothing. The statement was also given in response to the inquiry of the process server; Bedord did not initiate this communication. On the third criterion, however, the court faltered. After reviewing the statutory history, the court concluded that section 1001 was intended to prosecute only those statements relating to false claims and statements that could "pervert or corrupt the authorized functions of those agencies to whom those statements were made."[93] Then, with no other explanation, the court concluded that Bedord's statements were outside that scope.[94] This conclusion is illogical. Bedord was not under investigation; he had no need to exculpate himself in any manner. Furthermore, his representation went beyond a mere denial; Bedord made a false, *affirmative* misrepresentation. He not only denied his identity, he claimed to be someone else.

The court failed to explain how it reached the conclusion that Bedord's statement did not impair the agency's function. Because of Bedord's misrepresentation, the process server was unable to do the very thing that he was authorized to do—serve the subpoena. However, the court never addressed this issue; it merely stated its conclusion, apparently meant to be accepted *a priori*. The court of appeals only thinly disguised this statutory alteration as legitimate judicial interpretation.

After *Bedore*, the Ninth Circuit began to expand the list of factors in exculpatory no analysis.[95] The court ultimately created a

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[91] *See id.*

[92] Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962).

[93] *Bedore*, 455 F.2d at 1111.

[94] *Id.*

[95] In United States v. Rose, 570 F.2d 1358 (9th Cir. 1978), the court added two additional factors: (1) whether the inquiry by the agency was an administrative, rather than investigative inquiry, and (2) whether the defendant could have incriminated himself by telling the truth. *Id.* at 1364.

Defendant Rose was charged under section 1001 after he lied to a border agent concerning the nature of his travels. *Id.* at 1363. The court affirmed the conviction, concluding that the statement was related to a claim against the government—entry into the country. *Id.* at 1364. The court further held that the statement was "material" because,

five-part test, now known as the *Medina* test, in 1986.[96] In *United States v. Medina de Perez*,[97] the court addressed the conviction of a defendant who was charged under section 1001 for giving false answers to a Drug Enforcement Administration officer during a post-arrest interrogation.[98] In its decision to reverse the conviction, the court looked at five factors. Under the *Medina* test, a defendant is entitled to the exculpatory no defense only if:

> 1) the defendant has no claim against the United States and seeks no privilege;[99]
> 2) the defendant is responding to inquiries from the agency when making the statement;
> 3) the statement does not impair the authorized function of the agency;
> 4) the government inquiries are not a "routine exercise of administrative responsibility"; and
> 5) a truthful answer would have incriminated the defendant.[100]

On its face, the *Medina* test appears to narrow the exculpatory no defense. After all, the test does have five requirements, all of which must be met in order to invoke the exculpatory no doctrine. However, the result of *Medina* has instead created an ironic dichotomy: a test that appears strict on its face but is very lenient in its application. For example, in *United States v. Equihua-Juarez*,[101] the defendant gave an alias to a Border Patrol agent in order to conceal his prior criminal record.[102] Using the *Medina* test, the court should have affirmed the conviction because it impaired the agent's function. However, the court held that the defendant's statement did *not* impair the authorized function of

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although the false statement did not actually impair the function of the Customs Service, the statement had the "intrinsic capability" of doing so. *Id.* (citations omitted).

[96] *See* United States v. Medina de Perez, 799 F.2d 540 (9th Cir. 1986).

[97] *Id.*

[98] *Id.* at 542.

[99] Entry into the United States is one example of a privilege. However, the Ninth Circuit has not been consistent on the question of whether such a claim to privilege precludes the exculpatory no under the first criterion. *Compare Rose*, 570 F.2d at 1364 (holding that defendant who lied about overseas travel was claiming a privilege when trying to enter) *with Medina*, 799 F.2d at 545 n.8 (holding that even though defendant was attempting to enter the country, false statements were not sufficiently related to such claim as to preclude exculpatory no defense).

[100] *Id.* at 544 & n.5.

[101] 851 F.2d 1222 (9th Cir. 1988).

[102] *Id.* at 1223.

the agency, because the agent testified that he did not rely on the defendant's statement.[103] Therefore, the court construed the third element of the *Medina* test as one of *actual*, rather than *potential*, effect. In order to do this, the court had to ignore circuit precedent establishing that this third element could be met by a false statement with the "intrinsic capability" of perverting an agency function; actual reliance and perversion were not required.[104]

Thus, despite its deceptively narrow appearance, the *Medina* test is quite broad in effect. In fact, the Ninth Circuit interpretation of the exculpatory no doctrine, which is by far the most complex, is also considered to be among the most liberal.[105] Such illusion is dangerous, because it conceals the true nature of the court's actions. While *Medina* purports to comply with the congressional purpose behind section 1001,[106] it actually represents a judicial departure from the bounds of statutory language and legislative intent.

3. *The Fourth and Eighth Circuits*

The Fourth and Eighth Circuits have espoused *Medina* in both form and application.[107] In *United States v. Cogdell*,[108] the defendant lied to a Secret Service agent concerning a fraudulently obtained replacement check from the IRS.[109] The Fourth Circuit held

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[103] *Id.* at 1225.

[104] United States v. Rodriguez-Rodriguez, 840 F.2d 697, 700 (9th Cir. 1988); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978). The *Rose* decision is irreconcilable with *Equihua-Juarez*. Defendant Rose told a border agent that he had not traveled overseas when in fact he had. *See Rose*, 570 F.2d at 1363. However, the border agent did not rely on that information and, consequently, the agency function was not perverted. Yet the Ninth Circuit, citing precedent from the Third and Ninth Circuits and Pennsylvania, held that the statement "had the 'intrinsic' capability of bringing it about," which was enough. *Id.* at 1364. There is no practical difference between those factual situations. However, the court in *Equihua-Juarez* failed even to mention *Rose* in this part of its opinion.

[105] Nicholson, *supra* note 26, at 240. The "liberal" courts would also include the Fourth and Eighth Circuits, which follow *Medina*. *See infra* notes 107-15 and accompanying text.

[106] The Ninth Circuit claimed to recognize the Supreme Court's broad interpretation of section 1001. *See Medina*, 799 F.2d at 543 (citing United States v. Rodgers, 466 U.S. 475 (1984)); Bryson v. United States, 396 U.S. 64 (1969); United States v. Bramblett, 348 U.S. 503 (1955); *see also supra* note 26.

[107] *See* United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988); United States v. Taylor, 907 F.2d 801 (8th Cir. 1990).

[108] 844 F.2d 179 (4th Cir. 1988).

[109] *Id.* at 180.

that the defendant's statements met all five elements under *Medina*, and reversed the defendant's conviction.[110] In order for the court to reach this decision, it had to overcome the obstacle that the replacement check was a "claim against the government" in violation of the first element of *Medina*. The court reasoned that while the claim for the check was in fact a claim against the government, the defendant's statements to the Secret Service agent, made after the check was received and cashed, were not "related to a claim against the government" under *Medina*.[111]

In *United States v. Taylor*,[112] the Eighth Circuit was fairly liberal in its interpretation of *Medina*, reversing a defendant's conviction for making false denials to a bankruptcy judge that the defendant had signed some forged pleadings.[113] The court held that such denials did not pervert the court's function, as required by *Medina*, because the bankruptcy court "should not have been overly surprised that Taylor denied guilt."[114] Furthermore, in order to satisfy the *Medina* test, the court had to hold that the bankruptcy hearing was not an exercise of "administrative responsibility," and that Taylor would have incriminated himself by admitting that he signed the documents, despite the fact that he had a power of attorney to do so.[115]

Like the Ninth Circuit, the Fourth and Eighth Circuits have chosen to abandon the original limits set forth in *Paternostro*, moving on to bigger, though arguably not better, forms of analysis. However, several circuits still abide by a more narrow view of the exculpatory no doctrine.

C. *Adherence to Strict Limits*

Medina is not the law everywhere. Several circuits, refusing to adopt the *Medina* rationale, have declined to join their liberal peers' effort to redraft section 1001 through judicial exception. These conservative circuits feel compelled to stay within the spirit of *Paternostro* and therefore recognize the exculpatory no doctrine only in limited form.

Though they have never expressly accepted or rejected the exculpatory no doctrine, the Second and Seventh Circuits have

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[110] *Id.* at 184-85.
[111] *Id.* at 184.
[112] 907 F.2d 801 (8th Cir. 1990).
[113] *Id.* at 802-03.
[114] *Id.* at 806.
[115] *Id.* at 806-07.

both expressed strong opinions as to its application. In *United States v. Capo*,[116]the Second Circuit stated that "any statement beyond a simple 'no' does not fall within the [exculpatory no] exception."[117] In *United States v. King*,[118] the Seventh Circuit affirmed the section 1001 conviction of a defendant who made a series of false denials to government agents in an effort to obtain Supplemental Security Income.[119] When the defendant attempted to invoke the exculpatory no defense, the court stated that the defense was inapplicable: "[T]he doctrine stands as a *very limited exception to section 1001* . . . limited to simple negative answers . . . under circumstances indicating that the defendant is unaware that he is under investigation . . . and is not making a claim or seeking employment with the government."[120]

The Tenth Circuit likewise refused to apply the exculpatory no doctrine in *United States v. Fitzgibbon*.[121] Defendant Fitzgibbon was indicted under section 1001 after he falsely checked a "no" response on a customs form that inquired whether he was carrying more than $5000. Fitzgibbon later falsely denied that he was carrying more than $5000 when questioned directly by customs officials.[122] The court held that a finding of possible self-incrimination, which did not exist in the case at bar,[123] was critical to the application of the exculpatory no exception.[124] This requirement, also found in the *Medina* test, is quite logical: if there is no possibility for self-incrimination, then there is no need for exculpation.

The Eleventh Circuit cites *Paternostro* as its source of exculpatory no interpretation,[125] and the First Circuit, which has never

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[116] 791 F.2d 1054 (2d Cir. 1986).

[117] *Id.* at 1069.

[118] 613 F.2d 670 (7th Cir. 1980).

[119] *Id.* at 671-72.

[120] *Id.* at 674-75 (emphasis added) (citations omitted). The defendant's attempt to invoke the doctrine here was erroneous because his statements were made for the purpose of supporting a claim against the government for Supplemental Security Income. *Id.* at 672.

[121] 619 F.2d 874 (10th Cir. 1980).

[122] *Id.* at 875.

[123] It is not illegal to carry more than $5000 into the country. It is only illegal not to report it. Therefore, Fitzgibbon would not have incriminated himself by admitting that he was carrying the money.

[124] *Id.* at 881.

[125] *See* United States v. Tabor, 788 F.2d 714 (11th Cir. 1986) (notary public who disclaimed involvement in criminal activity fell under the exculpatory no exception where her answer was essentially a denial in response to an investigative question designed to elicit an incriminating response); United States v. Payne, 750 F.2d 844, 861 (11th Cir. 1985) (applying the exculpatory no defense to 18 U.S.C. § 1006, which prohibits false statements

been faced with the opportunity to accept a *Paternostro*-like form of the doctrine, has indicated its predisposition to do so.[126]

The most recent mark added to the conservative circuit court tally is that of the Sixth Circuit in *Steele II*.[127] Not only did that court reject the *Medina* test, but in so doing also took its liberal peers to task by cutting through the illusory surface of the multi-factor test and disarming the assumption on which the liberal view is based.

III. BACK TO BASICS

A. *The Issues Behind the Controversy—Steele II*

The *Steele II* court addressed several issues critical to the exculpatory no controversy: (1) the breadth of the statutory language;[128] (2) the administrative/investigative distinction;[129] and (3) Fifth Amendment concerns.[130]

1. *The Statutory Language*

The Sixth Circuit acknowledged the breadth of the language of section 1001.[131] However, the court responded, "we do not think these concerns legitimize the creation of the Ninth Circuit's broad exception to this statute."[132] The Sixth Circuit disagreed with the argument that there were no realistic limits within the statute concerning its application: "The statute does contain language which reasonably limits its application: only 'material' statements

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to Federal Land Banks, where the defendant could show that "truthful answers would have been incriminating, or . . . that he or she reasonably believed that truthful affirmative answers would have been incriminating").

[126] The First Circuit has twice stated, in dicta, that mere negative responses or denials are not "statements" within section 1001. *See* United States v. Pandozzi, 878 F.2d 1526, 1533 (1st Cir. 1989); United States v. Chevoor, 526 F.2d 178, 184 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

[127] *Steele II*, 933 F.2d 1313 (6th Cir. 1991).

[128] *Id.* at 1321-22.

[129] *Id.* at 1321.

[130] *Id.* at 1320-21.

[131] *Id.* at 1321. "[I]f read literally, [this statute] could make 'virtually any false statement, sworn or unsworn, written or oral, made to a government employee . . . a felony.'" United States v. Medina de Perez, 799 F.2d 540, 543-44 (9th Cir. 1986) (quoting United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972)).

[132] *Id.* The Ninth Circuit's "broad exception" is the *Medina* test.

are violations."[133] Materiality, as it has been defined by the courts, comports with the purpose of the statute: protecting government functions. A statement is material under section 1001 if it has the capability or tendency to affect or pervert a governmental function.[134]

This statute was not designed to punish trivial falsehoods. However, any statement that has the power to pervert an agency function is exactly the kind of statement that Congress intended to prevent. Therefore, the materiality requirement placed within the statutory language is a reasonable limit in light of the purpose of the statute.[135] The statutory language of section 1001 also requires "knowledge" and "intent" on the part of the defendant. A party will not be convicted under section 1001 for giving a false statement that the defendant reasonably believed was true.[136] Furthermore, Congress was relying on prosecutorial discretion to control the statute's application:

> [C]ongress appears to have relied primarily upon the discretion of a prosecutor in limiting the potential application of this section. This mechanism—prosecutorial discretion—is a valid means of limiting the potential application of the statute. It is not our role to re-write a statute simply because we are discomforted by the manner in which Congress chose to structure its enforcement. . . . "[E]stablishment of different policies for the

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[133] *Steele II*, 933 F.2d at 1321. The Sixth Circuit further noted that "the third criterion [of the *Medina* test, that the statement impair the agency function,] appears superfluous in light of the requirement of materiality. . . . 'Since materiality is a critical element of [section 1001], this [third criterion] seems redundant.'" *Id.* at 1321 n.7 (quoting United States v. Alzate-Restreppo, 890 F.2d 1061, 1068 (9th Cir. 1989) (Patel & Nelson, J.J., concurring in the judgment)).

[134] *Steele II*, 933 F.2d at 1319 (citing United States v. Chandler, 752 F.2d 1148 (6th Cir. 1985) and United States v. McGough, 510 F.2d 598, 602 (6th Cir. 1975)).

[135] Although a grammatically particular reading would reveal that the "material" requirement modifies only the first clause of the statute, courts generally have assumed that Congress intended for the "materiality" element to modify all three clauses in the statute so as "to exclude trivial falsehoods from the purview of the statute." *Steele II*, 933 F.2d at 1318 (quoting United States v. Chandler, 752 F.2d 1148, 1151 (6th Cir. 1985) (other citations omitted)).

[136] *See* United States v. Yermian, 468 U.S. 63 (1984) (holding that the government must prove beyond a reasonable doubt that defendant's statement was made with knowledge of its falsity). However, it should also be noted that the defendant does *not* have to have knowledge of federal involvement to be convicted under section 1001. *See id.* at 73-74.

With regard to "intent," the prosecution must prove that the defendant had the specific intent to make a false statement deliberately or with reckless disregard of the truth. United States v. Tamargo, 637 F.2d 346, 351 (5th Cir. Unit B Feb.), *cert. denied*, 454 U.S. 824 (1981).

governmental agencies affected [in order to curb overzealous application of section 1001] is in the executive and legislative rather than the judicial domains."[137]

It must be conceded that Congress wrote a very broad statute, but Congress has the power to write very broad statutes if it chooses to do so, provided such statutes are not so broad or vague as to offend the Constitution.[138] Furthermore, any statute designed to protect the activities of all governmental agencies must by necessity be somewhat broad.

2. *Administrative v. Investigative Functions*

Those courts that follow the *Medina* test have placed a great deal of emphasis on the requirement that the government agent must have been acting in an investigative capacity for the exculpatory no doctrine to apply.[139] However, the distinction actually originated in the Fifth Circuit in *United States v. Bush.*[140] In *Bush,* the court noted that an exception to section 1001 should exist in investigative situations "based on [the statute's] historical evolution as a statute seeking to prevent the administration of federal government programs from being subverted or frustrated by the false presentation of interested parties."[141]

The distinction is often premised on the idea that an investigating officer is less likely to rely on a declarant's statements than is a government agent whose work is routinely administrative; therefore, the function of the investigating agent is less likely to be impaired.[142] Again, such reasoning may be theoretically sound.

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[137] *Steele II,* 933 F.2d at 1321 (quoting United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974)).

[138] The Supreme Court has already determined that the language of section 1001, although broad, is neither ambiguous nor unjust. United States v. Rodgers, 466 U.S. 475, 484 (1984).

[139] Under the fourth element of *Medina,* a statement will not fit within the "exculpatory no" doctrine if that statement was in the context of "a routine exercise of administrative responsibility." United States v. Medina de Perez, 799 F.2d 540, 544 (9th Cir. 1986).

[140] 503 F.2d 813 (5th Cir. 1974).

[141] *Id.* at 815.

[142] Although federal regulatory schemes cannot adequately function if deterrents to the providing of false information are not provided, it is a fundamental premise of our criminal justice system that the detection of crimes does not depend on assuring that the accused individuals be forced to tell the truth to law enforcement agents.

United States v. Goldfine, 538 F.2d 815, 825 (9th Cir. 1976) (Ferguson, J., concurring in part, dissenting in part). *See also* United States v. Philippe, 173 F. Supp. 582, 584 (S.D.N.Y.

However, the resultant reality is that courts may strain to conclude that an officer or agency is acting in an investigative capacity.[143] Furthermore, the distinction between an administrative and investigative capacity is often blurred.[144] In fact, the Eleventh Circuit completely rejected the dichotomy because it was simply "unhelpful."[145] However, the best argument dealing with the issue came in *Steele II*:

> [T]he fourth criterion [of the *Medina* test] fails to account for the Supreme Court's guidance in *Rodgers*. The Supreme Court expressly recognized that "[a] criminal investigation surely falls within the meaning of 'any matter. . . .'" Thus, a distinction between an agency's administrative and investigative functions is unwarranted. There is no reason to undertake the superfluous analysis required by the fourth prong of this test because section 1001 applies to all agency actions, criminal or otherwise.[146]

If Congress had intended to restrict section 1001 to administrative agency functions, it could have easily done so. However, no such restriction may be inferred from the statute.

3. *Fifth Amendment Concerns*

Undoubtedly, the most often cited reason behind the creation of the exculpatory no doctrine is the court's concern for the protection of the defendant's Fifth Amendment rights.[147] Under the

1959) (stating that "refusal of a suspect to affirmatively assist a criminal investigator in preparing a case for criminal prosecution against himself has no tendency to pervert the investigator's function").

[143] *See supra* notes 77-78 and accompanying text (discussing the Fifth Circuit's finding that question on income tax form was investigative in nature).

[144] "[T]he court is confronted with an absence of explanation by the court as to what is meant by the phrase 'routine function of administrative duty.'" United States v. Marusich, 637 F. Supp. 521, 526 (S.D. Cal. 1986); *see also* United States v. Becker, 855 F.2d 644, 646 (9th Cir. 1988) ("It is difficult to draw a sharp distinction between administrative and investigative responsibilities.").

[145] United States v. Payne, 750 F.2d 844, 863 n.21 (11th Cir. 1985).

[146] *Steele II*, 933 F.2d at 1321 (quoting United States v. Rodgers, 466 U.S. 475, 479 (1984)). *See also* United States v. Payne, 750 F.2d 844, 863 n.21 (11th Cir. 1985) (rejecting the administrative/investigative distinction because it is unhelpful).

[147] "Undoubtedly, the judicial gloss put on § 1001 by the 'exculpatory no' decisions originates at least in part from latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment." United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974). *See also* United States v. Alzate-Restreppo, 890 F.2d 1061, 1069-70 (9th Cir. 1989); (Patel & Nelson, J.J., concurring in the judgment); United States v. Tabor, 788 F.2d 714, 719 (11th Cir. 1986).

Fifth Amendment, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[148] However:

> Fifth Amendment concerns . . . fail to justify [the *Medina* test]. An individual has a constitutional privilege against self-incrimination, but he has no constitutional right to give an untruthful statement. . . . "A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."[149]

The Fifth Amendment does not give a person the right to lie. While some courts have claimed that section 1001 creates a "Hobson's choice" for a defendant in an investigative interrogation—in other words, "confess or be charged with a section 1001 felony,"—this dilemma does not in fact exist. The individual always has the option to remain silent.[150]

> [Section 1001] does not usher a heads we win, tails you lose philosophy into the criminal justice system. ("If you tell our version of the truth, we will call it an admission and use it against you on the substantive offense; If you tell us something which materially varies from our version of the truth, we will charge you with a § 1001 felony"). . . . The coin fortunately is three sided. The accused can say nothing or plead the Fifth Amendment and that action cannot be used against him in a federal proceeding.[151]

In light of a "realistic" view of investigative questioning, the language of the Sixth Circuit may seem a bit harsh. It is often pointed out that any answer of silence in a post-arrest interrogation will be deemed as guilt by the investigator.[152] However, that is not ample justification for the defendant to launch into a response replete with falsehoods. The Fifth Amendment only provides that the defendant will not be forced to be a witness against himself; it does not say that the Constitution will provide every opportunity for a guilty defendant to evade detection.

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

[149] *Steele II*, 933 F.2d at 1320 (quoting Bryson v. United States, 396 U.S. 64, 74 (1969)).

[150] *Id.* at 1320-21.

[151] United States v. Goldfine, 538 F.2d 815, 821 & n.2 (9th Cir. 1976) (Ferguson, J., concurring in part, dissenting in part) (citing United States v. Hale, 422 U.S. 171 (1975)).

[152] "[A]ny appreciation of the communicative realities must lead to the recognition that standing mute in the face of questions is an exceedingly unnatural response and that 'taking the fifth' has been so often accompanied by social ostracism that it is an unwholesome option." *Id.* at 822 n.2.

Nonetheless, no court that has dealt with the exculpatory no doctrine has ever suggested that defendants who merely deny their guilt in fear of self-incrimination should not be protected by the exculpatory no defense. In fact, even the Sixth Circuit has suggested that such an application might be acceptable.[153] However, such an exception need not be based on Fifth Amendment grounds. It is easily argued, successfully in *Paternostro*, that such statements merely do not fall within the purview of section 1001.[154]

B. *A Suitable Alternative*

It is time to return to basics. Since its origin in *Stark* and *Paternostro*, the exculpatory no doctrine has been stretched and pulled well beyond reasonable bounds. Although the federal courts claim to respect the power and intention of the legislature, many of them have clearly strayed beyond the limits of separation of powers.

Many of the standards on which exculpatory no analysis has been premised are inappropriate. Furthermore, courts have misapplied those standards, manipulating the law to reach the desired result. Many courts are clearly uncomfortable with section 1001, and have in effect rewritten the statute through the device of exception. Such action surpasses the constitutional bounds of the judiciary's power. The authority to legislate belongs to Congress. The Supreme Court has already addressed the constitutionality of section 1001, and the statute remains viable. Courts do not have to *like* the statute, but they must respect Congress' power to create the statute.

The Sixth Circuit was correct in rejecting the exculpatory no defense as applied in *Medina*. The reasons supporting the doctrine simply do not justify the breadth it has been given in more liberal circuits. The appropriate application of the doctrine is both feasible and simple: except only those statements that are denials and only if those denials were given in light of a reasonable fear of self-incrimination. Once a defendant insists on embellishing that denial with affirmative misrepresentations, he or she is no longer pro-

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[153] *See Steele II*, 933 F.2d at 1319-20. The *Steele II* court recognized the exception made in *Paternostro* where the defendant merely denied guilt. However, the facts in *Steele II* were not so simple; Steele's actions were more than mere denials. Therefore, the court was not faced with an opportunity to accept the doctrine as it had been used in *Paternostro*.

[154] United States v. Paternostro, 311 F.2d 298, 309 (5th Cir. 1962). The court stated that "the 'exculpatory no' answer without any affirmative, aggressive or overt misstatement on the part of the defendant does not come within the scope of the statute. . . ."

tected by the exculpatory no doctrine or by the Fifth Amendment, and the application of section 1001 is appropriate. Such an interpretation would comport with the legislative history and recognized purpose of the statute, and would return the exculpatory no doctrine to its limited origins.

CONCLUSION

The exculpatory no controversy is ripe for review by the Supreme Court and Congress. Thirty years of inconsistency and confusion is enough. In the interim, however, the circuits must speak to the issue themselves. The Sixth Circuit, through *Steele II*, has done so, rejecting the examples set by other circuits and choosing to follow the guidelines set forth by the legislative authors in the statutory language. Other circuits should follow suit and stop rewriting the rule by expanding the exception.

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