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JUDICIAL RELUCTANCE TO ENFORCE THE FEDERAL FALSE STATEMENT STATUTE IN INVESTIGATORY SITUATIONS

INTRODUCTION

The false statement statute, section 1001 of the federal criminal code,[1] prohibits the making of false statements to any department or agency of the United States in any matter within their jurisdiction.[2] Because of the broad language of the statute, and the broad construction given it by the Supreme Court,[3] section 1001 has been applied to a myriad of situations.[4] For example, the statute has been employed against offenses ranging from false written statements filed with federal regulatory agencies[5] to false oral statements made to Customs officials at airports.[6] Notwithstanding this breadth, some courts have

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1. 18 U.S.C. § 1001 (1976). Section 1001 provides in full:

> 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.

2. *Id.*

3. Bryson v. United States, 396 U.S. 64, 70 (1969) ("[W]e think the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001 . . . ."); United States v. Bramblett, 348 U.S. 503, 509-10 (1955) ("[T]hat criminal statutes are to be construed strictly . . . does not mean that every criminal statute must be given the narrowest possible meaning . . . ."); United States v. Gilliland, 312 U.S. 86, 93 (1941) ("We see no reason why [the broad] intention [of Congress] should be frustrated by construction.").

4. *E.g.*, Bryson v. United States, 396 U.S. 64, 65 (1969) (false statement to NLRB); United States v. Bramblett, 348 U.S. 503, 504 (1955) (false statement to Disbursing Office of House of Representatives); United States v. Gilliland, 312 U.S. 86, 89-90 (1941) (construing predecessor to § 1001, 18 U.S.C. § 80 (1940)) (false statement to Federal Tender Board); United States v. Adler, 380 F.2d 917, 919 (2d Cir.) (false statement to FBI), *cert. denied*, 389 U.S. 1006 (1967); United States v. McCue, 301 F.2d 452, 453 (2d Cir.) (false statement to IRS), *cert. denied*, 370 U.S. 939 (1962); Pitts v. United States, 263 F.2d 353, 353-54 (9th Cir.) (false statement to Atomic Energy Commission), *cert. denied*, 360 U.S. 935 (1959); United States v. Blake, 206 F. Supp. 706, 706-07 (W.D. Mo. 1962) (false statement to U.S. Postal Service), *aff'd*, 323 F.2d 245 (8th Cir. 1963); United States v. Ganz, 48 F. Supp. 323, 323-24 (D. Mass. 1942) (construing predecessor to § 1001, 18 U.S.C. § 80 (1940)) (false statement to Office of Price Administration).

5. *E.g.*, United States v. Gilliland, 312 U.S. 86, 89-90 (1941) (construing predecessor to § 1001, 18 U.S.C. § 80 (1940)) (false statement to Federal Tender Board); Pitts v. United States, 263 F.2d 353, 353-54 (9th Cir.) (false statement to Atomic Energy Commission), *cert. denied*, 360 U.S. 935 (1959).

6. *E.g.*, United States v. Cutaia, 511 F. Supp. 619, 620 (E.D.N.Y. 1981); United States v. Pereira, 463 F. Supp. 481, 483 (E.D.N.Y. 1978).

interpreted the statute narrowly, holding that false statements made to federal investigative agencies are not within the scope of the statute.[7]

The judicial reluctance to enforce section 1001 has been manifested in cases falling into three theoretical categories. The first of these categories is amorphous; the decisions have been based upon no single rationale.[8] They have been grounded upon the courts' belief that application of the statute in the particular circumstance would be unfair, such as when the government has improperly elicited a false statement.[9] They represent appropriate exercises of judicial discretion and the implementation of the maxim that criminal statutes are to be strictly construed.[10]

The second category of cases is based upon a very narrow construction of the term "jurisdiction" or "agency." Several courts have held,

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7. *E.g.*, United States v. Hajecate, 683 F.2d 894, 901 (5th Cir. 1982) (false statement to IRS on income tax return); United States v. Schnaiderman, 568 F.2d 1208, 1214 (5th Cir. 1978) (false statement to Customs officials); United States v. Bush, 503 F.2d 813, 819 (5th Cir. 1974) (false statements to IRS during special investigation); Friedman v. United States, 374 F.2d 363, 368 (8th Cir. 1967) (false complaints to FBI); Paternostro v. United States, 311 F.2d 298, 300, 305 (5th Cir. 1962) (false statements to IRS during special investigation); United States v. Thevis, 469 F. Supp. 490, 514 (D. Conn.) (false exculpatory statements to FBI), *aff'd mem.*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); United States v. Ehrlichman, 379 F. Supp. 291, 292 (D.D.C. 1974) (false statements to FBI during informal interview); United States v. Philippe, 173 F. Supp. 582, 584 (S.D.N.Y. 1959) (false statements to IRS during special investigation), *overruled*, United States v. McCue, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); United States v. Davey, 155 F. Supp. 175, 178-79 (S.D.N.Y. 1957) (false statement to FBI during informal interview); United States v. Stark, 131 F. Supp. 190, 208 (D. Md. 1955) (false statement to FBI while under oath); United States v. Levin, 133 F. Supp. 88, 90-91 (D. Colo. 1953) (false statement to FBI).

8. *See, e.g.*, United States v. Cowden, 677 F.2d 417, 420-21 (8th Cir. 1982); United States v. Stoffey, 279 F.2d 924, 927-28 (7th Cir. 1960). These courts, without employing reasoning that would exclude specific categories of statements from the scope of § 1001, have nevertheless refused to apply the statute to the facts before them. Thus, the *Cowden* court held that an immediately retracted false statement to an agent of the Customs Department was not "material" for the purposes of § 1001. 677 F.2d at 420-21. In *Stoffey*, by contrast, the court held that false statements made during a five-hour interrogation by a defendant who was "for all practical purposes . . . under arrest," were not within the scope of § 1001. 279 F.2d at 927-28.

9. *E.g.*, United States v. Cowden, 677 F.2d 417, 420-21 (8th Cir. 1982); United States v. Stoffey, 279 F.2d 924, 927-28 (7th Cir. 1960). While the *Cowden* court based its reversal on the rationale that the statement was not "material" for the purposes of § 1001, 677 F.2d at 420-21, the court so held because it felt that the government's conduct in eliciting the statement was "manifestly unfair." *Id.* Similarly, the *Stoffey* court held that the false statements before it were not within the scope of § 1001 because the agents to whom they were made were improperly seeking admissions of guilt rather than information. 279 F.2d at 927-28.

10. Williams v. United States, 102 S. Ct. 3088, 3095 (1982); United States v. Bass, 404 U.S. 336, 347 (1971); 3 C. Sands, Sutherland's Statutes and Statutory Construction § 59.03, at 6-8 (4th ed. 1974).

for example, that because the power to make a final disposition of a matter being investigated is vested in the judiciary,[11] a criminal investigation is not a matter within the "jurisdiction" of the FBI, as that term is used in section 1001. The FBI is therefore not an "agency" to which the statute is applicable.

The most clearly defined category of decisions is that which applies the "exculpatory no" doctrine to replies to questions of federal investigators.[12] This doctrine provides that an " 'exculpatory no' answer without any affirmative, aggressive or overt misstatement on the part of the defendant" is not a "statement" for the purposes of section 1001.[13] Despite the apparently limited reach of the exculpatory no doctrine, some courts have given the doctrine a broad application. Thus, responses made by anyone suspected of criminal activity have been excluded from the scope of section 1001, regardless of whether they were technically exculpatory[14] or made during an investigation.[15]

Both the narrow interpretation of the term "jurisdiction" and the exculpatory no doctrine depend upon overly narrow constructions of the statutory language and of congressional intent.[16] Underlying these judicial exceptions, however, are legitimate concerns, expressed by many courts, about the fairness of applying section 1001 in particular situations.[17]

Judicial reluctance to apply the statute in investigatory situations, especially in those instances in which the response can be character-

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11. *E.g.*, United States v. Lambert, 470 F.2d 354, 357-60 (5th Cir. 1972), *rev'd in part, aff'd in part on other grounds en banc*, 501 F.2d 943, 946, 948 (5th Cir. 1974); Friedman v. United States, 374 F.2d 363, 368 (8th Cir. 1967); United States v. Stark, 131 F. Supp. 190, 206-08 (D. Md. 1955).

12. *E.g.*, United States v. Hajecate, 683 F.2d 894, 901 (5th Cir. 1982); United States v. Schnaiderman, 568 F.2d 1208, 1214 (5th Cir. 1978); United States v. Bush, 503 F.2d 813, 818-19 (5th Cir. 1974); Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962); United States v. Thevis, 469 F. Supp. 490, 514 (D. Conn.), *aff'd mem.*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980).

13. Paternostro v. United States, 311 F.2d 298, 309 (5th Cir. 1962) (per curiam denial of rehearing).

14. *See* United States v. Schnaiderman, 568 F.2d 1208, 1213 (5th Cir. 1978) ("possible self-incrimination at least in the minds of" defendants, exculpatory no doctrine applied); United States v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972) (false statement of identification to FBI, exculpatory no doctrine applied).

15. *See* United States v. Hajecate, 683 F.2d 894, 899-901 (5th Cir. 1982) (question in ordinary tax return deemed "investigative" for purposes of exculpatory no doctrine).

16. See *infra* pt. II.

17. These concerns include criticisms that: 1) Compared to the perjury statute, § 1001 more severely punishes less serious behavior; 2) § 1001 is incompatible with the fifth amendment; and 3) the statute may encourage improper law enforcement procedure and criminalize trivial, inadvertent misbehavior. See *infra* pt. III.

ized as an exculpatory denial, has influenced Congress[18] in its continuing efforts to revise the federal criminal code.[19] The Senate is presently considering the enactment of a defense to prosecutions for false oral exculpatory statements made to law enforcement officials.[20]

This Note discusses the development and applications of the current false statement statute. It then analyzes the technical and policy arguments used to support refusals to enforce section 1001, particularly those advanced by courts employing the exculpatory no doctrine. The Note contends that the technical arguments are both incorrect and unconvincing, and that while the fairness concerns merit serious consideration, they should be addressed on a case-by-case basis, as is

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18. *E.g.*, Senate Comm. on the Judiciary, Report on the Criminal Code Reform Act of 1981, S. Rep. No. 307, 97th Cong., 1st Sess. 401-05 (1981) [hereinafter cited as Senate Report]; House Comm. on the Judiciary, Report on the Criminal Code Revision Act of 1980, H.R. Rep. No. 1396, 96th Cong., 2d Sess. 178-79 (1980) [hereinafter cited as House Report].

19. Numerous different revisions and replacements of title 18 have been introduced in Congress, but none has met with the approval of both houses. Drinan, Ward & Beier, *The Federal Criminal Code: The Houses Are Divided*, 18 Am. Crim. L. Rev. 509, 511-14 (1981); *see* Senate Report, *supra* note 18, at 1-18; House Report, *supra* note 18, at 5-10.

20. S. 1630, 97th Cong., 1st Sess. § 1343, 127 Cong. Rec. 9916-17 (1981), *reprinted in Reform of the Federal Criminal Laws: Hearings Before the Senate Comm. on the Judiciary on S. 1630*, 97th Cong., 1st Sess. 12,544-45 (1981) [hereinafter cited as *Senate Hearings*]. This section provides in pertinent part:

> § 1343. Making a False Statement
> (a) Offense.—A person commits an offense if—
> "(1) in a government matter, he—
> "(A) makes a material oral statement that he knows is false to a person who he knows is—
> "(i) a law enforcement officer; or
> "(ii) a person assigned noncriminal investigative responsibility by statute, or by a regulation, rule, or order issued pursuant thereto, or by the head of a government agency;
> and in fact such statement is volunteered or is made after the person has been advised that making such a statement is an offense;
> . . .
> (b) Defense.—It is a defense to a prosecution under subsection (a)(1)(A)(i) that the statement was made to a law enforcement officer during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense.

Id. Although it does not provide an exculpatory denial defense, the House of Representatives' proposed replacement for § 1001, H.R. 6915, 96th Cong., 2d Sess. § 1742, 126 Cong. Rec. 9718 (1980), *reprinted in Revision of the Federal Criminal Code: Hearings on Revision of the Federal Criminal Code Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. pt. 6, at 5179-80 (1982) [hereinafter cited as *House Hearings*], would eliminate oral statements from the coverage of the statute. House Report, *supra* note 18, at 182. In other sections of the House bill, however, certain oral false statements are made offenses:

done in decisions falling into the first category. Alternately, certain minor modifications of the statute currently being considered by Congress[21] would address these concerns without severely restricting the scope of the statute. Continued judicial application of the exculpatory no doctrine, however, or adoption of the doctrine by Congress, will exclude from the scope of section 1001 entire categories of what are in fact false statements within the meaning of the statute. Such exclusion would seriously diminish the effectiveness of a useful part of the federal criminal code.

I. The Statute and its Judicial Interpretation

A. *The Statute*

Section 1001 is the direct descendant of a statute passed during the Civil War to punish false claims made against the federal government by members of the armed forces.[22] The scope of the statute was gradually expanded,[23] and in 1934 the present version, covering false statements made in connection with "any matter within the jurisdiction of any department or agency of the United States,"[24] was enacted.[25] Although the 1934 statute was intended primarily to apply to false reports concerning the shipment of "hot oil" in violation of federal regulations,[26] the Supreme Court has approved its application in additional contexts.[27]

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§ 1712 (misprison of felony); § 1714 (false implication of another); § 1744 (false statement about emergencies). House Report, *supra* note 18, at 182.

21. See *infra* notes 100-01, 114-15 and accompanying text.

22. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 (currently codified as amended at 18 U.S.C. §§ 287, 1001 (1976)).

23. Act of June 22, 1874, ch. 5, § 5438, 18 Stat. 1054, 1060 (scope expanded from military personnel to include "every person"); Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015, 1015-16 (scope expanded beyond coverage of United States Government to include any corporation in which the government holds stock). *See generally* Note, *Fairness in Criminal Investigations Under The Federal False Statement Statute*, 77 Colum. L. Rev. 316, 317 & nn. 5-10 (1977).

24. 18 U.S.C. § 1001 (1976).

25. Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996 (currently codified as amended at 18 U.S.C. § 1001 (1976)). Although changes were made in 1948, these changes "were purely cosmetic except that the maximum term of imprisonment under the section was reduced . . . , " United States v. Goldfine, 538 F.2d 815, 823 n.4 (9th Cir. 1976), and the false claims provision of the statute was separated from the false statement provision and became 18 U.S.C. § 287 (1976), while the false statement statute became 18 U.S.C. § 1001 (1976).

26. The Supreme Court stated in 1941:

> Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under § 9(c) of the National Industrial Recovery Act of 1933 with respect to the transportation of "hot oil." The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had "for the presentation of false papers."

Although the statute covers all government agencies, it has special applicability in investigatory situations. It can be and has been utilized as a means of prosecuting those suspected of major criminal activity.[28] The statute may also serve as a second charge in a criminal prosecution.[29] Section 1001 can be particularly useful when the major charge will not result in a conviction because of insufficient proof or a strong defense.[30]

These uses are illustrated by a situation in which section 1001 has been consistently employed. The Bank Secrecy Act makes it illegal for a traveler to enter or leave the United States with more than $5000 in currency without first submitting a report to the Treasury Department.[31] Suspect travelers have been questioned at airports as to whether they were carrying amounts over the limit. When an ensuing investigation has shown their responses to be false, they have been arrested and charged with violations of the Bank Secrecy Act and/or section 1001.[32] Because conviction under the Bank Secrecy Act re-

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United States v. Gilliland, 312 U.S. 86, 93-94 (1941) (footnotes omitted). Although *Gilliland* provides perhaps the most detailed description of the legislative history of the statute, the history itself has aptly been described as "scanty." United States v. McCue, 301 F.2d 452, 454 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962).

27. Bryson v. United States, 396 U.S. 64, 70-71 (1969) (false statement to NLRB, conviction affirmed); United States v. Bramblett, 348 U.S. 503, 509 (1955) (false statement to Disbursing Office of House of Representatives, conviction affirmed); *see* 18 U.S.C. § 1001 (1976) ("in *any* matter within the jurisdiction of *any* department or agency of the United States" (emphasis added)).

28. *E.g.*, United States v. Goldfine, 538 F.2d 815, 820 (9th Cir. 1976) (pharmacist illegally distributing controlled substances); Paternostro v. United States, 311 F.2d 298, 300-02 (5th Cir. 1962) (police corruption); United States v. Gomez-Londono, 422 F. Supp. 519, 524-25 (E.D.N.Y. 1976) (narcotics trafficking), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977).

29. *E.g.*, United States v. Anderez, 661 F.2d 404, 406 (5th Cir. 1981); United States v. Moore, 638 F.2d 1171, 1172-73 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Schnaiderman, 568 F.2d 1208, 1210 (5th Cir. 1978); Paternostro v. United States, 311 F.2d 298, 300 (5th Cir. 1962); United States v. Cutaia, 511 F. Supp. 619, 623 (E.D.N.Y. 1981); United States v. Gomez-Londono, 422 F. Supp. 519, 522 (E.D.N.Y. 1976), *rev'd*, 553 F.2d 805 (2d Cir. 1977).

30. *E.g.*, United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978); United States v. Lambert, 501 F.2d 943 (5th Cir. 1974) (en banc); Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962). Paternostro was convicted under § 1001 for false statements made to an IRS agent during an investigation into police corruption in New Orleans, and under § 1621 for perjurious statements made before a grand jury in the same matter. *Id.* at 300. The Fifth Circuit reversed the perjury conviction because only one witness, without corroboration, testified as to the falsity of the statements. *Id.* at 306.

31. 31 U.S.C. § 1101 (1976).

32. *E.g.*, United States v. Cowden, 677 F.2d 417, 418 (8th Cir. 1982); United States v. Anderez, 661 F.2d 404, 406 (5th Cir. 1981); United States v. Moore, 638 F.2d 1171, 1172-73 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Fitzgibbon, 619 F.2d 874, 875 (10th Cir. 1980); United States v. Schnaiderman, 568 F.2d 1208, 1210 (5th Cir. 1978); United States v. Cutaia, 511 F. Supp. 619, 623 (E.D.N.Y. 1981); United States v. Pereira, 463 F. Supp. 481, 483-84 (E.D.N.Y.

quires proof of a knowing violation of the Act's provisions,[33] and many members of the public are unaware of these provisions due to insufficient warnings at airports, prosecution under the Act has not been particularly successful.[34] In such a situation the section 1001 charge may supply the conviction technically avoided on the Bank Secrecy Act charge.

B. *Judicial Reluctance to Enforce Section 1001*

The Supreme Court has interpreted the language of section 1001 on three occasions.[35] Although in these cases the Court did not consider the application of the statute to false statements made during investigations, it has stated unequivocally that section 1001 should be broadly construed.[36]

Notwithstanding this mandate from the Supreme Court, in one context some courts refuse to find a false statement within the scope of the statute. These courts hold that a false statement made to a federal

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1978); United States v. Gomez-Londono, 422 F. Supp. 519, 522 (E.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977).

33. 31 U.S.C. § 1101(a) (1976); *see* United States v. Schnaiderman, 568 F.2d 1208, 1211 (5th Cir. 1978); United States v. Granda, 565 F.2d 922, 925-26 (5th Cir. 1978); United States v. Gomez-Londono, 422 F. Supp. 519, 522-23 (E.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977).

34. *See* United States v. Schnaiderman, 568 F.2d 1208, 1210 (5th Cir. 1978); United States v. Granda, 565 F.2d 922, 924-26 (5th Cir. 1978).

The warning problem has been minimized to a large degree in the present customs declaration form, 6059-B, which is distributed to travelers as they enter or leave the country. The form advises a traveler that before he crosses the border he must declare whether he is carrying more than $5000, and that failure to so declare is a crime. *See* United States v. Cutaia, 511 F. Supp. 619, 622 (E.D.N.Y. 1981); United States v. Anderez, 502 F. Supp. 67, 68 n.3 (S.D. Fla. 1980), *rev'd on other grounds*, 661 F.2d 404 (9th Cir. 1981).

35. Bryson v. United States, 396 U.S. 64 (1969); United States v. Bramblett, 348 U.S. 503 (1955); United States v. Gilliland, 312 U.S. 86 (1941) (construing predecessor of § 1001, 18 U.S.C. § 80 (1940)).

36. Bryson v. United States, 396 U.S. 64, 70 (1969); United States v. Bramblett, 348 U.S. 503, 507-08 (1955); United States v. Gilliland, 312 U.S. 86, 93 (1941) (construing precedessor of § 1001, 18 U.S.C. § 80 (1940)).

In *Gilliland*, the Court also held that the statute was not invalid for indefiniteness, 312 U.S. at 91, and that it could be successfully applied to an offense even when a more specific statute directly applied. *Id.* at 95. The *Gilliland* Court also noted that Congress, in amending an earlier version of the statute, had eliminated the requirement that the false statement at issue be made in connection with a claim against the Government. *Id.* at 93. The Court next considered the statute in United States v. Bramblett, 348 U.S. 503 (1955), which held that § 1001 applies to all three departments of the federal government. *Id.* at 504-08. In *Bramblett* the Court stated that "[t]here is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." *Id.* at 507 (footnotes omitted). Finally, in Bryson v. United States, 396 U.S. 64 (1969), the Court stated that: "Because there is a valid legislative interest in protecting the integrity of official inquiries . . . we think the term 'jurisdiction' should not be given

investigator is not within the purview of section 1001. The first decision to so hold was in 1953 in *United States v. Levin*.[37] The defendant in *Levin* was indicted under section 1001 for making false statements to an FBI agent concerning the ownership of a stolen emerald ring. The district court dismissed the indictment, holding that the existence of the general perjury statute,[38] and other statutes authorizing agents of different departments and agencies to administer oaths when desired,[39] negated the government's contention that section 1001 should apply when the maker of the statement was under no legal duty to speak.[40] The court found that such a duty to speak or to provide information to the governmental agency with the authority to finally dispose of the matter being investigated was required to avoid flagrantly unjust applications of the statute.[41]

Two years after *Levin*, the district court in *United States v. Stark*,[42] presented with the same issue with respect to section 1001, reached the same conclusion but on different grounds.[43] The defendants in *Stark* were indicted for false statements to FBI agents who were investigating irregularities in mortgages insured by the Federal Housing Administration.[44] In contrast with the analysis employed by the *Levin* court, the *Stark* court based its findings on a lengthy analysis of the terms "statement" and "matter within the jurisdiction of" the FBI.

The court stated that the determination of whether a "statement" was uttered must be made in light of the congressional purpose underlying section 1001. This purpose was found to be the protection of the government from affirmative written or oral statements having the tendency and effect of perverting the government's normal, proper activities.[45] The court concluded that the mere denial by the defendants of knowledge of false payments, in the absence of both a voluntary statement or representation and a legal duty to speak, was not a statement for purposes of section 1001.[46]

The court then addressed the issue of whether the matter was within the jurisdiction of the FBI. Although it found that the FBI was

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a narrow or technical meaning for purposes of § 1001 . . . ." *Id.* at 70 (citations omitted).

37. 133 F. Supp. 88 (D. Colo. 1953).

38. The perjury statute in force when *Levin* was decided was the Crimes and Criminal Procedure Act, Pub. L. No. 80-772, § 1621, 62 Stat. 683, 773-74 (1948) (currently codified as amended at 18 U.S.C. § 1621 (1976)).

39. *E.g.*, 5 U.S.C. § 498 (1976) (investigators of Department of Interior); 18 U.S.C. § 4004 (1976) (wardens, superintendents and associate wardens of federal penal institutions) and 19 U.S.C. § 1486 (1976) (employees of Customs Bureau).

40. 133 F. Supp. at 90-91.

41. *Id.*

42. 131 F. Supp. 190 (D. Md. 1955).

43. *Id.* at 206.

44. *Id.* at 191.

45. *Id.* at 205.

46. *Id.* at 206.

a department or agency within the meaning of section 1001, the court ruled that the agency was not acting on a matter within its jurisdiction.[47] The court justified this finding by defining "jurisdiction" as the "authority to decide and act" on the matter in question.[48] This authority, according to the court, was reserved to the judiciary and not vested in an investigatory agency.[49]

Although both *Levin* and *Stark* articulated several of the arguments later employed by courts to circumscribe the statute, the decisions were contrary to existing appellate authority.[50] In 1962, however, in *Paternostro v. United States*,[51] the Fifth Circuit formulated the clearest argument yet advanced against a section 1001 conviction—the "exculpatory no" doctrine.

The defendant in *Paternostro*, a lieutenant in the New Orleans Police Department, was questioned under oath by a special agent of the Internal Revenue Service in connection with an investigation into police corruption. A number of the defendant's answers were later proven false, and he was convicted in the district court for violating section 1001; the court of appeals reversed the conviction.[52] In a decison that remains the leading case for courts reluctant to apply the statute,[53] the *Paternostro* court adopted the reasoning of *Levin* and *Stark* and from that reasoning formulated the exculpatory no doctrine. The court held that in an investigation initiated by an agent of the government, an " '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."[54]

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47. *Id.* at 207-08.

48. *Id.* at 206-07.

49. *Id.* at 207.

50. *See* Neely v. United States, 300 F.2d 67, 69-73 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962); Brandow v. United States, 268 F.2d 559, 564 (9th Cir. 1959); Knowles v. United States, 224 F.2d 168, 171-72 (10th Cir. 1955); Cohen v. United States, 201 F.2d 386, 391-92 (9th Cir.), *cert. denied*, 345 U.S. 951 (1953); Marzani v. United States, 168 F.2d 133, 137-38 (D.C. Cir.), *aff'd per curiam by an equally divided Court*, 335 U.S. 895 (1948).

51. 311 F.2d 298 (5th Cir. 1962).

52. *Id.* at 300. The false statements at issue in *Paternostro* consisted of denials of knowledge of the existence of an organized system of graft alleged to be operating in the police department of New Orleans. *Id.* at 300 n.3. The opinion does not indicate whether Paternostro himself was ever convicted of accepting any money, although the government alleged that his statement, that he had never solicited money from the operators of illegal businesses, was false. *Id.* at 300.

53. *See, e.g.*, United States v. Hajecate, 683 F.2d 894, 899 (5th Cir. 1982); United States v. Schnaiderman, 568 F.2d 1208, 1212-13 (5th Cir. 1978); United States v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972); Friedman v. United States, 374 F.2d 363, 368-69 (8th Cir. 1967).

54. 311 F.2d at 309 (per curiam denial of rehearing).

II. Arguments of Statutory Construction

A. *Congressional Intent*

Courts adopting limited constructions of section 1001 have maintained that Congress could not have intended the statute to apply to false statements made to federal criminal investigators.[55] Some of these courts suggest that the present version of section 1001 was passed not to protect investigatory agencies but rather to ensure the accurate flow of information to regulatory agencies.[56]

In *Friedman v. United States*,[57] for example, the Court of Appeals for the Eighth Circuit held that prosecution of the defendant under section 1001 for his false statement to the FBI, alleging that he was beaten by local police,[58] was not a matter within the jurisdiction of that agency.[59] The *Friedman* court reasoned that the 1934 statute was enacted to assist regulatory agencies, which, unlike investigatory agencies, have the authority to make a final disposition of the matter in question.[60] The court stated that the FBI was not acting in a matter within its jurisdiction because the power to make a final disposition on the matter—the power to determine guilt or innocence—is ultimately reserved to the judiciary.[61] The FBI is therefore, according to the

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55. *See* United States v. Hajecate, 683 F.2d 894, 900-01 (5th Cir. 1982); United States v. Schnaiderman, 568 F.2d 1208, 1212-13 (5th Cir. 1978); United States v. Chevoor, 526 F.2d 178, 178-83 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. Bush, 503 F.2d 813, 819 (5th Cir. 1974); United States v. Bedore, 455 F.2d 1109, 1110-11 (9th Cir. 1972); Friedman v. United States, 374 F.2d 363, 366 (8th Cir. 1967); Paternostro v. United States, 311 F.2d 298, 302-05 (5th Cir. 1962); United States v. Thevis, 469 F. Supp. 490, 513 (D. Conn.), *aff'd mem.*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); United States v. Ehrlichman, 379 F. Supp. 291, 291-92 (D.D.C. 1974); United States v. Philippe, 173 F. Supp. 582, 584 (S.D.N.Y. 1959), *overruled*, United States v. McCue, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); United States v. Davey, 155 F. Supp. 175, 176-77 (S.D.N.Y. 1957); United States v. Stark, 131 F. Supp. 190, 205-07 (D. Md. 1955); United States v. Levin, 133 F. Supp. 88, 89-90 (D. Colo. 1953).

56. Friedman v. United States, 374 F.2d 363, 366 (8th Cir. 1967); United States v. Levin, 133 F. Supp. 88, 89-90 (D. Colo. 1953); *see* United States v. Davey, 155 F. Supp. 175, 178 (S.D.N.Y. 1957).

57. 374 F.2d 363 (8th Cir. 1967).

58. Friedman and his lawyer voluntarily visited an office of the FBI in St. Louis to initiate a federal investigation under the Civil Rights Laws against a Lieutenant Maxey of the Missouri State Highway Patrol. *Id.* at 365. Friedman alleged that while handcuffed and in custody on a state-law charge he was "struck, beaten, assaulted, and severely injured and wounded by Lt. Maxey;" he then signed a written statement containing this allegation. *Id.*

59. *Id.* at 369.

60. *Id.* at 367-68; *accord* United States v. Stark, 131 F. Supp. 190, 206-07 (D. Md. 1955).

61. 374 F.2d at 367-68. The court stated: "It is in this more restrictive sense, we believe Congress intended to use the word 'jurisdiction' in determining violations of § 1001." *Id.* at 368.

Eighth Circuit, not an agency within the meaning of the statute; neither is a criminal investigation a matter within its jurisdiction.[62]

This argument is inconsistent with the legislative history of section 1001 and the interpretation given the statute by the Supreme Court[63] and by other federal courts.[64] Congress never limited the application of section 1001 to statements made to regulatory agencies.[65] Indeed, the language of the statute—"in *any* matter within the jurisdiction of *any* department or agency of the United States"[66]—is sufficiently broad to cover statements made to investigatory agencies. In *Bryson v. United States*,[67] the Supreme Court stated: "[W]e think the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001 . . . ."[68] The Second Circuit, presented in *United States v. Adler*[69] with a fact pattern similar to that of *Friedman*,[70] explicitly rejected the latter's narrow interpretation of agency jurisdiction, stating: "There is nothing to suggest, either in legislative history or in the cases, that Congress in enacting § 1001 intended to conserve the energies of only certain agencies."[71] Moreover, if the *Friedman* interpretation of jurisdiction were accepted, the abuse at which the original version of the statute was indisputably aimed—the submission of false reports required to be filed with federal agencies—would not be covered, because such agencies have no power to "finally dispose" of the matter.[72]

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62. *Id.* at 369.

63. See *supra* notes 35-36 and accompanying text.

64. *See, e.g.*, United States v. Adler, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); Ogden v. United States, 303 F.2d 724, 742-43 (9th Cir. 1962), *cert. denied*, 376 U.S. 973 (1964); United States v. White, 69 F. Supp. 562, 564 (S.D. Cal. 1946); United States v. Sanders, 42 F. Supp. 436, 439-40 (S.D. Tex. 1941).

65. *See, e.g.*, Bryson v. United States, 396 U.S. 64, 70-71 & n.10 (1969); United States v. Bramblett, 348 U.S. 503, 509 (1955); United States v. Gilliland, 312 U.S. 86, 93 (1941); United States v. Adler, 380 F.2d 917, 921-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); United States v. McCue, 301 F.2d 452, 454-55 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962).

66. 18 U.S.C. § 1001 (1976) (emphasis added). See *supra* note 1.

67. 396 U.S. 64 (1969).

68. *Id.* at 70. The Court did state, however, that it had "no occasion in the present context either to approve or disapprove *Friedman's* holding." *Id.* at 71 n.10.

69. 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

70. Adler was the president of a construction company that was engaged in a building project for the Navy. On his own initiative, Adler went to an office of the FBI and complained that he was being forced by government officials to pay bribes in the course of completing the contract. He later admitted that these allegations were false and that he had made them to "get even" with the officials handling his contract because they were giving him a "rough time" and he thought that an FBI investigation would keep them "off his back." *Id.* at 919-20. See *supra* note 58.

71. 380 F.2d at 922.

72. The Secretary of the Interior, to whom the false reports were being submitted, had no greater power than the FBI to "finally dispose" of, or punish, the criminal act of making a false report. Disposal of that matter is reserved to the judiciary.

Section 1001 was originally intended to protect the government against fraudulent claims.[73] Courts refusing to apply section 1001 to false statements made to federal investigators have noted in their reasoning that the statement in question did not constitute a claim.[74] That the sole purpose of the original statute was prevention of fraud against the government is not relevant to these cases. The Supreme Court resolved this issue in *United States v. Gilliland*[75] when it interpreted the 1934 revision of the statute, which had eliminated the requirement that the false statement be made for the purpose of "cheating and swindling" the government.[76] The Court stated: "In this [amendment], there was no restriction to cases involving pecuniary or property loss to the government."[77]

B. *Willfulness*

An essential element of any prosecution under section 1001 is that the false statement in question be made willfully.[78] Implicit in the reasoning of courts adopting narrow constructions of section 1001, and those applying the exculpatory no doctrine, is the argument that a nonaggressive reply to an investigative question is not willful for purposes of section 1001. These courts refuse to find violations of section 1001 when the false response was not an affirmative act calculated to pervert a function of government.[79]

This position was carried to its logical extreme in the Fifth Circuit's decision in *United States v. Schnaiderman*.[80] Schnaiderman was convicted of violating both section 1001 and the Bank Secrecy Act. Vacating the section 1001 conviction, the court stated: "Schnaiderman did not walk up to [the agent] and volunteer the statement, 'I am not

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73. See *supra* note 22 and accompanying text.

74. *E.g.*, United States v. Schnaiderman, 568 F.2d 1208, 1212-13 (5th Cir. 1978); United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. Bush, 503 F.2d 813, 818 (5th Cir. 1974); United States v. Bedore, 455 F.2d 1109, 1110-11 (9th Cir. 1972); Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962).

75. 312 U.S. 86 (1941).

76. *Id.* at 93. See *supra* text accompanying notes 24-27.

77. 312 U.S. at 93.

78. 18 U.S.C. § 1001 (1976); *see* United States v. Fitzgibbon, 619 F.2d 874, 879 (10th Cir. 1980); United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976); United States v. Pereira, 463 F. Supp. 481, 485 (E.D.N.Y. 1978). See *supra* note 1.

79. *See, e.g.*, United States v. Abrahams, 604 F.2d 386, 395 (5th Cir. 1979); United States v. Schnaiderman, 568 F.2d 1208, 1213 (5th Cir. 1978); United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); United States v. Bush, 503 F.2d 813, 818 (5th Cir. 1974); Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962); United States v. Stark, 131 F. Supp. 190, 205-06 (D. Md. 1955).

80. 568 F.2d 1208 (5th Cir. 1978).

transporting more than $5,000' in order to prevent [him] from doing his duty."[81]

This line of reasoning is inconsistent with prior interpretations of "willful" in section 1001 prosecutions. Willful means deliberate rather than premeditated or made with bad intent.[82] Moreover, a statement such as an exculpatory denial is indeed calculated to pervert the function of the agency asking the question. The maker of the statement seeks termination of the investigation through inducement of reliance upon the falsehood.

C. *Materiality*

The majority of courts interpreting section 1001 require that a false statement be material in order to be punishable under the statute.[83] For the purposes of the statute, materiality is defined as "the intrinsic capabilities of the false statement itself [to pervert the function of the agency involved], rather than the possibility of the actual attainment

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81. *Id.* at 1213. Schnaiderman arrived at Miami International Airport from Caracas. He was not the target of any investigation at that time. While he was waiting on the Customs line, however, a Customs agent noticed that he had not completed or signed his customs declaration form. The agent asked him to complete it. Schnaiderman completed the form answering "no" to the question on the form, "Are you carrying more than $5,000?" He also answered "no" to the same question put to him orally by the agent. Schnaiderman was then passed on to a second agent who, noticing Schnaiderman's nervousness and bulging pockets, asked him to empty them. Schnaiderman did so, revealing currency in excess of $5000. He was charged and convicted of violating both the Bank Secrecy Act, 31 U.S.C. § 1101 (1976), and § 1001. 568 F.2d at 1210.

82. *See* United States v. Baker, 626 F.2d 512, 515-16 (5th Cir. 1980); McBride v. United States, 225 F.2d 249, 253-55 (5th Cir.), *cert. denied*, 350 U.S. 934 (1955); Walker v. United States, 192 F.2d 47, 49 (10th Cir. 1951); Senate Report, *supra* note 18 at 405; Casenote, *Application of the "Exculpatory No" Defense to Prosecutions Under 18 U.S.C. § 1001:* United States v. Fitzgibbon, 1980 B.Y.U. L. Rev. 655, 659-61.

83. Senate Report, *supra* note 18, at 404 ("The vast weight of appellate authority takes the view . . . that materiality must be shown in all prosecution under 18 U.S.C. 1001." (citing Gonzales v. United States, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961); Robles v. United States, 279 F.2d 401 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961); United States v. Larocca, 245 F.2d 196 (3d Cir. 1957); Freidus v. United States, 223 F.2d 598 (D.C. Cir. 1955); Rolland v. United States, 200 F.2d 678 (5th Cir.), *cert. denied*, 345 U.S. 964 (1953))). Although the statute contains the word "material," 18 U.S.C. § 1001 (1976), the Second Circuit does not require materiality in a § 1001 prosecution. United States v. Mahler, 363 F.2d 673, 678 (2d Cir. 1966); United States v. Aadal, 368 F.2d 962, 964 (2d Cir.), *cert. denied*, 386 U.S. 970 (1966); United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965); United States v. McCue, 301 F.2d 452, 456 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); United States v. Silver, 235 F.2d 375, 377-78 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956); United States v. Pereira, 463 F. Supp. 481, 486 (E.D.N.Y. 1978). The Second Circuit's reasoning is based on a reading of the statute that applies the word "material" only to the "trick, scheme, or device" clause. United States v. Silver, 235 F.2d 375, 377 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956).

of its end as measured by collateral circumstances."[84] Even in the Fifth Circuit, which has construed section 1001 most narrowly, a false statement is deemed material notwithstanding the government's anticipation that the statement will be false.[85]

Implicit in the reasoning of courts that have severely restricted the scope of the statute, however, is that a false answer in an investigatory situation cannot be material. These courts appear to reason that because the investigator suspects the declarant of criminal activity, he also expects the defendant to lie and will not be misled by the falsehood.[86] The clearest statement of this position was given in *United States v. Philippe*,[87] in which the court stated: "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."[88]

If the intention of these courts is to adopt a new requirement for materiality in false statement prosecutions—a statement that actually perverts the function of a federal agency, not one which has only the intrinsic capability to do so—they have provided no reason for the change. If they mean, on the other hand, that a false statement made during an investigation does not have the intrinsic capability of perverting the function of an investigatory agency, their reasoning is incorrect. A false statement made during an investigation, especially an exculpatory statement, does have the ability if relied upon to pervert the function of the agency involved: If the statement is relied upon, the investigation will be terminated.

III. Policy Considerations

Contrasted with the strained and semantic arguments used to support narrow constructions of section 1001 are several arguments that present legitimate concerns about the fairness of applying the statute to false statements made to investigators. Many courts adjudicating violations of section 1001 have analogized these offenses to perjury,[89]

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84. United States v. Quirk, 167 F. Supp. 462, 464 (E.D. Pa. 1958), *aff'd per curiam*, 266 F.2d 26 (3d Cir. 1959); *accord* United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980); Brandow v. United States, 268 F.2d 559, 565 (9th Cir. 1959); Senate Report, *supra* note 18, at 405; *see* United States v. Schmoker, 564 F.2d 289, 291 (9th Cir. 1977).

85. United States v. Johnson, 530 F.2d 52, 54-55 (5th Cir.), *cert. denied*, 429 U.S. 833 (1976); *accord* United States v. Schmoker, 564 F.2d 289, 290 (9th Cir. 1977); United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976).

86. United States v. Philippe, 173 F. Supp. 582, 584 (S.D.N.Y. 1959), *overruled*, United States v. McCue, 301 F.2d 452, 456 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); *accord* Paternostro v. United States, 311 F.2d 298, 303-04 (5th Cir. 1962); *see* United States v. Davey, 155 F. Supp. 175, 178-79 (S.D.N.Y. 1957).

87. 173 F. Supp. 582 (S.D.N.Y. 1959), *overruled*, United States v. McCue, 301 F.2d 452, 456 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962).

88. *Id.* at 584.

89. *E.g.*, United States v. Beer, 518 F.2d 168, 172-73 (5th Cir. 1975); Paternos-

which carries the same prison sentence but a lesser maximum fine.[90] Additionally, a number of these courts have suggested that section 1001 prosecutions either fail to comport with the requirements of the fifth amendment,[91] encourage improper law enforcement procedures[92] or overcriminalize insubstantial or technical violations of the statute.[93]

A. *The Perjury Argument*

Presently, perjury is punishable by a maximum five year prison term and/or a $2000 fine.[94] Violations of section 1001 are punishable by the same prison term, but the maximum fine is $10,000.[95] Some courts have maintained that because perjury—lying while under oath—is generally more serious than false statement, Congress could not have intended that section 1001 apply to unsworn oral statements.[96] Even circuits that refuse to apply section 1001 to investiga-

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tro v. United States, 311 F.2d 298, 303 (5th Cir. 1962); United States v. Ehrlichman, 379 F. Supp. 291, 292 (D.D.C. 1974); United States v. Davey, 155 F. Supp. 175, 177 (S.D.N.Y. 1957); United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953). See *infra* notes 94-99 and accompanying text.

90. *Compare* 18 U.S.C. § 1001 (1976) (false statement punishable with maximum $10,000 fine and/or five years imprisonment) *with* 18 U.S.C. § 1621 (1976) (perjury punishable with maximum $2000 fine and/or five years imprisonment).

91. *See, e.g.*, United States v. Bush, 503 F.2d 813, 818 (5th Cir. 1974); United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (en banc); United States v. Davey, 155 F. Supp. 175, 178 (S.D.N.Y. 1957). See *infra* notes 102-16 and accompanying text.

92. *See* United States v. Cowden, 677 F.2d 417, 420-21 (8th Cir. 1982); United States v. Bush, 503 F.2d 813, 815-16 (5th Cir. 1972); United States v. Stoffey, 279 F.2d 924, 927 (7th Cir. 1960); United States v. Gomez-Londono, 422 F. Supp. 519, 525-26 (E.D.N.Y. 1976), *rev'd*, 553 F.2d 805 (2d Cir. 1977). See *infra* notes 117-21 and accompanying text.

93. *See* Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967); Paternostro v. United States, 311 F.2d 298, 303 (5th Cir. 1962); United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953).

94. 18 U.S.C. § 1621 (1976).

95. *Id.* § 1001. See *supra* note 1.

96. Friedman v. United States, 374 F.2d 363, 366 (8th Cir. 1967); Paternostro v. United States, 311 F.2d 298, 303 (5th Cir. 1962); *see* United States v. Beer, 518 F.2d 168, 172 (5th Cir. 1975); United States v. Ehrlichman, 379 F. Supp. 291, 292 (D.D.C. 1974); United States v. Davey, 155 F. Supp. 175, 177 (S.D.N.Y. 1957); United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953). As the *Levin* court stated:

> If the statute is to be construed as contended for here by the United States, the results would be far-reaching. The age-old conception of the crime of perjury would be gone . . . . Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, . . . would be guilty of a crime punishable with greater severity than that of perjury . . . . A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress.

Id. at 90.

tory situations, however, agree that the statute covers unsworn oral statements in a non-investigatory context.[97] Thus, these courts are applying the perjury argument inconsistently, depending upon the function of the particular agency involved.[98] Moreover, the difference in maximum penalties does not necessarily support the contention that Congress did not intend section 1001 to apply to unsworn statements. The broader range of penalties available to the court for a section

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97. *See, e.g.*, United States v. Krause, 507 F.2d 113, 118 n.2 (5th Cir. 1975); Neely v. United States, 300 F.2d 67, 69-72 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962).

98. This inconsistent stance is illustrated by courts that have considered whether to apply the "exculpatory no" doctrine to statements made in reply to questions asked by different federal agencies. The Ninth Circuit has applied the defense to a statement made to the FBI, *see* United States v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972) (cited as an exculpatory no case in United States v. Ratner, 464 F.2d 101, 105 (9th Cir. 1972)), but not to statements made to the IRS, United States v. Ratner, 464 F.2d 101, 105 (9th Cir. 1972), or the Drug Enforcement Agency (DEA). United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976). Both *Goldfine* and *Ratner* distinguish between the purely investigative function of the FBI and the regulatory functions of the IRS and DEA. 538 F.2d at 821; 464 F.2d at 102-05. Similarly the Tenth Circuit has characterized a Customs agent as an administrator rather than an investigator. United States v. Fitzgibbon, 619 F.2d 874, 880 (10th Cir. 1980). The Second Circuit has suggested that it might consider applying the doctrine in the "case of the citizen who replies to the policeman with an 'exculpatory "no," ' " United States v. McCue, 301 F.2d 452, 455 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962), but in cases in which the issue has arisen, this Circuit has only once deemed the agent in question a "policeman." *Compare* United States v. McCue, 301 F.2d 452, 455 (2d Cir.) (Treasury agents not policemen, exculpatory no doctrine not applied), *cert. denied*, 370 U.S. 939 (1962) *with* United States v. Thevis, 469 F. Supp. 490, 514 (D. Conn.) (FBI agent, exculpatory no doctrine applied), *aff'd mem.*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980).

The distinction between regulators and investigators is often unclear. A Customs official, for example, can at one time be acting in a purely investigative capacity, while at another he may be routinely distributing questionnaires to travelers entering the country. Neither the legislative history nor the Supreme Court's interpretation of § 1001 supports these inconsistent applications of the statute. The Court has stated that "[a] statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001." Bryson v. United States, 396 U.S. 64, 71 (1969).

The inconsistency of the perjury argument is further illustrated by the fact that in several of the cases in which restrictive interpretations have been given to § 1001, the false statement in question was either given under oath or in writing, and was thus punishable as perjury. *E.g.*, United States v. Hajecate, 683 F.2d 894, 899 (5th Cir. 1982) (signed tax return); United States v. Bush, 503 F.2d 813, 816 (5th Cir. 1974) (affidavit); Friedman v. United States, 374 F.2d 363, 365 (8th Cir. 1967) (signed statement); Paternostro v. United States, 311 F.2d 298, 300 (5th Cir. 1962) (oral statement under oath); United States v. Philippe, 173 F. Supp. 582, 583 (S.D.N.Y. 1959) (same), *overruled*, United States v. McCue, 301 F.2d 452, 456 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962).

1001 violation permits a judge to impose a large fine if the violation is material but the circumstances do not warrant incarceration.[99]

Despite the inconsistencies inherent in the perjury argument, Congress, in considering the relationship between the offenses,[100] has provided less severe penalties in its proposed replacements for the false statement statute.[101] Such modification, while diminishing the sentencing discretion now available, would in no way restrict the scope of the statute.

B. *Fifth Amendment*

A reason commonly advanced by courts in support of their refusal to enforce section 1001 is that prosecutions for false answers to federal investigators come dangerously close to violating the fifth amendment.[102] These courts have not made explicit the nature of the possible fifth amendment violations inherent in section 1001 prosecutions; rather they have based their holdings on the nebulous concept of fairness. One court explained these decisions as the result of a "latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment."[103] Similarly, in *United States v. Bush*[104] the court reversed a section 1001 conviction for false statements to IRS agents regarding kickback payments.[105] The court emphasized that

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99. The Supreme Court recognized this in United States v. Gilliland, 312 U.S. 86 (1941), when it stated, in rejecting an argument similar to the perjury argument: "The matter of penalties lay within the discretion of Congress. Section 35 [the 1934 version of section 1001] covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations." *Id.* at 95.

100. Senate Report, *supra* note 18, at 401-04; House Report, *supra* note 18, at 182-83.

101. S. 1630, 97th Cong., 1st Sess. § 1343, 127 Cong. Rec. 9916-17 (1981), *reprinted in Senate Hearings, supra* note 120, at 12,544-46 (class E felony, maximum imprisonment three years); H.R. 6915, 96th Cong., 2d Sess. § 1742, 126 Cong. Rec. 9718 (1980), *reprinted in House Hearings, supra* note 20, at 5179-80 (class A misdemeanor, maximum imprisonment one year).

102. *See* United States v. Bush, 503 F.2d 813, 818 (5th Cir. 1974); United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974); Paternostro v. United States, 311 F.2d 298, 303 (5th Cir. 1962); United States v. Davey, 155 F. Supp. 175, 178 (S.D.N.Y. 1957).

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

104. 503 F.2d 813 (5th Cir. 1974).

105. *Id.* at 819. Bush, engaged in the business of selling mobile school classrooms, was approached by two special agents of the Intelligence Division of the IRS, who told him they were verifying the tax returns of Victor Carona. Carona was suspected of accepting kickbacks for his influence with the school board responsible for purchasing the classrooms. Bush signed an affidavit which denied that he knew Carona. *Id.* at 815. Over one year later, after the statute of limitations had run for the false statements Bush made on that affidavit, two agents again appeared at his office.

because Bush had never been informed that he was under investigation or that he had the right to remain silent to avoid self-incrimination, he should not be "convicted by his own words given to an investigating officer of the United States government."[106] The court stopped short, however, of holding that the fifth amendment had been violated because Bush was not informed of his *Miranda* rights or because he was compelled to incriminate himself.[107]

Despite these expressed concerns, the fifth amendment is not implicated in these cases. A present statement such as an exculpatory no or a perjurious statement is not protected by the fifth amendment.[108] Both section 1001 and the perjury statute punish the present statement, not the criminal act the maker is trying to conceal. Additionally, as long as the defendant is not compelled to speak, as he is in a grand jury proceeding in which silence could lead to a contempt conviction,[109] another element of a fifth amendment defense—compulsion—is not present.[110] If the questioning becomes coercive, the

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Bush signed another affidavit containing additional false statements, for which he was convicted under § 1001. *Id.* at 815-17.

106. *Id.* at 818. Examination of the affidavits signed by Bush, *id.* at 816-17 n.1, compels the conclusion that Bush was fully aware that he was under suspicion at the time he made them. *See id.*

107. *See id.* at 818-19.

108. United States v. Chevoor, 526 F.2d 178, 181 (1st Cir. 1975) ("The privilege against self-incrimination bars compelled testimony as to past crimes; it does not shelter new perjury."), *cert. denied*, 425 U.S. 935 (1976); *accord* United States v. Knox, 396 U.S. 77 (1969); Glickstein v. United States, 222 U.S. 139 (1911); United States v. Pommerening, 500 F.2d 92, 99-100 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974); Robinson v. United States, 401 F.2d 248, 251-52 (9th Cir. 1968); United States v. DiGiovanni, 397 F.2d 409, 412 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968); United States v. Winter, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965); United States v. Parker, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957).

109. A grand jury witness may assert the privilege against self-incrimination, Blau v. United States, 340 U.S. 159, 161 (1950); Counselman v. Hitchcock, 142 U.S. 547, 562-63 (1892), unless it is " *'perfectly clear . . .* that the answer [to the question] *cannot possibly . . .* ' incriminate." Hoffman v. United States, 341 U.S. 479, 488 (1951) (emphasis in original) (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)); *accord* Malloy v. Hogan, 378 U.S. 1, 12 (1964); National Lawyer's Guild, Representation of Witnesses Before Federal Grand Juries § 13.4, at 331-32 (2d ed. 1981). Unless the witness claims the privilege in response to each question, however, he may be convicted of criminal contempt when he refuses to answer. Marcello v. United States, 196 F.2d 437, 441 (5th Cir. 1952); United States v. Cahn, 282 F. Supp. 275, 279 (E.D.N.Y. 1968); National Lawyer's Guild, *supra*, § 13.8, at 360; *see* United States v. Mandujano, 425 U.S. 564, 574-75 (1976).

110. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966) (statements made in custodial interrogation require warning because custody is coercive) *with* Beckwith v. United States, 425 U.S. 341 (1976) (statements made to IRS in noncustodial interview admissible, even absent *Miranda* warnings).

Courts have noted that prosecutions under § 1001 for false statements made to investigators fall for the most part into the noncustodial category. *E.g.*, United States

court may determine from the record that an arrest took place, thus requiring that the maker of the statement have been apprised of his rights under the fifth amendment.[111] There is a general duty, however, to respond truthfully to a question properly asked.[112] If the speaker desires, he does not have to answer at all, claiming his fifth amendment right. He may not, however, "with impunity knowingly and willfully answer with a falsehood."[113]

A minor modification of the statute, such as the inclusion of the warning requirement included by the Senate in its recently proposed replacement for section 1001,[114] would not unduly restrict its applicability to investigatory situations. The warning requirement would ensure that no conviction could be obtained under section 1001 unless the person being questioned was informed that to respond falsely would subject him to criminal liability.[115] Although such a modification of section 1001 may not be necessary,[116] it would alleviate the fifth amendment concerns of those courts that have been reluctant to enforce the statute.

C. *Inquisitional Law Enforcement and Overcriminalization*

Many courts have expressed the concern that literal interpretation of the statute may encourage improper law enforcement procedure.[117]

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v. Rose, 570 F.2d 1358, 1361 (9th Cir. 1978); United States v. Gomez-Londono, 422 F. Supp. 519, 523-24 (E.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977). In *Gomez-Londono*, the court stated: "[T]he case is one not of the custodial interrogation of one who is in the focus of investigation and at the point of accusation. It is a noncustodial interrogation . . . ." *Id.*

111. When the interview is a "custodial interrogation," see *supra* note 110, and *Miranda* warnings are not given, even the Second Circuit, which has given § 1001 its broadest interpretation, will not find a violation of the statute. United States v. Thevis, 469 F. Supp. 490, 513-14 (D. Conn.), *aff'd mem.*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *accord* United States v. Stoffey, 279 F.2d 924, 927-28 (7th Cir. 1960) (pre-*Miranda* decision, defendant "for all practical purposes . . . under arrest," statements not within § 1001).

112. United States v. Gomez-Londono, 422 F. Supp. 519, 524 (E.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977); *cf.* United States v. Mandujano, 425 U.S. 564, 583-84 (1976) (duty exists in grand jury proceedings); United States v. Chevoor, 526 F.2d 178, 182, 185 (1st Cir. 1975) (same), *cert. denied*, 425 U.S. 935 (1976).

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

114. S. 1630, 97th Cong., 1st Sess. § 1343, 127 Cong. Rec. 9916-17 (1981), *reprinted in House Hearings*, *supra* note 20, at 12,544-45.

115. Section 1343(a) requires that when the statement is oral and made to a law enforcement officer or a person assigned noncriminal investigative responsibility, the statement must be "volunteered or . . . made after the person [making the statement] has been advised that making such a statement is an offense." S. 1630, 97th Cong., 1st Sess. § 1343(a), 127 Cong. Rec. 9916-17 (1981), *reprinted in Senate Hearings*, *supra* note 20, at 12,545.

116. See *supra* notes 108-13 and accompanying text.

117. *See* United States v. Bush, 503 F.2d 813, 815 (5th Cir. 1974); United States v. Stoffey, 279 F.2d 924, 927 (7th Cir. 1960); United States v. Gomez-Londono, 422 F.

It has even been suggested that the statute gives "powerful impetus to inquisition as a method of criminal investigation."[118] In addition, section 1001 has come under criticism as a statute that criminalizes what may be inadvertent or trivial misbehavior.[119] Thus, in *Friedman v. United States*,[120] the court stated that "if we adopt a literal application of this statute, anything more than a casual social conversation with a Government employee would, without warning, subject the speaker to the possibility of severe criminal punishment."[121]

When improper law enforcement practices may be rewarded, or trivial misbehavior may be punished as a felony, judicial intervention is a traditional and proper remedy.[122] Nevertheless, the exculpatory no doctrine need not be the vehicle for this intervention. Other protections against overzealous investigation do not require the exclusion of an entire category of false statements from the coverage of section 1001. For example, when examination of the record leads an appellate court to conclude that the false statement was improperly elicited, it may determine that punishment under section 1001 would violate due process.[123] Additionally, when a person is under custodial interrogation, he must be told that he has the right to remain silent.[124] Moreover, the Department of Justice discourages routine enforcement of the statute in cases solely involving false replies to questions of federal criminal investigators.[125]

Supp. 519, 525-26 (E.D.N.Y. 1976), *rev'd*, 553 F.2d 805 (2d Cir. 1977); United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953).

118. United States v. Bush, 503 F.2d 813, 815 (5th Cir. 1974).

119. *See* Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967); Paternostro v. United States, 311 F.2d 298, 302-03 (5th Cir. 1962); United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953).

120. 374 F.2d 363 (8th Cir. 1967).

121. *Id.* at 366.

122. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 445-58 (1966) (statements given by defendant in custody inadmissible absent warning of constitutional rights; admissibility would encourage use of "third degree"); Mapp v. Ohio, 367 U.S. 643, 657-60 (1961) (exclusionary rule applied because it is the only effective deterrent for illegal police activity); Rochin v. California, 342 U.S. 165, 173 (1952) ("real evidence" pumped from defendant's stomach inadmissible, admission would "afford brutality the cloak of law").

123. *See* United States v. Stoffey, 279 F.2d 924, 927-28 (7th Cir. 1960). *But see* United States v. Gomez-Londono, 553 F.2d 805, 811 (2d Cir. 1977), *rev'd*, 422 F. Supp. 519, 524-26 (E.D.N.Y. 1976).

124. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966). See *supra* note 110.

125. The Department of Justice mandates that a United States Attorney consult with the Criminal Division of the Department of Justice before he institutes Grand Jury proceedings under § 1001. United States Att'ys Manual § 9-2.133 (1977); Fiske, *White-Collar Crime: A Survey of Law*, 18 Am. Crim. L. Rev. 169, 280 (1981). The Tax Division of the Department of Justice restricts prosecutions under § 1001 to false statements made under oath or in writing. United States Dep't of Justice, Manual For Criminal Tax Trials 55 (1973); Fiske, *supra*, at 280.

Any potential for overcriminalization that may be present in section 1001 prosecutions can be removed through a proper reading of the statute. Two essential elements of a section 1001 offense are that the false statement be material[126] and that it be made willfully.[127] Properly construed, these elements ensure that the statute will not be applied unfairly. Courts such as that deciding *United States v. Friedman*,[128] disdaining the consequences of a "literal application" of the statute, have instead failed to perceive the significance of these essential elements of a section 1001 prosecution.

CONCLUSION

The false statement statute should be recognized by all courts as a valuable part of the federal criminal code. The essential elements required for a section 1001 prosecution, combined with traditional constitutional protections and judicial discretion, provide adequate safeguards against unfair convictions. Minor modifications of the statute such as those being considered by Congress would alleviate many of the concerns expressed by the courts that refuse to enforce section 1001 in investigatory contexts. Congressional adoption of, or judicial adherence to, restrictive interpretations of the statute or the exculpatory no doctrine would unduly curtail the scope of section 1001 by removing from its reach entire categories of false statements.

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126. See *supra* notes 1, 83 and accompanying text.
127. See *supra* notes 1, 78 and accompanying text.
128. 374 F.2d 363 (8th Cir. 1967). See *supra* notes 120-21 and accompanying text.