SUPREME COURT OF THE UNITED STATES

No. 96–1579

JAMES BROGAN, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[January 26, 1998]

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, concurring in the judgment.

Because a false denial fits the unqualified language of 18 U. S. C. §1001, I concur in the affirmance of Brogan's conviction. I write separately, however, to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes. I note, at the same time, how far removed the "exculpatory no" is from the problems Congress initially sought to address when it proscribed falsehoods designed to elicit a benefit from the Government or to hinder Government operations.

I

At the time of Brogan's offense, §1001 made it a felony "knowingly and willfully" to make "any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any department or agency of the United States." 18 U. S. C. §1001 (1988 ed.). That encompassing formulation arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government

officer could prompt.[1]

This case is illustrative. Two federal investigators paid an unannounced visit one evening to James Brogan's home. The investigators already possessed records indicating that Brogan, a union officer, had received cash from a company that employed members of the union Brogan served. (The agents gave no advance warning, one later testified, because they wanted to retain the element of surprise. App. 5.) When the agents asked Brogan whether he had received any money or gifts from the company, Brogan responded "No." The agents asked no further questions. *After* Brogan just said "No," however, the agents told him: (1) the Government had in hand the records indicating that his answer was false; and (2) lying to federal agents in the course of an investigation is a crime. Had counsel appeared on the spot, Brogan likely would have received and followed advice to amend his answer, to say immediately: "Strike that; I plead not guilty." But no counsel attended the unannounced interview, and Brogan divulged nothing more. Thus, when the interview ended, a federal offense had been completed– even though, for all we can tell, Brogan's unadorned denial misled no one.

A further illustration. In *United States* v. *Tabor*, 788 F. 2d 714 (CA11 1986), an Internal Revenue Service agent discovered that Tabor, a notary public, had violated Florida law by notarizing a deed even though two signatories had not personally appeared before her (one had died five

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[1] See Note, Fairness in Criminal Investigations Under the Federal False Statement Statute, 77 Colum. L. Rev. 316, 325–326 (1977) ("Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying substantive crime.") (footnotes omitted).

weeks before the document was signed). With this knowledge in hand, and without "warn[ing] Tabor of the possible consequences of her statements," *id.*, at 718, the agent went to her home with a deputy sheriff and questioned her about the transaction. When Tabor, regrettably but humanly, denied wrongdoing, the Government prosecuted her under §1001. See *id.*, at 716. An IRS agent thus turned a violation of state law into a federal felony by eliciting a lie that misled no one. (The Eleventh Circuit reversed the §1001 conviction, relying on the "exculpatory no" doctrine. *Id.*, at 719.)

As these not altogether uncommon episodes show,[2] §1001 may apply to encounters between agents and their targets "under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction." *United States* v. *Ehrlichman*, 379 F. Supp. 291, 292 (DC 1974). Because the questioning occurs in a noncustodial setting, the suspect is not informed of the right to remain silent. Unlike proceedings in which a false statement can be prosecuted as perjury, there may be no oath, no pause to concentrate the speaker's mind on the importance of his

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[2] See, *e.g.*, *United States* v. *Stoffey*, 279 F. 2d 924, 927 (CA7 1960) (defendant prosecuted for falsely denying, while effectively detained by agents, that he participated in illegal gambling; court concluded that "purpose of the agents was not to investigate or to obtain information, but to obtain admissions," and that "they were not thereafter diverted from their course by alleged false statements of defendant"); *United States* v. *Dempsey*, 740 F. Supp. 1299, 1306 (ND Ill. 1990) (after determining what charges would be brought against defendants, agents visited them "with the purpose of obtaining incriminating statements"; when the agents "received denials from certain defendants rather than admissions," Government brought §1001 charges); see also *United States* v. *Goldfine*, 538 F. 2d 815, 820 (CA9 1976) (agents asked defendant had he made any out-of-state purchases, investigators already knew he had, he stated he had not; based on that false statement, defendant was prosecuted for violating §1001).

or her answers. As in Brogan's case, the target may not be informed that a false "No" is a criminal offense until *after* he speaks.

At oral argument, the Solicitor General forthrightly observed that §1001 could even be used to "escalate completely innocent conduct into a felony." Tr. of Oral Arg. 36. More likely to occur, "if an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers. If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove." Note, False Statements to Federal Agents: Induced Lies and the Exculpatory No, 57 U. Chi. L. Rev. 1273, 1278 (1990) (footnote omitted). If the statute of limitations has run on an offense– as it had on four of the five payments Brogan was accused of accepting– the prosecutor can endeavor to revive the case by instructing an investigator to elicit a fresh denial of guilt.[3] Prosecution in these circumstances is not an instance of Government "punishing the denial of wrongdoing more severely than the wrongdoing itself," *ante*, at 7; it is, instead, Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable.

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[3] Cf. *United States* v. *Bush*, 503 F. 2d 813, 815–819 (CA5 1974) (after statute of limitations ran on §1001 charge for defendant Bush's first affidavit containing a false denial, IRS agents elicited a new affidavit, in which Bush made a new false denial; court held that "Bush cannot be prosecuted for making a statement to Internal Revenue Service agents when those agents aggressively sought such statement, when Bush's answer was essentially an exculpatory 'no' as to possible criminal activity, and when there is a high likelihood that Bush was under suspicion himself at the time the statement was taken and yet was in no way warned of this possibility").

II

It is doubtful Congress intended §1001 to cast so large a net. First enacted in 1863 as part of the prohibition against filing fraudulent claims with the Government, the false statement statute was originally limited to statements that related to such filings. See Act of Mar. 2, 1863, ch. 67, 12 Stat. 696–697. In 1918, Congress broadened the prohibition to cover other false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States." Act of Oct. 23, 1918, ch. 194, §35, 40 Stat. 1015–1016. But the statute, we held, remained limited to "cheating the Government out of property or money." *United States* v. *Cohn*, 270 U. S. 339, 346 (1926).

"The restricted scope of the 1918 Act [as construed in *Cohn*] became a serious problem with the advent of the New Deal programs in the 1930's." *United States* v. *Yermian*, 468 U. S. 63, 80 (1984) (REHNQUIST, J., dissenting). The new regulatory agencies relied heavily on self-reporting to assure compliance; if regulated entities could file false reports with impunity, significant Government interests would be subverted even though the Government would not be deprived of any property or money. See generally *United States* v. *Gilliland*, 312 U. S. 86, 93–95 (1941). The Secretary of Interior, in particular, expressed concern that "there were at present no statutes outlawing, for example, the presentation of false documents and statements to the Department of the Interior in connection with the shipment of 'hot oil,' or to the Public Works Administration in connection with the transaction of business with that agency." *United States* v. *Yermian*, 468 U. S., at 80 (REHNQUIST, J., dissenting).

In response to the Secretary's request, Congress amended the statute in 1934 to include the language that formed the basis for Brogan's prosecution. See *Hubbard* v. *United States*, 514 U. S. 695, 707 (1995) ("We have repeat-

edly recognized that the 1934 Act was passed at the behest of the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior.'") (quoting *United States* v. *Gilliland*, 312 U. S., at 93–94). Since 1934, the statute, the relevant part of which remains the same today,[4] has prohibited the making of "any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder." Act of June 18, 1934, ch. 587, §35, 48 Stat. 996.

As the lower courts that developed the "exculpatory no" doctrine concluded, the foregoing history demonstrates that §1001's "purpose was to protect the Government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions." *Paternostro* v. *United States*, 311 F. 2d 298, 302 (CA5 1962); accord, *United States* v. *Stark*, 131 F. Supp. 190, 205 (Md. 1955). True, "the 1934 amendment, which added the current statutory language, was not limited by any specific set of circumstances that may have precipitated its passage." *United States* v. *Rodgers*, 466 U. S. 475, 480 (1984). Yet it is noteworthy that Congress enacted that amendment to address concerns quite far removed from suspects' false denials of criminal misconduct, in the course of informal interviews initiated by Government agents. Cf.

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[4] Congress separated the false claims from the false statements provisions in the 1948 recodification, see Act of June 25, 1948, §§287, 1001, 62 Stat. 698, 749, and made unrelated substantive changes in 1996, see False Statements Accountability Act of 1996, Pub. L. 104–292, 110 Stat. 3459.

ALI, Model Penal Code §241.3, Comment 1, p. 151 (1980) ("inclusion of oral misstatements" in §1001 was "almost [an] accidental consequenc[e] of the history of that law").

III

Even if the encompassing language of §1001 precludes judicial declaration of an "exculpatory no" defense, the core concern persists: "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." *Sherman* v. *United States*, 356 U. S. 369, 372 (1958).[5] The Government has not been blind to this concern. Notwithstanding the prosecution in this case and the others cited *supra*, at 2–3, and n. 2, the Department of Justice has long noted its reluctance to approve §1001 indictments for simple false denials made to investigators. Indeed, the Government once asserted before this Court that the arguments supporting the "exculpatory no" doctrine "are forceful even if not necessarily dispositive." Memorandum for United States in *Nunley* v. *United States*, O. T. 1977, No. 77–5069, p. 7; see also *id.*, at 7–8 (explaining that "[t]he legislative history affords no express indication that Congress meant Section 1001 to prohibit simple false denials of guilt to Government officials having no regulatory responsibilities other than the discovery and deterrence of crime").

In *Nunley*, we vacated a §1001 conviction and remanded with instructions to dismiss the indictment, at the Solicitor General's suggestion. *Nunley* v. *United States*, 434 U. S. 962 (1977). The Government urged such a course

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[5] Deterrence of Government-manufactured crimes is not at stake where a false denial of wrongdoing forms the basis, not for the imposition of criminal liability, but for an adverse employment action. For that reason, *LaChance* v. *Erickson*, ___ U. S. ___ (January 21, 1998), is inapposite.

because the prosecution had been instituted without prior approval from the Assistant Attorney General, and such permission was "normally refused" in cases like Nunley's, where the statements "essentially constitute[d] mere denials of guilt." Memorandum for United States, *supra*, at 8.

Since *Nunley*, the Department of Justice has maintained a policy against bringing §1001 prosecutions for statements amounting to an "exculpatory no." At the time the charges against Brogan were filed, the United States Attorneys' Manual firmly declared: "Where the statement takes the form of an 'exculpatory no,' 18 U. S. C. §1001 does not apply regardless who asks the question." United States Attorneys' Manual ¶9–42.160 (Oct. 1, 1988). After the Fifth Circuit abandoned the "exculpatory no" doctrine in *United States* v. *Rodriguez-Rios*, 14 F. 3d 1040 (1994) (en banc), the manual was amended to read: "It is the Department's policy that it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government." United States Attorneys' Manual ¶9–42.160 (Feb. 12, 1996).[6]

These pronouncements indicate, at the least, the dubious propriety of bringing felony prosecutions for bare exculpatory denials informally made to Government agents.[7]

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[6] While this case was pending before us, the Department of Justice issued yet another version of the manual, which deleted the words "that it is" and "appropriate" from the sentence just quoted. The new version reads: "It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government." United States Attorneys' Manual ¶9–42.160 (Sept. 1997).

[7] The Sentencing Guidelines evince a similar policy judgment. Although United States Sentencing Commission, Guidelines Manual §3C1.1 (Nov. 1997) establishes a two-level increase for obstruction of justice, the application notes provide that a "defendant's denial of guilt

Although today's decision holds that such prosecutions can be sustained under the broad language of §1001, the Department of Justice's prosecutorial guide continues to caution restraint in each exercise of this large authority.

IV

The Court's opinion does not instruct lower courts automatically to sanction prosecution or conviction under §1001 in all instances of false denials made to criminal investigators. The Second Circuit, whose judgment the Court affirms, noted some reservations. That court left open the question whether "to violate Section 1001, a person must know that it is unlawful to make such a false statement." *United States* v. *Wiener*, 96 F. 3d 35, 40 (1996). And nothing that court or this Court said suggests that "the mere denial of criminal responsibility would be sufficient to prove such [knowledge]." *Ibid.* Moreover, "a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent," *ibid.*, and a jury could be instructed that it would be permissible to draw such an inference. Finally, under the statute currently in force, a false statement must be "materia[l]" to violate §1001. See False Statements Accountability Act of 1996, Pub. L. 104–292, §2, 110 Stat. 3459.

The controls now in place, however, do not meet the basic issue, *i.e.*, the sweeping generality of §1001's language. Thus, the prospect remains that an overzealous prosecutor or investigator– aware that a person has committed some suspicious acts, but unable to make a criminal case– will create a crime by surprising the suspect, asking about those acts, and receiving a false denial.

(other than a denial of guilt under oath that constitutes perjury) . . . is not a basis for application of this provision." §3C1.1, comment., n. 1.

Congress alone can provide the appropriate instruction.

Congress has been alert to our decisions in this area, as its enactment of the False Statements Accountability Act of 1996 (passed in response to our decision in *Hubbard* v. *United States*, 514 U. S. 695 (1995)) demonstrates. Similarly, after today's decision, Congress may advert to the "exculpatory no" doctrine and the problem that prompted its formulation.

The matter received initial congressional consideration some years ago. Legislation to revise and recodify the federal criminal laws, reported by the Senate Judiciary Committee in 1981 but never enacted, would have established a "defense to a prosecution for an oral false statement to a law enforcement officer" if "the statement was made '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.'" S. Rep. No. 97–307, p. 407 (1981). In common with the "exculpatory no" doctrine as it developed in the lower courts, this 1981 proposal would have made the defense "available only when the false statement consists solely of a denial of involvement in a crime." *Ibid.* It would not have protected a denial "if accompanied by any other false statement (*e.g.*, the assertion of an alibi)." *Ibid.*[8]

The 1981 Senate bill covered more than an "exculpatory no" defense; it addressed frontally, as well, unsworn oral statements of the kind likely to be made without careful deliberation or knowledge of the statutory prohibition against false statements. The bill would have criminal-

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[8] See, *e.g.*, *United States* v. *Moore*, 27 F. 3d 969, 979 (CA4 1994) ("exculpatory no" doctrine covers simple denials of criminal acts, but "does not extend to misleading exculpatory stories or affirmative statements . . . that divert the government in its investigation of criminal activity").

ized false oral statements to law enforcement officers only "where the statement is either volunteered (e.g., a false alarm or an unsolicited false accusation that another person has committed an offense) or is made after a warning, designed to impress on the defendant the seriousness of the interrogation and his obligation to speak truthfully." *Id.*, at 408.

More stringent revision, following the lead of the Model Penal Code and the 1971 proposal of a congressionally chartered law reform commission, would excise unsworn oral statements from §1001 altogether. See ALI, Model Penal Code §§241.3, 241.4, 241.5 (1980); National Commission on Reform of Federal Criminal Laws, Final Report §§1352, 1354 (1971). A recodification proposal reported by the House Judiciary Committee in 1980 adopted that approach. It would have applied the general false statement provision only to statements made in writing or recorded with the speaker's knowledge, see H. R. Rep. No. 96–1396, pp. 181–183 (1980); unsworn oral statements would have been penalized under separate provisions, and only when they entailed misprision of a felony, false implication of another, or false statements about an emergency, see *id.*, at 182. The 1971 law reform commission would have further limited §1001; its proposal excluded from the false statement prohibition all "information given during the course of an investigation into possible commission of an offense unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information." National Commission on Reform of Federal Criminal Laws, Final Report §1352(3).

In sum, an array of recommendations has been made to refine §1001 to block the statute's use as a generator of crime while preserving the measure's important role in protecting the workings of Government. I do not divine from the Legislature's silence any ratification of the "exculpatory no" doctrine advanced in lower courts. The ex-

tensive airing this issue has received, however, may better inform the exercise of Congress's lawmaking authority.