

TEN YEARS AFTER BROGAN V. UNITED STATES – AN EMPIRICAL LOOK AT
THE “FALSE STATEMENTS” STATUTE, 18 U.S.C. § 1001

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INTRODUCTION

Imagine that you suspect your loved one, your brother, is about to commit a crime.¹ You suspect this because you read a letter in which he indicated so, and worried that he will go through with it, you rush to the airport to try to stop him. But before you get to him, before you can talk to your brother and determine whether he is really serious about his intentions, and before you can convince him to change his mind, an FBI agent approaches you, and asks you about your brother and whether he is planning to commit this crime. You get confused and do not know how to answer: on the one hand, you certainly want to prevent the crime from happening; but, on the other hand, it is your brother after all, and you hope that if you could just talk to him, you could convince him to change his mind and not go through with his intentions. What you do not know, is that you do not have to answer at all, because you have no duty to talk to the FBI agents who stopped you.² You could just decline to cooperate and walk away. But, you do not know this, and the FBI agents do not tell you that you do not have to answer. They also do not tell you that if you do not answer truthfully, you could be in trouble yourself, even though until that point, you did not do anything wrong. So, rather than tell the FBI agents the truth, you answer “regrettably, but humanly”³ that you are not sure, that your brother’s mental state worried you, but that you could not tell one way or another whether he intended to commit this crime. At this point, you will have committed a federal felony, probably without even knowing, due to an extremely broad federal statute, “Statements or Entries Generally,” 18 U.S.C. § 1001, which criminalizes materially false statements made to the federal government, even when the person does not know that making such false statements constitutes a crime.

¹ This example is based on the facts of one of the many plea agreements surveyed for purposes of this paper. *See* *United States v. Subeh*, 2007 WL 4664387 (W.D.N.Y. 2007).

² *See infra* note 62.

³ *See infra* note 95.

Section 1001 criminalizes not only materially false statements such as described in the example above, but even a simple denial of wrongdoing is enough to satisfy the extremely low threshold of § 1001. A little over ten years ago, the Supreme Court decided *Brogan v. United States*⁴ in which the Court affirmed the defendant's felony conviction for falsely denying his involvement in a certain criminal scheme when questioned by federal agents at his home.⁵ The defendant was indicted and convicted on federal bribery charges⁶ and under § 1001. 18 U.S.C. § 1001(a)⁷ provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years. . . .⁸

⁴ *Brogan v. United States*, 522 U.S. 398 (1998).

⁵ *Id.* at 399 (for further discussion of *Brogan* facts, see *infra* part II).

⁶ 29 U.S.C. §§ 186(b)(1), (a)(2) and (d)(2).

⁷ At the time defendant was convicted, 18 U.S.C. § 1001 provided:

“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.”

18 U.S.C. § 1001 was amended in 1996 (see *infra* part I) to add the materiality requirement to every subsection under section (a). Though the amended statute was arguably narrower than the one *Brogan* was convicted under, it is unlikely that the outcome would have been any different since the materiality element was subsequently interpreted to only require that the statement could have misled the investigator, as opposed to that it actually did. See *infra* note 48. Thus, *Brogan* would have likely been convicted under the amended statute.

⁸ Subsections (b) and (c) provide:

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

18 U.S.C. § 1001 has been interpreted as requiring proof of five elements: first, that the defendant made the statement as charged; second, that the statement was false; third, that the falsity related to a material matter; fourth, that the defendant acted willfully and with knowledge of the falsity; and fifth, that the false statement was made or used in relation to a matter within the jurisdiction of a department or agency of the United States.⁹

The defendant in *Brogan* appealed his conviction under § 1001 and urged both the court of appeals¹⁰ and the Supreme Court to adopt the so-called “exculpatory no” doctrine,¹¹ under which false denial of wrongdoing, though literally within the plain meaning of § 1001, would be excluded from § 1001’s scope.¹² Both courts disagreed, and held that the literal meaning of § 1001 does not exclude false denials of wrongdoing from its coverage.¹³ The decision was relatively uncontroversial as seven justices voted in favor of affirming the defendant’s conviction.¹⁴ However, Justice Ginsburg wrote a concurring opinion raising concerns regarding the “extraordinary authority” Congress has conferred “perhaps unwittingly, on prosecutors to manufacture crimes.”¹⁵ She noted that the wording of the statute gave power to the government

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

For purposes of this paper, subsections (b) and (c) are not discussed.

⁹ *United States v. Brown*, 151 F.3d 476, 484 (6th Cir. 1998); *United States v. Brehm*, 2007 WL 3311341 (M.D. Fla. 2007).

¹⁰ *United States v. Brogan*, 96 F.3d 35 (2d Cir. 1996).

¹¹ *Brogan*, 522 U.S. at 401.

¹² For further discussion on the “exculpatory no” doctrine, *see infra* part II.

¹³ *Brogan v. United States*, 522 U.S. at 408; *United States v. Brogan*, 96 F.3d at 37.

¹⁴ Justices Rehnquist, O’Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg voted in favor of affirming *Brogan*’s conviction. Justices Stevens and Breyer dissented.

¹⁵ *Brogan*, 522 U.S. at 408.

agents “not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt.”¹⁶

There have been many articles written about § 1001, the “exculpatory no” defense, and the likely impact the *Brogan* decision would have on the federal criminal justice system.¹⁷ Commentators and legislators alike have raised concerns regarding the broad scope of § 1001 long before the Supreme Court’s decision in *Brogan*, arguing that § 1001 “goes too far in many respects”¹⁸ and proposing that unsworn oral statements be excluded entirely from the threat of penalty under §1001.¹⁹ In 1970, almost thirty years before *Brogan*, the National Commission on Reform of Federal Criminal Law proposed unsuccessfully a revision to § 1001 that would have excluded statements made during the course of criminal investigations “unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information.”²⁰ Although commentators largely agree with the Supreme Court’s interpretation of the plain meaning of the statute in *Brogan*,²¹ they have criticized the Court for affirming *Brogan*’s conviction for “an innocuous violation that never materially impeded the government’s investigation.”²² More generally, commentators have raised concerns regarding the impact *Brogan* would have on subsequent prosecutions under §1001, cautioning that § 1001 would “lurk

¹⁶ *Id.* at 409.

¹⁷ Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999); Giles E. Birch, comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990); Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court’s Analysis of 18 U.S.C.A. § 1001*, 31 MCGEORGE L. REV. 147 (1999); Jeremy Baker, *False Statements and False Claims*, 42 AM. CRIM. L. REV. 427 (2005).

¹⁸ Model Penal Code § 208.22, cmts. at 141-42 (Tentative Draft No. 6, 1957); Model Penal Code § 241.3 (Official Draft 1962).

¹⁹ Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999) (discussing proposals for amending § 1001).

²⁰ *Id.* (citing National Commission on Reform of Federal Criminal Laws, New Federal Criminal Code § 1352 (Final Report 1971)).

²¹ Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999); Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court’s Analysis of 18 U.S.C.A § 1001*, 31 MCGEORGE L. REV. 147 (1999).

²² Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999).

in the repertoire of the ‘over-zealous prosecutor.’”²³ Others have criticized the “haphazard, discretionary approach to federal criminal law”²⁴ and argued that such haphazard criminal enforcement “threatens the integrity and efficacy of the law.”²⁵

These concerns, along with the relatively recent high profile cases of Martha Stewart²⁶ and disgraced Olympic athlete Marion Jones,²⁷ both of whom have been convicted²⁸ under § 1001, have prompted this investigation of the extent to which prosecutors rely on this extraordinarily broad criminal statute to convict individuals not for the underlying substantive crimes, but for basically lying. In order to determine the validity of fears and predictions commentators expressed before and after *Brogan*, this paper seeks to establish an empirical basis for discussion on what should be done to ameliorate the potentially harsh consequences of criminalizing all materially false statements made to the government. The paper looks at more

²³ Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court’s Analysis of 18 U.S.C.A § 1001*, 31 MCGEORGE L. REV. 147 (1999) (citing Petitioner's Brief at 18, *Brogan v. United States*, 522 U.S. 398 (1998) (No. 96-1579)).

²⁴ Julie R. O'Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & Criminology 643 (2006) (criticizing the federal criminal code as “duplicative, ambiguous, incomplete, and organizationally nonsensical”).

²⁵ Geraldine Szott Moohr, *What the Martha Stewart Case Tells us about White Collar Criminal Law*, 43 HOUS. L. REV. 591, 619 (2006) (raising concerns over the consequences of investigatory processes, the vagueness of criminal statutes, the breadth and depth of the criminal code, and the “enormous” prosecutorial discretion).

²⁶ Ms. Stewart allegedly engaged in insider trading which prompted Securities and Exchange Commission investigation. She was interviewed twice by the FBI and the SEC, once at the United States Attorney’s office, and once over the phone. Ms. Stewart allegedly lied about the real reason for her sale of certain stocks in order to cover up what was possibly an illegal trade, claiming that she had an agreement with her broker to sell her stocks if they fell below a certain price. At trial, the jury believed her claim that her sale of securities was pursuant to a preexisting agreement with her broker to sell if the stocks fell below a certain price as opposed to a result of insider trading, and acquitted her under that particular specification of the § 1001 charge. However, because she was found to have lied with respect to other details of the investigation, which were immaterial from the securities law perspective, she was ultimately convicted for covering up conduct that turned out to be innocent. *See United States v. Stewart*, 323 F. Supp.2d 606 (S.D.N.Y. 2004), *aff’d*, 433 F.3d 273 (2d Cir. 2006).

²⁷ Marion Jones was indicted in the Southern District of New York under two counts of § 1001 for lying to federal investigators (1) when she said that she had never seen or ingested a performance enhancing drug, when supposedly she had seen and ingested such performance enhancing drugs; and (2) for stating she was unaware of certain \$25,000 check to her when supposedly she was aware of that check and had in fact endorsed the check herself. Information, S6 05 Cr. 1067 (*available at* http://hosted.ap.org/specials/interactives/_documents/marion_jones/jones_charges.pdf). Jones subsequently pleaded guilty to both counts of § 1001 and was sentenced to six months in prison (*available at* http://www.liveleak.com/view?i=988_1200079976).

²⁸ Martha Stewart was convicted under § 1001 after a trial; Marion Jones pleaded guilty to two counts of § 1001.

than 1300 plea agreements implicating § 1001 and seeks to draw empirical conclusions regarding the way in which prosecutors rely on the all encompassing nature of § 1001 to obtain guilty pleas. Though most of the available § 1001 commentary seems to focus mainly on the peculiar factual scenario when the materially false statements are made in face to face encounters between defendants and federal investigators during criminal investigations (namely, false denial of wrongdoing),²⁹ this paper seeks to go beyond the false denials of wrongdoing to establish a more comprehensive picture of how § 1001 is administered.

Part I will give a brief overview of the history of 18 U.S.C. § 1001 and its original purpose. Part I will also examine how the problems that the statute was originally designed to address have changed since its enactment, and will question whether, in light of the extremely detailed federal criminal code now in existence, there is any further need for such a general, all-encompassing statute. Part II will discuss the demise of the “exculpatory no” doctrine in *Brogan v. United States*. Though this paper does not focus solely on the “exculpatory no” defense, the *Brogan* decision is the Supreme Court’s major interpretation of § 1001 and it offers a good overview of the arguments offered in favor and against the expansive reading of § 1001. Therefore, both the majority opinion and Justice Ginsburg’s concurrence will be addressed in some detail. Part II will also discuss concerns raised by commentators regarding § 1001, both before the *Brogan* decision and in the years following. Finally, Part II will discuss some of the proposals for reform commentators have made in light of § 1001’s broad scope. Part III will discuss the empirical data regarding the use of § 1001 in obtaining plea agreements. Namely, Part III will discuss the use of § 1001 to “pile on” offenses;³⁰ prosecutorial restraint from charging § 1001 when the conduct clearly falls within the scope of § 1001; the number of

²⁹ This undoubtedly is one of the most disconcerting problems of § 1001’s extremely broad scope and will be addressed in this paper extensively.

³⁰ See *infra* note 117.

instances when § 1001 is the sole count of conviction; the practice of charging § 1001 even when there is a substantive crime on point; and the frequency with which warnings are given in face to face encounters between defendants and federal investigators. In light of the empirical conclusions, Part IV will evaluate several commentators' proposals for achieving just and consistent application of § 1001, such as Congressional amendments requiring that knowledge of unlawfulness be an element of the crime;³¹ warnings that making materially false statements constitutes a federal felony³² which in turn would satisfy the knowledge requirement; redefining the materiality element;³³ and changing the level offense from felony to misdemeanor.³⁴ The paper also proposes requiring prosecutors to charge the substantive offense whenever possible, rather than rely on § 1001.

I. THE HISTORY OF § 1001 AND ITS ORIGINAL PURPOSE: A BRIEF OVERVIEW

18 U.S.C. § 1001 was originally enacted in 1863³⁵ during the Civil War to prohibit persons in military service from filing fraudulent claims against the government.³⁶ In 1874, Congress expanded the coverage of the statute to prohibit filing of fraudulent claims by any person,³⁷ not just military personnel. Two more revisions followed in 1918,³⁸ one that included corporations into class of "persons" who could be liable under the statute; and a second that broadened the types of prohibited fraudulent conduct to cover purposeful and intentional "cheating and swindling or defrauding the Government of the United States."³⁹ Though the 1918 amendments seemingly expanded the scope of § 1001's coverage, the 1926 Supreme Court

³¹ See *infra* note 134.

³² See *infra* note 120.

³³ See *infra* note 136.

³⁴ See *infra* note 135.

³⁵ See Act of March 2, 1863, ch. 67, 12 Stat. 696, 696-97 (1863).

³⁶ Jeffrey L. God, *Demise of the Little White Lie Defense – The Supreme Court Rejects the “Exculpatory No” Doctrine Under 18 U.S.C. § 1001*: Brogan v. United States, 118 S. CT. 805 (1998), 67 U. CIN. L. REV. 859 (1999).

³⁷ *Id.*

³⁸ Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015, 1015-16 (1918).

³⁹ *Id.*

decision in *United States v. Cohn*⁴⁰ interpreted the phrase “cheating and swindling or defrauding” to only include instances of “cheating the Government out of **property or money**.”⁴¹ Thus, despite the 1918 amendments, the scope of the prohibited conduct remained relatively narrow as it required showing of some pecuniary harm. This restricted interpretation of the 1918 act became a serious problem with the “advent of the New Deal programs.”⁴²

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. The Secretary of the 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.”⁴³

Congress responded in 1934 and amended the statute to remove the requirement of financial fraud, thus criminalizing false statements that did not result in any pecuniary harm.⁴⁴ However, despite removing the pecuniary harm element, the purpose of the statute remained limited “to protect the authorized functions of governmental departments and agencies from the perversion which might result from deceptive practices,”⁴⁵ and more specifically, from “**affirmative, aggressive and voluntary actions of persons who take the initiative.**”⁴⁶ Thus, the 1934 amendment was designed to address concerns “quite far removed from suspects' false

⁴⁰ 270 U.S. 339 (1926).

⁴¹ *Id.* (emphasis added).

⁴² *Brogan*, 522 U.S. at 412.

⁴³ *Id.* (quoting *United States v. Yermian*, 468 U.S. 63, 80 (1984) (REHNQUIST, J., dissenting) (emphasis added)).

⁴⁴ *Id.* at 413. Subsequently, the Supreme Court repeatedly 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.’” (*Hubbard v. United States*, 514 U.S. 695, 707 (1995) quoting *United States v. Gilliland*, 312 U.S. 86, 93-94 (1941)).

⁴⁵ *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991).

⁴⁶ *Brogan*, 522 U.S. at 413 (quoting *Paternostro v. United States*, 311 F.2d 298, 302 (5th Cir. 1962) (emphasis added)).

denials of criminal misconduct, in the course of informal interviews initiated by Government agents.”⁴⁷

The statute was subsequently amended several times, most significantly in 1996 when the statute was completely revised to include among other things a materiality requirement⁴⁸ in each subsection under section (a).⁴⁹ But the underlying principle remained the same: it was criminal to make false statements to the government regardless of whether such false statements caused any pecuniary harm. Since dispensing with the pecuniary harm requirement in 1934, 18 U.S.C. § 1001 has been applied broadly in many different contexts, such as in investigations by Federal Bureau of Investigation and Secret Service,⁵⁰ United States Attorney's Office,⁵¹ SEC,⁵² Federal Housing Administration,⁵³ and Bureau of Customs.⁵⁴ In light of that, § 1001 has been viewed as affording great flexibility to government when seeking prosecution due to its low standard for

⁴⁷ *Brogan*, 522 U.S. at 413-14.

⁴⁸ See generally Michael Gomez, *Re-Examining the False Statements Accountability Act*, 37 HOUS. L. REV. 515, 523 (2000) (stating that “courts have considered a statement to be material if it had a natural tendency or capacity to influence a decision or a federal agency function. It is not necessary that the statement actually influence anyone.”). Though arguably the materiality element was supposed to limit the scope of § 1001, the rather broad interpretation of materiality adopted by the federal courts makes this element hardly an obstacle to a conviction.

⁴⁹ See *supra* note 7 for the language of the statute prior to the 1996 amendments.

⁵⁰ *United States v. Rodgers*, 466 U.S. 475, 479 (1984) (reversing dismissal of the defendant’s indictment for falsely telling the FBI and Secret Service that his wife had been kidnapped and that she had been involved in a plot to assassinate the president).

⁵¹ *United States v. Tracy*, 108 F.3d 473, 477 (2d Cir. 1997) (affirming defendant’s conviction for making false statements to the Assistant United States Attorney during negotiations to settle seizure warrant pending in federal court).

⁵² *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991) (affirming defendant’s conviction for making false statements on Schedule 13D and Schedule 14D-1 submitted to the Securities and Exchange Commission).

⁵³ *Pruit v. United States*, 382 F.2d 277, 277-78 (9th Cir. 1967) (affirming defendant’s conviction for loaning purchasers the down payments necessary for obtaining Federal Housing Authority loans, and then submitting forms indicating that purchasers had paid the down payment in cash).

⁵⁴ *United States v. Haim*, 218 F. Supp. 922, 929 (S.D.N.Y. 1963) (affirming defendant’s conviction for illegal importation of Dutch whiskey into United States under the guise that Dutch whiskey was “Scotch” whiskey).

criminal liability,⁵⁵ and has been used by the government to “trap persons whose guilt is otherwise difficult to establish.”⁵⁶

As indicated, the original purpose of § 1001 was rather narrow, and it applied only to persons in military service.⁵⁷ At the time the original statute was enacted, the need for it was arguably greater than it is today. Though the exact numbers are rather difficult to find, it is safe to assume that the number of federal criminal statutes must have been minuscule in 1863 compared to the contemporary federal criminal code.⁵⁸ As the Secretary of Interior stated in the 1930s, the were “no statutes outlawing . . . presentation of false documents and statements to the Department of the Interior.”⁵⁹ Today, however, Congress regulates criminal conduct pervasively and there is a particular federal criminal statute addressing almost every possible crime. In those instances where § 1001 is used, more often than not, there is a specific federal criminal statute on point.⁶⁰ Therefore, § 1001 is no longer necessary to preserve the integrity of federal government programs⁶¹ as there are specific criminal statutes proscribing the vast majority of the conduct the original § 1001 was designed to prevent.⁶² As Justice Ginsburg noted in her discussion of

⁵⁵ Michael S. McGarry, *Winning the War on Procurement Fraud: Victory at What Price*, 26 COLUM. J.L. & SOC. PROBS. 269, 274 (1993).

⁵⁶ Peter W. Morgan, *The Underfined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 198-99 (1992).

⁵⁷ See *supra*, note 33.

⁵⁸ For an excellent discussion on the proliferation of criminal codes, see generally Erik Luna, *The Over-criminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

⁵⁹ See *supra* note 40.

⁶⁰ Examples include making false statements to the Housing and Urban Development Authority, which is punishable under 18 U.S.C. § 1012; making false statements in connection with identification documents, which is punishable under 18 U.S.C. § 1028; making false statements in application for passport, which is punishable under 18 U.S.C. § 1542; making false statements on federal tax returns, which is punishable under 26 U.S.C. § 7206, etc. See also Geraldine Szott Moohr, *What the Martha Stewart Case Tells us about White Collar Criminal Law*, 43 HOUS. L. REV. 591, 619 (2006) (stating that “the code reportedly contains at least 100 false statement statutes and over 325 fraud statutes”).

⁶¹ See *supra* p. 8, for discussion on the historic necessity for § 1001 in light of the New Deal government programs which relied heavily on self reporting to ensure compliance.

⁶² *Id.* As previously described, the original § 1001 targeted “affirmative, aggressive and voluntary actions of persons.” Now, however, there are specific criminal statutes covering most of the conduct that should fall within the scope of § 1001, namely affirmative conduct such as making false statements to the Housing and Urban Development Authority, making false statements in application for passport, and making false statements on federal

“exculpatory no” doctrine,⁶³ simple denials of guilt are “far removed . . . 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.”⁶⁴

II. THE DEMISE OF THE “EXCULPATORY NO” DEFENSE IN *BROGAN V. UNITED STATES*

Brogan remains the most influential Supreme Court decision regarding § 1001. Though the precise issue in *Brogan* was relatively narrow and focused mainly on the “exculpatory no” doctrine, the decision dealt extensively with statutory interpretation of § 1001, as well as many constitutional and policy implications. Therefore, *Brogan* serves as a logical starting point for any substantive discussion on § 1001.

1. The Facts and the Brief Procedural History

Brogan was convicted under § 1001 for falsely answering “no” when federal agents asked him whether he had received any cash or gift from a company whose employees were represented by a union in which he was an officer.⁶⁵ After *Brogan* answered “no,” the federal agents told *Brogan* that an earlier search of the employer’s premises had produced company records showing the contrary.⁶⁶ At that point, the agents told *Brogan* that lying to federal agents in the course of an investigation was a crime.⁶⁷ *Brogan* did not change his answer⁶⁸ and the interview ended.

tax returns, *see supra* note 60. One type of conduct that would arguably not be punishable under any other statute is the one where § 1001’s use is the most problematic, namely, making materially false statements during criminal investigations. However, this is largely due to the fact that such conduct should not, arguably, be criminalized at all, as it is contrary to the principle that a person approached by a law enforcement officer need not answer any question put to him unless there is reasonable suspicion or probable cause that he committed a crime. Since suspects are more likely to lie than to remain silent, *see infra* note 105, criminalizing such materially false statements is imposing a duty on suspect to cooperate with the police – a duty that they do not have. *See generally* M. Christine Klein, *A Bird Called Hiibel: The Criminalization of Silence*, 2004 CATO S. CT. REV. 357 (2004).

⁶³ *See infra* part II (Justice Ginsburg’s concurrence).

⁶⁴ *Brogan*, 522 U.S. at 408, 409.

⁶⁵ *Brogan*, 522 U.S. at 398.

⁶⁶ *Id.* at 399-400.

⁶⁷ *Id.* at 400.

⁶⁸ *Id.* (the fact that *Brogan* did not change his answer is irrelevant for purposes of § 1001 analysis. Courts have held that it is immaterial whether defendants subsequently change their story. Since materiality element of § 1001 is judged at the point of time when the statements were uttered, so long as the statements “could have influenced

On appeal, Brogan urged both the Second Circuit Court of Appeals, as well as the United States Supreme Court to adopt the so-called exculpatory no doctrine, “which excludes from § 1001’s scope false statements that consist of the mere denial of wrongdoing.”⁶⁹ At the time of his appeal, there were at least seven circuits that had adopted some sort of “exculpatory no” defense,⁷⁰ though as the Supreme Court pointed out, there was “considerable variation among the Circuits concerning, among other things, what degree of elaborated tale-telling carries a statement beyond simple denial.”⁷¹ Both the Court of Appeals and the Supreme Court rejected Brogan’s arguments and affirmed his conviction.

2. The Majority Opinion

Brogan argued several points in favor of overturning his conviction. His first argument was based on the premise that § 1001 was designed to criminalize materially false statements that “prevent governmental functions.”⁷² He attempted to distinguish “believed” false statements to government investigators which, according to Brogan, perverted governmental functions from “disbelieved” false denials of guilt which, in Brogan’s view, did not pervert governmental functions. Therefore, Brogan argued, § 1001 did not “criminalize simple denials of guilt to

federal agents in their investigation” at the time they were made, defendants are liable under § 1001 even if they subsequently change their story). *United States v. Seabagala*, 256 F.3d 59 (1st Cir. 2001) (declining to “transplant” the recantation defense available under the perjury statute 18 U.S.C. § 1623(d) into the “unreceptive soil of § 1001”).

⁶⁹ *Id.* at 398.

⁷⁰ *Id.* at 401, *citing* *Moser v. United States*, 18 F.3d 469, 473-474 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880-81 (10th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 183-84 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

⁷¹ *Id.* at 401. Some courts protected defendants only if they merely said “NO.” Others protected defendants’ more elaborate responses. Considering that the “exculpatory no” doctrine developed as a judicially created exception designed to curtail the extraordinarily broad scope of § 1001 while at the same time preserving the applicability of § 1001 to fact situations where Congress intended it to apply, *see generally* 102 A.L.R. Fed. 742 § 2, it is not surprising that the law did not develop uniformly: “[w]hether a particular false statement falls within the “exculpatory no” exception appears to be a matter of the circumstances of the case and the law of the Circuit pertaining to the exception.” *Id.*

⁷² *Brogan*, 522 U.S. at 401 (perversion of government functions, as discussed in part I, has traditionally been viewed as the main justification for the exceedingly broad scope of § 1001).

Government investigators,”⁷³ unless the investigators actually believed such statements. Justice Scalia, writing for the majority, dismissed Brogan’s first arguments as based on mistaken premises.⁷⁴ Justice Scalia saw “the investigation of wrongdoing to uncover truth”⁷⁵ as an important governmental function and he refused to see a distinction between “*disbelieved*”⁷⁶ falsehood, which according to Brogan would not impede the governmental investigative function⁷⁷ and “believed” falsehood. Justice Scalia stated that it would be “exceedingly strange” to “make the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar).”⁷⁸ While Brogan argued that § 1001 should be limited to exclude those instances where “a perversion of governmental functions does not exist,”⁷⁹ Justice Scalia maintained that the statute forbade *all* “deceptive practices” regardless of whether they *actually* impeded any government function.⁸⁰

Next, Brogan argued that “exculpatory no” doctrine was inspired by the Fifth Amendment,⁸¹ as the literal reading of § 1001 puts a “‘cornered suspect’ in the ‘cruel trilemma’ of admitting guilt, remaining silent, or falsely denying guilt.”⁸² Justice Scalia replied that “this ‘trilemma’ is wholly of the guilty suspect's own making, of course” and that “an innocent person will not find himself in a similar quandary.”⁸³ Justice Scalia went on to give a more legally sound explanation of his rejection of the Fifth Amendment argument. He reasoned that the Fifth

⁷³ *Id.* at 402.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (emphasis in the original).

⁷⁷ In Brogan’s case, the federal agents did not believe his statements denying his guilt as they already had evidence to the contrary.

⁷⁸ *Id.*

⁷⁹ *Id.* at 403.

⁸⁰ *Id.* at 403-404 (citing *United States v. Gilliland*, 312 U.S. 86, 93 (1941)).

⁸¹ The relevant part of the Fifth Amendment states: “nor shall [any person] be compelled in any criminal case to be a witness against himself.” U.S. CONST. AMEND. V.

⁸² *Brogan*, 522 U.S. at 404.

⁸³ *Id.*

Amendment allows a suspect to remain silent, but it did not allow a witness to “swear falsely.”⁸⁴ Thus, in Justice Scalia’s view, the Fifth Amendment protection against self incrimination did not serve to protect a defendant who, in an effort not to incriminate himself, falsely denied his guilt.⁸⁵

Finally, Brogan urged the Court to adopt a more limited interpretation of § 1001 in order to “eliminate the grave risk that § 1001 will become an instrument of prosecutorial abuse.”⁸⁶ Brogan argued that “overzealous prosecutors will use this provision as a means of ‘piling on’ offenses - sometimes punishing the denial of wrongdoing more severely than the wrongdoing itself.”⁸⁷ Justice Scalia, once again, dismissed Brogan’s argument. First, Justice Scalia, argued that this is not the fault of some “hypothetical prosecutor” but Congress,⁸⁸ and that it was up to Congress to limit the scope of § 1001, if it so chose. Second, Scalia argued that Petitioner could not point to “any history of prosecutorial excess.”⁸⁹

Justice Scalia concluded the majority opinion by stating there was nothing to support a more limited reading of § 1001. In his view, the Court was not at liberty to impose its own limitations on legislation, “no matter how alluring the policy arguments for doing so.”⁹⁰ As he generally does, Justice Scalia relied on the plain language of § 1001 to find no exception for an “exculpatory no.”⁹¹

⁸⁴ *Id.*

⁸⁵ The extraordinary scope of this holding should be obvious. It is hard to imagine a criminal interrogation in which a defendant would not at least at some point profess his innocence. According to Justice Scalia, even in those circumstances, defendants’ claims of innocence would fall within § 1001.

⁸⁶ *Id.* at 405.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* This doubt regarding the prevalence of prosecutorial abuse, among other things, prompted the writing of this paper.

⁹⁰ *Id.* at 408.

⁹¹ *Id.*

3. Justice Ginsburg's Concurrence

Though Justice Ginsberg concurred, somewhat reluctantly, based on the plain meaning of the text, her concern with the expansive use of § 1001 is evident. She addressed many of the problems associated with § 1001 and raised by Brogan on appeal. She began her concurrence with the statement that Congress has conferred “extraordinary authority, perhaps unwittingly, on prosecutors to manufacture crimes.”⁹² She noted that the wording of the statute gave power to the government agents “not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt”:⁹³

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.

Justice Ginsburg further illustrated this point with the facts of the case *United States v. Tabor*,⁹⁴ where the IRS agents confronted a notary public who had violated the Florida law by notarizing a deed even though two signatories had not personally appeared before her. When she “regrettably but humanly” denied this, the Government prosecuted her under § 1001, thus turning a violation of state law into a federal felony “by eliciting a lie that misled no one.”⁹⁵ Justice Ginsburg also noted the Solicitor General’s forthright observations during the oral arguments that § 1001 could even be used to “escalate completely innocent conduct into a felony.”⁹⁶ Furthermore, this is most likely to occur if

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

⁹² *Brogan*, 522 U.S. at 408.

⁹³ *Id.* (quoting note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 325-326 (1977)).

⁹⁴ 788 F.2d 714 (11th Cir. 1986).

⁹⁵ *Brogan*, 522 U.S. at 410.

⁹⁶ *Id.* at 411 (quoting Tr. Of Oral Arg. At 36).

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.⁹⁷

Justice Ginsburg commented that the facts of *Tabor* as well as Brogan's situation are "not altogether uncommon episodes"⁹⁸ and may occur under "extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction."⁹⁹ She went on to say:

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 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.¹⁰⁰

In closing, Justice Ginsburg urged the Congress to adopt measures to "block the statute's use as a generator of crime while preserving the measure's important role in protecting the workings of Government."¹⁰¹

4. Commentators' Views on Brogan and § 1001

Even before *Brogan*, commentators had written about § 1001, criticizing its extraordinary breadth.¹⁰² Commentators have argued that one of the most controversial uses of § 1001 is in

⁹⁷ *Id.*

⁹⁸ *Brogan*, 522 U.S. at 410, fn. 2. Justice Ginsburg gave the following examples of agents questioning defendants to obtain incriminating statements: *United States v. Stoffey*, 279 F.2d 924, 927 (7th Cir. 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 (N.D.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 (9th Cir. 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).

⁹⁹ *Brogan*, 522 U.S. at 410-11 (*quoting United States v. Ehrlichman*, 379 F. Supp. 291, 292 (D.D.C. 1974)).

¹⁰⁰ *Id.* (emphasis added; italics in the original).

¹⁰¹ *Id.* at 418.

situations when suspects “lie to federal agents during criminal investigations.”¹⁰³ One author argued that using § 1001 in such situations perverts the information-gathering purpose of the statute because investigators, relying on the fact that “guilty suspects asked incriminating questions are very likely to lie . . . seem to prefer those lies to silence.”¹⁰⁴ Since the suspects are almost certain to lie,¹⁰⁵ the author argued, this allowed “investigators to set up violations that they fully expect to occur.”¹⁰⁶ Thus, rather than using § 1001 as a shield “to protect agency information-gathering” functions,¹⁰⁷ the prosecutors can rely on § 1001 as a sword to obtain convictions for conduct that is otherwise hard to prove.¹⁰⁸

After *Brogan*, commentators debated the effects the decision would have on prosecutorial reliance on § 1001. Though most authors seemed to agree that the decision correctly interpreted the plain meaning of the statute,¹⁰⁹ commentators criticized the piecemeal evolution of the

¹⁰² See *supra* note 17.

¹⁰³ Giles E. Birch, comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990) (arguing that the § 1001 allows “the authority to force suspects to admit their guilt either by words or by silence” and that this “is an unusual power in the hands of an investigative agent.” *Id.* at 1295. Though this comment was written long before *Brogan* was decided, it raises the same concerns as the *Brogan* decision addressed). See also notes 16 -24 (describing concerns regarding the broad scope of § 1001).

¹⁰⁴ *Id.* at 1273.

¹⁰⁵ *Id.* at 1277.

¹⁰⁶ *Id.* at 1277.

¹⁰⁷ *Id.* at 1276.

¹⁰⁸ This practice is further disconcerting considering the questionable power of federal investigators to “demand that [they] not be lied to.” *Id.* at 1276. Though lying to the police is “obviously objectionable,” *id.* at 1275, traditionally police authority did not “include the power to punish suspects who lie.” *Id.* On the contrary, criminal investigations are like a “traditional dance:”

Columbo asks the suspect questions; the suspect tells inventive and plausible lies; Columbo doggedly uncovers the truth and confronts the perpetrator with the growing evidence of his guilt; the lies become less persuasive; Columbo proves his case; and the suspect confesses. The suspect's role is to evade detection as much as Columbo's role is to unravel the web of his deceit.

Id. at fn. 14.

¹⁰⁹ See Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999) (arguing that “the Court's decision in *Brogan v. United States* is neither surprising nor unjustifiable”); Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court's Analysis of 18 U.S.C.A § 1001*, 31 MCGEORGE L. REV. 147 (1999) (arguing that “to the extent that one agrees with Justice Scalia that § 1001 is phrased unambiguously, the ultimate rejection of the “exculpatory no” defense was sound).

statute,¹¹⁰ fearing that the Supreme Court’s approval of prosecutions for falsely denying wrongdoing “under the broad language of § 1001”¹¹¹ would lead to increased reliance on § 1001.¹¹² On the other hand, some commentators have argued that the Supreme Court’s refusal to adopt the “exculpatory no” defense in *Brogan* would not have a large impact in light of the extreme breadth of § 1001.¹¹³ One author argued that since the “exculpatory no” defense covered a very limited set of circumstances,¹¹⁴ it was “like the proverbial needle in a haystack, . . . not capable of taking to task § 1001’s full potential for abuse.”¹¹⁵ However, the author recognized that even so, “§ 1001 [would] lurk in the repertoire of the ‘over-zealous prosecutor.’”¹¹⁶

Another concern often raised about § 1001 is the possibility that a single lie can lead to multiple counts of offense, the so called “piling on,” when “[e]very time a lie is repeated during an investigation, a separate count of the crime may be charged.”¹¹⁷ This practice, one author argued, “does not necessarily aid in truth-finding during trial” and if anything, such multiple counts are “used to leverage plea agreements, as prosecutors ‘give up’ some counts in return for

¹¹⁰ Michael Gomez, *Re-Examining the False Statements Accountability Act*, 37 HOUS. L. REV. 515, 523 (2000) (arguing that § 1001 is an example of how “statutes can evolve piecemeal, enacted to address one need and then developing into something completely different--taking small steps over the span of many years--with no one noticing the encompassing breadth that has ultimately accrued.”).

¹¹¹ *Brogan*, 522 U.S. at 415.

¹¹² Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999) (arguing that “one immediate effect of the *Brogan* decision is that federal prosecutors now have a useful tool with which to pursue convictions for making false statements” and that this would lead to “an increasing number of section 1001 prosecutions that the government can maintain in the absence of the ‘exculpatory no’”).

¹¹³ Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court’s Analysis of 18 U.S.C.A § 1001*, 31 MCGEORGE L. REV. 147 (1999).

¹¹⁴ See *supra* note 71 and accompanying text (describing how different circuit courts had adopted different interpretations of the doctrine).

¹¹⁵ Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court’s Analysis of 18 U.S.C.A § 1001*, 31 MCGEORGE L. REV. 147 (1999).

¹¹⁶ *Id.* at 190.

¹¹⁷ Geraldine Szott Moohr, *What the Martha Stewart Case Tells us about White Collar Criminal Law*, 43 HOUS. L. REV. 591, 619 (2006).

the plea.”¹¹⁸ While these practices might be legally permissible, the author suggested that such “a win-at-any-cost attitude” on the part of the government can harm the criminal justice system in the long term and “may offend the community's sense of fairness.”¹¹⁹

5. Proposals for Reform

Concerned with the breadth of § 1001, both before and certainly after *Brogan*, commentators had suggested several proposals for ameliorating the potentially harsh consequences of the extremely wide application of § 1001. Several commentators have suggested that criminal prosecution be permitted only if “the target has been warned that any lie can be a breach of federal law.”¹²⁰ One author suggested an affirmative defense of “induced lie,”¹²¹ which would preclude criminal prosecution in those instances where defendant’s response was not required and investigators failed to warn the interviewee “that lying is a crime and that silence is permissible.”¹²² The author suggests that relying merely on the protections offered by Miranda warnings is not enough for two reasons. First, though the Miranda warnings can warn a suspect of his right to remain silent, they are required only in custodial interrogations. Thus, “suspects questioned before arrest need not be warned”¹²³ and some suspects will not know that they have a right to remain silent. Second, and more importantly, even if warned of their right to remain silent, suspects “are unlikely to know of the punishment in store for them if

¹¹⁸ *Id.* (noting that double jeopardy would not remedy this problem due to the restrictive test adopted by the Supreme Court, focusing on the elements of the statutes at issue. *See* *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). *See also* *United States v. Woodward*, 469 U.S. 105, 108-10 (1985) (holding that charging defendant with false statements under 18 U.S.C. § 1001 and failing to report transportation of currency under 31 U.S.C. § 1058 did not violate the double jeopardy clause).

¹¹⁹ *Id.*

¹²⁰ Michael Gomez, *Re-Examining the False Statements Accountability Act*, 37 HOUS. L. REV. 515, 557 (2000); Giles E. Birch, comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990).

¹²¹ Giles E. Birch, comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990).

¹²² *Id.* at 1274.

¹²³ *Id.*

they lie.”¹²⁴ Thus, a guilty suspect aware of his right to remain silent, but unaware that making materially false statements is a federal felony is “very likely to lie”¹²⁵ and not only by professing his innocence, but offering “more than a flat denial.”¹²⁶ Therefore, to increase compliance with § 1001’s purpose of “information gathering,”¹²⁷ investigators should warn all interviewees of the risk of prosecution under § 1001 if they lie as opposed to merely warning suspects who are in custody that they have the right to remain silent.

To curtail the prosecutorial practice of “piling on”¹²⁸ which seeks to maximize the probability of conviction, two commentators, prompted by Ms. Stewart’s case,¹²⁹ have proposed the so called “law of counts” to curtail the “redundant charging phenomenon” in order to “cabin prosecutorial charging discretion.”¹³⁰ The law of counts would address the ad hoc approach to substantive federal criminal law,¹³¹ which is full of overlapping and redundant statutes, by a court conducted pre-trial review of the indictment to determine “if the charges in it were duplicative and overlapping in a manner jeopardizing the defendant’s right to a fair trial”¹³² and to merge “all counts that deal with the same conduct or transaction.”¹³³

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Inducing lies in the view of this author does not amount to information gathering. *See supra*, notes 104-108.

¹²⁸ *See supra* note 117.

¹²⁹ Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1113 (2005) (stating that “the decisions to investigate Martha Stewart and prosecute her for her cover-up was justifiable.” However, “the number and type of charges filed against her” were more troublesome. Noting that Ms. Stewart was charged with five separate counts, the authors argue that “[t]he indictment in the Stewart case is an illustration of the tremendous power prosecutors have to shape the contours of a crime and to split it up--perhaps arbitrarily--into many different but overlapping counts”).

¹³⁰ *Id.*

¹³¹ *Id.* at 1119 (describing the development of the federal criminal law as a political and reactionary process, and arguing that “Congress addresses criminal issues from a political standpoint and passes criminal laws to satisfy the outrage of the day. It pays scant attention to how the new statutes fit with the old ones.”).

¹³² *Id.*

¹³³ *Id.*

Other proposals included making knowledge of unlawfulness “a necessary component of § 1001's willfulness element,”¹³⁴ reducing the grade of § 1001 violations to misdemeanor level,¹³⁵ and changing the materiality standard to require that “the false statement actually mislead or obstruct the government's investigation.”¹³⁶

With these concerns and proposals for reform in mind, the paper now turns to the empirical data exploring the prevalence of prosecutorial reliance on § 1001.

III. EMPIRICAL DATA REGARDING PROSECUTORIAL RELIANCE ON § 1001

As described in Part II, soon after the *Brogan* decision, many commentators weighed in on the debate regarding the fairness of § 1001's broad scope, and attempted to predict how § 1001 would be applied in the future in light of the Supreme Court's ruling.¹³⁷ Ten years later, this paper seeks to determine the validity of the concerns expressed regarding the potential for prosecutorial abuse of § 1001. The results of the survey seek to address not only those instances where § 1001 is used to punish false denials of wrongdoing, but also to offer a more comprehensive understanding of the ways in which § 1001 is administered.

1. The Scope of the Research

The empirical portion of this paper surveys about 1300 plea agreements¹³⁸ implicating § 1001 that were available on Westlaw¹³⁹ from January until March, 2008. The plea agreements

¹³⁴ Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court's Analysis of 18 U.S.C.A § 1001*, 31 MCGEORGE L. REV. 147 (1999).

¹³⁵ *Id.*

¹³⁶ Harry E. Garner, *Criminal Law – 18 U.S.C. 1001- Abrogation of the “Exculpatory No” Doctrine*, 66 TENN. L. REV. 561 (1999).

¹³⁷ *See supra* part II.

¹³⁸ Though a number of all the convictions under § 1001 (both convictions obtained after trials as well as all of the plea agreements) would have represented a more complete picture regarding the frequency with which § 1001 is utilized, such data is difficult to come by and was outside the scope of the limited nature of this paper. Furthermore, plea agreements are vastly more common in our criminal justice system anyway and they tend to be the rule, rather than the exception. Therefore, unless convictions by trial systematically produce results different than those

were compiled by using the Westlaw “KeyCite” function,¹⁴⁰ resulting in 1311 plea agreements, covering fifty four districts¹⁴¹ in thirty one states,¹⁴² and ranging from 1998 until 2008.¹⁴³

The survey of the plea agreements sought to uncover patterns in prosecutorial reliance on § 1001 in the following circumstances: 1) to induce guilty pleas by charging and subsequently dismissing § 1001, or promising not to charge § 1001; 2) to obtain guilty pleas solely under § 1001; and 3) to obtain guilty pleas when the alleged violations occurred in face to face encounters between defendants and federal investigators and no warnings were given that making materially false statements constituted a federal felony. The specific parameters were: 1) whether a defendant pleaded guilty under § 1001; 2) whether a defendant pleaded guilty solely to § 1001 and to no substantive charge; 3) whether a defendant pleaded guilty both to § 1001 and to other substantive charges; 4) when a defendant pleaded guilty to § 1001, did the government dismiss, or specifically promise not to file other charges; 5) whether § 1001 count was dismissed in return for a guilty plea under another count; 6) whether the plea agreement reflected a promise not to charge a defendant with § 1001 in return for a guilty plea for a different crime; 7) whether the

reflected by these findings, the survey of the plea agreements probably represents a fairly accurate picture regarding the administration of § 1001.

¹³⁹ A cursory look at LexisNexis didn’t result in finding of any such agreements.

¹⁴⁰ KeyCite is a function that offers the history of any particular statute along with citing references. The precise method of this research was as follows: The author first “key cited” § 1001, and then performed a citing references search of § 1001, which produced more than 28,000 results. Those results included numerous cases, secondary sources, administrative decisions, numerous court documents, including motions, filings, briefs, and finally “verdicts, agreements, & settlements” - the database this paper focuses on. At the time the research for this paper was completed on March 18th 2008, there were 1341 documents in the category of “verdicts, agreements, & settlements.” During the several months of researching for this paper, Westlaw had added more than 200 more documents under the heading “verdicts, agreements, & settlements” and this process seems to be continuing. Any further research of this topic would likely render a more complete profile of the state of the law under § 1001 as it would likely include more documents than what was available at the time of this research. As of April 21, 2008, there are 1911 such documents, and the ones not included in this paper can be located by limiting the date of the documents displayed to those added after March 18th 2008. The vast majority of the documents located through this search were indeed plea agreements; however there was a small number of documents which represented jury verdicts and settlements; these documents were not discussed in the findings as they were outside the scope of this paper.

¹⁴¹ There are eighty nine districts in fifty continental states.

¹⁴² States not covered are: Arkansas, Connecticut, Delaware, Hawaii, Iowa, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, Ohio, Oregon, Rhode Island, South Carolina, Utah, Wisconsin, and Wyoming.

¹⁴³ The vast majority of the plea agreements were from the most recent years, 2005-2007.

government could have charged § 1001 but did not; 8) whether a defendant was given warnings that lying to the federal government was a federal felony; 9) whether the § 1001 charge resulted from a face to face interaction between a defendant and federal agents; 10) whether defendants were given warnings in such face to face interactions that lying was punishable under the federal law; and finally 11) in those instances where § 1001 conviction resulted from face to face interactions and defendants were not given warnings, whether § 1001 was the only count of conviction.¹⁴⁴

Before addressing the findings of the research, a couple of points should be made regarding the methodology. First, despite the best efforts to accurately determine the precise charges as well as the factual basis for each plea agreement, the information available on Westlaw was not always as complete as one could hope. This was due to the format of some of the plea agreements, which did not contain “factual basis” as an integrated portion of the plea agreement and one had to look further to find such information.¹⁴⁵ Sometimes, the information was available in the original criminal indictment, and such indictment was electronically linked to the plea agreement, and thus easy to locate. However, at other times, there was no such information available, and the author did not seek out additional information. Thus, the findings

¹⁴⁴ There were several other parameters, which will not be addressed specifically in the paper: namely, the nature of the substantive charges defendants pleaded guilty to in addition to § 1001; if a defendant did not plead guilty under § 1001, what were the substantive charges the defendant pleaded guilty to; and finally, whether the plea agreement contained a specific warning that failure to comply with the plea agreement and answer all questions truthfully would result in subsequent prosecution under § 1001. This particular parameter turned out to be quite important due to the nature of the dataset researched. Since the keycite function pulled all the available documents which contained citing references to § 1001, many documents turned out not contain actual § 1001 charges but simply had references to § 1001 as warnings for future prosecutions. There were 1041 such cases, and vast majority of them, 907, will be discarded for purposes of this paper, as the majority of them dealt with narcotics, firearms and similar charges, and based on the facts available, these did not implicate § 1001 in any way. However, some of these “warnings only” documents were actually useful in another way, as examples of instances in which the government could have charged § 1001, but did not to do so and instead charged the defendant with the underlying substantive crime only. This is discussed *infra* pp 28-29.

¹⁴⁵ Unfortunately, the author did not keep track of the number of instances when it was necessary to look beyond the plea agreements to find information regarding the underlying facts.

are limited to whatever information was readily available on Westlaw, either in the plea agreement itself or in the underlying indictment.

Second, in light of such limited information, the author was sometimes forced to make educated guesses. Given the commentators' predictions regarding the overly expansive use of § 1001, in those instances when a key piece of information was unavailable, the findings generally reflect the more conservative approach. For example, unless the plea agreement specifically mentioned multiple § 1001 charges, or such information was readily determinable by looking at the original indictment, the author assumed for purposes of this paper that the defendant was charged with only one count of § 1001.¹⁴⁶ Additionally, for the guilty pleas arising out of written false statements submitted on governmental forms, the author treated all such forms as containing general warnings cautioning that submission of false statements constituted a federal crime.¹⁴⁷

On the other hand, however, the author took the contrary approach when factual scenarios involved face to face conversations between defendants and federal agents. In those instances, unless the facts clearly indicated so, the author assumed that the warnings were not given. The assumptions underlying this approach were further reinforced by the fact that there were several plea agreements which contained information indicating that government agents did give such warnings to defendants. Therefore, the author assumed that had such facts been available, they would have been included in the "statement of facts" in the plea agreement.

¹⁴⁶ In light of many instances where prosecutors charged multiple § 1001 counts, it is probably safe to assume that more often than not, there were indeed multiple § 1001 counts.

¹⁴⁷ For example, the Application for a U.S. Passport contains the following warning: "WARNING: False statements made knowingly and willfully in passport applications, including affidavits or other documents submitted to support this application, are punishable by fine and/or imprisonment under the provisions of 18 USC 1001" (*available at* <http://www.state.gov/documents/organization/100004.pdf>); The Social Security Form "Certificate of Responsibility for Welfare and Care of Child not in Applicant's Custody" contains similar warnings: "I know that anyone who (a) makes or causes to be made any false statement or representation of a material fact for use in determining a right to or the amount of any payment, . . . commits a crime Punishable under Federal law by fine, imprisonment or both." (*available at* <http://www.ssa.gov/online/ssa-781.pdf>).

2. The Basic Numbers

Out of the 407 relevant¹⁴⁸ plea agreements, defendants pleaded guilty to § 1001 in 231 cases. There were 172 cases where defendants pleaded solely to § 1001, while only 59 cases where defendants pleaded to § 1001 and to another crime. Out of the 172 cases where § 1001 was the only count of conviction, in 127 cases other substantive charges were dismissed in return for a guilty plea under § 1001. In fifty nine cases, at least one count of § 1001 was dismissed in return for a guilty plea, with thirty five cases involving multiple § 1001 counts and defendants pleaded guilty to at least one § 1001 count while others were dismissed, and in twenty four cases § 1001 count was dismissed in return for a guilty plea under a substantive charge. In thirty eight cases the government promised not to charge § 1001 in return for a guilty plea under a substantive crime. There were 112 instances where defendants' conduct fell within the scope of § 1001, yet the government did not charge § 1001 and instead charged the underlying substantive crime only.¹⁴⁹ As for the warnings given, out of 231 cases of guilty pleas under § 1001, in 133 the government gave some type of warnings, usually because the nature of the crime involved submission of false statements on government forms.¹⁵⁰ In rare instances, the government officials actually gave oral warnings that making materially false statements constituted a federal crime: there were 101 instances of face to face interactions and only 8 plea agreements indicating that oral warnings were given. Further, out of the ninety three cases where § 1001 conviction resulted from face to face interactions between defendants and federal agents and no warnings

¹⁴⁸ See *supra* note 144 for discussion on “warnings only” documents (there were additional 907 plea agreements, which did not implicate § 1001 substantively, and only contained warnings that any future false statements defendant makes would constitute a federal crime for which defendant may be prosecuted under § 1001. These plea agreements will not be further discussed.).

¹⁴⁹ These 112 cases were part of the “warnings only” plea agreements, *see supra* note 144, where § 1001 was implicated only as warning that failure to comply with the plea agreement and answer all questions truthfully would result in subsequent prosecution under § 1001. However, the facts of these 112 cases fell clearly within the scope of § 1001, yet defendants were not charged with it. The implications of this finding are discussed *infra* pp. 28-29.

¹⁵⁰ See *supra* note 147.

were given, in seventy three cases, § 1001 was the only crime defendants pleaded guilty to. With these basic numbers in mind, we now turn to the implications of these findings.

3. Plea Bargaining Practices - Overcharging

Overcharging as a way of aggressive plea bargaining is nothing new in the criminal justice system and has been approved by the Supreme Court as a legitimate tool in plea bargaining.¹⁵¹ It is often utilized, both in the form of charging multiple counts and then dismissing some counts in exchange for a guilty plea for other counts, and in the form of promising not to add specific charges in return for a plea of guilty. As previously suggested, some commentators feared that § 1001 could be (ab)used for “piling on” of charges, as each time a lie is repeated, “a separate count of the crime may be charged.”¹⁵² As these findings will show, such fears were founded.

The survey of the plea agreements shows a relatively high ratio between the cases in which defendants pleaded guilty under § 1001 and those where § 1001 counts were either dismissed or not brought in exchange for guilty pleas under other charges. For 231 guilty pleas under § 1001, there were 97 instances¹⁵³ when § 1001 counts were either dismissed or the prosecutor promised not to charge § 1001 in exchange for a guilty plea under another statute. This finding indicates that prosecutors often utilize § 1001 not only to obtain convictions under § 1001 but also as a way of inducing defendants to plead guilty under other charges. If we add to these numbers the 112 cases where defendants’ conduct clearly fell within the scope § 1001 but prosecutors did not bring § 1001 charges, the numbers are even higher, coming to a ratio of almost 1:1: for every

¹⁵¹ *Brady v. United States*, 397 U.S. 742 (1970) (holding that a plea of guilty is not invalid merely because entered to avoid the possibility of a harsher penalty).

¹⁵² *See supra* note 117.

¹⁵³ In 59 of those, § 1001 counts were dismissed, including 35 instances where some of the § 1001 counts were dismissed while the defendant pleaded guilty under other § 1001 counts. In 38, prosecutors agreed not to bring § 1001 charges.

§ 1001 guilty plea, prosecutors agree to either dismiss § 1001 counts, or expressly or implicitly agree not to charge § 1001.

These findings show that those commentators fearing that § 1001 would be used as a way to induce people to plead guilty have been most likely correct. Aware that defendants, in an effort to avoid multiple felony convictions, or to avoid felony convictions all together, have every incentive to plead guilty when charged with, or at least aware of the possibility of being charged with §1001, prosecutors utilize § 1001 not only to obtain convictions under that particular statute, but are just as likely to use § 1001 to obtain convictions for other crimes. While one can argue that this practice of using § 1001 to “pile on” offenses is no different from any other crime, as most misconduct is governed by more than one criminal provision and prosecutors can almost always pile on charges, § 1001 is arguably different as it often arises out of separate conduct, unrelated to the underlying misconduct that the government really wants to punish. Furthermore, suspects, who may or may not be guilty of the underlying crime, are “almost certain to lie” and will “regrettably but humanly” not only profess their innocence but will offer “more than a flat denial.” Thus, prosecutors can use § 1001 to pile on charges and obtain convictions when the underlying crime is hard to prove, or even worse, like in Martha Stewart’s case, when the underlying conduct turns out to be innocent.¹⁵⁴ As one commentator cautioned, describing Martha Stewart’s case, “if a well-educated, wealthy person, aided by experienced defense counsel, was caught in the web of statutes and enforcement powers . . . , we should be very concerned about the plight of the more typical offender.”¹⁵⁵

¹⁵⁴ See *supra* note 26.

¹⁵⁵ Geraldine Szott Moohr, *What the Martha Stewart Case Tells us about White Collar Criminal Law*, 43 HOUS. L. REV. 591, 619 (2006).

4. Restraint from charging § 1001 when clearly could have done so

The number of cases in which the government could have charged, or at least threatened to charge defendants with § 1001, but did not do so, seems rather high as well. Out of the plea agreements surveyed, for every three cases where prosecutors either charged or promised not to charge § 1001, there was one case where § 1001 did not play any role whatsoever even though defendants' conduct fell clearly within the scope of the statute.¹⁵⁶ Though this particular finding might be skewed due to the somewhat fortuitous way in which these plea agreements came to the author's attention,¹⁵⁷ there are at least a couple of observations worth mentioning.

First, one way of looking at this statistic, as was suggested in the previous section, is to assume that in these types of situations defendants knew very well that their conduct could be punished under multiple statutes and they pleaded guilty to avoid increased charges at trial. Therefore, the fact that the § 1001 was not specifically mentioned in the plea agreement does not necessarily reflect positively on prosecutorial restraint. The very possibility that defendants' conduct could have been prosecuted under § 1001 might have and probably did play a role in obtaining guilty pleas.

Second, and more importantly, the fact that prosecutors chose to forgo charging § 1001 to obtain guilty pleas shows that § 1001 is not necessary to punish that criminal conduct which the statute was designed to prevent. For example, while some prosecutors chose to prosecute lying to the Department of Housing and Urban Development (HUD) under § 1001, other defendants

¹⁵⁶ These plea agreements came to the author's attention because they contained warnings that failure to comply with the plea agreement and answer all questions truthfully would result in subsequent prosecution under § 1001, *see supra* note 144.

¹⁵⁷ *Id.*

were prosecuted under the HUD-specific statute, 18 U.S.C. § 1012,¹⁵⁸ which not only covers the same conduct, but it also provides a lesser punishment.¹⁵⁹

5. § 1001 is three times more likely to be the sole count of conviction

Defendants are three times more likely to plead guilty to § 1001 as the sole count of conviction than to plead guilty to both § 1001 and to a substantive crime. This finding is further divided into two: out of 172 cases in which defendants pleaded to § 1001 and to no substantive crime, in 90 cases other charges were dismissed in return for a guilty plea under § 1001; in 82 other cases § 1001 was the sole count to being with.¹⁶⁰ Again, there are several observations that can be made about these findings, all of which are rather disconcerting.

First, the fact that defendants are three times more likely to plead guilty solely under § 1001 as opposed to both § 1001 and to substantive crimes seems to confirm the fears expressed by Justice Ginsburg's concurrence and numerous commentators that government can rely on § 1001 to punish conduct that is otherwise hard to convict.¹⁶¹ For example, one defendant pleaded guilty under § 1001 for falsely stating that he knew nothing about his restaurant building being intentionally destroyed by fire and that he did not claim insurance proceeds.¹⁶² Rather than charging him with a substantive crime, which would have likely required circumstantial evidence to establish defendant's knowledge and involvement in the arson, it was certainly easier for

¹⁵⁸ 18 U.S.C. § 1012 provides:

Whoever, with intent to defraud, makes any false entry in any book of the Department of Housing and Urban Development or makes any false report or statement to or for such Department; or
Whoever receives any compensation, rebate, or reward, with intent to defraud such Department or with intent unlawfully to defeat its purposes; or
Whoever induces or influences such Department to purchase or acquire any property or to enter into any contract and willfully fails to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract--
Shall be fined under this title or imprisoned not more than one year, or both.

¹⁵⁹ See *supra* p. 2 for the full text of the statute. Under § 1001, the maximum punishment is five years, while under § 1012 the maximum punishment is only one year.

¹⁶⁰ As mentioned, defendants pleaded guilty to both § 1001 and a substantive crime in only 59 cases.

¹⁶¹ See *supra* note 56.

¹⁶² *United States v. Coon*, 2007 WL 3068978 (E.D. Mich. 2007).

prosecution to simply charge defendant with § 1001. Defendant, undoubtedly fearful of the possible harsher penalty for any substantive crime, probably took the § 1001 offer eagerly.

Similarly, in *United States v. Pabon-Santiago*¹⁶³ the defendant pleaded guilty to violating § 1001 for denying that she had been in Jacksonville with her co-defendant when in fact she had been there. The investigators who had questioned her knew that she was lying as they found a receipt for a hotel in Jacksonville.¹⁶⁴ Interestingly, the car driven by her and the co-defendant contained six kilograms of cocaine, yet defendant was not charged with any drug related offense. Why she was not charged with any substantive offense is not clear; it is possible that she was not the primary target of the investigation and it might have been difficult to prove that she knew that the drugs were in the car. Regardless, it is safe to assume that when she was charged with § 1001 as opposed to drug related offenses, the defendant jumped at the opportunity to plead guilty under § 1001, fearing that any possible substantive crime would have carried a much harsher penalty.

On the other hand, while it is clear that prosecutors rely on § 1001 in circumstances where it would arguably be hard to obtain convictions otherwise, it is not clear that this is always to the defendants' detriment. For example, in the two cases discussed above, both defendants arguably benefited from pleading guilty under § 1001 because the government probably did not want to risk acquittal on the more serious charges. In turn, the defendants were only punished under § 1001 rather than receiving a more severe punishment that they arguably deserved. The problem with that argument, however, is that it makes § 1001 a fall back crime: when the government can't prove the underlying crime, investigators can induce defendants, who are almost certain to deny any wrongdoing, into lying and enable prosecutors to convict defendants under § 1001 when they can't convict for the substantive crime. While one can arguably see this as benefiting

¹⁶³ 2005 WL 5872961 (M.D. FL 2005).

¹⁶⁴ This scenario is precisely what the commentators feared it would happen. Here, the defendant was actually given Miranda warnings, but Miranda does not warn that lying is a separate crime.

defendants who escape the more serious punishment, this practice is precisely the sort of “manufacturing of crimes” which is far from the “information gathering” purpose that the original statute was designed to serve.

6. Charging defendants with § 1001 when there is a substantive crime on point

One of the surprising findings of this survey was the frequency with which prosecutors obtain guilty pleas under § 1001 even when there is a substantive crime on point. Out of the 172 cases where defendants pleaded guilty to § 1001 only, the vast majority of them, if not all¹⁶⁵ could have been prosecuted under another crime.¹⁶⁶ On the other hand, there were 112 cases where defendants’ conduct clearly fell within the scope of § 1001 but prosecutors chose to charge the substantive crimes only. Even more interestingly, the conduct in the latter category was often extremely similar to the types of charges brought under § 1001, most notably fraud perpetrated on governmental agencies such as the Housing and Urban Development (HUD) agency, or various social security fraud schemes.¹⁶⁷

What was often the only distinguishing factor among these cases was the jurisdiction where the charges were brought.¹⁶⁸ In most jurisdictions surveyed, § 1001 was often utilized as

¹⁶⁵ Again, it is questionable whether those false statements made in the course of a criminal investigation could have been prosecuted under any other statute.

¹⁶⁶ Examples include applying for housing benefits and failing to disclose that the son was receiving social security benefits which could have been prosecuted under 18 U.S.C. § 1012 (United States v. Timmons, 2007 WL 3311382 (M.D. Fla. 2007)); marriage fraud to obtain immigration benefits could have been prosecuted under 8 U.S.C. § 1325(c) (United States v. Ezech, 2006 WL 4914651 (M.D. Fla. 2006)).

¹⁶⁷ Examples include charging defendant with theft of government money under 18 U.S.C. § 641 for submitting false statements to obtain social security supplemental income, rather than charging § 1001 (United States v. Blake, 2007 WL 3311464 (N.D. Ill. 2007)); charging defendant under 42 U.S.C. § 1383a(a)(3) for fraudulently obtaining social security supplemental income benefits as opposed to § 1001 (United States v. Cooper-Cooley, 2006 WL 4977053 (N.D. Ill. 2006)); charging defendant with filing false tax returns under 26 U.S.C. § 7206(1) as opposed to § 1001 (United States v. Greve, 2006 WL 4973467 (N.D. Ill. 2006)).

¹⁶⁸ For example, in Northern District of Illinois, there were 98 cases in which the government could have brought § 1001 charges but did not do so. On the other hand, other jurisdictions had only a handful of such cases: Eastern District of California had 4 cases; Western District of Louisiana: 1 case; District of Massachusetts: 1 case; District of Maryland: 1 case; Eastern District of Michigan: 2 cases; Eastern District of Virginia: 1 case; Southern District of Texas: 1 case, Western District of New York: 1 case; Northern District of New York: 1 case; and Eastern District of North Carolina: 1 case. This large discrepancy is in part due to a vastly different numbers of available plea agreements from each of these districts. Northern District of Illinois had by far the largest number of plea

the primary tool for enforcement of fraud perpetrated on governmental programs. In those jurisdictions, all sorts of various criminal behavior was simply prosecuted under § 1001, regardless of whether it was social security fraud, immigration, or HUD fraud. On the other hand, in the Northern District of Illinois, for example, where the U.S. Attorneys showed the most restraint in using § 1001, defendants generally pleaded guilty under the specific statutes rather than the broad, all encompassing § 1001.

There are several points to be made about this finding. First, while one might question the importance of these distinctions, especially in cases where the underlying punishment is the same, this haphazard, discretionary approach to federal criminal law threatens the integrity and efficacy of the law.¹⁶⁹ If certain conduct is prosecuted under one statute in one federal district and under another statute in another federal district, this can certainly lead to uncertainty and lack of uniformity in enforcement of federal crimes. Unlike state laws, which by definition differ from state to state, the federal criminal justice system is supposed to operate uniformly on the national level.

Second, and more importantly, it is rather strange and extremely unfair to have one defendant, in one district, plead guilty, for example, under § 18 U.S.C. 1012¹⁷⁰ which prohibits making of false statements to the HUD, and be sentenced to a maximum one year in prison, for the same conduct that another defendant is convicted under 18 U.S.C. § 1001 and sentenced to a maximum of five years in a different district.¹⁷¹ Same reasoning applies when § 1001 is used to

agreements available (496), whereas there were only a few plea agreements available from other districts such as District of Massachusetts (2), District of Maryland (2), or Eastern District of Michigan (18). Nonetheless, the discrepancy in numbers is large enough to suggest a real jurisdictional difference in prosecutorial reliance on § 1001.

¹⁶⁹ See *supra* notes 18-19 (Geraldine Szott Moohr, *What the Martha Stewart Case Tells us about White Collar Criminal Law*, 43 HOUS. L. REV. 591, 619 (2006)).

¹⁷⁰ For the full text of § 1012 *see supra*, note 158.

¹⁷¹ *Compare* United States v. Ware, 2006 WL 4915630 (M.D. Fla. 2006) (defendant pleaded guilty under § 1001 for making false statements to the Department of Housing and Urban Development) *with* United States v. Ernst, 2005

defendant's benefit,¹⁷² as for each of those instances, there is another defendant who is charged with the substantive crime arising out of similar facts, with a more serious punishment. The outcome is the same – unjustifiable, disparate treatment for the same conduct.¹⁷³

Had Congress intended prosecutors to use § 1001 to punish conduct that is covered by another more specific statute, then Congress would not have enacted those more specific statutes. For one, such practice renders the specific statutes superfluous and unnecessary.¹⁷⁴ And second, the specific provisions targeting a particular issue are there for a reason; they represent a judgment of Congress as to the appropriate punishment for a particular conduct.

7. Warnings

Finally, the findings regarding the frequency and types of factual scenarios when warnings were given are probably the most concerning. In 231 instances where defendants pleaded guilty to § 1001, warnings were given in 133 cases. However, those cases included 125 instances of § 1001 charges arising out of submission of false statements on some type of governmental forms, all of which contain warnings that submission of false statements constitutes a federal felony.¹⁷⁵

The more interesting and worrisome were the cases of face to face interactions between federal investigators and various defendants. There were 101 cases where defendants pleaded

WL 5902939 (N.D. Ill. 2005) (defendant pleaded guilty under 18 U.S.C. § 1012 for making false statements to the Department of Housing and Urban Development).

¹⁷² Compare *United States v. Arajuo*, 2007 WL 2718617 (C.D. Cal. 2007) (defendant pleaded guilty under 18 U.S.C. § 1542, “False Statement in Application for Passport,” which provides for a maximum penalty of ten years imprisonment) with *United States v. Orozco*, 2008 WL 345625 (C.D. Cal. 2008) (defendant pleaded guilty under § 1001, which provides for a maximum penalty of five years, for submitting false statements on a passport application).

¹⁷³ One can certainly argue, and be largely correct to say that these prosecutorial charging decisions reflect exercise of (almost) unreviewable discretion which reflects a judgment call regarding culpability of any given defendant. However, just because that is the current state of the law does not mean that it should not be criticized.

¹⁷⁴ This concern has specifically been raised in the context of securities laws enforcement, as the enactment of § 1001 with its low standard of criminal liability rendered certain securities laws arguably superfluous. See Arthur F. Mathews et al., *1990 Securities Enforcement Review*, 741 PLI/CORP 85 (1991).

¹⁷⁵ See *supra* note 147.

guilty to § 1001 based on materially false statements given in some type of face to face interactions with federal investigators. Out of those, in more than ninety percent of the cases, ninety three to be precise, no warnings were given. Examples of such factual scenarios include: defendant falsely claimed that he did not know the identity of the individual who caused certain explosion when “he did know the identity of the individual who had caused said explosion”¹⁷⁶ (there was no substantive charge and no warnings); defendant falsely told an FBI agent that he was not sure and could not tell one way or another whether his brother wanted to become a suicide bomber when in effect defendant had a letter from his brother saying that he did¹⁷⁷ (no substantive charge and no warnings); two defendants were charged with § 1001 for stating that they did not know where certain drugs came from and for failing to provide further information to the FBI regarding the underlying crime¹⁷⁸ (neither defendant was charged with any substantive crime and there were no warnings). Furthermore, out of the ninety three cases when no warnings were given in face to face encounters, in sixty eight cases § 1001 was the only crime defendants pleaded guilty to. Thus, about 70% of the cases involving face to face interactions represent precisely the types of factual scenarios commentators feared would result in § 1001 charges: where defendants are questioned about criminal activity, not given warnings that lying is a crime, and then convicted solely under § 1001 and for no substantive crime.

One can arguably see this trend as benefiting defendants who avoid multiple charges.

Furthermore, it would certainly seem anomalous to advocate that prosecutors charge § 1001 only

¹⁷⁶ United States v. Alba, 2005 WL 5902999 (N.D. Ill. 2005) (though the ATF agents did identify themselves as such, the facts in the plea agreement do not indicate that defendant was given any type of warning that lying to the agents would constitute a federal crime. The defendant was only charged with § 1001 and no substantive crime).

¹⁷⁷ United States v. Subeh, 2007 WL 4664387 (W.D.N.Y. 2007) (the facts of this case are rather remarkable and were described in the introduction. Defendant “suspected” his brother wanted to become a suicide bomber, and defendant actually tried to stop him. But, because he was questioned by the FBI, and no warnings were given to him explaining that lying to the FBI constituted a federal felony, defendant was convicted for § 1001.).

¹⁷⁸ United States v. Lewis, 2006 WL 5051925 (W.D.N.Y. 2006); United States v. Lewis, 2006 WL 5051929 (W.D.N.Y. 2006).

in addition to the substantive crime, as that would constitute precisely the type of “piling on” of offenses commentators feared. However, the frequent absence of substantive charges in these cases seems to indicate that prosecutors use § 1001 when they are unable to prove the underlying crime. Furthermore, since these cases often occur “under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction,”¹⁷⁹ this practice resembles, as discussed above,¹⁸⁰ “manufacturing of crimes”: if suspects are unaware that making materially false statements is a federal felony, they are “very likely to lie,” and federal investigators can “set up violations that they fully expect to occur.” Since prosecutors seem to rely on § 1001 in such instances, defendants should at least get the benefit of warnings.

IV. WHERE DO WE GO FROM HERE?

As previously suggested,¹⁸¹ there have been several proposals made for restricting the broad scope of § 1001. One of easiest way to overcome problems addressed in this paper is to hope that prosecutors will not continue to bring charges under § 1001 in the circumstances such as described above, both with respect to informal interviews when defendants are not given specific warnings as well as in those instances when there is a specific criminal statute on point. However, at least with respect to the first problem, even at the time Brogan was indicted and convicted, the Department of Justice had a policy against bringing § 1001 prosecutions for statements amounting to an “exculpatory no.”¹⁸² The United State’s Attorney’s Manual “firmly

¹⁷⁹ See *supra* part II (Justice Ginsburg’s concurrence).

¹⁸⁰ See *supra* p. 31.

¹⁸¹ See *supra*, part II.

¹⁸² *Brogan*, 522 U.S. at 415.

declared”¹⁸³ that “‘where the statements take the form of an ‘exculpatory no,’ 18 U.S.C. § 1001 does not apply regardless of who asks the question.’”¹⁸⁴ Yet despite this policy, Brogan and countless other defendants were convicted under § 1001 precisely under the scenario envisioned by the Justice Department. After the *Brogan* holding that prosecutions for falsely denying guilt can be sustained under the broad language of § 1001”¹⁸⁵ the only impediment between the DOJ and an easy conviction is the practically un-reviewable prosecutorial discretion.

Many of the proposals suggested by various commentators¹⁸⁶ would certainly help ameliorate the harsh consequences of § 1001’s broad scope, and would achieve the uniformity of application and a sense of fairness in criminalizing the conduct that the statute was designed to prevent.¹⁸⁷ Specifically, giving all interviewees warnings, not only that they have the right to remain silent, but more importantly that lying is a federal felony, would increase compliance with § 1001’s purpose of “information gathering” as opposed to “crime manufacturing.” Of the plea agreements surveyed, there were several instances, though extremely few, when specific warnings were given, cautioning defendants that lying was a separate crime. For example, a confidential informant who was supposed to arrange to buy a firearm, but instead stole the money and lied that he was robbed, was specifically warned that lying was a crime;¹⁸⁸ another defendant was interviewed regarding a real estate loan application and was specifically told that lying was a crime.¹⁸⁹ Though these particular defendants still lied despite the warnings that lying was a crime, the fact that they were given warnings certainly contributed to the legitimacy and fairness of their convictions. Furthermore, giving such warnings would possibly increase

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 415 (quoting the United States Attorney’s Manual & para; 9-42.160 (Oct. 1, 1988)).

¹⁸⁵ *Brogan*, 522 U.S. 415.

¹⁸⁶ *See supra* part II.

¹⁸⁷ *See supra* part I.

¹⁸⁸ *United States v. Hernandez*, 2007 WL 3299334 (E.D. Wash. 2007).

¹⁸⁹ *United States v. Martinez*, 2007 WL 2764296 (C.D. Cal. 2007).

the odds that the defendant would either choose to remain silent and thus not mislead the investigators, or would choose to tell the truth which would help the “information gathering” function of federal agencies.

Other proposals for amending the statute, namely requiring that knowledge of unlawfulness be an element of the crime, as well as changing the materiality standard to require that the false statement actually mislead or obstruct the government's investigation would both improve the haphazard way in which the § 1001 is currently utilized. The knowledge element would likely achieve similar results to those achieved by mandatory warnings: it would hopefully result in fewer defendants giving false statements and misleading investigators; second, it would certainly be more fair to hold criminally liable those defendants who knowingly choose to lie as opposed to those who do so “regrettably but humanly.” Further, interpreting the materiality element as requiring that the lie actually mislead or obstruct the government’s investigation would be entirely consistent with the original purpose of the statute which was to “protect the authorized functions of governmental departments and agencies.” With all due respect to Justice Scalia’s view that it would be “exceedingly strange” to distinguish disbelieved from believed falsehoods, that is precisely what needs to happen, as disbelieved falsehoods do not impede government functions in any way.¹⁹⁰ On the contrary, disbelieve falsehoods only serve to convict defendants whose substantive crimes are “otherwise hard to prove.”

Finally, prosecutors should certainly be required to charge defendants with specific criminal statute, if available, rather than relying on the broad language of § 1001. As explained

¹⁹⁰ Furthermore, though materiality is similarly defined in other areas of the law as an objective element, for example as requiring that information “assumes actual significance in the deliberations of the *reasonable* [person],” *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (addressing the test for materiality under Rule 10b-5 of the Securities and Exchange Act) (emphasis added), reliance element often serves as a limiting factor, requiring that the person alleging material misrepresentation actually relied on such statements. Since § 1001 does not contain reliance as one of the elements, materiality requirement should be interpreted to require that the material statements actually affect government functions in order to preserve the limited purpose of § 1001.

above,¹⁹¹ in those instances where maximum punishments are different, charging defendants with § 1001 as opposed to the substantive crime both defies Congressional determination as to how severely certain conduct should be punished, as well as makes the specific statutes “superfluous and unnecessary.”

CONCLUSION

Section 1001 as well as *Brogan* have prompted many commentators to address the potential problems associated with the broad scope of § 1001 and to predict the impact *Brogan* would have on subsequent prosecutions under § 1001. Though this empirical data might not paint as bleak of a picture of prosecutorial reliance on § 1001 as commentators feared, the data certainly suggest that there is much inconsistency in the way § 1001 is utilized among different jurisdictions, and confirms that prosecutors do often prosecute defendants who have not been warned that lying is a federal felony under § 1001 for falsely denying their guilt. Therefore, Congress should amend the statute to require that warnings be given, to impose the knowledge of unlawfulness as an element of the crime, to redefine the materiality element, and finally, to require prosecutors to charge specific statutes whenever available rather than rely on the all encompassing § 1001.

¹⁹¹ See *supra* part III.