SUPREME COURT OF THE UNITED STATES

No. 96–1579

JAMES BROGAN, PETITIONER *v.* UNITED STATES

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

[January 26, 1998]

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

Although I agree with nearly all of what Justice Ginsburg has written in her concurrence–a concurrence that raises serious concerns that the Court totally ignores–I dissent for the following reasons.

The mere fact that a false denial fits within the unqualified language of 18 U. S. C. §1001 is not, in my opinion, a sufficient reason for rejecting a well-settled interpretation of that statute. It is not at all unusual for this Court to conclude that the literal text of a criminal statute is broader than the coverage intended by Congress. See, *e.g.*, *Staples* v. *United States*, 511 U. S. 600, 605, 619 (1994); *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 68–69 (1994) (departing from "most natural grammatical reading" of statute because of "anomalies which result from this construction," and presumptions with respect to scienter in criminal statutes and avoiding constitutional questions); *Id.*, at 81 (stating that lower court interpretation of statute rejected by the Court was "quite obviously *the only grammatical reading*") (SCALIA, J., dissenting); *Williams* v. *United States*, 458 U. S. 279, 286 (1982) (holding that statute prohibiting the making of false statements to a bank was inapplicable to depositing of a "bad check" because "the Government's interpretation . . . would make a surprisingly

broad range of unremarkable conduct a violation of federal law"); *Sorrells* v. *United States*, 287 U. S. 435, 448 (1932) ("We are unable to conclude that it was the intention of the Congress in enacting [a Prohibition Act] statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them"); *United States* v. *Palmer*, 3 Wheat. 610, 631 (1818) (holding that although "words 'any person or persons,' [in maritime robbery statute] are broad enough to comprehend every human being . . . general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them") (Marshall, C. J.). Although the text of §1001, read literally, makes it a crime for an undercover narcotics agent to make a false statement to a drug peddler, I am confident that Congress did not intend any such result. As Justice Ginsburg has explained, it seems equally clear that Congress did not intend to make every "exculpatory no" a felony.[1]

Even if that were not clear, I believe the Court should show greater respect for the virtually uniform understanding of the bench and the bar that persisted for decades with, as Justice Ginsburg notes, *ante*, at 7–8, the approval of this Court as well as the Department of Justice.[2] See *Central Bank of Denver, N. A.* v. *First Interstate*

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[1] "[M]eaning in law depends upon an understanding of purpose. Law's words, however technical they may sound, are not magic formulas; they must be read in light of their purposes, if we are to avoid essentially arbitrary applications and harmful results." *Behrens* v. *Pelletier*, 516 U. S. 299, 324 (1996) (BREYER, J., dissenting).

[2] It merits emphasis that the Memorandum for the United States filed in support of its confession of error in *Nunley* v. *United States*, 434 U. S. 962 (1977), contains a detailed discussion of the many cases that had endorsed the "exculpatory no" doctrine after the 1934 amendment to §1001. Memorandum for United States in *Nunley* v. *United States*, O. T. 1977, No. 77–5069, pp. 4–8.

Bank of Denver, N. A., 511 U. S. 164, 192–198 (1994) (STEVENS, J., dissenting); *McNally* v. *United States*, 483 U. S. 350, 362–364, 376 (1987) (STEVENS, J., dissenting).[3] Or, as Sir Edward Coke phrased it, "it is the common opinion, and *communis opinio* is of good authoritie in law."[4] 1 E. Coke, Institutes 186a (15th ed. 1794).

Accordingly, I respectfully dissent.

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[3]Although I do not find the disposition of this case as troublesome as the decision in *McNally*, this comment is nevertheless apt:

"Perhaps the most distressing aspect of the Court's action today is its casual–almost summary–rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present. The quality of this Court's work is most suspect when it stands alone, or virtually so, against a tide of well-considered opinions issued by state or federal courts. In these cases I am convinced that those judges correctly understood the intent of the Congress that enacted this statute. Even if I were not so persuaded, I could not join a rejection of such a longstanding, consistent interpretation of a federal statute." *McNally* v. *United States*, 483 U. S., at 376–377 (STEVENS, J., dissenting).

[4]The majority's invocation of the maxim *communis error facit jus* adds little weight to their argument. As Lord Ellenborough stated in *Isherwood* v. *Oldknow*, 3 Maule & Selwyn 382, 396–397 (K. B. 1815):

"It has been sometimes said, *communis error facit jus*; but I say *communis opinio* is evidence of what the law is; not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the ground-work and substratum of practice." See also *United States* v. *The Reindeer*, 27 F. Cas. 758, 762 (No. 16, 145) (CC RI 1848).