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 SCALIA delivered the opinion of the Court.

This case presents the question whether there is an exception to criminal liability under 18 U. S. C. §1001 for a false statement that consists of the mere denial of wrongdoing, the so-called "exculpatory no."

I

While acting as a union officer during 1987 and 1988, petitioner James Brogan accepted cash payments from JRD Management Corporation, a real estate company whose employees were represented by the union. On October 4, 1993, federal agents from the Department of Labor and the Internal Revenue Service visited petitioner at his home. The agents identified themselves and explained that they were seeking petitioner's cooperation in an investigation of JRD and various individuals. They told petitioner that if he wished to cooperate, he should have an attorney contact the U. S. Attorney's Office, and that if he could not afford an attorney, one could be appointed for him.

The agents then asked petitioner if he would answer some questions, and he agreed. One question was

whether he had received any cash or gifts from JRD when he was a union officer. Petitioner's response was "no." At that point, the agents disclosed that a search of JRD headquarters had produced company records showing the contrary. They also told petitioner that lying to federal agents in the course of an investigation was a crime. Petitioner did not modify his answers, and the interview ended shortly thereafter.

Petitioner was indicted for accepting unlawful cash payments from an employer in violation of 29 U. S. C. §§186(b)(1), (a)(2), (d)(2), and making a false statement within the jurisdiction of a federal agency in violation of 18 U. S. C. §1001. He was tried, along with several co-defendants, before a jury in the United States District Court for the Southern District of New York, and was found guilty. The United States Court of Appeals for the Second Circuit affirmed the convictions, 96 F. 3d 35 (1996). We granted certiorari on the issue of the "exculpatory no." 520 U. S. ___ (1997).

II

At the time petitioner falsely replied "no" to the Government investigators' question, 18 U. S. C. §1001 (1988 ed.) 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."

By its terms, 18 U. S. C. §1001 covers "any" false statement– that is, a false statement "of whatever kind,"

United States v. *Gonzales*, 520 U. S. ___, ___ (1997) (slip op., at 3) (internal quotation marks and citation omitted). The word "no" in response to a question assuredly makes a "statement," see *e.g.*, Webster's New International Dictionary 2461 (2d ed. 1950) (def. 2: "That which is stated; an embodiment in words of facts or opinions"), and petitioner does not contest that his utterance was false or that it was made "knowingly and willfully." In fact, petitioner concedes that under a "literal reading" of the statute he loses. Brief for Petitioner 5.

Petitioner asks us, however, to depart from the literal text that Congress has enacted, and to approve the doctrine adopted by many Circuits which excludes from the scope of §1001 the "exculpatory no." The central feature of this doctrine is that a simple denial of guilt does not come within the statute. See, *e.g.*, *Moser* v. *United States*, 18 F. 3d 469, 473–474 (CA7 1994); *United States* v. *Taylor*, 907 F. 2d 801, 805 (CA8 1990); *United States* v. *Equihua-Juarez*, 851 F. 2d 1222, 1224 (CA9 1988); *United States* v. *Cogdell*, 844 F. 2d 179, 183 (CA4 1988); *United States* v. *Tabor*, 788 F. 2d 714, 717–719 (CA11 1986); *United States* v. *Fitzgibbon*, 619 F. 2d 874, 880–881 (CA10 1980); *United States* v. *Chevoor*, 526 F. 2d 178, 183–184 (CA1 1975), cert. denied, 425 U. S. 935 (1976). There is considerable variation among the Circuits concerning, among other things, what degree of elaborated tale-telling carries a statement beyond simple denial. See generally Annot., 102 A. L. R. Fed. 742 (1991). In the present case, however, the Second Circuit agreed with petitioner that his statement would constitute a "true 'exculpatory n[o]' as recognized in other circuits," 96 F. 3d, at 37, but aligned itself with the Fifth Circuit (one of whose panels had been the very first to embrace the "exculpatory no" see *Paternostro* v. *United States*, 311 F. 2d 298 (CA5 1962)) in categorically rejecting the doctrine, see *United States* v. *Rodriguez-Rios*, 14 F. 3d 1040 (CA5 1994) (en banc).

Petitioner's argument in support of the "exculpatory no" doctrine proceeds from the major premise that §1001 criminalizes only those statements to Government investigators that "pervert governmental functions"; to the minor premise that simple denials of guilt to government investigators do not pervert governmental functions; to the conclusion that §1001 does not criminalize simple denials of guilt to Government investigators. Both premises seem to us mistaken. As to the minor: We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard-of.[1] Moreover, as we shall see, the only support for the "perversion of governmental functions" limitation is a statement of this Court referring to the *possibility* (as opposed to the certainty) of perversion of function– a possibility that exists whenever investigators are told a falsehood relevant to their task.

In any event, we find no basis for the major premise that only those falsehoods that pervert governmental

---

[1] "The government need not show that because of the perjured testimony, the grand jury threw in the towel. . . . Grand jurors . . . are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer." *United States* v. *Abrams*, 568 F. 2d 411, 421 (CA5), cert. denied, 437 U. S 903 (1978). See generally 70 C. J. S. Perjury §13, pp. 260–261 (1987).

functions are covered by §1001. Petitioner derives this premise from a comment we made in *United States* v. *Gilliland*, 312 U. S. 86 (1941), a case involving the predecessor to §1001. That earlier version of the statute subjected to criminal liability "'whoever shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States . . . .'" *Id.*, at 92–93. The defendant in *Gilliland*, relying on the interpretive canon *ejusdem generis*,[2] argued that the statute should be read to apply only to matters in which the Government has a financial or proprietary interest. In rejecting that argument, we noted that Congress had specifically amended the statute to cover "'any matter within the jurisdiction of any department or agency of the United States,'" thereby indicating "the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *Id.*, at 93. Petitioner would elevate this statement to a holding that §1001 does not apply where a perversion of governmental functions does not exist. But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself. The holding of *Gilliland* certainly does not exemplify such a

---

[2] "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 129 (1991).

practice, since it *rejected* the defendant's argument for a limitation that the text of the statute would not bear. And even the relied-upon dictum from *Gilliland* does not support restricting text to supposed purpose, but to the contrary acknowledges the reality that the reach of a statute often exceeds the precise evil to be eliminated. There is no inconsistency whatever between the proposition that Congress intended "to protect the authorized functions of governmental departments and agencies from the perversion which might result" and the proposition that the statute forbids *all* "the deceptive practices described." *Ibid.*

The second line of defense that petitioner invokes for the "exculpatory no" doctrine is inspired by the Fifth Amendment. He argues that a literal reading of §1001 violates the "spirit" of the Fifth Amendment because it places a "cornered suspect" in the "cruel trilemma" of admitting guilt, remaining silent, or falsely denying guilt. Brief for Petitioner 11. This "trilemma" is wholly of the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a "lemma," Allen, The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets, 67 U. Colo. L. Rev. 989, 1016 (1996)). And even the honest and contrite guilty person will not regard the third prong of the "trilemma" (the blatant lie) as an available option. The *bon mot* "cruel trilemma" first appeared in Justice Goldberg's opinion for the Court in *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964), where it was used to explain the importance of a suspect's Fifth Amendment right to remain silent when subpoenaed to testify in an official inquiry. Without that right, the opinion said, he would be exposed "to the cruel trilemma of self-accusation, perjury or contempt." *Id.*, at 55. In order to validate the "exculpatory no," the elements of this "cruel trilemma" have now been altered– ratcheted up, as it were, so that the right to

remain silent, which was the *liberation* from the original trilemma, is now *itself* a cruelty. We are not disposed to write into our law this species of compassion inflation.

Whether or not the predicament of the wrongdoer run to ground tugs at the heart strings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. "[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely." *United States* v. *Apfelbaum*, 445 U. S. 115, 117 (1980). See also *United States* v. *Wong*, 431 U. S. 174, 180 (1977); *Bryson* v. *United States*, 396 U. S. 64, 72 (1969). Petitioner contends that silence is an "illusory" option because a suspect may fear that his silence will be used against him later, or may not even know that silence is an available option. Brief for Petitioner 12–13. As to the former: It is well established that the fact that a person's silence can be used against him– either as substantive evidence of guilt or to impeach him if he takes the stand– does not exert a form of pressure that exonerates an otherwise unlawful lie. See *United States* v. *Knox*, 396 U. S. 77, 81–82 (1969). And as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized "Miranda" warnings, that is implausible. Indeed, we found it implausible (or irrelevant) 30 years ago, unless the suspect was "in custody or otherwise deprived of his freedom of action in any significant way," *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966).

Petitioner repeats the argument made by many supporters of the "exculpatory no," that the doctrine is necessary to eliminate the grave risk that §1001 will become an instrument of prosecutorial abuse. The supposed danger is 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. The objectors' principal grievance on this score,

however, lies not with the hypothetical prosecutors but with Congress itself, which has decreed the obstruction of a legitimate investigation to be a separate offense, and a serious one. It is not for us to revise that judgment. Petitioner has been unable to demonstrate, moreover, any history of prosecutorial excess, either before or after widespread judicial acceptance of the "exculpatory no." And finally, if there is a problem of supposed "overreaching" it is hard to see how the doctrine of the "exculpatory no" could solve it. It is easy enough for an interrogator to press the liar from the initial simple denial to a more detailed fabrication that would not qualify for the exemption.

III

A brief word in response to the dissent's assertion that the Court may interpret a criminal statute more narrowly than it is written: Some of the cases it cites for that proposition represent instances in which the Court did *not* purport to be departing from a reasonable reading of the text, *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 77–78 (1994); *Williams* v. *United States*, 458 U. S. 279, 286–287 (1982). In the others, the Court applied what it thought to be a background interpretive principle of general application. *Staples* v. *United States*, 511 U. S. 600, 619 (1994) (construing statute to contain common-law requirement of *mens rea*); *Sorrells* v. *United States*, 287 U. S. 435, 446 (1932) (construing statute not to cover violations produced by entrapment); *United States* v. *Palmer*, 3 Wheat. 610, 631 (1818) (construing statute not to apply extraterritorially to noncitizens). Also into this last category falls the dissent's correct assertion that the present statute does not "ma[ke] it a crime for an undercover narcotics agent to make a false statement to a drug peddler." *Post*, at 2. Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. See, *e.g.*, 2 P. Robinson, Criminal Law Defenses §142(a), p. 121 (1984) ("Every

American jurisdiction recognizes some form of law enforcement authority justification").

It is one thing to acknowledge and accept such well defined (or even newly enunciated), generally applicable, background principles of assumed legislative intent. It is quite another to espouse the broad proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions. The problem with adopting such an expansive, user-friendly judicial rule, is that there is no way of knowing when, or how, the rule is to be invoked. As to the when: The only reason JUSTICE STEVENS adduces for invoking it here is that a felony conviction for this offense seems to him harsh. Which it may well be. But the instances in which courts may ignore harsh penalties are set forth in the Constitution, see Art. 1, §9; Art. III, §3; Amdt. 8; Amdt. 14, §1; and to go beyond them will surely leave us at sea. And as to the how: There is no reason in principle why the dissent chooses to mitigate the harshness by saying that §1001 does not embrace the "exculpatory no," rather than by saying that §1001 has no application unless the defendant has been warned of the consequences of lying, or indeed unless the defendant has been put under oath. We are again at sea.

To be sure, some of this uncertainty would be eliminated, at our stage of judging, if we wrenched out of its context the principle quoted by the dissent from Chancellor Coke, that "*communis opinio* is of good authoritie in law,"[3] and if we applied that principle consistently to a

---

[3] Chancellor Coke said this in reference not to statutory law but to the *lex communis*, which most of his illustrious treatise dealt with. E. Coke, Institutes (15th ed. 1794). As applied to that, of course, the statement is not only true but almost an iteration; it amounts to saying that the common law is the common law.

consensus in the judgments of the courts of appeals. (Of course the courts of appeals themselves, and the district courts, would still be entirely at sea, until such time as a consensus would have developed.) But the dissent does not propose, and its author has not practiced, consistent application of the principle, see, *e.g.*, *Hubbard* v. *United States*, 514 U. S. 695, 713 (1995) (STEVENS, J.) ("We think the text of §1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial functions exception"); *Chapman* v. *United States*, 500 U. S. 453, 468 (1991) (STEVENS, J., dissenting) (disagreeing with the unanimous conclusions of the courts of appeals that interpreted the criminal statute at issue); thus it becomes yet another user-friendly judicial rule to be invoked *ad libitum*.

* * *

In sum, we find nothing to support the "exculpatory no" doctrine except the many Court of Appeals decisions that have embraced it. While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court's jurisprudence. Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language of §1001 admits of no exception for an "exculpatory no," we affirm the judgment of the Court of Appeals.

It is so ordered.