Can You Lie to the Government and Get Away with It--The Exculpatory-No Defense under 18 U.S.C. 1001

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“Lying is not only excusable; it is not only innocent, and
instinctive; it is, above all, necessary and unavoidable...”

H.L. Mencken¹

I. INTRODUCTION

Lieutenant Kelly Flinn, the nation’s first female B-52 pilot,² was asked by
Air Force investigators if she had had an adulterous affair with a married man.
Lieutenant Flinn lied. She was afraid “the truth would end her dream of flying

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² H.L. MENCKEN, PREJUDICES: FOURTH SERIES 15 (1924) quoted in INTERNATIONAL THESAURUS OF

² Flinn Wants Honorable Discharge, ST. PETERSBURG TIMES, May 20, 1997, at 3A.
fighter jets.\textsuperscript{3} But the investigators had other evidence, and so Lieutenant Flinn was not only charged with adultery by the United States Air Force, but she was also charged with violating Article 107 of the Uniform Code of Military Justice (UCMJ)\textsuperscript{4} which is the military analogue to 18 U.S.C. § 1001.\textsuperscript{5}

18 U.S.C. § 1001 purports to criminalize false statements made to government investigators.\textsuperscript{6} Lieutenant Flinn could have raised as a defense to the false statement charge, the “exculpatory-no” doctrine.\textsuperscript{7} According to this doctrine,\textsuperscript{8}

\begin{enumerate}
\item \textit{Id.}\textsuperscript{4}
\item Uniform Code of Military Justice, 10 U.S.C. § 907, Art. 107 (1994) provides that “[a]ny person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.”
\item See Lt. Brent G. Filbert, \textit{Article 107, Uniform Code of Military Justice: Not a License to Lie}, ARMY LAW., 1994 - MAR, at 3, 4 (“In Hutchins, the United States Court of Military Appeals (COMA) held that a ‘general analogy’ between Article 107 and § 1001 existed . . . The COMA also held that the purpose of both statutes was identical . . . The Hutchins decision was important . . . because it firmly established the link between Article 107 and § 1001 - a connection still recognized today.”).

Section 1001 covers all statements, whether oral or written, sworn or unsworn, voluntary or required by law. Such statements include invoices and certifications, credit card statements, checks naming false drawees (but not “bad” checks), applications to obtain official documents, . . . identifications to border agents, information given to customs agents, Medicare claims, radio distress signals broadcast to naval aircraft, marriage vows given to gain citizenship, information given to federal investigators, and a wide variety of statements to other governmental entities, usually made in attempts to profit under false pretenses.

\textit{Id.} (footnotes omitted).
\item See Filbert, supra note 5, at 9 (stating that COMA has recognized the exculpatory-no defense, although they have never used it to overrule an Article 107 conviction).
\item There is considerable divergence over the exact content of this “doctrine.” See United States v. Wiener, 96 F.3d 35, 40 (2d Cir. 1996) ("[E]ven among circuits that have adopted it, there is a considerable divergence concerning its content."). \textit{Compare} United States v. Becker, 855 F.2d 644, 646 (9th Cir. 1988) (setting out a five-part test which must be satisfied before applying the "exculpatory-no" limitation: (1) the false statement must not involve a claim against the government; (2) the declarant must be responsive to inquiries initiated by federal agency; (3) the statement must not impair a governmental function; (4) the government inquiry must not have constituted a routine exercise of administrative, as opposed to investigative, responsibility; and (5) a truthful answer would have incriminated the defendant) \textit{with} United States v. Steele, 933 F.2d 1313, 1321 (6th Cir. 1991) (en banc) (rejecting the Ninth Circuit test as too broad), \textit{cert. denied}, 502 U.S. 909 (1991).

Even among those Courts of Appeals adopting the Ninth Circuit test, there is a divergence
"a person may not be prosecuted for making a false exculpatory response to government investigators." In its most common form, the defense operates when a defendant simply says no, he did not commit the crime, in response to questioning by a government investigator. Other courts have extended the defense to immunize more elaborate, discursive denials of guilt.

Although the United States Supreme Court has not addressed the doctrine, the Court has accepted certiorari on a Second Circuit exculpatory-no case. The federal circuits are divided on whether the exculpatory-no doctrine is a defense to

as to how liberally or narrowly the elements of the test should be applied. See generally John E. Davis & Michael K. Forde, Tenth Survey of White Collar Crime: False Statements, 32 AM. CRIM. L. REV. 323, 331, n.38 (Winter 1995) (discussing differences between Fourth Circuit’s and Ninth Circuit’s application of five-part test). There is also a divergence of authority between those circuits that permit an affirmative exculpatory story or statement to qualify as an “exculpatory-no.” See, e.g., United States v. Myers, 878 F.2d 1142, 1144 (9th Cir. 1989) (applying doctrine to affirmative statements of Secret Service agents); United States v. Moore, 27 F.3d 969, 979 (4th Cir. 1994) (stating “exculpatory-no” doctrine does not extend to misleading exculpatory stories or affirmative statements other than simple denials); United States v. King, 613 F.2d 670, 674 (7th Cir. 1980) (holding “exculpatory-no” applies only where the responses to government inquiry are merely “no” without affirmative discursive falsehood, under circumstances indicating that defendant is both unaware that he is under investigation, and is not making a claim or seeking employment); See generally Davis & Forde, supra at 331 (discussing other conflicts of circuit authority); Tim A. Thomas, Annotation, What Statements Fall Within Exculpatory Denial Exception to Prohibition, Under 18 USCS § 1001, Against Knowingly and Willfully Making False Statement Which is Material to Matter Within Jurisdiction of Department or Agency of United States, 102 A.L.R. Fed. 742, 748-49 (1991).

9 U.S. v. Equihua-Juarez, 851 F.2d 1222, 1224 (9th Cir. 1988) ("The ‘exculpatory no’ doctrine provides an exception to [Section] 1001. If certain requirements are met, a person may not be prosecuted under [Section] 1001 for making a false exculpatory response to government investigators."); See, e.g., United States v. Tabor, 788 F.2d 714, 715 (11th Cir. 1986) ("[T]he federal courts have held that in some circumstances false statements exculpatory in nature, though made to a department or agency of the United States, are not criminalized by [Section] 1001."); See also Wiener, 96 F.3d at 36 ("[T]he doctrine embodies the view that Section 1001 is generally not applicable to false statements that are essentially exculpatory denials of criminal activity.").

a prosecution under 18 U.S.C. § 1001.\(^{11}\) It has been recognized by seven circuits,\(^{12}\) and the defense has been rejected by two.\(^{13}\)

18 U.S.C. § 1001 contains three clauses that criminalize three kinds of conduct: concealing a material fact, making a false statement, and using a false writing. The false statement clause to which the exculpatory-no doctrine is directed is the second clause of 18 U.S.C. § 1001. It provides:

> 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 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.\(^{14}\)

In order to convict a defendant under the plain language of 18 U.S.C. § 1001, the government must prove that the accused (1) knowingly and willfully, (2) made a statement, (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge that it was false, fictitious, and fraudulent.\(^{15}\)

By the plain language of the statute, the false statement clause would seem to prohibit any and all false statements. It does not contain an exception for false

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\(^{11}\) See, e.g., Kraft & Sadoff, supra note 6, at 547 ("The circuits are split on the applicability of section 1001 to exculpatory denials."); See also Sandra L. Turner, Note, Would I lie to You? The Sixth Circuit Joins the "Exculpatory No" Controversy in United States v. Steele, 81 KY. L.J. 213, 218 (1992/1993) ("Not only is there disagreement as to the appropriate form of the exculpatory no doctrine, but also as to the proper application of the doctrine. This conflict presents a disturbing inconsistency that demands clarification."); See also Timothy I. Nicholson, Note, Just Say "No": An analysis of the "Exculpatory No" Doctrine, 39 WASH. U. J. URB. & CONTEMP. L. 225, 226 (1991) ("Although a majority of the federal circuits purport to adopt the doctrine, the supporting rationales are inconsistent. Consequently, tests for the application of the doctrine likewise vary from circuit to circuit.").

\(^{12}\) See infra notes 16-22.

\(^{13}\) See infra notes 23-24.


\(^{15}\) See Weiner, 96 F.3d at 37.
denials of guilt. But seven circuit courts of appeal, the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh, have adopted the exculpatory-no

16 See United States v. Chevoor, 526 F.2d 178, 183-184 (1st Cir. 1975) (discussing for the first time in the circuit the exculpatory-no defense, albeit not denoting it as such).

17 See United States v. Cogdell, 844 F.2d 179, 182 (4th Cir. 1988) ("We agree with Cogdell's contention that her conviction under section 1001 of making false statements to the investigating agent cannot stand. We conclude, applying the 'exculpatory no' doctrine . . ."); see also United States v. Moore, 27 F.3d 969, 978 (4th Cir. 1994) ("This circuit has embraced the 'exculpatory no' doctrine.").

18 See Moser v. United States, 18 F.3d 469, 473-474 (7th Cir. 1994):
   The "exculpatory no" doctrine represents a judicial gloss on 18 U.S.C. [Section] 1001. A careful examination of cases in the Supreme Court of the United States dealing with Section 1001 reveals that this concept has not found favor there. In a very narrow and limited fashion, it has found favor here. It therefore becomes our obligation to examine this record under the concept of "exculpatory no" which has evolved in this circuit.

Id. (citations omitted).

19 See United States v. Taylor, 907 F.2d 801, 804 (8th Cir. 1990):
   The circuits which have squarely addressed the applicability of the "exculpatory no" doctrine have concluded that, "under certain circumstances, the government may not prosecute an individual for false or fraudulent statements which were made in response to questioning initiated by the government where a truthful statement would have incriminated the defendant." An examination of these cases persuades us as well that we should apply the "exculpatory no" doctrine to this case.

Id. (citations omitted).

20 See United States v. Equihua-Juarez, 851 F.2d 1222, 1224 (9th Cir. 1988) ("The 'exculpatory no' doctrine provides an exception to [Section] 1001 . . . . In Medina De Perez, combining elements drawn from Bedore and Rose, we discussed five factors that should be satisfied to apply the 'exculpatory no' doctrine . . . .") (citations omitted).

21 See United States v. Fitzgibbon, 619 F.2d 874, 880 (10th Cir. 1980) ("We have held, in enunciating the so-called 'exculpatory-no' doctrine, that essentially negative answers to questions propounded by investigating government officials are not statements within the meaning of the second clause of [Section] 1001 in the absence of some affirmative, aggressive, or overt falsehood on the defendant.").

22 See United States v. Tabor, 788 F.2d 714, 719 (11th Cir. 1986) ("Here as in Bush and Paternostro, the agent acting in a police role, aggressively sought a statement from a person under suspicion and not warned. The answer was essentially an exculpatory 'no' as to possible criminal activity. All of the bases for the exception to [Section] 1001 apply here.").
exception. Two circuits, the Fifth, and most recently the Second, have rejected the doctrine based on its departure from the plain language of 18 U.S.C. § 1001.

Supporters of the defense have been concerned that permitting a conviction for an oral, unsworn statement would be unfair since the 18 U.S.C. § 1001 crime is punishable with greater severity than that of perjury. They are also concerned that 18 U.S.C. § 1001 swallows up the perjury statute and a plethora of other more specific federal statutes that proscribe the making of false statements to specific agencies and activities of government. They have also expressed concern about the chilling effect aggressive prosecution, under 18 U.S.C. § 1001, will have on the willingness of citizens to come forward and aid federal investigations, where the most trivial and innocent statement can result in a felony prosecution. These concerns underlie or supplement the potential legal bases for the defense: (1) the privilege against self-incrimination, and (2) the statutory history of 18 U.S.C. § 1001.

Some of the circuits have suggested the need for the exculpatory-no doctrine because the broad application of section 1001 comes "uncomfortably close" to infringing on Fifth Amendment rights, although no circuit has directly based its decision on the Fifth Amendment. Instead, those circuits recognizing the exculpatory-no defense have done so primarily based on their interpretations of legislative history.

It will be argued that questioning under 18 U.S.C. § 1001 does not coerce a person into incriminating herself because such questioning does not force a person into a constitutionally forbidden trilemma – confess, lie, or remain silent – and that such questioning does not constitute coercive state action which violates that

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23 See United States v. Rodriguez-Rios, 14 F.3d 1040, 1045 (5th Cir. 1994) ("Finding no such reason to deviate from the plain language of [Section] 1001, we now discard the 'exculpatory no' doctrine in this circuit.").

24 See United States v. Wiener, 96 F.3d 35, 37 (2d Cir. 1996) ("Our flirtation with the 'exculpatory no' doctrine is over . . . and we therefore consider whether the doctrine is a defense to Section 1001 liability in this circuit. We hold that it is not.").

25 Compare Rodriguez-Rios, 991 F.2d at 170 (Higginbotham, J. concurring) (rejecting the doctrine and stating that "[w]e found further justification for the doctrine in a perception that a broad application of the statute came 'uncomfortably close' to infringing upon Fifth Amendment rights.") (citing United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974)) (en banc) with United States v. Medina De Perez, 799 F.2d 540, 547 (9th Cir. 1986) (accepting the doctrine and mentioning the "distaste for an application of the statute that is uncomfortably close to the Fifth Amendment") and United States v. Cogdell, 844 F.2d 179, 182 (4th Cir. 1988) (accepting the doctrine and stating that "[c]ourts also have recognized an additional justification for the doctrine as a safeguard against applications of section 1001 that are 'uncomfortably close to [violating] the Fifth Amendment.'") (citations omitted).
person’s privilege against self-incrimination. Such a person must make a “choice,” and that choice will have consequences. But consequences do not equate with coercion. If telling the truth would incriminate the person, he has the freedom to remain silent, just like any other witness before a government investigator. He cannot lie and then seek to avoid the “perjury-like” 18 U.S.C. § 1001 prosecution by claiming he was coerced into the lie.

This article will also consider whether there is a materiality requirement in 18 U.S.C. § 1001. Courts that have recognized a materiality requirement have provided a defense to those who have lied to the government in minor or trivial ways. This article will conclude that recognition of a materiality requirement contradicts the plain language of the section and improperly resurrects some forms of the exculpatory-no defense.

The concerns of the supporters of the exculpatory-no defense and a materiality requirement need not be ignored. In particular, the fear that 18 U.S.C. § 1001 will be used to prosecute minor or trivial lying is already addressed by the Eighth Amendment independently in so far as it prohibits extreme punishment for minor misconduct.

II. EXCULPATORY-NO AND THE FIFTH AMENDMENT

The clause of the Fifth Amendment, which is regarded as the privilege against self-incrimination, provides that “[no person] shall be compelled in any criminal case to be a witness against himself...”26 The key is compulsion.27 The privilege “is not triggered unless there is compulsion to talk...”28 and “this compulsion must come from the state.”29 Although the text of the Fifth Amendment “does not delineate the ways in which a person might be made a ‘witness against himself’,”30

26 U.S. CONST. amend. V.

27 See South Dakota v. Neville, 459 U.S. 553, 562 (1983) (“[A]s Professor Levy concluded in his history of the privilege, ‘[t]he element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogatories.’ W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 328 (1968)...”).

28 See, e.g. Fisher v. United States, 425 U.S. 391, 397 (1976) (“The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege.”) (citations omitted).


[The Court has] long held that the privilege does not protect a suspect from being compelled by the State to produce “real or physical evidence.” Rather, the privilege “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” “[T]he privilege against self-incrimination is also ‘founded on our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, lying, or punishable silence.”

Although the privilege is clearly involved when the state directly compels a witness to incriminate himself, it may also be implicated when the government gives the witness a “Hobson’s choice.” This “Hobson’s choice” can result when the state “boxes-in” a guilty person, forcing him to confess or lie. As it has been stated, the privilege against self-incrimination is also “founded on our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, lying, or punishable silence.”

In the 18 U.S.C. § 1001 exculpatory-no situation, is the person who would incriminate himself by telling the truth placed in this constitutionally prohibited cruel trilemma? Such a person has three “choices”: (1) talk truthfully (risking self-incrimination), (2) lie, giving an “exculpatory-no” response, which risks 18 U.S.C. § 1001 prosecution, or (3) refuse to give a statement (perhaps risking use of his

31 Id. (citations omitted).

32 But not all “choices,” will constitute “coercion.” The fact that the government “gives a defendant or suspect a ‘choice’ does not, always resolve the compulsion inquiry. The classic Fifth Amendment violation — telling a defendant at trial to testify — does not, under an extreme view, compel the defendant to incriminate himself. He could submit to self accusation, or testify falsely (risking perjury) or decline to testify (risking contempt). But the Court has long recognized that the Fifth Amendment prevents the state from forcing the choice of this ‘cruel trilemma’ on the defendant.” See Neville, 459 U.S. at 562-563 (citing Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964)). The Neville court also noted the proposition that “telling a witness under a grant of legislative immunity to testify or face contempt sanctions is ‘the essence of coerced testimony.’” New Jersey v. Portash, 440 U.S. 450, 459 (1979).

33 Muniz, 496 U.S. at 597 (“Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the ‘trilemma’ of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.”) (footnote omitted).
silence in cross-examination if he should take the stand in his trial on the underlying offense and testify to a defense which he failed to state to the investigator. But is the defendant in the 18 U.S.C. § 1001 trilemma really “boxed

34 [According] to the general rules regarding admissions, the prosecution is generally permitted in a criminal case to prove that an accusatory statement was made in the hearing of the defendant and that the defendant’s response was such as to justify the inference that he agreed with or ‘adopted’ the accusation. Such evidence is admissible as substantive proof of the defendant’s guilt of the crime charged . . . . Underlying this theory of admission by failure to deny is the assumption that human nature is such that innocent persons will deny false accusations.

McCORMICK ON EVIDENCE § 160 (Edward W. Cleary, ed., 3d ed. 1984) (citing 4 WIGMORE, EVIDENCE § 1071 (Chadboum rev. 1972)). But there can be constitutional problems with drawing an inference from a criminal defendant’s reliance upon the privilege against self-incrimination: Griffin v. California . . . held that the Fifth Amendment prohibits drawing an inference of guilt from a criminal defendant’s reliance upon the privilege against compelled self-incrimination. The next year, in Miranda v. Arizona, the Court held that custodial interrogation by law enforcement officers implicated the privilege and therefore a suspect in that situation had a right to silence protected by the Fifth Amendment.

Id. (emphasis added) (footnotes omitted). But Griffin and Miranda do not apply to the usual 18 U.S.C. § 1001 investigative setting because the witness is not in custody at the time of the interview. See infra note 45 and accompanying text.

35 The position that use of evidence to impeach a testifying defendant is less intrusive upon any interests violated by the obtaining of that evidence than is use of such evidence as direct proof of guilt, was reinforced by the Supreme Court’s decision in Harris v. New York that the Fifth Amendment did not bar the use of confessions obtained in violation of Miranda for such limited purposes. Whether a defendant’s post-arrest silence in the face of accusations could constitutionally be used for impeachment if the defendant took the stand at trial was addressed in Doyle v. Ohio. In Doyle, the defendants were charged with sale of marijuana to a police informer. At trial, they took the stand and testified that the transaction—which was not clearly observed by officers—was actually a sale by the informer to them. On cross-examination, the prosecution was permitted to elicit from each defendant that neither, after being arrested and given the Miranda warnings, told the arresting officer the version of the events offered at trial. The prosecution did not urge admission of the defendants’ silence as proof of guilt but only as impeaching the defendants’ credibility as witnesses . . . . The Supreme Court held this constitutional error for two reasons. First, silence after arrest and Miranda warnings are “insolubly ambiguous.” The person has been informed of the right to silence. If the silence is merely reliance upon that right, it is not, of course, evidence of consciousness of guilt. Permitting the jury to speculate on the inference under these circumstances, the Court apparently concluded would be constitutionally impermissible. Second, implicit in the Miranda warning of the right to silence is the assurance that silence will carry no penalty. To give an arrestee such an assurance and then permit use of that silence to impeach an explanation later offered at trial would be “fundamentally unfair and a deprivation
in" as in the traditional trilemma? As we have seen, the only danger to the defendant in the 18 U.S.C. § 1001 trilemma is the use of his silence against him in the event he takes the stand at his trial. But if the defendant takes the stand at his trial he will not only be telling the truth, but presumably he will also be telling a story that is exculpatory, not inculpatory. If so, why did he not tell the story to the investigator in the 18 U.S.C. § 1001 investigation? After all, if it is the truth and also is exculpatory, then that story would not have incriminated the defendant at the 18 U.S.C. § 1001 investigation; if it could not have incriminated him then, the trilemma does not apply.

The gravamen of a coercive trilemma is coercion. Again, the issue is, were the choices coerced? The focus is not on the whether the choice or choices have consequences, for the "criminal process often requires suspects and defendants to make difficult choices." As to the coercion factor, the Fifth Circuit considered the possible application of a "section 1001 trilemma," when it stated:

There is a concern that [section] 1001 forces persons who had committed a crime to choose between lying and incriminating themselves. This concern is not entirely correct. In such a situation, such individuals have the third option of remaining silent — a choice protected by the Fifth Amendment . . . .

A suspect, like every other witness in a 18 U.S.C. § 1001 situation can remain silent. The key is that this silence is not forcing him into a trilemma. The

of due process". 

McCormick, supra note 34, at 426-427 (emphasis added) (footnotes omitted).

But in the 18 U.S.C. § 1001 situation, the witness is not in custody or under arrest, and therefore his silence can be admitted against him. In Jenkins v. Anderson, 447 U.S. 231 (1980), [the] defendant, at his state trial for murder, testified that his killing of the victim was in self-defense. On cross-examination, the prosecution elicited from him that he had not been apprehended for the offense until two weeks after the killing and during that time he had in no way raised any claim of self-defense. Finding no constitutional error, the Court characterized Doyle as resting upon the proposition that fundamental fairness that prohibits inducing a suspect to remain silent by implicitly assuring him that silence cannot be used against him and then using that silence to impeach him. On the facts of Jenkins, the Court concluded, "no governmental action induced [Jenkins] to remain silent before arrest," and therefore "the fundamental unfairness present in Doyle is not present in this case".

Id. (footnotes omitted).

36 Neville, 459 U.S. at 564.

37 Rodriguez-Rios, 14 F.3d at 1050.
third choice under 18 U.S.C. § 1001 is not the type of compulsion suggested in the traditional trilemma's third prong of silence where the threat of contempt forces the witness to testify, and thereby incriminates himself by confessing or is thereby punished by perjury for lying.  

Any witnesses that gives evidence to a government investigator under 18 U.S.C. § 1001 risks the possibility that their testimony or silence could be used against them. Their choice is simple -- tell the truth or remain silent. But those choices are hardly coerced. If they are coerced, every statement and every silence in a government investigation could not be used against a witness at trial as a confession or impeachment because such statements or silence would be the result of unconstitutional coercion. The issue is the presence of compulsion, not the presence of adverse consequences, and in the 18 U.S.C. § 1001 situation there is simply no constitutionally recognized compulsion in the exculpatory-no situation. For this reason, none of those courts which has recognized the exculpatory-no defense has grounded its decision on the privilege alone. They believe the prosecution of "exculpatory-nos" is "close" to offending the Fifth Amendment, but is not close enough to produce a constitutional infirmity in the process.

Another factor in determining if a constitutionally prohibited trilemma exists is whether the government has used the trilemma "subtly [to] coerce[] the [witness] into choosing the option it had no right to compel." In Neville, the Court considered an argument that a D.U.I. defendant was coerced into choosing between taking a breath test and having his refusal to take the test offered against him at trial. Justice O'Connor, in writing for the majority, said there was no coercion in Neville because the State was not subtly trying to use a trilemma to get the

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38 Although not directly ruling on whether this 18 U.S.C. § 1001 risk of silence (tacit admission/impeachment) on cross-examination is the "contempt" equivalent third prong of the traditional "cruel trilemma," the adverse consequences of remaining silent have been mentioned by one circuit court. See Rodriguez-Rios, 14 F.3d at 1050 n.26 (referring to the silence prong of the trilemma and stating that "[t]his is not to say that remaining silent is not without its drawbacks. Silence may be used to impeach one's testimony in court. Silence is an unnatural response from which the questioner may infer the suspect's guilt.") (citation omitted).

39 See United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (stating that the exception is due in part to the "latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment.").

40 Neville, 459 U.S. at 563.

41 Id.
defendant to refuse the blood-alcohol test so that they could use that refusal against him in court.\textsuperscript{42}

Which choice is the government seeking to have the witness make in the purported 18 U.S.C. § 1001 trilemma? Does it not want his truthful testimony? After all, it is trying to resolve an investigation. Would not the truthful testimony of witnesses be helpful in that regard? Or is the government subtly coercing the witness to lie, so it can prosecute him for a violation of 18 U.S.C. § 1001? The witness can claim his silence, and there may be penalties for exercising that choice, just as there were for Neville for refusing the blood-alcohol test. But as Justice O’Connor stated, a choice may not be “an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.”\textsuperscript{43}

Just as there is a concern that the witness in the 18 U.S.C. § 1001 situation should be advised that it is against the law to lie to the investigator, there might be a concern that the witness should receive Miranda-like warnings about the trilemma in a 18 U.S.C. § 1001 investigation. But such a witness is not constitutionally entitled to Miranda warnings.\textsuperscript{44} Without the witness being in custody or the functional equivalent of custody, interrogations do not require Miranda warnings,

\textsuperscript{42} See id. at 563-564.

In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test. We recognize, of course, that the choice to submit or refuse to take a blood alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.

Id. (emphasis added) (citations omitted).

\textsuperscript{43} Id. at 563.

\textsuperscript{44} See infra note 45 and accompanying text.
and the giving of warnings cannot create a custodial or coercive environment where none exists.45

If the Court were to find that the exculpatory-no defense is constitutionally mandated in the 18 U.S.C. § 1001 situation by the self-incrimination privilege of the Fifth Amendment, then people who are guilty of the offense for which the investigator is probing get a real windfall by virtue of the effects of such a ruling. If they confess, their confession cannot be used against them. If they lie, they can not be prosecuted under 18 U.S.C. § 1001. If they remain silent, their silence cannot be used against them. In those situations, why would anyone tell the truth or take care to be accurate, when talking to government investigators? Maybe the Miranda-type warning that should be given in that event by the government investigator should read:

You have the right to confess, lie, or remain silent, and if you do confess, lie, or remain silent, your confession, admissions, or anything law enforcement gets as a result of those confessions or admissions can not be used against you at a later criminal trial. If you lie, you can not be prosecuted under 18 U.S.C. § 1001 which statute punishes lying to investigators with up to five years in prison. If you remain silent, your silence in the face of my accusations cannot be used against you if we ever get enough admissible evidence to charge you with some crime. If you take the stand in your trial and tell a different story to the jury then you tell today, the government cannot ask you at trial why your story at trial is different than the story you told today. Knowing these rights, is there any reason you would want to talk to me, and if you do talk to me, is there any reason I should believe anything you tell me?

But there is another problem related to the Fifth Amendment argument that is raised by the exculpatory-no defense. The circuits adopting the defense have not applied the doctrine to all cases. These circuits have established a prerequisite for application of the defense by limiting it to situations where government agents act as "police investigators" as opposed to "administrators."46 Some circuits have


46 See United States v. Medina De Perez, 799 F.2d 540, 545 (9th Cir. 1986) ("Hence, it is when government agents are acting as 'police investigators' rather than as 'administrators' that this prerequisite for invocation of the 'exculpatory no' doctrine is met."); see also id. at 545 n.6; cf. United States v. Chevoor, 526 F.2d 178, 183 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976) ("Cases
established another prerequisite. The Ninth Circuit, in promulgating the exculpatory-no defense, has devised a "five factors" test\(^{47}\) that "must be satisfied" before the doctrine can be applied in any particular case. Other Circuits have adopted the Ninth Circuit test.\(^{48}\)

\(^{47}\) The Ninth Circuit in *United States v. Medina de Perez*, 799 F.2d 540, combined the elements drawn from *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972) and *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978). *U.S. v. Equihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988), set forth the five factors that should be satisfied to apply the "exculpatory-no" doctrine:

1. The false statement must be unrelated to a claim to a privilege or a claim against the government;
2. The declarant must be responding to inquiries initiated by a federal agency or department;
3. The false statement must not impair the basic functions entrusted by law to the agency;
4. The government's inquiries must not constitute a routine exercise of administrative responsibility; and
5. A truthful answer would have incriminated the declarant.

*Equihua-Juarez*, 851 F.2d at 1222.

\(^{48}\) See, e.g., *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988) (citing *Medina*, listing the five factors, and evaluating Cogdell's case under the Ninth Circuit's factors); see also *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990) (citing *Medina*, listing the five factors, and evaluating
The "five factors" test limits application of the exculpatory-no defense regarding some false statements made to governmental agencies. The Ninth Circuit has concluded that the defense is not applicable to false statements "that might support fraudulent claims against the Government, or that might pervert or corrupt the authorized functions of those agencies to whom the statements were made."\footnote{United States v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972).}

But contrary to the Ninth Circuit's "five factors" test, the Fifth Amendment trilemma would be just as present for the suspect in the two situations culled out by the Ninth Circuit as it is in the situations covered by applying their "five factors" test. If the trilemma exists as it states, does it not exist in the two culled out cases? And if answering truthfully would incriminate the suspect or witness, the privilege against self-incrimination would mandate the application of the exculpatory-no defense in those cases as well.

Although factor five of the Ninth Circuit analysis applies "if a truthful answer would have incriminated the declarant,"\footnote{See supra note 47 and accompanying text.} a person must satisfy the four other factors to receive the benefit of the exculpatory-no defense.\footnote{See Equihua-Juarez, 851 F.2d at 1224-1226.} This leaves persons exposed to 18 U.S.C. § 1001 prosecution in the Ninth Circuit who would otherwise be protected if the 18 U.S.C. § 1001 situation really posed a constitutionally prohibited coercive trilemma under a Fifth Amendment analysis. Thus, the Ninth Circuit and those circuits adopting its reasoning are wrong about the applicability of their doctrine. If the defense is applicable, it is applicable to every case in which a witness, by answering truthfully, will incriminate himself. These circuits probably made their mistake about the limited application of the defense because they only fashioned their theory from their reading of the legislative history of 18 U.S.C. § 1001, rather than grounding their rulings in the Fifth Amendment.

III. EXCULPATORY-NO, STATUTORY EVOLUTION, AND plain MEANING

As indicated previously, the exculpatory-no doctrine has been accepted by the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.\footnote{See supra notes 14-24 and accompanying text.} These circuits base their acceptance of the defense primarily on their interpretation of the
The statutory evolution of 18 U.S.C. § 1001. The Fifth Circuit, and the Second Circuit have been the only circuits to reject the defense, and they, likewise, base their rejection of the defense primarily on their reading of the statutory evolution of 18 U.S.C. § 1001. The Third, Sixth, and D.C. Circuits have neither adopted nor rejected the exculpatory-no defense.

The circuits adopting the exculpatory-no doctrine, based on their reading of the statutory evolution of 18 U.S.C. § 1001, state that false denials to criminal investigators are not the statements Congress intended to prohibit under 18 U.S.C. § 1001. Under this interpretation of the evolution of 18 U.S.C. § 1001, there are only two kinds of false statements sought to be prohibited by 18 U.S.C. § 1001: (1)

53 The exculpatory-no doctrine was first enunciated by Judge Chestnut in the case of United States v. Stark, 131 F. Supp. 190 (D. Md. 1955). In that case,
[after carefully reviewing the legislative history of section 1001, Judge Chestnut stated that Congress intended the statute to ‘protect the government against false pecuniary claims’ and ‘to protect governmental agencies from perversion of their normal functioning. . . .’ He therefore concluded that Congress did not intend the statute to reach false statements that were not volunteered with the intent to induce government action, but were instead exculpatory responses to questioning initiated by government agents.

Cogdell, 844 F.2d at 182 (citations omitted). The Fourth Circuit relied on the reasoning of Judge Chestnut in adopting the “exculpatory-no” defense and several other circuits which have adopted the defense have cited Stark. See Steele, 896 F.2d at 1007:

The genesis of the idea that [section] 1001 should not be applied as written in certain cases is a trial court opinion emanating from a United States District Court for the District of Maryland in 1955, U.S. v. Stark, in which the court held that certain false negative answers, given under oath to agents of the Federal Bureau of Investigation, were not ‘statements’ within the meaning of [section] 1001. There issued, thereafter, a line of cases from several courts to the general effect that [section] 1001 will not be applied to false negative answers to official inquiries when the speaker elects to make the untruthful response because a truthful answer would be ‘incriminating’.

Id. (citations omitted).

54 See Wiener, 96 F.3d at 37 (citing Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962)).

55 See supra notes 23-24 and accompanying text.

56 See, e.g., United States v. Wiener 96 F.3d 35, 38-40 (2d Cir. 1996) (discussing the statutory language and legislative history of 1001 and concluding “we find no support for [the ‘exculpatory-no’ defense] in statutory language or legislative history.”). See also United States v. Rodriguez-Rios, 14 F.3d 1040, 1044 (5th Cir. 1994) (discussing the legislative history of 18 U.S.C. § 1001, finding no intent on the part of Congress to recognize an “exculpatory-no” defense, and concluding by stating that “[f]inding no such reason to deviate from the plain language of [section] 1001, we now discard the ‘exculpatory no’ doctrine in this circuit”).

57 See Wiener, 96 F.3d at 37.
those related to a claim to a privilege or a claim against the government, and (2) those that impair or pervert the basic functions entrusted by law to the agency. Since true exculpatory-no statements do not relate to a claim or privilege, nor do they impair the basic functions of an agency, the argument goes, such statements are not criminalized under 18 U.S.C. § 1001. Although there is some variation in the circuits about which test to use to ferret out an exculpatory-no situation, the


While the Special Agent may have been disappointed that defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in any way perverted. The only possible effect of exculpatory denials however false, received from a suspect such as defendant is to stimulate the agent to carry out his function.


We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said: ‘[a]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby . . .’. This Court also has recognized that ‘history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . .’.

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.

Escobedo, 378 U.S. at 488-490 (footnotes omitted) (citations omitted). See also United States v. Medina De Perez, 799 F.2d 540, 546 (9th Cir. 1986).

[A] competent government investigator will anticipate that [a] defendant will make exculpatory statements. A defendant who meets this expectation cannot possibly pervert the investigator’s police function. We presume that a thorough agent would continue vigorous investigation of all leads until he personally is satisfied that he has obtained the truth.

Medina De Perez, 799 F.2d at 546. But see United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974), vacated, 501 F.2d 943 (5th Cir. 1974). (“Statements such as that given by appellant and falsely pointing to possible criminal conduct that is within the power of the FBI to investigate carry a substantial potential for wasting the Bureau’s time and thus perverting its central function.”).

59 See supra note 47 and accompanying text.

60 See Giles A. Birch, Comment, False Statements to Federal Agents: Induced Lies and the Exculpatory No, 57 U. CHIC. L. REV. 1273, 1283-1284. Birch discusses the different tests:

[There are significant differences between the . . . [Ninth Circuit] and the [Fifth Circuit]. . . . First, unlike the Fifth Circuit, the Ninth Circuit did not ‘see, in the context of a post-arrest interrogation, any meaningful distinction between an exculpatory “no, I am not guilty,” and a more complete, evasive exculpatory
most used test is the five-part test, originally devised by the Ninth Circuit. The five factors, all of which must be satisfied to qualify a false statement for exculpatory-no treatment are (1) the false statement must be unrelated to a claim of privilege or a claim against the government; (2) the declarant must be responding to inquiries initiated by a federal agency; (3) the false statement must not impair the basic functions entrusted by law to the agency; (4) the government’s inquiries must not constitute a routine exercise of administrative responsibility; and (5) a truthful answer would have incriminated the declarant.

18 U.S.C. § 1001 began as a Civil War enactment. It was originally passed to cover a spate of frauds against the federal government. The original version was promulgated in 1863 and one clause of that act made it a crime for a member of the military to make a false claim against the government. A second clause dealt with statements that supported false claims. In 1873, the statute was codified as

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response to a direct question.' Second, because the test is conjunctive, there is no exculpatory no if the suspect did not fear self-incrimination. Finally, the Ninth Circuit test has two elements not usually considered in the Fifth Circuit cases: whether the question was administrative or investigative, and whether a false answer would impair the agency’s function.

Id. (footnotes omitted) (citing the Fifth Circuit as pro-exculpatory-no because they were so before their decision in Rodriguez-Rios).

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61 Id. ("The Ninth Circuit articulated the most frequently cited test for the exculpatory-no doctrine in United States v. Medina De Perez. . . ").

62 See supra note 56 and accompanying text, for how the supporters of exculpatory-no assert that merely answering "no" does not pervert or impair the basic functions of an agency arguing that trained investigators expect this response from suspects. But what happens if the investigator does not suspect the witness? Would this still be an expected response? Would this impair the function of the agency by wasting valuable time and money in pursuit of other leads or new people who, based on the witnesses, now have become suspects, albeit, wrongly?

63 See United States v. Rodriguez-Rios, 14 F.3d 1040, 1046 (5th Cir. 1994) (referring to the Act of March 2, 1863, Ch. 67, 12 Stat. 696 (1863)).

64 Id. Rodriguez-Rios noted that it is a criminal offense for any person in the land or naval forces of the United States . . . [to] make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . .

Id.

65 [[It was illegal for any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll,
Revised Statute § 5438. Congress amended the statute so it covered "every person" instead of being limited to military personnel. In 1918, Congress amended the false statement clause of the statute and required a purpose to cheat, swindle or defraud the government. In 1934, the purpose requirement was removed at the request of the Secretary of the Interior, Harold Ickes, who wanted to use the statute to enforce section 9(c) of the NIRA. The purpose requirement of the 1918 Act had been interpreted by the court to require that the government suffer pecuniary or property loss. Hence, the purpose requirement of pecuniary gain or property loss, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry.

Id.


67 See id., quoting the Act of Oct. 23, 1918, Pub. L. No. 65-228, § 35, 40 Stat. 1015-16 (1918), which provided that whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such a claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Id. (emphasis in original).

68 Rodriguez-Rios, 14 F.3d at 1046 n.14 (quoting United States v. Gilliland, 312 U.S. 86, 93-94). Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under § 9(c) of the [NIRA] . . . [A]fter the President objected to the original legislation, [a]nother measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to hot oil. The report of the Judiciary Committee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the purpose of reaching a large number of cases involving the shipment of hot oil, where false papers are presented in connection therewith.

Id. (citations omitted) (quotations omitted).


A sale of 'hot oil' did not cause such a loss. Any loss would be suffered by other oil producers, not by the government, as the other oil producers would face a reduction in profit following the slight decrease in the price of oil caused by a sale of 'hot oil'.
as contained in the purpose clause of the 1918 Act, was removed so the statute could be used to enforce the NIRA.\textsuperscript{70}

"In United States v. Gilliland,\textsuperscript{71} the Court rejected the argument that the predecessor to § 1001 should be restricted to the narrow purpose of the 1934 amendment of aiding in the enforcement of the NIRA.\textsuperscript{72} The Gilliland Court stated:

The fact that the Secretary of the Interior was then seeking aid in the enforcement of § 9(c) of the [NIRA], which this Court later found to be invalid (Panama Refining Co. v. Ryan, 293 U.S. 388) in no way affects the present application of the statute. Its provisions were not limited to the enforcement of § 9(c) of the [NIRA] but were enacted with appropriate breadth so that they at once applied to the presentation of affidavits, reports, etc., required by the subsequent Act of February 22, 1935, and the regulations duly prescribed thereunder.\textsuperscript{73}

Thus, as stated in Rodriguez-Rios, "the Court approached the statute by looking not at its purpose but at its plain language."\textsuperscript{74} The Rodriguez-Rios court also noted that

[A]lthough the Court stated that the purpose of § 1001’s predecessor was to deter perversions of governmental functions, the Court refused to limit the statute to the "hot oil" rationale, not because the rationale was an inaccurate characterization of the statute's purpose, but because such a limitation would conflict with its text.\textsuperscript{75}

\textsuperscript{70} Rodriguez-Rios, 14 F.3d at 1047 n.15.

\textsuperscript{71} Rodriguez-Rios, 14 F.3d at 1047.

\textsuperscript{72} 312 U.S. 86 (1941).

\textsuperscript{73} Gilliland, 312 U.S. at 95.

\textsuperscript{74} Rodriguez-Rios, 14 F.3d at 1047.

\textsuperscript{75} Id. at 1047 n.17.
The exculpatory-no doctrine, and particularly factor three of its five-part test is an attempt to "resurrect" the old purpose requirement that was contained in the statute prior to 1934. It attempts to do this by seeking to determine if the statements impair or pervert the basic functions of the agency.\textsuperscript{76} But, as stated by Rodriguez-Rios, it is clear that when Congress wanted to restrict the scope of statements under § 1001 to those made for certain purposes, it did so explicitly.\textsuperscript{77} "Therefore, even if it were necessary to go beyond the statute's plain meaning, the 'exculpatory-no' exception defies the legislative history of § 1001."\textsuperscript{78}

The 1934 amendment is critical to the argument over the statutory history of § 1001. And the court's conclusion about that amendment in United States v. Gilliland provides the strongest support for the exculpatory-no doctrine, the Ninth Circuit's five-part test, or at least some narrowing of the scope of § 1001 to statements that impair or pervert. In Gilliland, the court stated in a phrase, often quoted by the supporters of the defense:

The statute [the predecessor to § 1001] was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.\textsuperscript{79}

But there is more evidence that Congress is aware of the problems herein discussed surrounding § 1001 and exculpatory-no and is still satisfied with the plain language of § 1001. Attempts have been made in that body to address some of the concerns or justifications for the exculpatory-no defense discussed in this article, but all of them have failed to pass. Congress, in this regard, considered but failed to pass the following bills: (1) one requiring the statement in § 1001 to be recorded

\textsuperscript{76} See id. at 1048 (making a similar argument as to the criteria in Paternostro).
\textsuperscript{77} Id. (footnote omitted).
\textsuperscript{78} Id.
\textsuperscript{79} Gilliland, 312 U.S. at 93.
and made with the declarant’s knowledge and another one requiring the government to advise defendants that lying was a crime,\(^80\) and (2) one reducing exculpatory-no statements to misdemeanors with a maximum penalty of twelve months and requiring either written statements or corroborating evidence if the statement is oral.\(^81\)

Hence, while the exculpatory-no defense may be suggested by some of the old statutory history of § 1001, the plain language of § 1001 and Supreme Court precedent trumps that old statutory history.

**IV. POLICY CONCERNS AND § 1001**

Although there is a judicial conflict over the breadth and application of the exculpatory-no defense,\(^82\) several consistent policy concerns laid down early on in

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\(^81\) *See United States v. Poutre*, 646 F.2d 685, 686 n.2 (1980)

As of the date of this opinion, versions of the long-awaited revision of the federal criminal code have been favorably reported by the judiciary committees of both houses of Congress (H.R. 6915, S.1722, 96th Congress, 2d Sess.). Each version significantly narrows the scope of the existing false statements provision while grading the offense less severely. The House provision, § 1742, covers only written or recorded statements, thereby avoiding the dangers associated with the lack of a reliable transcript. The House bill reduces most false statement offenses to misdemeanors, punishable by a maximum term of imprisonment of twelve months as compared to five years under existing law, and grades as a class E felony (eighteen months) false statements made in an investigation by the Inspector General. The Senate version takes a different approach, covering unrecorded oral statements but requiring corroborating evidence in such prosecutions. §§ 1343(a) (1) (A), 1346(b) (4). The Senate bill incorporates the ‘exculpatory-no’ doctrine as a grading devise, classifying such statements as class A misdemeanors (twelve months) and all other false statements as class E felonies (two years).

*Id.*

\(^82\) *See United States v. Wiener*, 96 F.3d 35, 37 (2d Cir. 1996) (“While the breadth of the doctrine [exculpatory-no] varies from circuit to circuit . . . .”); *United States v. LeMaster*, 54 F.3d 1224, 1228 (6th Cir. 1995) (“Although a majority of the circuits have adopted the ‘exculpatory-no’ doctrine, their reasoning in applying the doctrine varies greatly.”); *see also* Birch, *supra* note 60 at 1273-74:

Even the courts that have adopted the doctrine explicitly, however, have had difficulty defining it. The existing definitions of the exculpatory no depend on arbitrary distinctions. Some courts attempt to distinguish between simple denials and more complex, or “affirmative,” falsehoods. Other courts attempt to distinguish between investigative and administrative inquiries. And even courts
the jurisprudence of the doctrine underlie the formal justifications for the defense. First, there is a concern that it is unfair to prosecute someone for an oral, unsworn false statement under § 1001 when an oath and sometimes a writing is required in perjury prosecutions.\(^3\) Defendants in perjury prosecutions are constructively informed that, by taking an oath, they are legally obligated to tell the truth, but most defendants do not know it is against the law to lie to a federal investigator in a prosecution under § 1001. There is also a concern that, because no writing is required in the § 1001 situation, law enforcement itself will be encouraged to fabricate allegedly false testimony, or at least pit the defendant against the investigator and his report in a contest the defendant cannot hope to win. But the same argument can be made regarding statutes prohibiting the false report of a crime.\(^4\) In those crimes, there is no requirement of an oath and the report is often

\[\text{that use the same definition of the exculpatory no have reached contradictory conclusions in cases with similar facts.}\]


\(^3\) See United States v. Chevoor, 526 F.2d 178, 183-184 (1st Cir.1975).

The defendant here did not initiate anything; he did not even go so far as to fabricate a misleading story in response to the inquiries. He merely gave negative, oral responses to the questioning. No oath was given; no transcript taken. The interviews were informal. Under all these circumstances, we hold that Chevoor's responses were not "statements" within the meaning of 18 U.S.C. § 1001. The government quite properly did not charge him under that section; instead, they charged him under a statute carrying with it the safeguards of formality, normally including a transcript, as well as the average citizen's awareness that lying under oath is a crime.

\(^4\) See, e.g., FLA. STAT. ANN. § 817.49 (West 1959), which provides

Whoever willfully imparts, conveys or causes to be imparted or conveyed to any law enforcement officer false information or reports concerning the alleged commission of any crime under the laws of this state, knowing such information or report to be false, in that such crime had actually been committed, shall upon conviction thereof be guilty of a misdemeanor of the first degree.

\(^4\)
made to the police officer in person or over the phone. Furthermore, these same objections have been raised before Congress and rejected.\textsuperscript{85}

A second concern is that the witness in a § 1001 investigation should be advised or warned that lying is a crime.\textsuperscript{86} This is an interesting suggestion. Are we not presumed to know the law as enacted by Congress? Would the adoption of this requirement lead to further requirements that no one can be prosecuted for the commission of a criminal act until he is advised that committing the act is against the law? Would this prevent the prosecution of income tax invasion unless and until the taxpayer is warned that tax evasion is a crime? It is also interesting to note that Congress considered, but failed to enact, a bill that would have required the government in § 1001 investigations to advise defendants that lying is a crime.

The punishment for false reports of crime, however, is typically less than that provided for violations of § 1001, which leads to the second concern. Supporters of the exculpatory-no defense have been concerned that allowing a § 1001 conviction for an oral, unsworn statement would be unfair since the § 1001 crime is punishable with greater severity than that of perjury.\textsuperscript{87} This unfairness argument, however, was rejected by the court in \textit{United States v. Rogers},\textsuperscript{88} where the court stated that this marginal disparity had no significance. The matter of penalties, according to the court, lies within the discretion of Congress, and because the statutes only provide the maximum permitted punishment, they permit discretion by the sentencing judges depending on the gravity of the particular violations.\textsuperscript{89}

\textsuperscript{85} \textit{See supra} note 80-81 and accompanying text.

\textsuperscript{86} \textit{See} Birch, \textit{supra} note 60, at 1288 (“[T]he statute should be presumed not to apply unless the agent has warned the suspect that lying is a crime and that silence is permitted.”).

\textsuperscript{87} \textit{See} Friedman v. United States, 374 F.2d 363, 366 (1967) (arguing that Congress could not have “considered it more serious for one to informally volunteer an untrue statement to an F.B.I. agent than to relate the same story under oath before a court of law”). It should also be noted that the maximum penalty for perjury under 18 U.S.C. § 1621 is $2,000 or five years in prison. The maximum penalty under § 1001 is $10,000 or five years in prison.

\textsuperscript{88} 466 U.S. at 482 (1984).

\textsuperscript{89} \textit{Id.} at 482.

A similar argument was made and rejected in \textit{United States v. Gilliland}, 312 U.S. at 95. The fact that the maximum possible penalty under Section 1001 marginally exceeds that for perjury provides no indication of the particular penalties, within the permitted range, that Congress thought appropriate for each of the myriad violations covered by the statute. Section 1001 covers “a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations”.
A third concern is that § 1001 swallows up the perjury statute and a plethora of other federal statutes that proscribe the making of false statements to specific agencies and activities of government.\textsuperscript{90} In essence, the applicability of the specific statute trumps the all-encompassing § 1001. This argument was rejected by the court in United States v. Batchelder,\textsuperscript{91} however, where the court stated that it had long recognized that where conduct violates more than one statute, the government may prosecute under either so long as the choice does not discriminate against any particular class of defendants.\textsuperscript{92} Batchelder further made it clear that this prosecutorial discretion is constitutional. In fact, the court in Batchelder stated that it is constitutional for a prosecutor to choose to prosecute a defendant under a felony statute instead of a misdemeanor statute where both statutes proscribe identical conduct.\textsuperscript{93}

\textsuperscript{90} See United States v. Bedore, 455 F.2d 1109, 1110 (1972). If the italicized portion of section 1001 were read literally, virtually any false statement, sworn or unsworn, written or oral, made to a Government employee could be penalized as a felony. Thus read, section 1001 would swallow up perjury statutes and a plethora of other federal statutes proscribing the making of false representations in respect of specific agencies and activities of Government. 

\textit{Id.} (citation omitted).

\textsuperscript{91} 442 U.S. 114 (1979).

\textsuperscript{92} \textit{Id.} at 124 ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.") (citations omitted).

\textsuperscript{93} \textit{Id.}

The Court of Appeals acknowledged this 'settled rule' allowing prosecutorial choice. Nevertheless, relying on the dissenting opinion in Berra v. United States . . . the court distinguished overlapping statutes with identical standards of proof from provisions that vary in some particular. (citation omitted). In the court's view, when two statutes prohibit 'exactly the same conduct,' the prosecutor's 'selection of which two penalties to apply' would be 'unfettered.' (citation omitted). Because such prosecutorial discretion could produce 'unequal justice,' the court expressed doubt that this form of legislative redundancy was constitutional. (citation omitted). We find this analysis factually and legally unsound.

See also \textit{Id.} at n.8 (referring to the case of Berra v. United States, 351 U.S. 131, 140 (1956). Berra involved two tax evasion statutes, which the Court interpreted as proscribing identical conduct. The defendant, who was charged and convicted under the felony provision, argued that the jury should have been instructed on the misdemeanor offense as well. The Court rejected this contention and refused to consider whether the defendant's sentence was invalid because in excess of the maximum authorized by the misdemeanor statute. The dissent urged that permitting the prosecutor to control whether a particular act would be punished
A fourth concern is that the specter of a § 1001 prosecution would have a chilling effect on citizens coming forward with vital information in criminal investigations. This chilling effect was rejected in Rodgers, where the Court stated the concern was debatable and since § 1001 only applies to one who knowingly and willfully lies, innocent citizens acting in good faith would not be deterred from performing their civic responsibilities.

A related concern is that the plain language of § 1001 will criminalize trivial and innocent statements. A similar argument was made in a case involving an analogous false statement statute, 18 U.S.C. § 1014. But the court rejected that argument in United States v. Wells. In Wells, the court made it clear that it would strike down prosecutions that sought to criminalize innocent or unremarkable

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as a misdemeanor or a felony raised ‘serious constitutional questions’.

94 See Friedman v. United States, 374 F.2d 363, 369 (8th Cir. 1967).
In reaching this decision we are influenced by the important social policy that is served by an open line of communication between the general public and law enforcement agencies. To preserve order, individuals must be given every encouragement to report suspected crimes to the police. To divert this free flow of information would allow more crimes to go undetected and criminals free to commit further depredations. To construe this statute to embrace individuals who volunteer unsworn information to the police, even though the information is proved false, we fear would to a degree dry up a prime source of truthful information. When the specter of criminal prosecution hangs over the head of every citizen who reports suspected violations, individuals will naturally hesitate, or even refuse, to provide vital information. They will fear that should their information appear to be false to the police they may be called upon to defend themselves in a criminal prosecution. Especially will this be true when the source of the information is persons of the lower educational and economic strata and those with criminal backgrounds.

Id.

95 United States v. Rodgers, 466 U.S. 475, 4873 (1984) ("But the justification for this concern is debatable. Section 1001 only applies to those who 'knowingly and willfully' lie to the Government. It seems likely that 'individuals acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F.B.I.'") (citations omitted).

96 See United States v. Lambert, 470 F.2d 354, 358 (1972) ("It is noted that we are dealing with a very broad statute. Were it to be applied in every situation consonant with its literal wording any individual who passed on to a governmental agency the most trivial bit of misinformation would be criminally liable for his statement.").

conduct, and it cited two examples where the court had done just that. But a victim of this predicament need not rely only on a discretionary ad hoc determination by the court. He can rely on the Constitution. The court, in Coker v. Georgia, stated that the Eighth Amendment’s prohibition of cruel and unusual punishment bars not only punishments that are barbaric, but also those that are excessive or are grossly out of proportion to the severity of the crime.

Hence, the concerns of the supporters of the exculpatory-no defense and a materiality requirement should not be ignored. However, the fear that § 1001 will be used to prosecute minor or trivial lying is already addressed by the Eighth Amendment independently in so far as it prohibits extreme punishment for minor misconduct.

V. MATERIALITY AND § 1001

The plain language of § 1001 does not limit prosecution under that statute to only “material” false statements, understanding the word material to mean having a natural tendency or is capable of influencing the decision of the decision-maker. If § 1001 did, there would be no need for an exculpatory-no defense, for the phrase “having a natural tendency or is capable of influencing” is analogous to the impairment and perversion factor in that defense and would require the government to show, on an ad hoc basis, how the false statement influenced, or was capable of influencing, the action of the agency.

But even the circuits that have rejected the exculpatory-no defense have read a materiality component into the false statement clause of § 1001. And the United States Supreme Court has assumed there is a materiality requirement in that

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98 Id. at 931.

Respondents next urge that we follow the reasoning of some Courts of Appeals in reading materiality into the statute to avoid the improbability that Congress intended to impose substantial criminal penalties on relatively trivial or innocent conduct. But we think there is no clear call to take such a course. It is true that we have held Section 1014 inapplicable to depositing false checks at a bank, in part because we thought that it would have made a surprisingly broad range of unremarkable conduct a violation of federal law, and elsewhere thought it possible to construe a prohibition narrowly where a loose mens rea requirement would otherwise have resulted in a surprisingly broad statutory sweep.

Id. (citations omitted).


100 Id. at 592.
clause. But if plain meaning prevails in the exculpatory-no situation, how can the court justify reading a materiality requirement into § 1001 which will resurrect a piece of the exculpatory-no defense when the plain language of the false statement clause fails to mention the concept?

Contrary to the plain language of the false statement clause of § 1001, a majority of the circuits that have adopted the exculpatory-no doctrine consider materiality an essential element of a § 1001 false statement. Even the Fifth Circuit, which has rejected exculpatory-no, considers materiality an essential element of the false statement clause of § 1001, and the Second Circuit does too, albeit because it believes the court has so assumed.


102 See, e.g., United States v. Brittain, 931 F.2d 1413, 1415 (10th Cir. 1991) (using the following language: “[a]lthough materiality remains an essential element of the § 1001 offense”). United States v. Oren, 893 F.2d 1057, 1063-64 (9th Cir. 1990) ("Materiality is an essential element of a conviction for false statements under § 1001."); United States v. Whitaker, 848 F.2d 914,916 (8th Cir. 1988) ("The requirement that the statement or representation be material as well as false is not set forth in the statute, however it is recognized as a judicially imposed ‘essential element’ of a charge under § 1001."); United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (quoting United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980) ("While materiality is not an explicit requirement of the second, false statements, clause of § 1001, courts have inferred a judge-made limitation of materiality in order to exclude trifles from its coverage."); United States v. Brantley, 786 F.2d 1322, 1326 (7th Cir. 1986) ("Materiality constitutes an essential element of a charge brought under 18 U.S.C. § 1001."); United States v. Greber, 760 F.2d 68, 73 (3rd Cir. 1985) (setting forth that most of the Courts of Appeals, with the exception of the Second Circuit, have held that materiality is an essential element of § 1001.).

103 See, e.g., United States v. Krause, 507 F.2d 113, 118 (5th Cir. 1975) ("An essential element of the offense of making a false, fictitious, or fraudulent statement proscribed by 18 U.S.C. § 1001 is that such a statement relate to a material fact."); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 (5th Cir. 1994) ("[A]ny violation of § 1001 must be material.").

104 See United States v. Ali, 68 F.3d 1468, 1474 (2d Cir. 1995).

Following briefing in this case, . . . the Supreme Court decided United States v. Gaudin, . . . which unanimously held that the element of materiality under § 1001 must be determined by the jury and not the court. It is uncontested that conviction under § 1001 requires that the statements be "material" to the government inquiry, and that "materiality" is an element of the offense that the Government must prove. Nonetheless, the Court's focus on the constitutional role of the jury to decide whether the offending statements [in a prosecution under § 1001] are material is premised on its implicit view that materiality is indeed an element of the offense.

Id. (citations omitted) But the Second Circuit had rejected materiality as a requirement for prosecution under § 1001 before the Court decided Gaudin. Id.
The court has dealt with materiality and § 1001 in two recent decisions. In United States v. Gaudin, the Court dealt with the issue by assuming that materiality was a requirement of the false statement clause of § 1001 because the parties agreed that materiality was an element of § 1001. The court again dealt with the issue in United States v. Wells. In Wells, however, the court was dealing with whether the false statement clause of 18 U.S.C. § 1014 contained a materiality requirement.

As set forth in Wells, Congress has enacted at least 100 false statement statutes. Forty-two of them "contain an express materiality requirement, while fifty-four do not." In writing for the court in an 8-1 decision, Justice Souter began his analysis by establishing an interpretive framework for determining whether 18 U.S.C. § 1014 contains a materiality element. He first examined the text and concluded that materiality under this, the first criterion of his interpretive hierarchy, would not be an element of § 1014. The same applies to § 1001.

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107 Wells, 117 S.Ct. at 924 ("While the appeal was pending, we decided United States v. Gaudin, . . . in which the parties agreed that materiality was an element of 18 U.S.C. § 1001 . . . .") See also Johnson v. United States, 117 S.Ct. 1544, 1548 (1997) (establishing the possible predicate for finding materiality is not required by the plain language of § 1001 as shown by the following language: ". . . although we merely assumed in Gaudin that materiality is an element of making a false statement under 18 U.S.C. § 1001, and although we recently held that materiality is not an element of making a false statement to a federally insured bank under 18 U.S.C. § 1014 . . . .") (citations omitted).


109 See id. at 926 ("We . . . consider whether materiality of falsehood is an element under § 1014, understanding the term in question to mean 'ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed . . . .'") (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

110 Id. at 934 (Stevens, J. dissenting) ("[A]t least 100 federal false statement statutes may be found in the United States Code.").

111 Id. (referring to Judge Kozinski's opinion in United States v. Gaudin, 28 F.3d 943, 959-960, nn.3-4 (9th Cir. 1994) in which Judge Kozinski catalogued these statutes in his dissenting opinion).

112 See Wells, 117 S.Ct. at 926-931.

113 See id. at 926-927 ("We begin with the text . . . . Nowhere does it further say that a material fact must be the subject of the false statement or so much as mention materiality . . . . Thus, under the first criterion in the interpretive hierarchy, [based on] a natural reading of the full text, . . . materiality would
Nowhere does the term "material" or "materiality" appear in the second clause, the false statement clause of § 1001.

Next, Justice Souter sought to determine if there was a showing that at common law the term "false statement" acquired any "implication of materiality that came with it into § 1014."\(^{114}\) Finding none,\(^ {115}\) he proceeded to the next criterion of his interpretive analysis. Section 1001, a false statement statute, as opposed to a perjury statute, likewise has no roots in the common law.

The next criterion is statutory history. Justice Souter perused the codifications and recodifications of § 1014 and concluded that Congress deliberately dropped the term materiality and intended that materiality not be an element of § 1014.\(^ {116}\) In the statutory evolution of § 1014 materiality was continuously written in and out of the various codifications and still Justice Souter derived no support for the contention that materiality was an essential element of § 1014. In the evolution of § 1001, the word "material" or "materiality" was never drafted into the false statement clause of that statute.

Justice Souter then addressed two more arguments advanced by Justice Stevens in his dissent in \emph{Wells}. Justice Stevens argued that the rule of lenity supported a materiality element in § 1014. The rule of lenity provides that an ambiguous criminal statute is to be construed in favor of a defendant.\(^ {117}\) But Justice Souter summarily dismissed this argument because for the rule to apply, there must be "no more than a guess as to what Congress intended," and he found no ambiguity in § 1014.\(^ {118}\)

\(^{114}\) \emph{Id.} at 927-928.

Nor have respondents come close to showing that at common law the term "false statement" acquired any implication of materiality that came with it into § 1014. We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those terms . . . have accumulated settled meaning under . . . the common law and the statute [does not] otherwise dictate.

\emph{Id.} (citations omitted).

\(^{115}\) Justice Souter concludes this point by stating that "[r]espondents here, however, make no claims about the settled meaning of 'false statement' at common law; they merely note that some common-law crimes involving false statements, such as perjury, required proof of materiality. But Congress did not codify the crime of perjury or comparable common-law crimes in § 1014 . . . ." \emph{Id.} at 927.

\(^{116}\) \emph{Wells}, 117 S.Ct. at 928 ("Statutory history confirms the natural reading.").

\(^{117}\) \emph{See} Staples v. United States, 511 U.S. 600 (1994).

\(^{118}\) \emph{Wells}, 117 S.Ct. at 931.
Justice Souter also addressed the argument urged by the dissent in *Wells* to adopt the reasoning of some of the courts of appeals that materiality should be read into § 1014 because Congress could not have intended to impose such severe penalties on relatively trivial or innocent conduct. But Justice Souter also rejected this argument. First, he said that there was no need to read materiality into § 1014, and he gave two examples where the court had struck down prosecutions under statutes that "made a surprisingly broad range of unremarkable conduct a violation of federal law." Second, Justice Souter said the plain language of § 1014 would avoid the severity or triviality problem. He explained:

[A]n unqualified reading of § 1014 poses no risk of criminalizing so much conduct as to suggest that Congress meant something short of the straightforward reading. The language makes a false statement to one of the enumerated financial institutions a crime only if the speaker knows the falsity of what he says and intends it to influence the institution.

But there is another more fundamental reason to reject this argument. As indicated previously, a victim of the dissent’s predicament can rely on the Constitution. In this regard, the court in *Coker v. Georgia* stated that the Eighth Amendment’s prohibition of cruel and unusual punishment bars not only punishments that are barbaric, but also those that are excessive or are grossly out of proportion to the severity of the crime.

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119 *Id.*

120 *Id.*

We think there is no clear call to take such a course. It is true we have held § 1014 inapplicable to depositing false checks at a bank, in part because we thought that it would have 'ma[d]e a surprisingly broad range of unremarkable conduct a violation of federal law,' Williams v. United States, 102 S.Ct. at 3093 (1982), and elsewhere thought it possible to construe a prohibition narrowly where a loose mens rea requirement would otherwise have resulted in a surprisingly broad statutory sweep, see United States v. X-Citement Video, Inc., 513 U.S. 64, 71-72 . . . (1994).

*Id.*

121 *Id.*


123 *Id.* at 592.
But § 1014’s false statement clause is different than § 1001’s. Section 1014 criminalizes ""knowingly mak[ing] any false statement . . . for the purpose of influencing in any way the action’ of an FDIC insured bank . . . .”

Although § 1014 does not contain a materiality requirement per se, requiring the false statement to have a natural tendency to influence or be capable of influencing a decision maker, it does have a “purpose” clause, which in effect does the same thing that a materiality clause does. But § 1001 has neither a materiality requirement nor a § 1014 purposes clause. Should that deficiency require that courts read a materiality requirement into § 1001? No, for two reasons.

First, the majority in Wells cited other false statement statutes that have no materiality requirement. Although some of these statutes do contain a § 1014 purposes requirement, others contain no such clause. If the court were to now read in materiality as an essential requirement for those “no material, no purpose” false statement statutes, the court would be flooded with habeas petitions.

Second, materiality is not required in all statutes. Requiring materiality in a statute focuses on the consequences of a defendant’s conduct, or the nexus between the defendant’s act and the consequences caused. But statutes drawn without a materiality element, presumably like those fifty-four mentioned in Wells, focus on the character of the defendant’s conduct, including the intent behind that conduct. As stated in a case cited by Justice Souter in Wells, statutes can be drawn either way.

124 Wells, 117 S.Ct. at 926.

125 See id. at 926 (setting forth Justice Souter’s understanding of the definition of materiality in the false statement provision of § 1014).

126 See id. at 931 (“Hence the literal reading of the statute will not normally take the scope of § 1014 beyond the limit that a materiality requirement would impose.”).

127 Wells, 117 S.Ct. at 934.

128 Id. n.8.

129 Id.

130 See Unites States v. Staniforth, 971 F.2d 1355, 1357 (7th Cir. 1992):

The word ‘material’ does not appear in section 1014 and, as an original matter, one might have supposed that the omission was deliberate. Section 1014 is a criminal statute and many criminal statutes place greater emphasis on the character of the defendant’s act (including the intent behind it) than on the consequences. On the assumption that the omission of the word ‘material’ from the statute was deliberate, all that would be required of the government was proof that the
VI. CONCLUSION

Perhaps it would have been better if Congress had drafted some form of exculpatory-no or materiality into § 1001. But that is obviously not its current intent. Congress has been tinkering with § 1001 since the Civil War. It has considered amendments to exclude exculpatory-no, reduce the punishment, and require *Miranda*-like warnings. It could have drafted materiality into the statute, but it has not.

If, however, following the court’s rejection of exculpatory-no and materiality, prosecutors start to file charges based on innocent or inconsequential statements, then Congress can act; but there is no evidence of that today. In circuits where the exculpatory-no defense is not recognized, § 1001 has not been abused. If that changes, the court has demonstrated that it will not hesitate to strike down those prosecutions that seek to punish innocent or inconsequential conduct. Besides, the Eighth Amendment will stop that conduct dead in its tracks.

The court should not do what Congress has decided not to do. Exculpatory-no is an amorphous and confusing doctrine without legal basis that sends the wrong message to the citizenry by saying it is okay to lie to the government. Why not send the right message? If you cannot tell the truth, do not say anything at all.

Citizens should tell government investigators the truth. It saves time. It saves money. And it is the right thing to do, no matter what H.L. Mencken says.