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Criminal Law: The "Exculpatory No" Doctrine Is Not A Defense Under 18 U.S.C. 1001

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Summary

In some judicial circuits, the "exculpatory no" doctrine has shielded from 18 U.S.C. §1001 liability an individual's denial of involvement in, or knowledge of criminal activity. In *Brogan v. United States,* the Supreme Court decided that there is no exception to §1001 criminal liability for a false statement consisting merely of an "exculpatory no."

The federal criminal code is found in section 18 of the United States Code. Section 18 U.S.C. 1001 makes lying to criminal investigators a federal felony. In *Brogan v. United States,*[1] the petitioner, James Brogan accepted cash payments from JRD Management Corporation, a real estate company whose employees were represented by the union. Upon being questioned by federal agents from the Department of Labor and the Internal Revenue Service regarding whether he had received any cash or gifts from JRD when he was a union officer, his response was "no." At that point, the agents produced company records showing the contrary. They also informed the petitioner that lying to federal agents in the course of an investigation was a crime. The petitioner did not modify his answers, and the interview ended thereafter. Subsequently, the 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.

The petitioner was tried, along with several co-defendants, in the United States District for the Southern District of New York, and was found guilty. The United States Court of Appeals for the Second Circuit affirmed the convictions. The Supreme Court granted *certiorari* on the issue of the "exculpatory no" doctrine.

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[1] 66 U.S.L.W. 4111 (U.S. Jan. 27, 1998).

At the time the petitioner falsely replied "no" to the Government investigators' question, 18 U.S.C. §1001 (1988) contained clauses that criminalize three kinds of conduct: (1) concealing a material fact, (2) making a false statement, (3) 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, 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."

The petitioner argued that the Court should depart from the literal text that Congress had enacted, and approve the doctrine adopted by many Circuits which makes the "exculpatory no" an exception to the scope §1001.[2] The courts that created this exception have expressed the view that one could not be prosecuted under the statute for merely denying criminal conduct.[3] These courts generally have said that prosecutions in such cases come very close to violating the privilege against self-incrimination which is protected by the Fifth Amendment.[4] Therefore, the issue before the Court was whether the "exculpatory no" doctrine should be recognized as a complete defense to false statements charges under 18 U.S.C. §1001?

In writing for the Court in a seven to two decision holding that there is no exception to §1001 criminal liability for a false statement consisting of an "exculpatory no", Justice Scalia began his analysis by making it clear that although many Court of Appeals decisions have embraced the "exculpatory no" doctrine as the petitioner argues, it is not supported by §1001's plain language.[5] The Court said the law itself made no such exception and "... [n]either the text nor the spirit of the Fifth Amendment confers a privilege to lie."[6]

The Court noted that "[p]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness [or potential witness] to remain silent but not to swear falsely."[7] However, the Court said, unlike criminal suspects in custody, people questioned by government investigators generally have no right to remain silent. Silence in such circumstances can be interpreted as an indication of guilt.

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[2] *Id.* at 4112.

[3] *Id.*

[4] *See, e.g., United States v. Rodriguez-Rios,* 991 F.2d 167, 170 (5th Cir. 1993) (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."); *United States v. Armstrong,* 715 F. Supp. 242, 243 (S.D. Ind. 1989).

[5] *Brogan,* 66 U.S.L.W. at 4112.

[6] *Id.* at 4113.

[7] *Id.*

The net effect of the Supreme Court's decision is likely to fortify the dilemma for the suspect inasmuch as the statute has the potential for being used as a powerful means of obtaining convictions to substitute for an underlying crime that otherwise cannot be proven. For example, the suspect can tell the truth to the federal investigator and incriminate himself and risk punishment or remain silent when silence may be treated as an admission of culpability and used at a subsequent trial.

Justice Ginsburg concurred in the judgment but wrote a separate opinion in order to call attention to the extraordinary authority Congress, perhaps unintentionally, has conferred on prosecutors to manufacture crimes. She concluded that because the controls are not in place to address the basic issue, *i.e.,* the sweeping generality of §1001's language, ...the prospect remains that an overzealous prosecutor or investigator-aware that a person has committed some suspicious acts, but unable to make a criminal case-will create a crime by surprising the suspect, asking about those acts, and receiving a false denial."[8] As in *Brogan,* Justice Ginsburg noted that "... the target may not be informed that a false 'No' is a criminal offense until after he speaks."[9]

Justice Stevens, with whom Justice Breyer joined in dissenting said "... it seems ... clear that Congress did not intend to make every 'exculpatory no' a felony."[10]

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[8] *Id.* at 4116.

[9] *Id. at* 4115.

[10] *Id. at* 4117.