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Lie to Me: Examining Specific Intent Under 18 U.S.C. §§ 1001, 1035

LIE TO ME: EXAMINING SPECIFIC INTENT UNDER 18 U.S.C. §§ 1001, 1035

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INTRODUCTION

The Federal Circuits are split as to whether there is a specific intent requirement for a conviction under 18 U.S.C. § 1001 ("Section 1001"). The crux of the split amongst the Federal Circuits relies mainly on the "willfulness" element listed in Section 1001. Courts that have interpreted the "willfulness" element narrowly have held that this burden is met if it is proven that the defendant made the statement with

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the knowledge that it is was false.[1] Courts that interpreted the "willfulness" element broadly have held that the "willfulness" element requires a specific intent, which is defined as the "intent to deceive."[2]

Section 1001 is part of a comprehensive classification of crimes colloquially referred to as "process offenses," which also include contempt, perjury, and failure to appear.[3] Process offenses are criminal offenses that interfere with the procedures of the justice system.[4] The purpose of criminalizing process offenses is to preserve the integrity of the justice system.[5]

The plain language of Section 1001 makes no mention of intent and states as follows:

1. *See, e.g.*, *United States v. Riccio*, 529 F.3d 40, 46-47 (1st Cir. 2008) ("willfulness" in § 1001 means "nothing more . . . than that the defendant knew that his statement was false when he made it or—which amounts in law to the same thing—consciously disregarded or averted his eyes from its likely falsity.") (quoting *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006)); *United States v. Daughtry*, 48 F.3d 829, 831-32 (4th Cir. 1995), *vacated on other grounds,* 516 U.S. 984 (1995), *reinstated in relevant part,* 91 F.3d 675 (4th Cir. 1996); *United States v. Guzman*, 781 F.2d 428, 431 (5th Cir. 1986) (§ 1001 requires a "false representation . . . . that . . . is made with an intent to deceive or mislead."); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *United States v. Hildebrandt*, 961 F.2d 116, 118-19 (8th Cir. 1992); ("willful" in § 1001"simply means that the defendant did the forbidden act 'deliberately and with knowledge.' It is not necessary that the defendant act with the intent to deceive the United States . . . .") (citations omitted), *cert. denied*, 506 U.S. 878 (1992); *United States v. Verduzco-Contreras*, No. 88–5120, 1990 WL 34147, at *3 (9th Cir. Mar. 27, 1990) ("[T]he government need not prove intent to deceive under 18 U.S.C. § 1001.") (citing *United States. v. Vaughn*, 797 F.2d 1485, 1490 (9th Cir. 1986)); *United States v. Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007); *United States v. Russo*, No. 98-3245, 2000 WL 14298, at *5 (10th Cir. Jan. 10, 2000) ("willful" in § 1001 "does not require proof of evil intent but rather only that 'the act [was] done deliberately and with knowledge.'") (quoting *Walker v. United States*, 192 F.2d 47, 49 (10th Cir. 1951)).

2. *See, e.g.*, *United States v. Whab*, 355 F.3d 155, 160 (2nd Cir. 2004), *cert. denied*, 541 U.S. 1004 (2004); *United States v. Bakhtiari*, 913 F.2d 1053, 1059 n.1 (2nd Cir. 1990), *cert. denied*, 499 U.S. 924 (1991); *United States v. Starnes*, 583 F.3d 196, 212 (3rd Cir. 2009) ("The record in this case contains sufficient evidence . . . that [the defendant] acted deliberately and with knowledge that the representations contained in the air-monitoring reports . . . were false and he was aware . . . that his conduct was unlawful."); *United States v. Guzman*, 781 F.2d 428, 431 (5th Cir. 1986) (§ 1001 requires a "false representation is one . . . made with an intent to deceive or mislead."); *United States v. Geisen*, 612 F.3d 471, 487 (6th Cir. 2010) (§ 1001 requires that the "statement was made with knowledge of its falsity, and an 'intent to deceive.'") (citations omitted); *United States v. Dothard*, 666 F.2d 498, 503 (11th Cir. 1982) ("Proof that the defendant has the specific intent to deceive by making a false or fraudulent statement is a prerequisite to conviction under 18 U.S.C. § 1001.") (citing *United States v. Lange*, 528 F.2d 1280, 1286 (5th Cir. 1976)); *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

3. *See* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L. J. 1533, 1612 (1997).

4. *See generally* Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L. J. 1215, 1218 (2004).

5. *See generally* Joel Feinberg, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMS TO OTHERS 63 (1984).

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

> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

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

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

> (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
>
> (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.[6]

Section 1035 was modeled after Section 1001 and created specifically for allegations involving heath care.[7] Section 1035 states:

6. *See* 18 U.S.C. §1001 (2006).

7. *United States v. Natale*, 719 F.3d. 719, 733 (7th Cir. 2013) ("The language of 18 U.S.C. § 1001(a) also supports this conclusion. The health care benefit program requirement is the jurisdictional element of § 1035. It largely tracks, both in words used and placement within the statute, the jurisdictional element of § 1001(a). *Compare* § 1035(a) ('[w]hoever, in any matter involving a health care benefit program . . .'), *with* § 1001(a) ('whoever, in any matter within the jurisdiction of . . . [a] branch of the Government of the United States . . . .'") (alterations in original) (internal quotations omitted).

(a) Whoever, in any matter involving a health care benefit program, knowingly and willfully—

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

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

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24(b) of this title.[8]

One court notes that the Supreme Court of the United States ("SCOTUS") has previously not found specific intent to be required under similar language within Section 1001.[9] While there are many similarities between Sections 1001 and 1035, there are salient differences. Notwithstanding the differences, this Article argues that Sections 1001 and 1035 should be interpreted without "intent to deceive" and rather be interpreted as a strict liability offense.

This argument began with Part I, which provided a brief introduction regarding specific intent under Sections 1001 and 1035. Part II examines the purpose of criminalizing false statements, which identifies why the statute should be interpreted narrowly. Part III analyzes case law and how the Federal Circuits have interpreted the statute. Part IV discusses how Sections 1001 and 1035 meet the required elements to be classified as a public welfare offense. Part V analyzes why it is malapropos for the Department of Justice to trumpet their views on the law, and how it crosses the line of the separation of powers. Part VI identifies the "exculpatory no" doctrine, which the Supreme Court ultimately rejected, as an example of courts going beyond the plain meaning interpretation of the statute. Part VII explores the materiality requirement of the statute, and how courts have interpreted it. Part VIII provides conclusive thoughts and analysis.

8. *See* 18 U.S.C. §1035 (1996).

9. *United States v. Starnes*, 583 F. 3d 196 (3d Cir. 2009).

I. Underlying Purpose of Criminalizing False Statements to the Government

Originally enacted during the Civil War in 1863, the purpose of Section 1001 was to prohibit members of the military from filing fraudulent claims against the government.[10] In 1874, Congress amended the statute and significantly broadened its coverage to prohibit all persons from filing fraudulent claims against the government.[11] In 1918, Congress made two pertinent Amendments to Section 1001. First, it stated that corporations may be found liable under the statute as a class of "persons."[12] Second, it expanded the statute beyond filing fraudulent claims to also encompass purposeful and intentional "cheating and swindling or defrauding the Government of the United States."[13]

In 1926, SCOTUS narrowly interpreted the term "cheating and swindling or defrauding the Government of the United States" by holding that it is only applicable to "cheating the Government out of *property or money*."[14] The first mention of "intent to defraud" is in *United States v. Cohen* when SCOTUS observed that the statute identifies intent in the context of 'cheating and swindling, to steal or purloin, and to defraud' when it cites Section 25 of the Penal Code.[15] This narrow interpretation would render the statute toothless several years later, in light of the New Deal.[16]

In 1934, Congress revised the statute by removing the property and financial fraud requirement.[17] The Secretary of Interior, Harold

10. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696-97 (1863) (currently codified under 18 U.S.C. §1001 (2006)).

11. Under the codification of Dec. 1, 1873, approved June 22, 1874, R. S. § 5438, the statute was extended to cover "every person"—not merely military personnel (currently codified under 18 U.S.C. §1001 (2006)).

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

13. *See id.*

14. *United States v. Cohn*, 270 U.S. 339, 346-47 (1926) (emphasis added).

15. *Id.* at n.1.

16. *United States v. Yermian*, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting) (The Secretary of the Interior, in particular, expressed concern that "there were at present no statutes outlawing, for example, the presentation of false documents and statements to the Department of the Interior in connection with the shipment of 'hot oil,' or to the Public Works Administration in connection with the transaction of business with that agency.").

17. *See* Act of June 18, 1934, ch. 587, § 35, Pub. L. No. 394, 48 Stat. 996 (1934) (amending Act of Oct. 23, 1918, ch. 194, § 35, Pub. L. No. 228, 40 Stat. 1015 (1918)). The Act stated in relevant part: "[W]hoever 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 or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the

Ickes, played a significant role in pushing for this revision. Secretary Ickes was motivated to have a law in order "to prosecute 'for the presentation of false papers.'"[18] The statute was broadened to include "any matter within the jurisdiction of any department or agency of the United States."[19] Thus, the statute criminalizes false statements that do not result in any property or pecuniary harm.

In 1941, SCOTUS acknowledged that the statute may be interpreted more broadly in light of the 1934 revision.[20] In *United States v. Gilliland*, the defendant submitted false reports regarding the petroleum amount produced by certain oil wells.[21] SCOTUS, relying on legislative history, held that the statute was meant to be interpreted broadly and is no longer limited to the requirement of governmental pecuniary or property loss.[22] SCOTUS further noted that a narrow interpretation of the statute may frustrate the legislative intent.[23]

In 1948, the statute was amended again when Congress sundered the false claims and false statements provisions.[24] In 1996, the statute was amended again, as Congress renamed it the False Statements Account Accountability Act of 1996 and added a material requirement in each subsection under section (a).[25]

One reason as to why courts are looking beyond the plain language of the text is because there is a notion that the language of Sections 1001 and 1035 are overbroad and may lead to a wide swath of criminalizing behavior that is beyond Congressional intent. In a concurring opinion, Justice Ruth Bader Ginsburg alleges that Section 1001 gives prosecutors "extraordinary authority" to "manufacture

jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder . . . ."

18. *See* Letter from Harold L. Ickes, the Secretary of the Interior, to Henry F. Ashurst, the Chairman of the Judiciary Committee of the Senate (Feb. 7, 1934) S. Rep. No. 288, 73d Cong., 2d Sess.; 78 Cong. Rec., Pt. 3, p. 2859; *see also* H. Rep. No.829, 73d Cong., 2d Sess.

19. *See* Act of June 18, 1934, ch. 587, § 35, Pub. L. No. 394, 48 Stat. 996 (1934) (amending Act of Oct. 23, 1918, ch. 194, § 35, Pub. L. No. 228, 40 Stat. 1015 (1918)).

20. *See United States v. Gilliland*, 312 U.S. 86, 93 (1941).

21. *Id.* at 87.

22. *Id.* at 93 ("The amendment eliminated the words 'cheating and swindling' and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained.").

23. *Id.* ("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.").

24. *See* Act of June 25, 1948, ch. 645, § 285, Pub. L. No. 772, 62 Stat. 683, 698 (1948); *see also* Act of June 25, 1948, ch. 645, § 1001, Pub. L. No. 772, 62 Stat. 683, 749 (1948).

25. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (1996) (codified as 18 U.S.C. § 1001 (1994 & Supp. IV 1998)).

crimes."[26] Justice Ginsburg does acknowledge that the plain meaning of the statute does not allow for intent to be read into the statute.[27] Moreover, Justice Ginsburg does not acknowledge the materiality requirement, which does offer a defense for those charged with making false statements that they claim are not essential to what prosecutors are seeking.[28]

The statute has an intriguing history, with critiques about the statute at opposite ends of extremes: being too narrowly tailored or being overly broad. While some criminal statutes have a *mens rea* read into them if the statute is silent as to which *mens rea* is necessary, this does not hold true for public welfare offenses.[29] Notwithstanding, if intent was read into the statute, it should require the speaker to have intended to make the statement rather than possess an intent to defraud, which is rather a motive.

II. Current State of the Law

Courts that read an "intent to deceive" requirement into Sections 1001 and 1035 are interpreting the statutes beyond their plain meaning. The "intent to deceive" requirement being read into Sections 1001 and 1035 are within the intent element, specifically the "knowingly and willfully" language.[30]

26. *Brogan v. United States*, 522 U.S. 398, 408 (1998) (Ginsburg, J., concurring) ("I write separately, however, to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes.").

27. *Id.* at 412.

28. *See id.* at 408-12.

29. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994) (reiterating that public welfare statutes may dispense with a "mental element"); *see also Liparota v. United States*, 471 U.S. 419, 433 (1985) (stating that a public welfare offense is "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety.").

30. *See, e.g.*, *United States v. Whab*, 355 F.3d 155, 160 (2nd Cir. 2004), *cert. denied*, 541 U.S. 1004 (2004); *United States v. Bakhtiari*, 913 F.2d 1053, 1059 n.1 (2nd Cir. 1990), *cert. denied*, 499 U.S. 924 (1991); *United States v. Starnes*, 583 F.3d 196, 212 (3rd Cir. 2009) ("The record in this case contains sufficient evidence . . . that [the defendant] acted deliberately and with knowledge that the representations contained in the air-monitoring reports . . . were false and he was aware . . . that his conduct was unlawful."); *United States v. Guzman,* 781 F.2d 428, 431 (5th Cir. 1986) (§ 1001 requires a "false representation is one . . . made with an intent to deceive or mislead."); *United States v. Geis*en, 612 F.3d 471, 487 (6th Cir. 2010) (§ 1001 requires that the "statement was made with knowledge of its falsity, and an 'intent to deceive.'") (citations omitted); *United States v. Dothard*, 666 F.2d 498, 503 (11th Cir. 1982) ("Proof that the defendant has the specific intent to deceive by making a false or fraudulent statement is a prerequisite to conviction under 18 U.S.C. § 1001.") (citing *United States v. Lange*, 528 F.2d 1280, 1286 (5th Cir. 1976)); *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

SCOTUS has held that the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law.[31] Additionally, SCOTUS has held that term "willfully" means that the actor commits an act that is unlawful but does not need to know that his act is unlawful.[32] Alternatively, the stance of the Department of Justice ("DOJ") on the interpretation of "willfully" is that the defendant knew his or her statement was unlawful–not just that the statement was false.[33] The Solicitor General reiterates this position in its' briefs in *Ajoku v. United States* and *Russell v. United States, and Natale v. United States*.[34] Section 1001 requires proof the defendant knew his or her conduct was unlawful: "[I]t is now the view of the United States that the "willfully" element of Sections 1001 and 1035 requires proof that the defendant made a false statement with knowledge that his conduct was unlawful."[35] Having to show that the person knew making a false statement was unlawful violates the general rule that ignorance of the law or a mistake of law is not a defense to criminal prosecution.[36] SCOTUS has explicitly stated that if Congress

31. *Bryan v. United States*, 524 U.S. 184, 192 (1998); *see also* Wilson R. Huhn, *In Defense of the Roosevelt Court*, 2 FLA. AGRIC. & MECH. UNIV. L. REV. 1, 4 (2007) (discussing how the favored canons of construction of SCOTUS Justices has a profound impact on the law).

32. *Id.* at 192-93.

33. *United States v. Ajoku*, 584 F. App'x 824 (9th Cir. 2014) (""As conceded by the government in its opposition brief to Ajoku's petition for certiorari, the district court erred by giving an instruction on the element of "willfulness" that does not comply with *Bryan v. United States*. *See* 524 U.S. 184, 191-92 (1998) ("As a general matter, when used in the criminal context, a willful act is one undertaken with a bad purpose. In other words, in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (footnote and internal quotation marks omitted)). It is thus undisputed that Ajoku's jury received an erroneous instruction.").

34. Brief for the United States in Opp'n, *Ajoku v. United States*, 572 U.S. 1056 (2014) (No. 13-7264), 2014 WL 1571930, at *11. "In three recent briefs opposing certiorari, DOJ announced that it now views the "willfully" element of Sections 1001 and 1035 as requiring proof that the defendant made a false statement with knowledge that his conduct was false. *See Ajoku v. United States,* No. 13-7264, *Russell v. United States,* No. 13-7357, and *Natale v. United States,* No. 13-744." https://www.wiley.law/newsletter-4992.

35. Brief for the United States in Opp'n, Natale v. United States, No. 13-744, 2014 WL 1018796, at *10.

36. *See, e.g.*, *United States v. Smith*, 18 U.S. 153, 182 (1820) (Livingston, J., dissenting); *see also Barlow v. United States*, 32 U.S. 404, 411 (1833); *see also Reynolds v. United States*, 98 U.S. 145, 167 (1878); Shevlin-Carpenter Co. v. Minn., 218 U.S. 57, 68 (1910); *see also Lambert v. Cal.,* 355 U.S. 225, 228 (1957); *see also Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); *see also* Oliver Wendell Holmes, Jr., THE COMMON LAW 47-48 (1881).

intended for an "intent to deceive" element to be in Section 1001, it would have included the phrase when it amended the statute.[37]

A. Narrow Interpretation

1. First Circuit

The First Circuit has held that Section 1001's requirement of "knowingly and willful" is met if the defendant deliberately made the statement with knowledge that it was false.[38] In *United States v. Riccio*, the court upheld defendant-Riccio's conviction for violating Section 1001 by submitting a false statement to a federal agency, the Transportation Security Agency ("TSA").[39] Appellant-Riccio worked at Wal-Mart from December 2003 through February 2004, and then claimed that he suffered a back injury on the job and began to collect workers' compensation until October 2005.[40] The workers' compensation claim lasted from October 2005 until February 2007.[41] In July 2004, Riccio began employment with the TSA while collecting workers compensation.[42] Riccio claims he merely forgot about his employment with Wal-Mart.[43] The prosecution argued this was not plausible because Riccio was engaged in litigation with Wal-Mart at the time.[44] Moreover, the prosecution noted that Wal-Mart's discovery of Ricco's employment with the TSA could have compromised his workers' compensation lawsuit.[45]

Riccio's argument on appeal was that the district court erred with regard to jury instructions when it omitted the scienter require-

37. *United States v. Yermian*, 468 U.S. 63, 73 (1984) ("Noticeably lacking from this enactment is any requirement that the prohibited conduct be undertaken with specific intent to deceive the Federal Government, or with actual knowledge that false statements were made in a matter within federal agency jurisdiction. If Congress had intended to impose either requirement, it would have modified the prior bill by replacing the phrase 'with intent to defraud the United States' with the phrase 'with intent to deceive the United States,' or by inserting the phrase 'knowing such statements to be in any matter within the jurisdiction of any federal agency.' That Congress did not include such language, either in the 1934 enactment or in the 1948 revision, provides convincing evidence that the statute does not require actual knowledge of federal involvement.").

38. *United States v. Riccio*, 529 F.3d 40, 46-47 (1st Cir. 2008).

39. *Id.* at 41-42.

40. *Id.* at 42.

41. *Id.* at n.1.

42. *Id.* at 42.

43. *Id.* at 43.

44. *Riccio,* 529 F.3d 40, at 43.

45. *Id.*

ment ("knowingly and willfully") on the verdict form.[46] The court rejected this argument and held that the scienter requirement was satisfied when Riccio "submitted a false SF-86 Form and that he did so intentionally."[47] If the court had held that there was an "intent to deceive" requirement, the decision may have come out in favor of Riccio. This is because Ricco was suing Wal-Mart, in which the court doubted the merit of the claim due.[48] Thus, the intent would be construed to possibly defraud a private actor, Wal-Mart, and not the government. Nevertheless, Riccio claimed that he was mistaken when he filled out the forms,[49] and thus he would not have the specific intent required to deceive or defraud the government. *Ignorantia facti excusa* (ignorance of a fact is an excuse, or mistake of fact) "is determined not by the actual facts but by the actor's opinion regarding them."[50]

2. Fourth Circuit

The Fourth Circuit used a plain meaning interpretation of the term "willfully" when it held that it does not require specific intent.[51] In *United States v. Daughtry*, the defendant's sole argument was that "willfully" under Section 1001 should be interpreted with specific intent.[52] The *Daughtry* court's analysis compares Section 1001 with 31 U.S.C. § 5322(a) ("Section 5322") and lead to the determination that "willingly" is a modifier.[53] The court held that, with regard to Section 1001, "willingly" modifies "falsifies, conceals or covers up," which does not indicate intent.[54] With regard to Section 5322, "willingly" modifies "violating," which indicates that a person must act "deliberately and intentionally."[55]

46. *Id.* at 47.
47. *Id.* at 46.
48. *Id.* at 43.
49. *See id.* at 43.
50. Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 3 (1957).
51. *United States v. Daughtry*, 48 F.3d 829, 831 (4th Cir. 1995) ("Nothing in the language or structure of § 1001 indicates that one may violate § 1001 only by acting with knowledge of the existence of the law and an intent to violate or disregard it."), *vacated on other grounds,* 516 U.S. 984 (1995), *and reinstated in relevant part,* 91 F.3d 675 (4th Cir. 1996).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

The *Daughtry* court noted that "willfully" may come to have different meanings in the context of different statutes.[56] In the context of Section 1001, the Fourth Circuit notes that SCOTUS came to the conclusion that a defendant need not have knowledge that they made a false statement within the jurisdiction of a federal agency.[57] Utilizing this logic, the *Daughtry* court held that a harmonious reading of the statute would not require that a defendant had knowledge that their conduct, a statement, is unlawful.[58] It would be incongruent to hold that the term "violating" can alter the interpretation of "willfully" to require specific intent, yet the terms "falsifies," "conceals," or "covers up" do not.

SCOTUS has come to a similar interpretation of "willfully" as a modifier in a statute.[59] In *Ratzlaf v. United States*, the Court noted that "willfully" under Section 5322 modifies evading report requirements of financial institutions.[60] Structuring transactions for money laundering purposes is a sophisticated act that requires a certain level of skill.[61] Additionally, there is a reporting requirement on behalf of the financial institutions.[62] Thus, the statute creates a legal duty.[63] It

56. *See id.* ("We do not believe that *Ratzlaf* controls the definition of the term "willfully" in the context of 18 U.S.C.A. § 1001. In 31 U.S.C.A. § 5322(a), the word 'willfully' modifies 'violat[es],' indicating that an individual must deliberately and intentionally violate the currency structuring laws in order to be convicted. In significant contrast, in § 1001 the word 'willfully' modifies, *inter alia*, 'falsifies, conceals or covers up . . . a material fact, or makes any false, fictitious or fraudulent statements.' Nothing in the language or structure of § 1001 indicates that one may violate § 1001 only by acting with knowledge of the existence of the law and an intent to violate or disregard it.") (alteration in original) (omission in original).

57. *Daughtry*, 48 F.3d at 832.

58. *Id.*

59. *See Ratzlaf v. United States*, 510 U.S. 135, 137-38 (1994).

60. *Id.* at 140.; *see also* Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1354, 100 Stat. 3207, 3207-22 (codified as amended at 31 U.S.C. § 5324 (2000)).

61. *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 987–89 (E.D.N.Y. 1992) (detailing a sophisticated money laundering scheme of another narcotics-trafficking organization); see also *Business Community's Compliance with Federal Money Laundering Statutes: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 101st Cong. 178–90 (1990).

62. Internal Revenue Service Form No. 4789 (Currency Transaction Reports ("CTR")). Financial institutions are required to provide the requested information pursuant to 31 C.F.R. §§ 103.22, 103.26-.27 (1987); *see also Money Laundering Operations and the Role of the Department of the Treasury: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 99th Cong. 56–58 (1985) (statement of James Knapp, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice: Congress should enact money-laundering legislation so that the "emphasis will shift from investigating and prosecuting violations of currency reporting and recordkeeping statutes to attacking persons and institutions who knowingly 'launder' the profits of illicit enterprises"); PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND

also gives credence that a financial institution has the knowledge of what it is doing and what its' duties and responsibilities are, as per the legal duty that it is under, which is why the term "violates" is in the statute.[64] Notably, Section 1001 does not create a legal duty and therefore, does not have the term "violate" in it.[65] Hence, Section 1001 does not need to have intent read into the statute, as that would be going beyond a plain meaning interpretation of the statute.

3. Seventh Circuit

Opposing *certiorari* in *Natale v. United States*, the Solicitor General's brief argues that the interpretation of "willfully" does not require a "specific intent to deceive."[66] Notwithstanding, the DOJ is aware that their newfound interpretation of "willfully" may have unintended implications and have offered some rather confusing syllogism. In its' brief, the Solicitor General warned against interpreting the term "willfully" to have the same meaning when used in other criminal statues, as "[c]ontext and history may support a different interpretation . . . ."[67] Thus, the Solicitor General confessed that the DOJ is advocating for a definition of "willfully" that goes beyond its plain meaning, and is also concerned about how this newfound definition could have deleterious effects if used in other statutes. Notwithstanding, SCOTUS has held that the government must be able to justify using a different

MONEY LAUNDERING 8 (1984); *see, e.g.*, Sarah N. Welling, *Money Laundering: The Anti-Structuring Laws*, 44 ALA. L. REV. 787, 791 (1993); Radley Balko, *The Federal 'Structuring' Laws are Smurfin' Ridiculous*, WASHINGTON POST TIMES (Mar. 24, 2014, 4:01 PM), https://www.washingtonpost.com/news/the-watch/wp/2014/03/24/the-federal-structuring-laws-are-smurfin-ridiculous/?noredirect=on&utm_term=.de93815f5eab.

63. *See* Bank Records and Foreign Transaction Act (BRFTA), Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.); Report of International Transportation of Currency, Customs Form No. 4790, is required to be filed pursuant to 31 U.S.C. § 5316 (1982 & Supp. III 1985); 18 U.S.C. § 1956(a)(l)(B).

64. *See, e.g., United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984) (The court observed "Congress no doubt made the failure to file CTRs a specific intent crime because, without knowledge of the reporting requirement, a would-be violator cannot be expected to recognize the illegality of his otherwise innocent act."); *see also Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted").

65. *Id.*

66. Brief for the United States in Opp'n, *Natale v. United States*, 134 S. Ct. 1875 (2014) (No. 13-744), 2014 WL 1018796 at *9-11.

67. Brief for the United States in Opp'n, *supra* note 34, at *15.

meaning of a word from its regular meaning.[68] The Fifth Circuit has defined "willfully" as an act done deliberately and with knowledge.[69] Furthermore, the fact that Congress did not define "willfully" in the statute leads one to believe that it intended for the term to be interpreted using its regular meaning, as it is in other statutes.[70]

4. Eighth Circuit

Similar to the Fourth Circuit, the Eighth Circuit has held that "willfully" modifies Section 1001, but it does not require an "intent to deceive."[71] In *United States v. Hildebrandt*, the defendant was a farmer who ran into significant financial trouble and had his property foreclosed on.[72] Following the teachings of Roger Elvick, Hildebrant sent IRS Form 1099 to persons he claimed he paid in non-wage compensation, totaling about $68,000,000.[73] Hildebrand testified that he believed the 1099 forms he filed were not false.[74] The court ultimately ruled that "willful" under Section 1001 is the "the willful doing of a prohibited act,"[75] which is how strict liability statutes are interpreted.[76] The court reasoned that "knowingly and willfully" modifies

68. *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010) ("[A]nd we 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense,'") (quoting *Gonzales v. Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)); *see also Rowan Cos. v. United States*, 452 U.S. 247, 257 (1981) ("Contradictory interpretations of substantially identical definitions do not serve that interest. *It would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently.*") (emphasis added).

69. *See McClanahan v. United States*, 230 F.2d 919, 924 (5th Cir. 1956), *cert. denied*, 352 U.S. 824 (1956); *see also McBride v. United States*, 225 F.2d 249, 254-55 (5th Cir. 1955), *cert. denied*, 350 U.S. 934 (1956).

70. *See Rowan Cos. v. United States*, 452 U.S. 247, 262 ("We conclude that Treas. Reg. §§ 31.3121(a)-1(f) and 31.3306(b)-1(f) *fail to implement the statutory definition of 'wages' in a consistent or reasonable manner. The plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner* for FICA and FUTA as for income-tax withholding.") (emphasis added).

71. *United States v. Hildebrandt*, 961 F.2d 116, 118-19 (8th Cir. 1992).

72. *Id.* at 117.

73. *Id.*

74. *Id.* at 117-18.

75. *Id.* at 118.

76. *Id.*; *See, e.g.*, CAL. PENAL CODE § 288(a) (West 2019), which provides in relevant part: "a person who *willfully* and lewdly commits any lewd and lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for a term of three, six, or eight years." (emphasis added) (omission added).

"false statement", but it does not mean it is necessary to prove that the defendant acted with the intent to deceive the United States.[77]

If the court were to hold that the government must prove a defendant had the "intent to deceive," Hildebrant may not have been convicted under Section 1001. Elvick put together audiotapes, videotapes, and printed materials that explained his scheme, which Hildebrant relied upon when he filled out the 1099 forms.[78] In another case, Elvick had an elaborate scheme where people would claim significant refunds from their tax returns and execute counterfeit instruments purporting to be certified by the IRS.[79] Elvick would then negotiate the counterfeit instruments for legitimate instruments.[80]

With Elvick's history, it is plausible that Hildebrant could claim he legitimately believed what he was told by Elvick and, thus, could not have had an "intent to deceive." Under this logic, the statute would be effortlessly circumvented if a person could claim that they relied on someone else when they made a false statement, which would easily negate the requisite "intent to deceive". Thus, the person would have no responsibility for the statements they made to government officials.

5. Ninth Circuit

In *United States v. Tatoyan*, the court found that the "knowingly and willfully" requirement of Section 1001 was met if the government could prove the defendant made the statement with knowledge that it was false.[81] In *Tatoyan*, a United States Customs Inspector at an airport informed the defendants, who were scheduled for an international flight, that if they were carrying *more than* $10,000 they were required to fill out a form.[82] The first defendant replied he was carrying $8,000 and the second defendant stated she was carrying $10,000.[83] It was discovered that the defendants attempted to smuggle $17,601 and $43,717, respectively, in undeclared currency out of the United States.[84] The court observed the defendants' concealment

77. *Hildebrandt*, 961 F.2d at 118-19.

78. *See id.* at 117.

79. *United States v. Wiley*, 979 F.2d 365, 366 (5th Cir. 1992).

80. *Id.*

81. *United States v. Tatoyan*, 474 F.3d 1174, 1179 (9th Cir. 2007).; Section 1001 has also been enforced against false oral statement made to Customs officials at airports (E.g., *United States v. Cutaia*, 511 F. Supp. 619, 620 (E.D.N.Y. 1981); United *States v. Pereira*, 463 F. Supp. 481, 483 (E.D.N.Y. 1978)).

82. *Id.* at 1176.

83. *Id.*

84. *Id.*

of the money they failed to report was sufficient to support their convictions.[85] The court ultimately determined that the defendants intentionally made false statements because the United States Customs Inspector required them fill out a form since they were carrying more than $10,000.

The court opined that intent is not required, discerning that requiring intent may possibly render the statute toothless.[86] In *Tatoyan*, the defendants contended that they were going to give the money to a family member in need of financial help.[87] "The government presented no evidence at trial to contradict this or to establish that the funds were related to any illicit activity."[88] If the prosecution was required to show that the defendants were trying to defraud the government, the statute could be easily manipulated in the context of making false statements when taking money out of the country is involved. "[T]here [i]s no law against taking money out of the United States."[89] Thus, since there is no law against taking money out of the country, it would be legally impossible to defraud the government by not declaring money.

B. Broad Interpretation

1. Second Circuit

The Second Circuit has mistakenly read the legislative history of Section 1001 as showing that Congress intended for it to be interpreted broadly.[90] In *United States v. Bakhtiari*, the court's rationale that the statute should be interpreted broadly came from the amendments by Congress after *United States v. Cohn*.[91] The Second Circuit freely admits that after *Cohn*, Congress eliminated specific intent when it removed the government pecuniary or property loss requirement.[92] The court is confused as it is implementing specific intent when it claims that a defendant needs to have knowledge of the general unlawfulness of the conduct at issue.[93] A precise reading of the

85. *Id*. at 1178.
86. *Tatoyan*, 474 F.3d 1180-81.
87. *Id.* at 1177.
88. *Id.*
89. *Id.* at 1176.
90. *United States v. Bakhtiari*, 913 F.2d 1053, 1061 (2d Cir. 1990).
91. *See id.*
92. *Id.*
93. *See id.* ("In addition, the Supreme Court has consistently held that the jurisdictional clause of § 1001 should be given a broad interpretation. "There is no indication in

legislative history shows that Congress omitted the government pecuniary or property loss requirement to allow the Government to be able to capture a larger swath of activity. By reading specific intent into the statute, it would narrow the reach of the statute as it sets a higher burden of proof for the prosecution. How then, does the Second Circuit confess that Congress eliminated specific intent from Section 1001, yet somehow read it into Section 1001 through somersaults of statutory interpretation?

2. Third Circuit

The Third Circuit has inappropriately interpreted "knowingly and willfully" under Section 1001. The Third Circuits asks "[T]he question, then, is, What does 'knowingly and willfully,' as used in § 1001(a), mean?"[94] In *United States v. Starnes*, the court discerns the governments' concession that it must prove specific intent, and that the defendant did not make an argument as to what specific intent means under the statute.[95] The court theorizes that the term specific intent is abstract, and is not always clearly distinguishable from general intent.[96] The court reasons that the government has the burden of proving "knowingly and willfully" beyond a reasonable doubt, and not specific intent.[97] Further, the court explicates that knowingly is straightforward, whereas willfully "takes color from the text in which it appears."[98] In the final analysis, the words "knowingly" and "willfully" are interpreted in conjunction, rather than separately, and thus it requires the Government to prove that the defendant knew their underlying conduct was unlawful.[99]

SCOTUS has previously ruled that the "'most natural reading' of the statute evidences that 'knowingly and willfully' applied only to

either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted."). Moreover, '[i]n the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this Court to amend the criminal statute.'" (alteration in original) (citations omitted).

94. *United States v. Starnes*, 583 F.3d 196, 210 (3rd. Cir. 2009).

95. *Id.* at 209.

96. *See id.* at 209 (explaining that "while the 'traditional dichotomy of general versus specific intent' is a venerable one, in many situations it can be more perplexing than helpful.").

97. *See id.*; *see also id.* at 210 (citing Third Cir. Model Crim. Jury Instructions § 5.05)

98. *Id.* at 210 (quoting *United States v. Ladish Malting Co.*, 135 F.3d 484, 487-88 (7th Cir. 1998).

99. *Id.* at 210 (citations omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

the making of false or fraudulent statements . . . . "[100] Thus, it is evident that the "knowingly and willfully" requirements are not applicable to specific intent, nor is it necessary that the defendant knew their underlying conduct was unlawful. Moreover, in criminal cases the term "willfully" has been interpreted as a modifier as limiting liability to knowing violations.[101] If a defendant makes a false statement, they have knowingly done so, and therefore have knowingly violated the statute. Statutes imposing criminal liability using the modifier "willfully" and that require specific intent are highly technical and create a legal duty.[102] Sections 1001 and 1035 are not highly technical statutes, and do not create legal duties. Thus, it is inapposite to interpret these statutes with specific intent.

3. District of Columbia Circuit

In *United States v. Moore*, Judge Kavanaugh's concurring opinion breaks precedent in which the District of Columbia held that the government does not need to prove that the defendant knew their conduct was unlawful.[103] Judge Kavanaugh reckons that "[i]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[104] Judge Kavanaugh cites *Bryan v. United States*, where SCOTUS held that under 18 U.S.C. § 924 ("Section 924") the "willfully" element in Section 1001 requires proof that the defendant knew their conduct was unlawful.[105] Section 924 is distinguished from Section 1001, as Section 924 focuses exclusively on firearms.[106] Judge Kavanaugh then

100. *Liparota v. United States*, 471 U.S. 419, 435 (1985) (White, J., dissenting) (quoting *United States v. Yermian*, 468 U.S. 63, 69 n. 6 (1984)).

101. *See generally Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (noting "the Government must prove that the defendant acted with knowledge that his conduct was unlawful"); *See Bryan v. United States*, 524 U.S. 184, 191-92 (1998).

102. *See generally Cheek v. United States*, 498 U.S. 192, 200-02, (1991) (noting that "[w]illfulness as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.").

103. *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (establishing that "[f]or some regulatory offenses . . . the Supreme Court has . . . required affirmative proof of the defendant's knowledge that his or her conduct was unlawful.") (citing *Bryan v. United States,* 524 U.S. 184, 191-92, (1998)).

104. *Id.*

105. *See id.* at 704 (stating "district courts in § 1001 cases . . . require[ ] proof that the defendant knew his conduct was a crime.").

106. 18 U.S.C. § 924 (2018). Charges may not be brought under § 924 if the seller is not a federally licensed dealer. *See United States v. Letky,* 371 F. Supp. 1286 (W.D. Pa. 1974). There are gun sellers who are not federally licensed. For instance, people can purchase fire-

mistakenly implies that *Bryan v. United States* abrogates *United States v. Hsia*, which focuses on Section 1001.[107] With regard to Section 1001, in *United States v. Hsia*, the District of Columbia Court of Appeals held that a plain meaning interpretation of the statue demonstrates that the Government can prove the "knowingly and willfully" elements by (1) showing the defendant knew the statements made were false and (2) the defendant intentionally caused such statements to be made by another.[108]

If Judge Kavanaugh wanted to look to a Supreme Court case for analysis on Section 1001, he should have looked to *United States v. Yermian*.[109] In *Yermian*, SCOTUS held that a plain meaning interpretation does not support a specific intent under Section 1001.[110] In his concurring opinion, Judge Kavanaugh did not cite a case that focused on Section 1001, nor did he offer a canon of construction to support his interpretation of the statute.

III. Public Welfare Offenses

Public welfare offenses may include, but are not limited to: criminal nuisances; illegal liquor sales; sales of impure or adulterated food or drugs; sales of misbranded articles; violations of narcotic laws; violations of motor-vehicle laws; violations of traffic regulations; and violations of general police regulations, passed for the safety, health or well-being of the community.[111] SCOTUS has held that public welfare offenses do not have a scienter requirement.[112] Public welfare offenses are classified as regulatory offenses.[113] Judge Brett Kavanaugh issued

arms at gun shows. *See Northern Indiana Gun & Outdoor Shows v. City of South Bend*, 163 F.3d 449 (7th Cir. 1998).

107. *Moore*, 612 F.3d at 704.

108. *United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999).

109. *United States v. Yermian*, 468 U.S. 63, 73 (1984).

110. *See id.* at 74 (noting "[t]here is no indication that the addition of [specific intent] was intended also to change the meaning of the terms 'knowingly and willfully' to require proof of actual knowledge of federal involvement.").

111. *See generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 Col. L. Rev. 55, 73 (1933).

112. *Staples v. United States*, 511 U.S. 600, 606 (1994) ("Consequently, in the Government's view, this case fits in a line of precedent concerning what we have termed 'public welfare' or 'regulatory' offenses, in which we have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal."); *see also* Max Birmingham "*Strictly for the Birds: The Scope of Strict Liability Under the Migratory Bird Treaty Act*," 13 J. Animal & Nat. Res. L. 1, 12 (2017) (citing "[s]cienter is not an element of criminal liability under the Act's misdemeanor provisions.") (alterations in original).

113. Birmingham, *supra* note 112.

a concurring opinion in *United States v. Moore*, in which he states that Section 1001 is a regulatory statute.[114]

SCOTUS has acknowledged that there is not a precise definition for public welfare offenses, but held that they are offenses "against the state, the person, property, or public morals."[115] With regard to health care fraud, the state and the person, in this instance the person being the general public, are victimized and it is an act against public morals. Health care fraud is complex as it often creates a jurisdictional maze and victimizes patients and payers from various states.[116] Citing certain estimates, Congress observed that health care fraud is a $100 billion problem.[117] Congress is worried most about fraud perpetrated on insurance companies that drives up the cost of health insurance and, more generally, health care.[118] Faced with this problem, Congress decided it needed to enact legislation to make health care fraud a Federal crime.[119] Withal, Congress also did not state a *mens rea*. Thus, a consistent interpretation of the statute would be that there is no *mens rea* requirement, and that it is a strict liability offense.[120] Furthermore, in *United States v. Balint*, SCOTUS articulated that when the public is or may be financially injured, the actor may be held strictly liable.[121]

Regarding public welfare offenses, it is not necessary to prove actual injury to the Government or public in order to convict a defendant. Rather, the burden of proof is on the prosecution and requires

114. *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

115. *Morissette v. United States*, 342 U.S. 246, 255 (1952).

116. Health Care Fraud: All Public & Private Payers Need Federal Criminal Anti-Fraud Protections, H.R. REP. NO. 104–747, at 1 (1996).

117. *Id.*

118. *Id.* at 2.

119. *Id.* at 1.

120. 18 U.S.C. § 1035 (2010); *see United States v. Behrman*, 258 U.S. 280, 288 (1922) ("If the offense be a statutory one, and intent or knowledge is not made an element of it, *the indictment need not charge such knowledge or intent.*") (citations omitted) (emphasis added)).

121. *See generally United States v. Balint*, 58 U.S. 250, 252 (1922) ("So, too, in the collection of taxes, the importance to the public of their collection leads the Legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends and meeting it at the peril of punishment."); *see also United States v. Dotterweich*, 320 U.S. 277, 285 (1943) ("Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.").

them to show the defendant violated the law.[122] In *United States v. Dotterweich*, SCOTUS affirmed the conviction of a corporate officer who shipped adulterated and misbranded drugs in interstate commerce in violation of a federal statute, even "though consciousness of wrongdoing [was] totally wanting."[123] Thus, it is not necessary for the prosecution to show the speaker had the "intent to deceive" the Government when making a false statement. So long as the speaker "knowingly and willfully" made the statements that is sufficient to determine the speaker violated the statute.[124]

In 1995, SCOTUS addressed the statutory language of Section 1001 and interpreted it according to the plain meaning rule.[125] The statute, at the time had read, in part, "in any matter within the jurisdiction of any department or agency of the United States."[126] In *Hubbard v. United States*, the petitioner filed unsworn papers in Bankruptcy Court.[127] The Court of Appeals held that there is a "judicial function" exception under which Section 1001 extends to when false statements are made to a court while it is performing administrative or housekeeping functions, but not adjudicative functions.[128] SCOTUS re-

122. J. Manly Parks, *The Public Welfare Rationale: Defining Mens Rea in RCRA*, 18 WM. & MAR. ENVTL. L. & POL'Y REV. 219, 224 n.40 ("If a statute is found to be a public welfare statute, the lower burden of proof required will necessarily result in a greater ability to enforce the regulations in that statute, at least for cases that go to trial. The state will be more likely to obtain a conviction if it need only show that a defendant knew what he was doing, as compared to having to prove that the defendant acted knowing that his act was unlawful. Some critics have challenged the Court's reasoning in *Balint* and *Dotterweich*, arguing that enforcement of a non-regulatory statute would be as much obstructed by its intent requirement as enforcement of a regulatory statute would be. Webber, *supra* note 5, at 53.").

123. *Dotterweich*, 320 U.S. at 278, 284.

124. *Id*.

125. *See Hubbard v. United States*, 514 U.S. 695, 702 (1995) ("Prior to amendment, text read as follows: We think *Bramblett* must be acknowledged as a seriously flawed decision. Significantly, the *Bramblett* Court made no attempt to reconcile its interpretation with the usual meaning of 'department.' It relied instead on a review of the evolution of § 1001 and its statutory cousin, the false claims statute presently codified at 18 U.S.C. § 287, as providing a 'context' for the conclusion that 'Congress could not have intended to leave frauds such as [Bramblett's] without penalty.' *We are convinced that the Court erred by giving insufficient weight to the plain language of §§ 6 and 1001.*") (alteration in original) (emphasis added) (citations omitted).

126. *See* Pub. L. 104-292,18 U.S.C.A § 1001 (West 1996). ("[W]hoever, 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 under this title or imprisoned not more than five years, or both.")

127. *Hubbard*, 514 U.S. at 696.

128. *Id.* at 698-99.

versed in part, and held that a federal court is neither a "department" nor an "agency" under Section 1001, and thus the statute does not apply to false statements made in judicial proceedings.[129] When examining the legislative history, SCOTUS expounded that there is no clear, express intent to depart from the definition of "department" expressed in the original false claims statute.[130] As a result of the *Hubbard* opinion, Congress passed legislation that replaced "any department or agency" with "the executive, legislative, or judicial branch of the Government."[131] SCOTUS further explained that the original false claims statute was narrow in scope with regard to bilking the government out of property or money.[132] In response, Congress removed the property and financial fraud requirement since there is a need to "maintain[ing] the general good repute and dignity of . . . government . . . service itself."[133] Thus, Congress has already amended Section 1001 with the intent to expand the scope of the statute to incorporate all types of injury to the Government and the public.[134] Moreover, making false statements is considered a process crime.[135] Process crimes protect the criminal justice system,[136] in which the public is a major stakeholder.[137] Therefore, since making false statements is a crime under a regulatory statute that injures the public, it should be considered a public welfare offense. SCOTUS proclaimed that when a statute does not have a *mens rea*, it shall be interpreted that Congress purposefully omitted this requirement.[138] It logically follows that if Congress wanted to add a *mens rea*, it would have done so. Since there

129. *Id.* at 715.

130. *See id.* at 703-04.

131. Pub. L. 104-292, 18 U.S.C.A § 1001 (West 1996). H.R. 3166, 104th Cong. (1996); S. 1734, 104th Cong. (1996); *See generally* Christopher E. Dominguez, *Congressional Response to Hubbard v. United States: Restoring the Scope of 18 U.S.C. 1001 and Codifying the "Judicial Function" Exception*, 46 CATH. U. L. REV. 523 (1997).

132. *Hubbard*, 514 U.S. at 706.

133. *United States v. Lepowitch*, 318 U.S. 702, 704 (1943).

134. *See Hubbard*, 514 U.S. at 706.

135. *See generally* Green, *supra* note 3.

136. Feinberg, *supra* note 5.

137. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

138. *See Behrman*, 258 U.S. at 288 ("It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense. *If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.*" (citations omitted) (emphasis added)).

is no clear, express intent for the statute to have a *mens rea*, the statute should be interpreted accordingly.

IV. STANCE OF THE DEPARTMENT OF JUSTICE

There are several instances where the DOJ has weighed-in on laws, positing what is constitutional or unconstitutional. This violates the separation of powers.[139] Congress makes laws and is part of the Legislative Branch.[140] "[T]he structure of the Constitution does not permit the Congress to execute the laws; it follows that the Congress cannot grant to an officer under its control what it does not possess."[141] The DOJ enforces laws and is part of the Executive Branch.[142] When the DOJ takes stances on what is and what is not constitutional, it undermines the separation of powers and infringes on the powers of the Legislative Branch.[143]

In June 2018, the DOJ announced that the individual mandate[144] under the Affordable Care Act (the "ACA," colloquially referred to as Obamacare) is unconstitutional.[145] Attorney General Jefferson

139. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("[E]ach has one or more elements which identify it as essentially a function of separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

140. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

141. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

142. *See* U.S. CONST. art. II, § 3 ("[T]ake care that the Laws be faithfully executed . . . .).

143. *See Bowsher*, 478 U.S. at 726 ("To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.") (By this same logic, vesting powers to the Executive Branch, in this instance the DOJ, would reserve the right to the DOJ to make laws since they are determining what is constitutional and what is not constitutional.).

144. Letter from Attorney General Jeff Sessions Re: *Texas v. United States*, No. 4: I 8-cv-001 67-O (N.D. Tex.) ("After careful consideration, and with the approval of the President of the United States, I have determined that, in *Texas v. United States*, No. 4: l 8-cv-00167-O (N.D. Tex.), the Department will not defend the constitutionality of 26 U.S.C. 5000A(a), and will argue that certain provisions of the Affordable Care Act (ACA) are inseverable from that provision. . . . A coalition of 20 States and two individuals has now brought suit against the federal government, claiming that Section 5000A(a) is unconstitutional under NFIB in light of the Jobs Act's amendment to Section 5000A(c).").

145. Eric Beech & Lisa Lambert, *U.S. Justice Department Says Obamacare Individual Mandate Unconstitutional*, REUTERS (June 7, 2018, 9:48 PM) https://www.reuters.com/arti-

Sessions issued a letter stating that the DOJ "will not defend the constitutionality of 26 U.S.C. § 5000A(a), and will argue that certain provisions of the Affordable Care Act (ACA) are inseverable from that provision" in a case pending in Federal District Court.[146] In November 2018, after the Democratic Party won the majority in the House of Representatives, they announced they would investigate the DOJ's decision to not defend certain provisions.[147] In December 2018, the Federal District Court sided with the DOJ and found certain provisions of the ACA to be unconstitutional.[148]

The DOJ selecting which laws it finds to be constitutional and unconstitutional places it in the precarious position of being politicized. The Cable Television of Act of 1992 was enacted by Congress after it overrode the veto of President Bush,[149] who considered the "must-carry" provision unconstitutional.[150] This was challenged in Federal District Court, where the DOJ took the stance that it would interpret the constitutionality of the "must-carry" provision to be "*consistent with President Bush's veto message.*"[151] After President William Jefferson Clinton was elected, he reversed course and determined that the "must-carry" provision should be defended in court.[152] Consistent with President Clinton's message, the DOJ defended the "must-carry" provision in court.[153]

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cle/us-usa-healthcare/u-s-justice-department-says-obamacare-individual-mandate-unconstitutional-idUSKCN1J4062.

146. Letter from Jefferson B. Session III, Att'y Gen., to Paul Ryan, Speaker, U.S. H.R. (June 7, 2018), https://www.justice.gov/file/1069806/download.

147. *See* David Morgan, *House Democrats Target DOJ Decision Not to Defend Obamacare*, REUTERS (Nov. 19, 2018, 5:46 PM) https://www.reuters.com/article/us-usa-congress-obamacare/house-democrats-target-doj-decision-not-to-defend-obamacare-idUSK CN1NO2M7.

148. *See* Eric Beech & Nate Raymond, *Federal Judge Rules Obamacare Unconstitutional*, REUTERS (Dec. 14, 2018, 8:56 PM) https://www.reuters.com/article/us-usa-healthcare-court/federal-judge-rules-obamacare-unconstitutional-idUSKBN1OE01Y.

149. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

150. S. DOC. NO. 102-29, at 1 (1992); *see also Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 810 F. Supp. 1308, 1312 (D.D.C. 1992).

151. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 810 F. Supp. 1308, 1312 (D.D.C. 1992).

152. Neal Devins and Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 567–68 ("Fifteen years later, in a case involving the constitutionality of legislation mandating that cable television providers "must carry" certain stations, the Clinton DOJ reversed the position of the Bush I Administration. President Bush thought the laws unconstitutional, vetoed it on those grounds, and refused to defend it after Congress overrode his veto. President Clinton disagreed and directed his DOJ to defend the statute.").

153. *See Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 635 (1994) (referring to the "federal defendants' cross-motion to dismiss" the constitutional challenge).

President Richard Milhous Nixon signed the Voting Rights Act, which lowered the voting age to eighteen in state and local elections.[154] Solicitor General Erwin Griswold opined that Congress did not have the authority to enact this provision of the statute.[155] This provision was challenged in court.[156] During oral arguments, Solicitor General Griswold apprised SCOTUS of the conflicting views of President Nixon and the DOJ, and even went so far as to urge SCOTUS to consider the DOJ's position that the statute is unconstitutional.[157] This was attacked as being a less than zealous advocacy, as the Solicitor General lobbied SCOTUS for the opposing party's position.[158]

In another case, the DOJ took an even more extreme position of not just abstaining from defending the constitutionality of a statutory provision, but claiming a statutory provision to be unconstitutional in a case they were not a party to.[159] In *Metro Broadcasting v. Federal Communications Commission*, the DOJ filed an amicus brief arguing against the Federal Communications Commission (FCC) from adulterating minority preference policies.[160] SCOTUS disregarded the DOJ's amicus brief and held that the statutory provision is constitutional, but would later reverse this decision in a subsequent case.[161]

Regarding Sections 1001 and 1035, the DOJ has taken a newfound stance on how these statutes should be interpreted. In *United States v. Ajoku*, a nurse was indicted by a federal grand jury for health care fraud, conspiracy to commit health care fraud, and false statements in violation of Section 1035.[162] The nurse appealed her conviction to SCOTUS, challenging the term "willfully" as used in Section 1035.[163] The Solicitor General's brief opposing *certiorari* admitted

154. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301-302, 84 Stat. 314, 318 (1970) (codified as amended at 52 U.S.C. §10301 (2014)).

155. *See Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 94th Cong. 351 (1976) (statement of Erwin N. Griswold, Solicitor General of the United States).

156. *See Oregon v. Mitchell*, 400 U.S. 112, 117 (1970).

157. *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, *supra* note 155.

158. Report of the S. Comm. on Gov't Aff., No. 95-170, at 14 (1977).

159. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Metro Broad. v. Fed. Commc'ns Comm'n, 497 U.S. 547 (1990) (No. 89-453), 1989 WL 1126795 at *1.

160. *See id.*

161. *See Metro Broad. v. Fed. Commc'ns Comm'n*, 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

162. *United States v. Ajoku*, 718 F.3d 882, 886-87 (9th Cir. 2013).

163. Brief for the United States in Opposition, *Ajoku v. United States*, 572 U.S. 1056 (2014) (No. 13-7264), 2014 WL 1571930 at *8, *9.

that the government's interpretation of "willfully" in Sections 1001 and 1035 has changed.[164] The Solicitor General argued that "willfully" under Section 1035 does not require a "specific intent to deceive" and that the government must prove that the defendant knew the statement was false and knew that making a false statement was unlawful.[165]

In light of the Solicitor General's newfound stance on the interpretation of "willfully," SCOTUS granted the writ of *certiorari*, vacated the judgment, and remanded the case back to the Ninth Circuit for further consideration consistent with the Solicitor General's interpretation of "willfully" in his brief opposing *certiorari*.[166] SCOTUS took the aforementioned actions solely on the basis of the Solicitor General's brief. The DOJ's obvious influence on courts is far too great. The DOJ is now empowered to interpret laws in an *argumentum ab auctoritate* manner, which is to say the DOJ is using its authority for the conclusion of the argument.[167] The DOJ did not offer any evidence, fact, research, or statistics, *inter alia*, to support its' newfound stance on the interpretation of "willfully."

The Executive Branch making and interpreting laws is the beginning of a slippery slope. The roots of this may be traced to Solicitor General Robert Bork, who stated:

> [U]pon a sense of obligation to the Court and to the constitutional system so that we often behave less like pure advocates than do lawyers for private interests . . . . [I]t would seem to me not only institutionally unnecessary but a betrayal of profound obligations to the Court and to Constitutional processes to take the simplistic position that whatever Congress enacts we will defend, entirely as advocates for the client and without an attempt to present the issues in the round.[168]

Solicitor General Bork's viewpoint is susceptible to political ideology. We saw this transpire with the DOJ's shifting views on the "must-carry" provision as the White House went from a Republican President

164. *See id.* at *10 ("Upon further consideration, however, the government now agrees that the correct interpretation of 'willfully' in Section 1035 is the one articulated in *Bryan v. United States*, 524 U.S. 184 (1998). To find that a defendant 'willfully" 'made a false statement in violation of Section 1035, a jury must conclude 'that he acted with knowledge that his conduct was unlawful.' The same interpretation should apply to 18 U.S.C. 1001's materially identical prohibition on 'knowingly and willfully' making a false statement in a matter within the jurisdiction of the federal government.") (citations omitted).

165. *Id.* at *10, *11.

166. *Ajoku v. United States*, 572 U.S. 1056 (2014).

167. *See* DOUGLAS WALTON, INFORMAL LOGIC: A PRAGMATIC APPROACH, 210, 211 (Cambridge University Press, 2d ed. 2008).

168. Letter from Robert H. Bork, Solic, Gen., to Simon Lazarus III, Esq. (Aug. 5, 1975).

to a Democratic President.[169] Forbye, members of the Executive Branch making and interpreting laws is not limited to the Solicitor General.

In August 2013, Attorney General Eric Holder issued a memo that all federal prosecutors should omit the drug amounts in charging documents so courts would not know if mandatory minimums would be applicable to the sentencing.[170] After leaving office, Holder would acknowledge that the purpose of his memo was to push forward an agenda of President Barack Hussein Obama, even though there was not enough support in Congress, namely from Republicans, to pass sweeping legislation.[171] After President Donald John Trump, a Republican, succeeded President Obama, he appointed Jefferson Sessions as Attorney General who instructed federal prosecutors to disregard the Holder memo and to pursue the most severe penalties possible, which includes mandatory minimum sentencings.[172] Attorney General Sessions promulgated that this policy will bring the DOJ back to "enforcing the laws the Congress has passed."[173] Sessions' position is supported by the fact that Holder's memo asked prosecutors to *refrain* from performing a certain function of their job by not submitting drug amounts in charging documents, and Holder's admission in an op-ed that President Obama, who appointed him, was frustrated that criminal justice reform could not be passed.[174]

We see that it is a dangerous precedent when the DOJ starts to impose their views on what the laws should be and how they should be

169. *See Cable Television Consumer Protection and Competition Act of 1992*, *supra* note 149.

170. Memorandum from the Att'y Gen., Eric H. Holder, to the United States Attorney's and Assistant Att'y Gen. for the Crim. Division (Aug. 12, 2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf [hereinafter Memorandum].

171. Eric H. Holder Jr., *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), https://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html. ("In February 2015, President Obama convened a group of lawmakers—including the Republican senators Chuck Grassley of Iowa and Rand Paul of Kentucky and the Democratic senators Dick Durbin of Illinois and Cory Booker of New Jersey—to build support for sweeping reforms. *But the momentum has slowed thanks to opposition from a small group of Republican congressmen using language dredged from the past.* One, Senator Tom Cotton of Arkansas, even claimed recently that 'we have an under-incarceration problem.'") (emphasis added).

172. Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html.

173. *Id.*

174. *See* Memorandum, *supra* note 170.

interpreted, as the DOJ may then be weaponized to push a particular political agenda. Courts should not defer to what the DOJ claims "willfully" means under Sections 1001 and 1035, as that is the job of Congress and not the DOJ.

V. EXCULPATORY NO DOCTRINE

The "exculpatory no" doctrine is a creation of judicial activism.[175] As such, various courts have varied the scope of the doctrine. Some courts have held that Section 1001 does not extend to mere denials of guilt.[176] The Fifth Circuit noted that Section 1001 comes "uncomfortably close" to violating Fifth Amendment rights.[177] Other courts have limited the circumstances in which Section 1001 conflicts with the Fifth Amendment.[178] Some courts have held that there are no limiting circumstances, and rather view the privilege against self-incrimination as a justification to further the reach of the "exculpatory no" doctrine.[179] However, this is an overbroad interpretation of the Fifth Amendment, as "proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely. . . ."[180]

Courts that employed the "exculpatory no" doctrine went beyond the plain meaning of the statute and have not offered a canon of construction for doing so. The "exculpatory no" doctrine was first ar-

175. *United States v. Steele*, 896 F.2d 998, 1007 (6th Cir. 1990) (Ryan, J., dissenting) ("Over the years, judicial refusal to obey the command of § 1001 . . . was first given the name an 'exculpatory no' statement, then labeled an 'exception' to the statute, and, finally, elevated to the stature of a 'doctrine.' And thus, it is that in a span of a few years a federal trial court's refusal to apply a criminal statute as written . . . became a judge-made 'exception' to an Act of Congress and, for a touch of judicial legitimacy, was labelled a 'doctrine.'"); *see also* David Boies, *Reflections on Bush v. Gore: The Role of the United States Supreme Court*, 1 FLA. AGRIC. & MECHANICAL U.L. REV. 105, 108 (2006) (asserting that jurists can be classified as a "conservative-liberal" category, a "judicial activism-judicial restraint" category: "A liberal judge can be an advocate of judicial activism, such as Earl Warren, or judicial restraint, such as Felix Frankfurter. The same is true for a conservative judge.").

176. *See, e.g.*, United States v. Medina De Perez, 799 F.2d 540 (9th Cir. 1986); *see also* United States v. Bush, 503 F.2d 813, 819 (5th Cir. 1974); *see also* Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962).

177. *United States v. Lambert*, 501 F.2d 943, 946 n. 4 (5th Cir. 1974) (en banc), *abrogated by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994); *see* U.S. CONST. amend. V.

178. *See, e.g.*, United States v. King, 613 F.2d 670, 674, 675 (7th Cir. 1980) (noting the "exculpatory no" doctrine does not apply if the defendant has been read their Miranda rights).

179. *See, e.g.*, *United States v. Tabor*, 788 F.2d 714, 718-19 (11th Cir. 1986).

180. *United States v. Apfelbaum*, 445 U.S. 115, 117 (1980).

ticulated[181] in *United States v. Stark*,[182] when the court reasoned that Congress intended the statute to "protect the government against false pecuniary claims" and "to protect governmental agencies from perversion of their normal functioning."[183] In *Stark*, the court concluded that Congress intended the scope of the statute to cover false statements that are exculpatory responses to questioning initiated by government agents.[184]

The *Stark* court inappropriately applied the *ejusdem generis* ("of the same kinds, class, or nature") canon of construction to Section 1001 in its analysis of the statute, which is the basis for the foundation of the "exculpatory no" doctrine. The Scalia & Garner treatise opined on applying *ejusdem generis*:

> The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs*, *cats*, *horses*, *cattle*, *and other animals*. Does the phrase *and other animals* refer to wild animals as well as domesticated ones? What about a horsefly? What about protozoa? Are we to read *other animals* here as meaning *other similar animals*? The principle of *ejusdem generis* says just that: It implies the addition of *similar* after the word *other*.[185]

The *Stark* court reasoned that the word "statement" under Section 1001[186] being interpreted according to *ejusdem generis* "does not fairly apply to the kind of statement involved in this case where the defendants did not volunteer any statement or representation for the purpose of making claim upon or inducing improper action by the government against others."[187] First, *ejusdem generis* is not an

181. The term "exculpatory no" was first used in *United States v. McCue*, 301 F.2d 452, 455 (2d Cir. 1962). However, the exception to § 1001 liability was originally expressed in United States v. Stark, 131 F. Supp. 190 (D. Md. 1955), and then Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962). *See* Lt. Col. Bart Hillyer & Maj. Ann D. Shane, *The "Exculpatory No:" Where Did It Go?*, 45 A.F.L. Rev. 133, 13941 (1998).

182. *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955).

183. *Id. at* 205 (citing *United States v. Gilliland*, 312 U.S. 86 (1941)).

184. *See id.* at 205-06.

185. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 199 (1st ed. 2012).

186. 18 U.S.C. § 1001(a) (2006) ("Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent *statement* or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or *fraudulent* statement or entry; shall be fined under this title, imprisoned not more than 5 years . . . . ") (emphasis added).

187. *Stark*, 131 F. Supp. at 206.

appropriate canon of construction because there is not a catchall phrase and the end of an enumeration of specifics. Second, even if applying *ejusdem generis* to "statement" under Section 1001, it would have to be with the words "representation" and "entry." The *Stark* court conflates the qualifiers ("false, fictitious, fraudulent") with the specifics ("statement" and "entry"). The qualifiers are adjectives; the specifics are nouns. "False, fictitious, fraudulent" describe the type of "statement" or "entry" which is being prohibited. "Statement" is an oral response, and "entry" is a non-oral response, such as a written response.

In *Brogan v. United States*,[188] SCOTUS held that there is not an "exculpatory doctrine" under Section 1001.[189] When questioned as to whether he accepted bribes from an employer, Brogan falsely responded with a simple "no."[190] SCOTUS rebuked lower courts for interpreting the statute according to their own policy preferences, and ultimately held that the plain language of the statute does not allow for an "exculpatory no" doctrine.[191]

Reading "intent to deceive" into Section 1001 is beyond the plain language of the statute, and similar to the "exculpatory no" doctrine. An 'intent to deceive' is another attempt for courts to reign in the prosecutorial tool they may feel has too much reach. Notwithstanding, SCOTUS has held against this and explicitly stated that "[c]ourts may not create their own limitations on legislation."[192] Even if other courts try to interpret Section 1001 through a canon of construction in order to determine the intent of Congress, SCOTUS has declared that the intent of Congress with regard to Section 1001 is to cover a broad range of offenses and that the statute should be read as broadly as possible.[193]

VI. Interpreting the Materiality Requirement of the Statute

There is still ambiguity about what constitutes materiality under Section 1001. The purpose of the materiality requirement under Section 1001 is to clarify the scope of the statute, so as to put parame-

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

189. *Id.* at 408.

190. *Id.* at 400.

191. *Id.* at 408 ("Because the plain language of § 1001 admits of no exception for an 'exculpatory no,' we affirm the judgment of the Court of Appeals.").

192. *Id.* ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread.").

193. *United States v. Rodgers*, 466 U.S. 475, 480 (1984).

ters around the reach of prosecutors.[194] Some scholars have concurred with SCOTUS's plain meaning interpretation of the statute in *Brogan*,[195] but felt that the defendant's false statement did not meet the threshold of materiality since the government did not show that their investigation was impeded.[196] Notwithstanding, it should be noted that at the time Brogan was convicted Section 1001 did not have the materiality requirement.[197] Before the statute was amended in 1996, the Second Circuit held that materiality was not an element since it was not written in the statute.[198] Thus, a plain meaning of the interpretation would not have a materiality requirement, and the government would not have to show that their investigation had been impeded.

In 1995, the question before SCOTUS was whether it is constitutional or unconstitutional for a judge to refuse to allow a jury to determine the question of materiality under Section 1001.[199] In *United States v. Gaudin*, the majority opinion blazons that "[i]t is *uncontested* that conviction under this provision requires that the statements be 'material' to the Government inquiry, and that *'materiality' is an element of the offense* that the Government must prove."[200] However, in a concurring opinion Chief Justice Rehnquist states that "[t]he Court does not resolve that conflict; rather, *it merely assumes that materiality is, in fact, an element* of the false statement clause of § 1001."[201] It may

194. Nathan Edwards, *Brogan v. United States: A Critical Response to the Supreme Court's Analysis of 18 U.S.C.A. § 1001*, 31 MCGEORGE L. REV. 147, 187 (1999) (warning that "§ 1001 will lurk in the repertoire of the 'over-zealous prosecutor.'") (citing Petitioner's Brief at 18, *Brogan v. United States*, 522 U.S. 398 (1998) (No. 96-1579)); *see also* Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 619 (2006).

195. Edwards, *supra* note 194; *see also* Harry E. Garner, *Criminal Law–18 U.S.C. 1001–Abrogation of the "Exculpatory No" Doctrine*, 66 TENN. L. REV. 561, 593 (1999).

196. Garner, *supra* note 195.

197. At the time defendant Brogan was convicted, 18 U.S.C. § 1001 provided: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001 was amended in 1996, which added the materiality requirement to every subsection under section (a); *see also United States v. Brogan*, 522 U.S. 398, 400 (1998).

198. *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984) ("It is settled in this Circuit that materiality is not an element of the offense of making a false statement in violation of § 1001.").

199. *United States v. Gaudin*, 515 U.S. 506, 507 (1995).

200. *Id.* at 509 (emphasis added).

201. *Id.* at 524 (emphasis added).

be inferred that Chief Justice Rehnquist's view is that materiality was not an element because it was not in the statute at the time, and thus he utilized a plain meaning interpretation of the statute.

The term material may sometimes be confused with relevancy, but they are two very different legal terms.[202] SCOTUS has defined material as "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed."[203] This definition is quite broad, and a plain meaning interpretation of "influence, or [be] capable of influencing," does not require evidence that the false statement actually influences the government.[204]

The relevant part of Section 1001 states, "makes any materially false, fictitious, or fraudulent statement or representation." If the Series-Qualifier Canon were used to interpret the statute, the term materially would be construed in consistency with the interpretation of the term "statement."[205] The term "statement" has been interpreted according to its plain meaning by courts, and has come to encompass those that are oral,[206] written,[207] sworn,[208] unsworn,[209] voluntary,[210]

202. *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. (1956) ("'Material' when used in respect to evidence is often confused with 'relevant', but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i. e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material. Professor Wigmore depicts with some acerbity the difference between relevancy and materiality, 'the inaccuracy of our usage' of the terms, and 'the harmfulness of this inveterate error'. Materiality, he maintains, is a matter of substantive law and does not involve the law of evidence. He does not include "materiality" in the topics treated in his volumes on Evidence.").

203. *Gaudin*, 515 U.S. at 509; *see also Kungys v. United States*, 485 U.S. 759, 770 (1988) ("The most common formulation of that understanding [of the materiality concept] is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed.'"); *see, e.g.*, *Weinstock*, 231 F.2d at 702 n.6.

204. *United States v. Edgar*, 82 F.3d 499, 510 (1st Cir. 1996) (declaring that "[T]he standard is not whether there was actual influence, but whether it would have a *tendency* to influence.") (emphasis added); *see also United States v. Trent*, 949 F.2d 998, 999 (8th Cir. 1991) (holding that there is no reliance requirement because materiality only demands the *ability* to influence the government) (emphasis added); *see also United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991).

205. *See* ANTONIN SCALIA & BRYAN A. GARNER, *supra* note 185, at 147 ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.").

206. *See, e.g.*, *United States v. Rodriguez-Rodriguez*, 840 F.2d 697, 700-01 (9th Cir. 1988).

207. *See, e.g.*, *Franks v. Delaware*, 438 U.S. 154 (1978).

208. *See, e.g.*, *Id.*

209. *See, e.g.*, *United States v. Des Jardins*, 772 F.2d 578, 580 (9th Cir. 1985).

210. *See, e.g.*, *United States v. Adler*, 380 F.2d 917, 922 (2d Cir. 1967).

and on government documents for birth certificates,[211] passports,[212] residency,[213] and finances.[214] Thus, applying the Series-Qualifier Canon to interpret the statute, "materially" and "statement" would be defined in a "straightforward, parallel construction," which does not require that the government provide evidence that it has been influenced by the false statement.

While "capable of influencing" may be a low threshold,[215] it is nonetheless the threshold that the statute prescribes. There is still a circuit split as to whether materiality is a question of law or a question of fact. A majority of the courts hold that it is a question of law, but a minority of courts have taken the position that it should be decided by a trier of fact.

CONCLUSION

While SCOTUS and the DOJ agree that Sections 1001 and 1035 confer extraordinary authority on prosecutors,[216] this is what a plain meaning interpretation of the statutes prescribes. Reigning in this extraordinary authority is an issue for Congress, not for our courts. When courts tried to reign in this extraordinary authority under the "exculpatory no" doctrine, SCOTUS eventually rejected it.[217] Reviewing the legislative history, Congress tried to limit the scope by adding a property and financial fraud requirement in order to limit the reach of

211. *See, e.g.*, *United States v. Montemayor*, 712 F.2d 104, 106 (5th Cir. 1983).

212. *See, e.g.*, *United States v. Scott*, 915 F.2d 774, 775 (1st Cir. 1990).

213. *See, e.g.*, *United States v. Lopez*, 728 F.2d 1359, 1362-63 (11th Cir. 1984).

214. *See, e.g.*, *United States v. Leal*, 30 F.3d 577, 584 (5th Cir. 1994) (false statements on invoices made to the Small Business Administration); *see also* United States v. Kneen, 889 F.2d 770, 773 (8th Cir. 1989) (false statements made on expense reports to the Internal Revenue Service).

215. *See, e.g.*, *United States v. Alemany Riv*era, 781 F.2d 229, 235 (1st Cir. 1985) ("[T]he test for materiality under 18 U.S.C. § 1001 is . . . whether [the statement] had the capacity to influence a government function."); *see also United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980) ("The false statement must simply have the capacity to impair or pervert the functioning of a government agency."); *see also United States v. White*, 270 F.3d 356, 365 (6th Cir. 2001) ("'[*M*]*ateriality*' *is a fairly low bar* . . . . [T]he government must present at least some evidence showing how the false statement in question was capable of influencing federal functioning.") (emphasis added); *see also United States v. Moore*, 446 F.3d 671, 681 (7th Cir. 2006) (statement is material if it "has a natural tendency to influence, or . . . is capable of affecting, a government function."); *see also United States v. Calhoon*, 97 F.3d 518, 530 (11th Cir. 1996) ("[I]t is enough if the statements had a 'natural tendency to influence, or [were] capable of affecting or influencing a government function.'").

216. *See Brogan v. United States* , 522 U.S. 398, 408 (1998); *See Am. Surety Co. of N.Y. v. Sullivan*, 7 F.2d 605 (2d Cir. 1925).

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

prosecutors.[218] The statute was easily gamed, and Congress then removed the property and financial fraud requirement.[219] Now, it is being claimed again that the statute gives prosecutors extraordinary authority, which should be limited. If Congress intended to limit the reach of the statute, it could define "materially,"[220] as courts have interpreted the term with a low threshold.[221] Nevertheless, this is not an issue for our courts, as limiting the reach of prosecutors by holding that the statute requires specific intent goes beyond a plain meaning interpretation.

218. Act of Oct. 23, *supra* note 11.

219. Act of June 18, *supra* note 16.

220. *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010) (noting "Section 1001 does not define 'materially false.'").

221. *See* cases cited *supra* note 215.

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