

JUST SAY "NO": AN ANALYSIS OF THE "EXCULPATORY NO" DOCTRINE

INTRODUCTION

When individuals become the focus of an official inquiry,¹ they often lie.² If they lie to a federal department or agency they expose themselves to potential criminal liability under 18 U.S.C. § 1001.³ The all-encompassing⁴ breadth⁵ of section 1001 leaves room for agency abuse.

1. *See generally* United States v. Mendenhall, 446 U.S. 544, 544-57 (1980) (the Supreme Court recognizes the pressure an individual is under when stopped by police, and further recognizes that the individual feels compelled to respond).

2. *See generally* 3 W. LAFAVE, SEARCH AND SEIZURE § 9.02, at 52-55 (1978) (confronted with the option of keeping quiet or lying, the average person may feel that failing to respond will lead to further police involvement).

3. Section 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1970).

4. Section 1001 has been applied in a myriad of situations. *See, e.g.,* Bryson v. United States, 396 U.S. 64, 65 (1969) (false statement to the National Labor Relations Board); United States v. Adler, 380 F.2d 917, 919 (2d Cir.) (false statement to FBI), *cert. denied*, 389 U.S. 1006 (1967); United States v. McCue, 301 F.2d 452, 453 (2d Cir.) (false statement to IRS), *cert. denied*, 370 U.S. 939 (1962); United States v. Blake, 206 F. Supp. 706, 706-07 (W.D. Mo. 1962) (false statement to U.S. Postal Service).

5. *See* United States v. Rodgers, 466 U.S. 475, 484 (1984) ("Resolution of . . . whether a statute should sweep broadly or narrowly is for Congress."). The Court concluded that although the language of 18 U.S.C. § 1001 is broad, it is neither ambiguous or unjust. *Id.* *See also* Bryson v. United States, 396 U.S. 64, 72 (1969). The Court in *Bryson* held that section 1001 unambiguously states "a citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Id.*

Responding to the potential for abuse,⁶ several courts have narrowed the reach of section 1001. This judicial activism has created what has come to be known as the "exculpatory no"⁷ doctrine.⁸

Such as it is, the doctrine consists of a collection of diverse theories⁹ rather than a unitary rule.¹⁰ Although a majority of the federal circuits purport to adopt the doctrine, the supporting rationales are inconsistent. Consequently, tests for the application of the doctrine likewise vary from circuit to circuit.

Part I of this Note provides three hypotheticals to introduce the doctrine and to expose its attendant difficulties. Part II of this Note then engages in a brief discussion of the history of 18 U.S.C. § 1001, the statute which gave rise to the "exculpatory no" doctrine. The core of the Note is the federal circuit analysis which follows in Part III. This

6. See *infra* note 31 and accompanying text discussing judicial concern with the potential for police abuse of section 1001.

7. The first reported use of the term "exculpatory no" occurred in *United States v. McCue*, 301 F.2d 452, 455 (2d Cir. 1962). The court wrote the term as "exculpatory 'no'", putting the emphasis on a mere "no". This captures the essence of the doctrine as it was first enunciated by the Second Circuit in *United States v. Davey*, 155 F. Supp. 175, 177 (S.D.N.Y. 1957), "whether or not a simple 'no' is a statement from the standpoint of grammar and syntax, I do not construe it to be a statement within the contemplation of § 1001." *Id.*

The doctrine has also been referred to as the "investigative exception", *United States v. Medina de Perez*, 799 F.2d 540, 546 (9th Cir. 1986); the "exculpatory negative", *United States v. Poutre*, 646 F.2d 685, 686 (1st Cir. 1980); and the "exculpatory denial", *United States v. Russo*, 699 F. Supp. 1344, 1347 (N.D. Ill. 1988).

8. 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.'

United States v. Steele, 896 F.2d 998, 1007 (6th Cir. 1990) (Ryan, J., dissenting).

9. The Fifth Circuit, first defined the scope of the doctrine in *Paternoastro v. United States*, 311 F.2d 298 (5th Cir. 1963). *Paternoastro's* definition serves as a benchmark for subsequent formulations of the doctrine. The Fifth Circuit stated that an "'exculpatory no' answer without any affirmative aggressive or overt misstatement on the part of the defendant does not come within the scope of . . . § 1001." *Id.* at 309.

10. See 3 K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* § 13.19 (1989 Supp.); Fiske, *White Collar Crime: A Survey of the Law*, 18 AM. CRIM. L. REV. 169, 273-80 (1980); Comment, *False Statements to United States Customs Officials: The "Exculpatory No" Defense*, 2 CAN.-AM. L.J. 133 (1984); Note, *Judicial Reluctance to Enforce the Federal False Statement Statute in Investigatory Situations*, 51 FORDHAM L. REV. 515, 517-19 (1982); Note, *Constitutionally Privileged False Statements*, 22 STAN. L. REV. 783, 84 (1970).

analysis explores the disparate rationales by which the circuits endorse or reject the doctrine. By comparing the various tests used to apply the doctrine, the latent ambiguities in the doctrine become clear. Part IV of this Note discusses issues underlying any application of the doctrine. Finally, Part V concludes the Note by suggesting that courts should stop applying the exculpatory no doctrine until Congress fills in the doctrinal gaps with appropriate legislation.

PART I

Introductory Hypotheticals

(1) An FBI agent arrives at X's house wishing to question X about Y.

Q: Are you X?

A: No.

X's response is a lie in a situation where the agent was acting in an administrative rather than an investigative capacity.¹¹ X is not a suspect,¹² and X's response was not intended to "mislead."¹³ Arguably, X was responding out of fear of self-incrimination,¹⁴ a fear which may very well be justified in certain instances. Under these circumstances the government can prosecute X under 18 U.S.C. § 1001,¹⁵ and, if X is convicted, he or she can be fined up to \$10,000, imprisoned up to five years, or both.

Early judges who found a literal application of the statute unduly harsh in situations similar to the aforementioned created the "exculpatory no" doctrine¹⁶ to ameliorate the statute's effects. Under this view, X's response constitutes a mere "exculpatory no" which, for various reasons,¹⁷ falls outside the scope of section 1001.

(2) The FBI arrives at X's house wishing to question X about Y.

11. See *infra* notes 178-85 and accompanying text for a discussion of how some courts have attempted to carve out an exception to section 1001 when the government is acting in its investigatory rather than merely administrative capacity.

12. See *infra* notes 186-97 and accompanying text discussing the importance of whether an individual is a suspect when questioned.

13. See *infra* notes 29 & 151 characterizing capacity to mislead as materiality.

14. See *infra* note 32 discussing self-incrimination concerns.

15. See *supra* note 3.

16. See *supra* note 31 explaining how judicial concern with potential police abuse of section 1001 led to development of the "exculpatory no" doctrine.

17. See *infra* notes 27-32 and accompanying text for a discussion of those reasons which initially led judges to promulgate an exception to section 1001. Those reasons

Q: Are you X?

A(1): No, I am Z. X just left. Or,

A(2): No, I am the President of the United States. What can I do for you?

X's responses no longer are simple negatives. Both answers are affirmative false statements. Some courts began to stretch the mere "no" to false statements which exceeded "mere no's," but not by much.¹⁸ The question then became not whether the response was a "mere no," but whether the statement had "the capacity to pervert the authorized functions of the government."¹⁹

(3) The FBI arrives at X's house, wishing to question X about Y, while suspecting that X and Y together have engaged in criminal activity.

Q: Are you X?

A: No.

The doctrine becomes especially murky when the querying agency suspects X. Once the police arrest X, X obviously would know he or she was a suspect. But prior to an arrest, X might not know whether the police suspect him or her of wrongdoing. *Miranda* rights accrue at the point the police initiate a "custodial interrogation."²⁰ A lapse exists prior to such interrogation, during which X has no *Miranda* rights, and during which the police may ask questions whose answers they already know. Some courts have applied the doctrine in such circumstances to fill the void.²¹

PART II

History

Any analysis of the "exculpatory no" doctrine must begin with a brief history of its parent statute, 18 U.S.C. § 1001²² (Hereinafter section 1001). Section 1001 sprang from a congressional desire to

included a fear of potential police abuse, fairness, concerns that fifth amendment rights were being abused, and overly restrictive interpretations of jurisdiction and materiality.

18. *United States v. Russo*, 699 F. Supp. 1344, 1348 (N.D. Ill. 1988).

19. *See infra* note 151 discussing whether a false statement has the capacity to pervert the authorized functions of government.

20. *See infra* note 189 and accompanying text discussing the implications of *Miranda v. Arizona*, 384 U.S. 436 (1966).

21. *See infra* note 31 discussing potential abuse of section 1001.

22. *See supra* note 3 for text of section 1001.

criminalize the act of making false pecuniary claims by military personnel against the government.²³ Between 1863 and 1934 Congress continually expanded the scope of section 1001.²⁴ Eventually, section 1001 covered every false statement made to any government unit in any matter within that unit's jurisdiction. In 1948, section 1001 achieved its present form, after Congress separated false claims from false statements.²⁵

Shortly thereafter, judicial concern began to mount over the breadth of section 1001. If the statute were "read literally, virtually any false statement, sworn or unsworn, written or oral, made to a government employee could be penalized as a felony."²⁶

Thus began a stream of decisions minimizing the statute's impact. First courts limited what constituted a "statement."²⁷ Courts then shifted their focus to fairness,²⁸ materiality,²⁹ jurisdiction,³⁰ encourage-

23. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 (1865).

24. Act of Oct. 23, 1918, Pub. L. No. 228, ch. 194, § 35, 40 Stat. 1015 (extending false claims provision to cover corporations in which the government holds stock); Act of Mar. 4, 1909, Pub. L. No. 175, ch. 4, § 35, 35 Stat. 1095 (false statements were proscribed if made "for the purpose and with the intent of cheating and swindling or defrauding the government," or if made to obtain payment of a false claim); Act of June 22, 1874, ch. 5, § 5438, 18 Stat. 1054 (extension of statute to include "every person").

25. *United States v. Bramblett*, 348 U.S. 503, 508 (1955) (discussing the statutory evolution of section 1001). In 1948, Congress separately treated false claims and false statements in 18 U.S.C. § 287 and 18 U.S.C. § 1001 respectively.

26. *United States v. Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972) (holding that a defendant's false statement made to an FBI agent who was looking for him did not fall under the proscription of section 1001).

27. See *United States v. Stark*, 131 F. Supp. 190, 198 (D. Md. 1955). The court in *Stark* noted that in an FBI initiated inquiry, oral responses made under oath are not "statements" for the purposes of section 1001 because the defendant did not make a claim against the United States by lying to the FBI). *Id.* at 206. See also *United States v. Philippe*, 173 F. Supp. 582, 584 (S.D.N.Y. 1959) (reiterating the proposition that mere denials, unlike "affirmative representations," are not calculated to mislead the government and, therefore, are not "statements" for the purposes of section 1001).

28. *United States v. Levin*, 133 F. Supp. 88, 90 (D. Colo. 1953). In *Levin*, the court worried that allowing a section 1001 conviction for an unsworn statement would not only eliminate the "age-old conception of the crime of perjury," but would also create "flagrant injustices." *Id.* The court stated that "any person who failed to tell the truth to the myriad of government investigators . . . about any matter, regardless of how trivial, within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury." *Id.* Therefore, the court limited the application of section 1001 to persons under a legal obligation to speak. *Id.* at 91.

Note that the *Levin* court's essential fairness argument concerning the disparity between the perjury statutes and section 1001 previously had been rejected by the

ment of improper police procedure³¹ and potential fifth amendment conflicts.³²

Congress has considered these limitations, but steadfastly refuses to

Supreme Court in *United States v. Gilliland*, 312 U.S. 86, 95 (1941). The Supreme Court recently affirmed its rejection of this fairness argument in *United States v. Rodgers*, 466 U.S. 475, 482 (1984).

29. See *Brandow v. United States*, 268 F.2d 559, 565 (9th Cir. 1959) (the court defined immaterial statements as those which, although false, are incapable of perverting the agency's function). Under *Brandow*, materiality may be viewed as the intrinsic capability of a false statement to pervert an agency function. Following the *Brandow* model, the court in *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975) found that a bank president's failure to list a loan, when filling out an FDIC questionnaire, was immaterial, as no government official was relying on the truth of the matter asserted.

The Second Circuit does not require materiality as an element of section 1001. See *United States v. McCue*, 301 F.2d 452, 454-55 (2d Cir.) (rejecting the argument that section 1001 contemplates a very limited set of "material" false statements), *cert. denied*, 370 U.S. 939 (1962); see also *United States v. Pereira*, 463 F. Supp. 481, 486 (E.D.N.Y. 1978). The argument rejected in *McCue* focused on the legislative history of section 1001, S. REP. NO. 1202, 73d Cong., 2d Sess. 1 (1934); 78 CONG. REC. 11,270 (1934) which provided that section 1001, as amended in 1934, sought to prevent "false reports on shipments of 'hot oil' and false statements of wages paid on Public Works Administration projects." Noting the broad language of the amendment, the *McCue* court concluded that Congress included the aforementioned situations as mere examples of prohibited conduct. "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in *any way* restricted." *McCue*, 301 F.2d at 455 (quoting *Bramblett*, 348 U.S. at 507 (1955)).

30. *Friedman v. United States*, 374 F.2d 363, 369 (8th Cir. 1967) (limiting the application of section 1001 by finding that the power to investigate, in and of itself, did not satisfy the jurisdictional element of section 1001). *But see United States v. Adler*, 380 F.2d 917, 922 (2d Cir. 1967) (the *Friedman* court's restrictive interpretation cannot be reconciled with the broad interpretation given to other terms in the statute).

The Supreme Court in *United States v. Rodgers*, 466 U.S. 475, 479 (1984) also found the *Friedman* approach "unduly strained." The Court held that "section 1001 expressly embraces false statements made in *any* matter within the jurisdiction of *any* department or agency of the United States" including an FBI investigation. *Id.*

31. *United States v. Stark*, 131 F. Supp. 190, 207 (D. Md. 1955) provided the classic statement of judicial concern regarding potential police abuse of section 1001. The court found that section 1001 was meant "to operate as a shield for defense rather than as a sword for attack." *Id.*

Courts have voiced concern that an investigating agency could ask a suspect a series of questions, already knowing the answers, anticipating the suspect might lie. The agency could then prosecute the coerced lie under section 1001 even if the agency could not otherwise prosecute under the original substantive offense. See, e.g., *United States v. Bush*, 503 F.2d 813, 818-19 (9th Cir. 1974) (section 1001 inapplicable where IRS aggressively coerced a statement from defendant already under suspicion).

32. *United States v. Cogdell*, 844 F.2d 179, 183-84 (4th Cir. 1988) ("[A] criminal prosecution for denying guilt to a law enforcement officer is offensively close to a prose-

restrict the breadth of section 1001. Legislative efforts to limit section 1001 have focused on punishing an "exculpatory no" statement as a misdemeanor rather than a felony.³³ Congressional ambivalence apparently signifies satisfaction with the breadth of section 1001.³⁴

The Supreme Court likewise has refused to limit section 1001 by

cution for a statement protected by the constitutional privilege against self-incrimination.").

Some courts have explicitly limited the application of the "exculpatory no" doctrine to those circumstances where the false statement statute conflicts with the constitutional privilege against self-incrimination. *United States v. King*, 613 F.2d 670, 675 (7th Cir. 1980) ("exculpatory no" doctrine does not apply after *Miranda* warning administered). Other courts view the privilege against self-incrimination as providing additional justification for the doctrine rather than limiting its application. *See United States v. Tabor*, 788 F.2d 714, 718-19 (11th Cir. 1986); *United States v. Bush*, 503 F.2d 813, 818-19 (5th Cir. 1974).

See also United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974) ("undoubtedly the judicial gloss put on section 1001 by the 'exculpatory no' decisions originates at least in part from latent distaste for an application of the statute that is uncomfortably close to the fifth amendment."); *United States v. Davey*, 155 F. Supp. 175, 178 (S.D.N.Y. 1957) (in light of the fifth amendment, a false answer from an accused person cannot pervert the authorized functions of the Federal Bureau of Investigation); *United States v. Stark*, 131 F. Supp. 190, 207 (D. Md. 1955) ("it seems quite inconsistent with our fundamental concepts of due process . . . to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein. . .").

33. *Proposed Amendments to the Federal Criminal Code: Hearings on S. 1437 Before Committee on the Judiciary*, 95th Cong., 1st Sess. (1977) (Committee Report). The "exculpatory no" response would have been reclassified as a Class A misdemeanor providing up to one year in prison, whereas other false responses would have been graded as Class B felonies warranting up to two years in prison. The Committee recognized that although no person has a right to lie to federal officers, an individual may feel compelled to do so under some circumstances. The law should not be oblivious to this propensity. *Id.*

34. In fact, Congress has borrowed clauses from section 1001 in order to broaden other statutes. *See* 131 CONG. REC. S11,882 (daily ed. Sept. 20, 1985). Efforts to amend the Grand Jury Disclosure Act included adding the phrase "for use in a *matter within the jurisdiction of an agency*." The italicized language was borrowed from section 1001 because it "has already been broadly interpreted in cases involving 18 U.S.C. § 1001 and was [therefore] selected to avoid listing every conceivable agency proceeding." *Id.*

See also 135 CONG. REC. S14,497 (daily ed. Nov. 1, 1989) (statement of Rep. Edwards). In discussing the impeachment of Judge Walter L. Nixon, Jr., Representative Edwards stated as follows: "In our system of justice, a citizen has a constitutional right to remain silent when federal investigators ask questions. You don't have to cooperate. But if you agree to an interview, you have to tell the truth. That is the law. If you conceal information or lie, you violate 18 U.S.C. § 1001. You commit a felony." *Id.*

finding the statute neither impermissibly broad,³⁵ nor impermissibly vague.³⁶ Although the Court has never openly addressed the "exculpatory no" doctrine,³⁷ recent opinions have iterated that if Congress wants to limit section 1001, Congress knows how to do so.³⁸ The Court's elliptical statements on this issue impliedly admonish courts not to usurp the role of the legislature.

PART III

*Federal Circuit Analysis*³⁹

First Circuit

The First Circuit has never reversed a section 1001 conviction based on the "exculpatory no" doctrine. Initially, the First Circuit hinted in dicta that it would adopt the doctrine⁴⁰ as long as the false statement constituted a mere denial of wrongdoing in response to a governmental agency's investigatory questioning.⁴¹ This enthusiasm quickly waned,

35. See *supra* note 5 discussing the Supreme Court's ruling on the breadth of section 1001.

36. In *United States v. Gilliland*, 312 U.S. 86, 91 (1941), construing the predecessor to section 1001, 18 U.S.C. § 80 (1940), the Court held that the statute was not invalid for indefiniteness, commenting that it could be successfully applied even where a more specific statute more readily applied.

37. Fifteen petitions for writs of certiorari have been denied without a single dissenting rationale offered in cases where the defendant raised the "exculpatory no" defense.

See Brief in Opposition to a Writ of Cert., Brief for Petitioner, and Brief for Respondent, *United States v. Rodgers*, 466 U.S. 475 (1984) (No. 83-620). Each of the four briefs offered to the Supreme Court in *Rodgers* mentioned the "exculpatory no" doctrine. Nevertheless, the Supreme Court did not discuss the doctrine in its opinion.

38. *United States v. Rodgers*, 466 U.S. 475 (1984). "Resolution of . . . whether a statute should sweep broadly or narrowly is for Congress." *Id.* at 484.

39. This Note brings to light the profound disagreement among the circuits regarding both the parameters and application of the "exculpatory no" doctrine. To illustrate this disagreement, the text will give a brief synopsis of each circuit. In-depth analysis is reserved for the footnotes.

Note that the United States Army Court of Military Review also addressed this issue in *United States v. Jackson*, 22 M.J. 643 (A.C.M.R. 1986). The *Jackson* court found the policies chosen by circuits subscribing to the doctrine unpersuasive when applied to the defendant, who although not a suspect, deliberately attempted to mislead investigators. *Id.* at 646.

40. *United States v. Chevoor*, 526 F.2d 178, 183 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). The defendant in *Chevoor* was indicted under 18 U.S.C. § 1623, a perjury statute. The First Circuit refused to extend the doctrine to section 1623, though hinting it might apply it under section 1001.

41. *Id.*

however. Four years later the First Circuit refused to apply the doctrine in *United States v Poutre*.⁴² Although the *Poutre* court acknowledged the potentially perilous breadth of section 1001, the court felt a legislative remedy was imminent.⁴³ In addition, the court felt uncomfortable with the arbitrariness of a court drawn distinction between affirmative and exculpatory negative responses.⁴⁴

The doctrine might still be available as an affirmative defense, although it cannot support a motion to dismiss.⁴⁵ Because the First Circuit has neither explicitly accepted nor rejected the doctrine,⁴⁶ it is unclear where the circuit now stands.

Second Circuit

The Second Circuit has alluded to the "exculpatory no" doctrine on many occasions,⁴⁷ but has yet to encounter a fact situation which satis-

42. 646 F.2d 685 (1st Cir. 1980).

43. *Id.* at 686.

44. *Id.* By 1985, the doctrine had been narrowed still further. *United States v. Rendle*, No. CR 85-149-T, slip op. (D. Mass. Jan. 4, 1985) held that the doctrine failed to support a motion to dismiss, indicating that the "exculpatory no" exists as a trial and not a pretrial defense. *Id.* at 4. The court noted that even at trial the kind of "aggressive and creative lying [at issue] is not the sort of 'mere negative response' protected by the statute." *Id.*

In *United States v. Pandozzi*, 878 F.2d 1526, 1533 (1st Cir. 1989) the First Circuit clarified its position on the "exculpatory no" doctrine by stating that "simple denials of involvement in crime are not 'statements' within the meaning of . . . § 1001. . . ." *Id.* However, because the court again rejected the defendants' efforts to extend the doctrine to 18 U.S.C. § 1623 any reference to the doctrine in relation to section 1001 is merely dicta.

45. *Rendle*, No. CR 85-149-T, slip op. at 4.

46. *Pandozzi*, 878 F.2d at 1533.

47. Cases rejecting the "exculpatory no" doctrine in the Second Circuit include: *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990) (truth would not have inculpated); *United States v. Blackmon*, 839 F.2d 900, 916 (2d Cir. 1988) (court denied application of the doctrine where mere no's answered on a CJA form for the appointment of counsel were willful falsifications); *United States v. Capo*, 791 F.2d 1054, 1068-69 (2d Cir. 1986) (even mere "no's" given in response to federal questioning, if intended to mislead the government, fall outside the protection of the doctrine), *vacated in part, reheard in part*, 817 F.2d 947 (1987) (en banc); *United States v. Grotke*, 702 F.2d 49, 53-54 (2d Cir. 1983) (the doctrine does not apply where the truth would not have incriminated and where the defendant willfully violated the statute); *United States v. Shanks*, 608 F.2d 73, 76 (2d Cir. 1979) (doctrine rejected where defendant's false statements were a "clear attempt to pervert the operation of a government agency") (court refused to extend the doctrine to defendants who voluntarily made unsolicited misstatements to a federal agency), *cert. denied*, 444 U.S. 1048 (1980); *United States v. Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

At the federal district level eight courts refused to apply the doctrine, ignoring two

fies its conception of the doctrine. In *United States v. McCue*,⁴⁸ the court noted that "the case of a citizen who replies to the policeman with an 'exculpatory no' can be left until it arises."⁴⁹

The Second Circuit seemingly would limit the doctrine not only to

early decisions. The Second Circuit has never overruled *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957), *see supra* note 32, and *United States v. Philippe*, 173 F. Supp. 582 (S.D.N.Y. 1959). *See supra* note 27.

District courts that have refused to apply the doctrine include: *United States v. Barrett*, 639 F. Supp. 1342, 1348 (D. Vt. 1986) (involved a situation where false statements exceeded mere "no's"); *United States v. Pereira*, 463 F. Supp. 481, 485 (E.D.N.Y. 1978) (doctrine inapplicable where the truth would not incriminate); *United States v. Clifford*, 409 F. Supp. 1070, 1074 (E.D.N.Y. 1976) (the doctrine did not apply on the facts of the case); *United States v. Citron*, 221 F. Supp. 454, 456 (S.D.N.Y. 1963) (defendants' offer of an "exculpatory no" defense was premature to support a motion to dismiss).

The most recent district cases to address the "exculpatory no" issue include: *United States v. Rufolo*, No. 89 CR938 (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file) (preparation of a lengthy false statement exceeded the narrow confines of the doctrine); *United States v. Barenos-Burgos*, 739 F. Supp. 772 (E.D.N.Y. 1990); *United States v. Distefano*, 741 F. Supp. 49 (E.D.N.Y. 1990).

A black sheep resides in the Second Circuit family of "exculpatory no" cases. *See United States v. Thevis*, 469 F. Supp. 490 (D. Conn.), *aff'd without published opinion*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980). The court in *Thevis* applied the doctrine after recognizing that the Second Circuit had neither endorsed nor rejected it. *Thevis*, 469 F. Supp. at 514. What the *Thevis* court failed to realize was that the Second Circuit had qualified the doctrine, limiting its application to mere "no's." Thus, the *Thevis* court incorrectly extended the doctrine to a series of falsehoods regarding knowledge of, and association with, a fugitive.

48. 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962), *reh'g denied*, 374 U.S. 858 (1963).

49. *McCue*, 301 F.2d at 455. Apparently, if the situation arises, it simply is not being prosecuted. One commentator notes that "in order to control the use of section 1001, the Department of Justice requires that a United States Attorney considering grand jury proceedings under section 1001, consult the appropriate section of the Department's Criminal Division." Fiske, *White Collar Crime: False Statements*, 18 AM. CRIM. L. REV. 169, 280. "[I]f the United States Attorney and the Department of Justice representative disagree as to the propriety of a § 1001 action, the matter is referred to a higher authority within the Department of Justice." *Id.* at 280 n.933 (citing United States Attorney's Manual § 9-2.120 (1976)).

Fiske also notes that the Department of Justice only discourages the use of section 1001 in one class of cases — those involving statements made to criminal investigative agents. Finally, he notes that the Department's Tax division prefers to restrict section 1001 proceedings to "those instances where the false statement was made under oath or in writing." *Id.* at 280 nn.935-36.

In fact, the 1988 United States Attorney's Manual § 9-42.160 recognizes the "exculpatory no" doctrine, stating that "where an individual falsely denies the truth of questions submitted to him by government agents, such responses are not 'statements' or 'representations' within the meaning of section 1001 and therefore are not subject to criminal prosecution." *Id.* at 280 n.933.

mere denials of guilt,⁵⁰ but also to mere denials of guilt uttered without the intent to mislead the government.⁵¹ Furthermore, the statements would have to be responses to government initiated questioning, not information volunteered affirmatively by the defendant.⁵² The Second Circuit will not apply the doctrine when a truthful response fails to incriminate the speaker.⁵³ Finally, the doctrine probably would not support a motion to dismiss.⁵⁴

Third Circuit

The only Third Circuit decision addressing the "exculpatory no" doctrine is *United States v. Protch*.⁵⁵ In *Protch*, the court determined that false affidavits submitted to the IRS constituted "statements" for the purposes of section 1001. *Protch* then cited *United States v. Paternostro*,⁵⁶ *United States v. Bedore*,⁵⁷ and *United States v. Ratner*⁵⁸ for the proposition that section 1001 is subject to abuse by overly zealous government agents.⁵⁹ The court, however, felt bound by *United States v. Knox*⁶⁰ and *Bryson v. United States*,⁶¹ and refused to extend the doctrine to situations where a defendant knowingly and willfully lies to a

50. See, e.g., *United States v. Clark*, No. 87 CR 49 (S.D.N.Y. Oct. 6, 1987) (WESTLAW, Federal library, Dist file). In *Clark*, the defendant allegedly bought market sensitive information from Wall Street Journal columnist R. Foster Winans and then lied about his stock transactions to two Securities Exchange Commission officials. The court found that Clark's efforts to utilize the "exculpatory no" doctrine, even if the circuit recognized the doctrine, were misplaced, as his responses "were far more than merely answering an inquiry in the negative." *Id.* at 3.

51. See, e.g., *United States v. Capo*, 791 F.2d 1054, 1068-69 (2d Cir. 1986); *United States v. Grotke*, 702 F.2d 49, 53 (2d Cir. 1983). See *supra* note 29 discussing how materiality is not an element in the Second Circuit.

52. See, e.g., *United States v. Adler*, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967).

53. See, e.g., *United States v. Pereira*, 463 F. Supp. 481, 485 (E.D.N.Y. 1978).

54. See *United States v. Citron*, 221 F. Supp. 454, 456 (S.D.N.Y. 1963). *But see United States v. Thevis*, 469 F. Supp. 490 (D. Conn.), *aff'd without published opinion*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *United States v. Philippe*, 173 F. Supp. 582 (S.D.N.Y. 1959); *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957).

55. 481 F.2d 647 (3d Cir. 1973).

56. 311 F.2d 298 (5th Cir. 1962). See *supra* note 9 discussing *Paternostro*.

57. 455 F.2d 1109 (9th Cir. 1972). See *infra* note 118 discussing *Bedore*.

58. 464 F.2d 101 (9th Cir. 1972). See *infra* note 119 discussing *Ratner*.

59. See *supra* note 31 discussing section 1001's potential for official abuse.

60. 396 U.S. 77 (1969).

61. 396 U.S. 64 (1969).

governmental agent.⁶²

Fourth Circuit

The Fourth Circuit recognizes the "exculpatory no" and recently, in *United States v. Cogdell*,⁶³ reversed a conviction on its strength.⁶⁴ This circuit indicates that it must "balance the need for protecting the basic functions of government agencies with the concern that a criminal suspect not be forced to incriminate himself in order to avoid punishment under section 1001."⁶⁵ In order to further this policy, the circuit adopted the *Medina de Perez*⁶⁶ test by which the Ninth Circuit⁶⁷ applies the "exculpatory no" doctrine.

The elements of the *Medina de Perez*⁶⁸ test are:

- (1) the false statement must be unrelated to a claim to a privilege or a claim against the government;
- (2) the declarant must be responding to inquiries initiated by a federal agency or department;
- (3) the false statement must not "impair the basic functions entrusted by law" to the agency;
- (4) the government agency's inquiries must not constitute a routine exercise of administrative responsibility;

62. *United States v. Protch*, 481 F.2d 647 (3d Cir. 1973), quoted *Bryson v. United States*, 396 U.S. 64, 72 (1969) for the proposition that although "a citizen may decline to answer the question, or answer it honestly [he may not] with impunity, knowingly and willfully answer with a falsehood." 481 F.2d at 648.

63. 844 F.2d 179 (4th Cir. 1988).

64. *Id.* at 182-85. In *Cogdell*, the court reversed a section 1001 conviction for lying to the Secret Service under the "exculpatory no" doctrine even though the defendant had been read her *Miranda* rights, had been informed that the Secret Service knew she was lying, and was given the opportunity to recant. The *Cogdell* dissent aired its concern that the majority was "redrafting" section 1001. *Id.* at 187. Judge Wilkins urged that the terms of section 1001 should be given their plain meaning. The use of the word "any" six times in a single one-sentence statute left no doubt that Congress intended section 1001 to be broad. *Id.* Judge Wilkins analogized section 1001 to RICO, 18 U.S.C. §§ 1961-1968, which commentators have also criticized as overly broad. Wilkins lastly mentioned the Supreme Court's deferential response to breadth arguments under both RICO and section 1001. The lower courts should read the statute the way Congress clearly wrote it.

65. *Id.* at 183.

66. *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir. 1986).

67. The elements of the *Medina de Perez* test are actually an amalgamation of two previous Ninth Circuit decisions: *United States v. Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972) and *United States v. Rose*, 570 F.2d 1358, 1364 (9th Cir. 1978).

68. *Medina de Perez*, 799 F.2d at 544.

(5) a truthful answer would have incriminated the declarant.⁶⁹

Although purporting to adopt the above test, the Fourth Circuit includes one significant modification. The *Medina de Perez* test requires that the false statement be unrelated to a claim against the government. The Fourth Circuit, in contrast, recognizes the "exculpatory no" only where the false statement was made in pursuit of a false claim against the government.⁷⁰ Accordingly, the Fourth Circuit has rendered the liberal Ninth Circuit test even more permissive.⁷¹ The only restraint the Fourth Circuit has placed on the doctrine is the recognition that the doctrine is not a rule of evidence but rather defines the reach of 18 U.S.C. § 1001.⁷²

Fifth Circuit

The Fifth Circuit purports to have adopted a three-part test for the application of the "exculpatory no" doctrine.⁷³ In the most recent appellate decision under the doctrine,⁷⁴ however, the court declined to employ the test.⁷⁵ In practice, the court has applied the doctrine on a

69. See, e.g., *United States v. Holmes*, 840 F.2d 246, 249 (4th Cir.) (doctrine unhelpful where defendant gave an alias to a United States Magistrate when giving his true name would not have had criminal implications, despite defendant's fear that it might), cert. denied, 488 U.S. 831 (1988).

70. *United States v. Cogdell*, 844 F.2d 183. The *Cogdell* court, in adopting this language, inadequately addressed the distinction between 18 U.S.C. § 1001 and 18 U.S.C. § 287. See *supra* notes 23-25 and accompanying texts tracing the history of the distinction between false statements and false claims.

71. See *infra* notes 170-77 for a discussion of whether or not a false statement must be unrelated to a claim against the government in order to fall within the "exculpatory no" doctrine.

72. *United States v. Cole*, 622 F.2d 98, 100 (4th Cir.), cert. denied, 449 U.S. 956 (1980). See *infra* note 152 discussing whether the doctrine is a rule of evidence.

73. See, e.g., *United States v. Schnaiderman*, 568 F.2d 1208, 1212 (5th Cir. 1978). *Schnaiderman* held that false statements (1) must not relate to any claim against the United States or an agency thereof; (2) must be in response to a government initiated inquiry; (3) must not be an affirmative effort to pervert the legitimate functions of the government. *Id.*

In *Schnaiderman*, the defendant falsely replied "no" to a customs agent when asked if he was carrying more than \$5,000 over the border. *Id.* at 1210. The court applied the doctrine because the defendant *thought* he was committing a crime. *Id.* at 1213-14. The truth, however, would not actually have incriminated the defendant. Other circuits have expressly repudiated this analysis. See, e.g., *United States v. Grotke*, 702 F.2d 49, 52-53 (2d Cir. 1983).

74. *United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982) (finding that false responses on income tax forms qualified as "exculpatory no's"), cert. denied, 461 U.S. 927 (1983).

75. Rather than apply the *Schnaiderman* test which would have resulted in the doc-

case-by-case⁷⁶ basis, with inconsistent results.⁷⁷ The only common

trine's failure (Hajecate's responses clearly were an effort to defraud the United States government, negating the first element of the *Schnaiderman* test), the court found the questions falsely answered to be different from the other questions on the tax form. *Id.* at 900. The court determined that the questions were not clearly investigative or administrative on their face. *Id.* After an analysis of the tax statute in question, the court found it sufficiently investigative to warrant the "exculpatory no" doctrine. *Id.* at 901.

Note that the court's use of the *Hajecate* doctrine thus turned on a single critical element — the investigative/administrative dichotomy. See *infra* notes 178-85 and accompanying text discussing this issue.

76. Several Fifth Circuit cases have arguably embraced the "exculpatory no" doctrine. In *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962) the defendant falsely denied soliciting and receiving graft money. The court found his false denials outside the scope of section 1001 because they were "mere negative responses to questions propounded to him by an investigating agent during a question and answer conference, not initiated by appellant." *Id.* In *United States v. Bush*, 503 F.2d 813, 818 (5th Cir. 1974), *reh'g denied*, 511 F.2d 1402 (1975) the court found the fact situation "identical to the one in *Paternostro* Bush was approached by the Internal Revenue Service, the interview was initiated by the Internal Revenue Service, [and] the essence of Bush's statements were an exculpatory 'no' to the questions asked by the agent." *Id.* The court thus applied the doctrine in reversing the defendant's section 1001 conviction. Arguably, Bush's two-page sworn affidavits, replete with falsehoods, far exceeded the mere "no's" contemplated by *Paternostro*. See *infra* notes 154-69 discussing how far a "no" can go.

See also *United States v. Hajecate*, 683 F.2d 894 (5th Cir. 1982) (applying the doctrine when the defendant made false statements during an investigatory proceeding), *cert. denied*, 461 U.S. 927 (1983); *United States v. Abrahams*, 604 F.2d 386 (5th Cir. 1979) (*Abrahams* effectively utilizes the adjudicative parallel to the "exculpatory no" doctrine, discussed *infra* notes 84-85); *United States v. Schnaiderman*, 568 F.2d 1208 (5th Cir.) (applying the doctrine when the defendant uttered false statements out of fear of self-incrimination), *reh'g denied*, 573 F.2d 1309 (5th Cir. 1978); *United States v. London*, 550 F.2d 206, 213 (5th Cir. 1977) (a failure to truthfully disclose a material fact fell within the doctrine); *United States v. Beer*, 518 F.2d 168 (5th Cir. 1975) (applying the doctrine where the defendant checked off "none" falsely on a Federal Depositor's Insurance Corporation form because such a response would not materially affect the functioning of a government agency). The *London* court extended the doctrine to the first "conceal or cover-up" clause of section 1001 rather than the second "false statement" clause of section 1001 where it is traditionally applied. See *supra* note 3 for text of section 1001.

Cases which rejected application of the doctrine include: *United States v. Rowland*, 789 F.2d 1169, 1172 (5th Cir.) (doctrine inapplicable where the defendant filed false affidavits with the Internal Revenue Service in an attempt to stall an investigation and possible prosecution), *cert. denied*, 479 U.S. 964 (1986); *United States v. Anderez*, 661 F.2d 404, 409 (5th Cir.) (doctrine inapplicable where defendant "chose to continue in his falsehood after being told that the act he sought to conceal was not illegal . . ."), *reh'g denied*, 666 F.2d 592 (5th Cir. 1981); *United States v. Johnson*, 530 F.2d 52, 55 (5th Cir.), *cert. denied*, 429 U.S. 833 (1976); *United States v. Krause*, 507 F.2d 113, 117-18 (5th Cir. 1975) (doctrine inapplicable where the defendant made aggressive and substantial efforts to impair the basic functions of a government agency by appearing before the National Labor Relations Board as an intervenor in an attempt to affect the

theme throughout is a respect for the *Paternoastro*⁷⁸ precedent which limits the scope of section 1001 to those false statements initiated by declarants to pervert agency functions.⁷⁹

The Fifth Circuit has emphasized that the doctrine "is only a creature of section 1001"⁸⁰ in refusing to extend the doctrine to 18 U.S.C. § 1005⁸¹ and 18 U.S.C. § 1006.⁸²

course of government action); *United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (notwithstanding the court's statement that it "intend[ed] no violence" to the holding in *Paternoastro*, it found false statements designed to initiate a malicious investigation to be within the realm of section 1001). *See supra* note 32 and accompanying text for a further discussion of *Lambert*.

77. Compare *Anderez*, 661 F.2d 404 with *Schnaiderman*, 568 F.2d 1208. In both cases the statute in question permitted the transportation of large sums of money over the border. However, the statute required that the individual tell customs agents how much he or she was carrying. In each case the defendant lied. The *Anderez* court distinguished *Schnaiderman* because the defendant had the opportunity to recant and failed to do so. *Anderez*, 661 F.2d at 409. In essence, the Fifth Circuit requires customs officials to give liars a second chance to tell the truth.

Even if one accepts the reconciliation of *Anderez* and *Schnaiderman* offered by the *Anderez* court, the decision is irreconcilable with *United States v. Hajecate*, 683 F.2d 894 (5th Cir. 1982). The defendant in *Hajecate* similarly knew he would not have incriminated himself by answering affirmatively the question of whether or not he had foreign bank accounts. *See supra* notes 74-75 (discussing *Hajecate*).

Anderez was not necessarily wrongly decided, however. Other circuits will most likely conclude that *Schnaiderman* and its "I thought I might incriminate myself" progeny are the erroneous decisions. (Note that a primary concern of the *Schnaiderman* court has been ameliorated by a new customs form which more clearly describes the implications of one's answers.)

Compare also *United States v. Johnson with United States v. Bush* *see supra* note 76. In both cases defendants sent affidavits to the Internal Revenue Service replete with false statements. The *Johnson* court attempted to distinguish *Bush* on two levels. First, *Johnson* took the initiative to contact the Internal Revenue Service, whereas *Bush's* affidavits were in response to an official inquiry. Second, *Johnson* apparently knew of his criminal investigation after law enforcement officials issued *Miranda* warnings, whereas *Bush* remained unaware.

A close examination of the facts shows these distinctions to be spurious. *Bush* was receiving illegal kickbacks. Moreover, he knew his conduct was unlawful. When the IRS agents demanded affidavits attesting to his financial connections with the source of these kickbacks, he was not caught unaware. *Johnson's* efforts to exonerate himself were no different. Contacted by the IRS regarding a criminal audit, he similarly supplied false affidavits.

78. *Paternoastro*, 311 F.2d 298 (5th Cir. 1962). *See supra* note 9 and accompanying text.

79. *Paternoastro*, 311 F.2d at 305.

80. *Hajecate*, 683 F.2d at 901.

81. *See United States v. McCright*, 821 F.2d 226, 234 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988). 18 U.S.C. § 1005 makes it illegal to falsely answer a question on

By limiting the scope of section 1001 as it applies to the judicial branch, the Fifth Circuit recognized what one might call the adjudicative parallel to the "exculpatory no" doctrine.⁸³ Under the adjudicative parallel, lies to judges and magistrates are permissible as long as the judge or magistrate acts in an administrative rather than judicial capacity.⁸⁴

Sixth Circuit

In *United States v. Steele*,⁸⁵ the Sixth Circuit recently, embraced the "exculpatory no" doctrine. As with the Fourth Circuit, the Sixth Cir-

a bank questionnaire with the intent to defraud the bank. In refusing to extend the doctrine to section 1001, the court found that the question was not part of a government investigation. Because it was purely administrative, the defendant's fifth amendment rights were not implicated. *Id.* at 234.

82. *United States v. Stovall*, 825 F.2d 817, 825 (5th Cir.), *aff'd*, 833 F.2d 526 (5th Cir. 1987). Section 1006 makes it illegal to make false entries in bank records, reports or statements. 18 U.S.C. § 1006 (Supp. 1989). However, the court found it unnecessary to address defendant's "exculpatory no" defense, vacating his sentence on other grounds. *Stovall*, 825 F.2d at 824.

83. *United States v. Rowland*, 789 F.2d 1169 (5th Cir.), *cert. denied*, 479 U.S. 964 (1986); *United States v. Abrahams*, 604 F.2d 386 (5th Cir. 1979). See *infra* note 83 and accompanying text explaining the adjudicative parallel.

84. The adjudicative parallel originated in *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963). In *Morgan*, the defendant held himself out to be an attorney practicing in the District of Columbia. *Id.* at 235. In affirming convictions on three counts under section 1001, the D.C. Circuit stated that "the statute does apply to the type of action which essentially involved the 'administrative' or 'housekeeping' functions [but] not the 'judicial' machinery of the court." *Id.* at 237. In making this distinction the D.C. Circuit seemed to imply that where falsehoods go to the judicial machinery of the court a section 1001 conviction will not be sustained.

In *United States v. Abrahams*, 604 F.2d 386, 393-94 (5th Cir. 1979), removal proceedings and bail hearings were deemed "judicial proceedings," thereby opening the door to the adjudicative parallel. *Id.* The *Abrahams* court found that the defendant should have been placed under oath for these proceedings. *Id.* at 394. Had this taken place "there would have been a clear basis for prosecution under the perjury statute." *Id.* Furthermore, the court felt that "an accused person is entitled to be warned [under *Miranda*] that any statements he makes can be used against him." *Id.* (quoting *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979)). Because this defendant had not been warned, he should have been convicted on the basis of statements extracted from him during the proceedings. *Id.* at 395.

In *United States v. Rowland*, 789 F.2d 1169, 1172 (5th Cir. 1986), the Fifth Circuit found the "submission of a false and fraudulent bond [to come] within the . . . administrative function of the bankruptcy court," thereby precluding the adjudicative parallel. *Id.* See generally Comment, *United States v. Rowland: An Extension of 18 U.S.C. § 1001 to Civil Actions in Which the United States is Not a Party*, 62 TUL. L. REV. 291 (1987).

85. 896 F.2d 998 (6th Cir. 1990).

cuit adopted the *Medina de Perez*⁸⁶ test. In explaining the decision to endorse the doctrine, the court expressed concern for potential fifth amendment violations under section 1001.⁸⁷

Seventh Circuit

In *United States v. King*,⁸⁸ the Seventh Circuit acknowledged the "exculpatory no" doctrine "as a very limited exception to section 1001." *King* presented the court with the opportunity to decide whether the doctrine should apply to a series of lies designed to procure supplementary social security income.⁸⁹ The court held that the defendant's false statement that he never received workman's compensation exceeded the simple negative answers contemplated by the doctrine.⁹⁰ According to the court, the defendant's statements represented affirmative discursive falsehoods.⁹¹

The *King* court limits the doctrine to simple negative answers made in circumstances showing that the defendant did not know he was under investigation.⁹² Furthermore, the defendant must not have been making a claim against or seeking employment from the government.⁹³

86. *United States v. Medina de Perez*, 799 F.2d 540, 544-45 (9th Cir. 1986). See *supra* notes 66-68 and accompanying text explaining the court's test.

87. Unfortunately, the court lost sight of the administrative/investigative dichotomy, so critical to the *Medina de Perez* test. Where the individual in question is not under investigation and is asked questions by a federal agent merely in the exercise of his administrative duties, the doctrine can not be applied to his lies.

Although *Steele* recognized that defendant was not under investigation, the court applied the doctrine because someone *else* was under investigation. 896 F.2d at 1003. This is an unprecedented broadening of the doctrine.

Furthermore, the defendant's false statements were not of the mere "no" variety contemplated by several courts, but were extensive documents drawn up to support a fraudulent evasion of taxes.

Fortunately, the Sixth Circuit took the opportunity to clarify its position on the administrative/investigative dichotomy in *United States v. Sanihez-Batos*, No. 89-2065 (6th Cir. 1990) (LEXIS, Genfed library). The court recognized that the doctrine is limited to those responses made to an agent in connection with a criminal investigation, but refused to extend the doctrine to an individual unless the agent is specifically investigating that individual. *Id.* at 5. Note also that the Sixth Circuit has adopted the adjudicative parallel. See *supra* notes 83-84; see also *United States v. Erhardt*, 381 F.2d 173 (6th Cir. 1967).

88. 613 F.2d 670, 674 (7th Cir. 1980).

89. *Id.* at 672.

90. *Id.* at 674-75.

91. *Id.* at 674.

92. *Id.*

93. *Id.*

In *United States v. Armstrong*,⁹⁴ the court ignored the *King* test. Instead, the court decided to utilize the *Cogdell*⁹⁵ formulation of the doctrine.⁹⁶ Rather than integrating the missing *King* elements⁹⁷ into the *Cogdell* test, the *Armstrong* court found the *Cogdell* test squared with Seventh Circuit requirements.⁹⁸

The Seventh Circuit has yet to decide whether the doctrine supports a motion to dismiss. The district court in *United States v. Antonucci*⁹⁹ held that to apply the doctrine at this stage would be to challenge the sufficiency of the evidence. Accordingly, the doctrine cannot support a motion to dismiss when the decision ultimately will turn on the specific facts of the case.¹⁰⁰ *Armstrong*,¹⁰¹ on the other hand, cites Fifth¹⁰² and Ninth¹⁰³ Circuit precedents for using the doctrine to support a motion to dismiss.¹⁰⁴

Although *King* recognized the "exculpatory no" in dicta,¹⁰⁵ the Seventh Circuit never has reversed a section 1001 conviction under the doctrine.¹⁰⁶ Defendants, however, have employed the doctrine suc-

94. 715 F. Supp. 242 (S.D. Ind. 1989).

95. See *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988). See *supra* notes 66-71 and accompanying text discussing the *Cogdell* formulation of the *Medina de Perez* test.

96. *Armstrong*, 715 F. Supp. at 243-44.

97. Unlike the *King* test, the *Cogdell* test does not require that the falsehood be a simple negative answer without affirmative discursive lying. Furthermore, although the *Cogdell* test refers to an administrative/investigative dichotomy, it does not specify that the defendant must be unaware that he is under investigation when queried. See *Cogdell*, 844 F.2d at 183-85.

98. *Armstrong*, 715 F. Supp. at 244-45.

99. 663 F. Supp. 243 (N.D. Ill. 1987).

100. *Id.* at 245. See also *United States v. Antonucci*, 663 F. Supp. 245, 246 (N.D. Ill.), *reh'g denied*, 663 F. Supp. 245 (1987) (denying defendant's motion for reconsideration because the "exculpatory no" simply cannot support a motion to dismiss).

101. 715 F. Supp. 242 (S.D. Ind. 1989).

102. *Id.* at 245 (citing *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962)).

103. *Id.* (citing *United States v. Jarvis*, 653 F. Supp. 1396 (S.D. Cal. 1987)).

104. *Id.* at 245-46.

105. *United States v. King*, 613 F.2d 670, 674 (7th Cir. 1980).

106. The doctrine has proven unsuccessful at the appellate level in the Seventh Circuit in the following cases: *United States v. Picketts*, 655 F.2d 837, 842 n.3 (7th Cir.) (doctrine inapplicable to false declarations before a grand jury in violation of 18 U.S.C. § 1623), *cert. denied*, 454 U.S. 1056 (1981); *United States v. King*, 613 F.2d 670, 674-75 (7th Cir. 1980) (doctrine inapplicable where "defendant initiated the contact with the government for the purpose of making a statutory claim for benefits"); *United States v. Isaacs*, 493 F.2d 1124, 1158 (7th Cir. 1974) (doctrine inapplicable where defendant's

cessfully at the district court level.¹⁰⁷

Eighth Circuit

The Eighth Circuit in *United States v. Taylor*¹⁰⁸ adopted the "excul-

"statements were positive, affirmative, and were calculated to pervert the authorized functions of government"), *cert. denied sub nom. Kerner v. United States*, 417 U.S. 976, *reh'g denied*, 418 U.S. 955 (1974).

See also *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960). *Stoffey* was a pre-*Miranda* case that did not address the "exculpatory no" per se, but addressed several concerns the judiciary had with section 1001. The court reversed a section 1001 conviction because although defendant's responses were mere denials of guilt, law enforcement officials restricted his movement so that "for all practical purposes he was under arrest." *Id.* at 927. The court was convinced that the FBI agents questioning Stoffey had not sought information, but rather an admission of guilt. *Id.*

107. The doctrine has worked twice at the district court level in the Seventh Circuit. In *United States v. Russo*, 699 F. Supp. 1344 (N.D. Ill. 1988) the court granted the defendant's motion to arrest judgment on a section 1001 charge on the strength of the "exculpatory no." The defendant's statements to the FBI merely reiterated false statements he had made previously in a police report. *Id.* at 1347. The court accepted the "exculpatory no" defense even though the falsehoods in question were more than mere "no's." *Id.* The court recognized that "Defendant's response[s] . . . [were] . . . more than 'simple negative answers' but not much more." *Id.* at 1348. This standard begs the question of what constitutes a "no." See *infra* notes 154-69.

See also *United States v. Armstrong*, 715 F. Supp. 242 (S.D. Ind. 1989) (applying the *Cogdell* test to grant a motion to dismiss for a defendant who had made a series of false statements to an IRS agent investigating an alleged conversion of federal funds).

But see *United States v. Cherif*, No. 89 CR 450 (N.D. Ill. Sept. 19, 1989) (LEXIS, Genfed library, Dist file) (doctrine cannot support motion to dismiss); *United States v. Finley*, 705 F. Supp. 1272, 1293-94 (N.D. Ill. 1988) (in recognizing that the doctrine cannot support a motion to dismiss, the court held the doctrine inapplicable where defendant went beyond simple negative answers to affirmative falsehoods); *United States v. Gilpin*, 678 F. Supp. 1361, 1363 n.3 (N.D. Ill. 1988) (holding not only that the doctrine cannot support a motion to dismiss, but that the Supreme Court's interpretation in *Rodgers* of section 1001 "certainly casts doubt upon the vitality of this judicially created doctrine and the line of cases supporting its application"); *United States v. Antonucci*, 663 F. Supp. 243, 245 (N.D. Ill. 1987) (doctrine cannot support a motion to dismiss); *United States v. Ljuba Jones*, No. 85 CR 639 (N.D. Ill. 1985) (dismissing a section 1001 count because the U.S. Customs agent questioning the defendant had been tipped off and knew the answers to the questions he was asking; the defendant's lie therefore could not have been a material falsehood).

The Seventh Circuit recently rejected the doctrine in its entirety. *United States v. Ospina-Herrera*, Nos. 89C 8321, 38 CR 112-2 (N.D. Ill. Mar. 28, 1990) (LEXIS, Genfed library, Dist file). The court found that it had never really adopted the doctrine because it had previously addressed the doctrine in such a "limited fashion." *Id.* at 8. The court's decision casts serious doubt on exactly where the Seventh Circuit and its trial courts stand.

108. *United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990). Prior Eighth Circuit discussions of the doctrine were as follows: *United States v. Longbehn*, 850 F.2d 450, 452 n.2 (8th Cir. 1988) (the court did not address the "exculpatory no" issue other than

patory no" doctrine.¹⁰⁹ Although the trial court¹¹⁰ relied heavily on the line of cases¹¹¹ which provides an adjudicative parallel to the doctrine, the Eighth Circuit did not need to address the adjudicative parallel in light of its acceptance of the "exculpatory no" doctrine.¹¹² The *Taylor* court appeared to follow the Ninth Circuit's approach in *Medina de Perez*,¹¹³ without explicitly adopting that test.

Ninth Circuit

The Ninth Circuit created the prodigious *Medina de Perez*¹¹⁴ test,¹¹⁵ adopted in whole or in part by courts across the nation.¹¹⁶ Interestingly, just as the test has begun to garner wide acceptance, the Ninth Circuit is questioning its merits,¹¹⁷ as evidenced by the recent *Alzate-*

to say that the police deprived defendant of his freedom to such a significant degree as to require *Miranda* warnings before questioning, precluding any prosecution for false statements made while he was in custody); *United States v. Morris*, 741 F.2d 188, 191 (8th Cir. 1984) (doctrine inapplicable where the truth would not incriminate defendant); *United States v. Cowden*, 677 F.2d 417, 418-19 (8th Cir. 1982) (the court did not reach the "exculpatory no" issue because the defendant recanted his falsehoods quickly enough to satisfy a statutory remedy for section 1001); *Friedman v. United States*, 374 F.2d 363, 368 (8th Cir. 1967) (in reversing a section 1001 conviction for a defendant initiating a malicious investigation, the court gave a strained interpretation of "jurisdiction" under section 1001). *But see United States v. Rodgers*, 466 U.S. 475, 482-84 (1984) (implicitly rejecting the *Friedman* decision).

109. *Taylor*, 907 F.2d at 806 n.3.

110. *United States v. Taylor*, 105 Bankr. 486 (E.D. Ark. 1989).

111. *See supra* notes 84-85 discussing cases applying the adjudicative parallel.

112. *Taylor*, 907 F.2d at 806 n.3.

113. *United States v. Medina de Perez*, 799 F.2d 540, 544 (9th Cir. 1986). *See supra* notes 66-68 and accompanying text for a discussion of the *Medina de Perez* elements.

114. *Id.*

115. The *Medina de Perez* court did not actually list the test's five elements consecutively. The first time all the elements were presented in this form was in *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988).

116. *See, e.g., United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988) (discussed *supra* note 63 and accompanying text); *United States v. Armstrong*, 715 F. Supp. 242, 243-44 (S.D. Ind. 1989) (discussed *supra* note 95 and accompanying text).

117. *See United States v. Alzate-Restreppo*, 890 F.2d 1061, 1068-70 (9th Cir. 1989) (Patel, J., concurring) (arguing that the Ninth Circuit should abandon the five factor test). The concurrence favored abandoning the "cumbersome" *Medina de Perez* test for an analysis of whether "there was reasonable cause to detain, or probable cause to arrest the defendant or whether [the defendant] was the subject of a criminal investigation." *Id.* at 1069-70. If the situation became "uncomfortably close to the fifth amendment" the concurrence would reverse conviction on fifth amendment grounds, and not on the basis of the illusory "exculpatory no" doctrine. *Id.* *See supra* note 32 discussing the *Lambert* case.

*Restrepo*¹¹⁸ opinion. Inconsistencies abound in the circuit,¹¹⁹ and

118. The Ninth Circuit failed to adopt the doctrine in the following cases: *United States v. Manasen*, 909 F.2d 1357 (9th Cir. 1990) (doctrine inapplicable where person lying sought privilege of entry into the country); *United States v. Myers*, No. 88-5078 (9th Cir. June 23, 1989) (Westlaw, Federal library, 9th Cir. file) (finding that defendant's lies fell outside the scope of the doctrine because his statements were in response to administrative inquiries, but applying the doctrine to statements made after he became a suspect in a criminal investigation); *United States v. Becker*, 855 F.2d 644, 646 (9th Cir. 1988) (finding that defendant's lies fell outside the scope of the doctrine because his statements were in response to purely administrative inquiries by customs agents); *United States v. Olsowy*, 836 F.2d 439, 441 (9th Cir. 1987) (defendant's false statements relating to his claim against the government denied him the benefit of the "exculpatory no" defense), *cert. denied*, 485 U.S. 991 (1988); *United States v. Segal*, 833 F.2d 144, 146 n.3 (9th Cir. 1987) (precluding use of the doctrine where falsehoods plainly impaired the customs service's ability to investigate a corporation that did business with the defendant); *United States v. Des Jardins*, 772 F.2d 578, 580 (9th Cir. 1985) (doctrine rejected on authority of *United States v. Duncan*, 693 F.2d 971 (9th Cir. 1982)); *United States v. Gonzales-Mares*, 752 F.2d 1485, 1492 (9th Cir.) (doctrine inapplicable where the false statements obstructed the functions of a government agency), *cert. denied*, 473 U.S. 913 (1985); *United States v. Duncan*, 693 F.2d 971, 976 (9th Cir.) (affirmative falsehoods exceeding "mere no's" sufficed for a section 1001 conviction), *cert. denied*, 461 U.S. 961 (1982); *United States v. Carrier*, 654 F.2d 559, 561 (9th Cir. 1981) (doctrine inapplicable where defendant's statements did not involve the possibility of self-incrimination); *Tzantarmas v. United States*, 402 F.2d 163, 167-68 (9th Cir. 1968) (doctrine inapplicable where defendant initiated contact with a federal agency and used falsehoods to seek a claim or benefit against the United States), *cert. denied*, 394 U.S. 966 (1969).

The Ninth Circuit refuses to adopt the doctrine when the offending statements were made before *Miranda* rights vested. *See, e.g., United States v. Alzate-Restrepo*, 890 F.2d 1061, 1069 (9th Cir. 1989).

United States v. Moore, 638 F.2d 1171 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) treads a fine line as to whether the defendant was entitled to *Miranda* rights. The court held that the occupants of an unidentified aircraft approaching from Mexico were not entitled to *Miranda* rights when they were stopped at gunpoint by the police upon landing. *Id.* at 1175. The court concluded that government agents questioning an entrant at the border need not give *Miranda* warnings "unless and until the questioning agents have probable cause to believe that the person questioned has committed an offense." *Id.* As a result, the court refused to apply the doctrine because defendant's affirmative statements "potentially impaired the function of the customs service . . . [and it] . . . was not necessary for *Miranda* warnings to precede the questions that elicited appellants' false statements." *Id.* at 1176.

Cf. United States v. Goldfine, 538 F.2d 815 (9th Cir. 1976). In *Goldfine*, the court rejected the doctrine even though the false statements were made after the defendant received his warnings. *Id.* at 820-21. The court reached this conclusion despite the fact that the investigators already knew the answers to their questions. The court affirmed defendant's section 1001 conviction because the Ninth Circuit refuses to recognize the "exculpatory no" doctrine where the denial was "given to agents of a regulatory agency conducting a criminal investigation legitimately within its purview." *Id.* at 821.

The doctrine's application proved successful in *United States v. Myers*, No. 88-5078 (9th Cir. June 23, 1989) (WESTLAW, Federal library, 9th Cir. file) (applying the doc-

some judges have professed confusion as to what certain elements of the test represent.¹²⁰ The Ninth Circuit leads the way¹²¹ in placing the doctrine on the table¹²² for debate.¹²³

trine where defendant made false statements after becoming a suspect in criminal investigation); *United States v. Equihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988) (applying the *Medina de Perez* test to exonerate a defendant who gave a false name to a border patrol agent during a post-arrest interview); *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir. 1986) (defendant's statements fell inside the scope of the doctrine where he answered in response to investigative officers during a post-arrest interrogation); *United States v. Bedore*, 455 F.2d 1109, 1111 (9th Cir., 1972) (refusing to apply the doctrine where defendant gave an FBI agent a false name because his statement did not relate to a claim against the United States or impair the basic functions of a federal agency); *United States v. Gomez*, No. CR 86-1013-JSL (C.D. Cal. June 12, 1987) (LEXIS, Genfed library, Dist file) (applying the doctrine where defendants made false statements during a custodial interrogation and law enforcement officers failed to read them their *Miranda* rights); *United States v. Jarvis*, 653 F. Supp. 1396, 1398 (S.D. Cal. 1987) (applying the doctrine where defendant made false statements after he became the subject of a criminal investigation).

119. Compare *United States v. Duncan*, 693 F.2d 971, 976 (9th Cir.) ("exculpatory no's" may not exceed mere "no's"), *cert. denied*, 461 U.S. 961 (1982); *United States v. Schmoker*, 564 F.2d 289, 292 n.3 (9th Cir. 1977) (doctrine limited to answers of "no" when defendant is asked if he committed a crime); *United States v. Ratner*, 464 F.2d 101, 103 (9th Cir. 1972) ("exculpatory no's" may not exceed mere exculpatory denials) with *United States v. Myers*, 1989 U.S. App. LEXIS 9138 (9th Cir. 1988) ("exculpatory no" allowed as to conversation with Federal Aviation Administration (but not Secret Service) even though the false statement was an elaborate story and not a mere "no").

120. *United States v. Marusich*, 637 F. Supp. 521, 526 (S.D. Cal. 1986) ("the court is confronted with an absence of explanation by the courts as to what is meant by the phrase 'routine function of administrative duty'").

121. See, e.g., *Brandow v. United States*, 268 F.2d 559, 565 (9th Cir. 1959) (holding that to come within the parameters of section 1001, a false statement must be able to induce agency reliance). See *supra* note 29 and *infra* note 151 discussing materiality.

122. The Ninth Circuit also recognizes the adjudicative parallel. See *United States v. Mayer*, 775 F.2d 1387, 1391-92 (9th Cir. 1985) (misrepresentations made by defendant during sentencing hearing fall outside the scope of section 1001 because a sentencing hearing constitutes a judicial proceeding for purposes of section 1001); *United States v. Plascencia-Orozco*, 768 F.2d 1074, 1076 (9th Cir. 1985) (upholding conviction under section 1001 because defendant's concealment of his true identity from federal magistrate obstructed an administrative function). See *supra* note 83 and accompanying text discussing the adjudicative parallel.

123. The enthusiasm of the California courts towards the doctrine has resulted in its use by way of analogy. In *Guerra v. United States*, 645 F. Supp. 775, 781 (C.D. Cal. 1986) the court recognized that "a confused, disoriented person under police questioning can sometimes be expected to deny something he ought to admit" citing to *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir. 1986), *United States v. Rose*, 570 F.2d 1358, 1363-64 (9th Cir. 1978), and *United States v. Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972).

Tenth Circuit

The Tenth Circuit, in *United States v. Fitzgibbon*,¹²⁴ indicated that a finding of possible self-incrimination is critical to a determination that a false statement falls within the protection of the "exculpatory no" doctrine.¹²⁵ Furthermore, the court deemed the doctrine inapplicable when questions are posed by a government agent acting in an "exclusively administrative" capacity.¹²⁶ Under the facts of *Fitzgibbon*, the Tenth Circuit rejected the "exculpatory no" defense. In that case, the defendant's oral and written falsehoods were made in an administrative capacity, and the truth would not have incriminated him.¹²⁷

Eleventh Circuit

In delineating the scope of section 1001, the Eleventh Circuit, like the Fifth,¹²⁸ purports to rely on the *Paternoastro*¹²⁹ standard, applying the "exculpatory no" doctrine only when a defendant's false statement clearly exceeds a mere "no."¹³⁰ In *United States v. Tabor*,¹³¹ the Elev-

124. 619 F.2d 874 (10th Cir. 1980). In *Fitzgibbon*, the Tenth Circuit determined that the exculpatory no doctrine did not apply because the defendant made oral and written falsehoods to a government agent, acting in an administrative capacity. Further, even if the defendant spoke truthfully, he would not have incriminated himself. *Id.* at 881. See *infra* notes 178-85 regarding the administrative/investigative dichotomy.

125. *Fitzgibbon*, 619 F.2d at 881.

126. *Id.* at 880.

127. *Id.* See generally Comment, *Application of the "Exculpatory No" Defense to Prosecutions under 18 U.S.C. § 1001: United States v. Fitzgibbon*, 1980 B.Y.U. L. REV. 655 (1980). For precedent, *Fitzgibbon* relied on *United States v. Schnaiderman*, 568 F.2d 1208 (5th Cir.), *reh'g denied*, 573 F.2d 1309 (5th Cir. 1978). The Tenth Circuit, in rejecting *Fitzgibbon's* "exculpatory no" defense generously distinguished *Schnaiderman*, unlike other courts that simply rejected its holding and logic. See, e.g., *United States v. Grotke*, 702 F.2d 49 (2d Cir. 1983) (discussed *supra* note 47).

Interestingly, the Tenth Circuit, in reviewing *Fitzgibbon*, ignored *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953). *Levin* involved a predecessor to the "exculpatory no" and rose from within the boundaries of the Tenth Circuit. See *supra* note 28.

128. The Fifth Circuit split in 1981 to form the Fifth and Eleventh Circuits. Therefore, *United States v. Paternoastro*, 311 F.2d 298 (5th Cir. 1962) has precedential value in both circuits.

129. 311 F.2d 298 (5th Cir. 1962). See *supra* note 9 and accompanying text discussing *Paternoastro*.

130. See, e.g., *United States v. Van Horn*, 789 F.2d 1492, 1510-11 (11th Cir.) (rejecting the doctrine where the defendant's falsehoods were not mere denials of wrongdoing, but efforts to affirmatively mislead the FBI), *cert. denied*, 479 U.S. 854 (1986); *United States v. Palzer*, 745 F.2d 1350, 1355 (11th Cir. 1984). In *Palzer*, the defendant falsely represented to a customs agent that he was not carrying more than \$5,000. The court held that the government had to prove that the defendant knew it was legal to

enth Circuit reversed a section 1001 conviction under the doctrine.¹³² In reaching its conclusion, the court explained that the defendant's answer amounted to an "exculpatory no" because the police aggressively sought a statement from her while she was unaware that she was under police investigation.¹³³ Nonetheless, the court's conclusion conflicts with *Paterno* because the defendant's answer clearly went beyond mere denials of falsehood.¹³⁴

In *United States v. Payne*¹³⁵ the Eleventh Circuit indicated a willingness to extend the doctrine beyond section 1001 to 18 U.S.C. § 1006, but only where a "substantial and real hazard of self-incrimination"¹³⁶ was evident.¹³⁷

District of Columbia Circuit

The District of Columbia Circuit twice has addressed the "exculpatory no" doctrine.¹³⁸ In *United States v. North*¹³⁹ the defendant moved to dismiss three section 1001 counts, relying on the "exculpa-

carry more than \$5,000 in currency but lied anyway. The extraordinary burden placed on the government has no basis in the statute.

131. 788 F.2d 714 (11th Cir. 1986). In *Tabor*, the defendant falsely stated that, as a notary public, she had affixed her seal in the presence of certain parties, one of whom was already dead on the date she claimed he was a witness. *Id.* at 715.

132. *Id.* at 718, 719. The *Tabor* court, in extending the doctrine to the defendant, gave no test for its application. The court skirted around many of the ideas put forth by other circuits, but in the end relied largely on the *Lambert* footnote. *See supra* note 32. The court simply felt that this case was "uncomfortably close to the fifth amendment." *Id.* (citing *Lambert*, 501 F.2d 943 (5th Cir. 1974)).

133. *Id.* at 719.

134. For instance, affirmatively stating that a person is living and present is more than a mere "no." *See supra* note 131.

135. 750 F.2d 844, 861 (11th Cir. 1985). *See infra* notes 198-216 and accompanying text discussing *Payne*, and whether the doctrine should be permitted to migrate to other states.

136. 750 F.2d at 861. In *United States v. \$18,350 in U.S. Currency*, 758 F.2d 553 (11th Cir. 1985), the court confronted an effort to apply the doctrine to 31 U.S.C. § 1102, a forfeiture statute. The court found the doctrine "wholly inapplicable", where there was no risk of self-incrimination at issue. *Id.* at 555.

137. *See also* *United States v. Fernandez*, 905 F.2d 350 (11th Cir. 1990) (doctrine rejected outright); *United States v. Fern*, 696 F.2d 1269 (11th Cir. 1983) (acknowledging doctrine in a footnote). In the adjudicative parallel context, *see United States v. Lawson*, 809 F.2d 1514, 1520 (11th Cir. 1987) (refusing to reverse a section 1001 conviction for false documents submitted during a deposition because they impaired the administrative rather than adjudicative functions of a United States agency).

138. *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989); *United States v. North*, 708 F. Supp. 375 (D.D.C. 1988).

139. 708 F. Supp. 375 (D.D.C. 1988).

tory no" defense.¹⁴⁰ The court rejected his motions for several reasons. First, the court noted that "this circuit has not adopted the doctrine."¹⁴¹ Second, even if the circuit had recognized the doctrine, it would not have applied in this case because the defendant affirmatively sought to impair the lawful governmental functions of the House and Senate.¹⁴² Finally, the defendant gave more than mere "no's" in response to agency queries.¹⁴³ His letters to congressional committees contained extensive falsehoods designed not only to avoid self-incrimination, but also to impair the administrative functioning of those committees.¹⁴⁴

The D.C. Circuit's second opportunity to pass on the doctrine arose in *United States v. White*.¹⁴⁵ In *White* the court rejected the doctrine's application because the falsehoods occurred in an "administrative" rather than "investigative" setting.¹⁴⁶ In reaching this decision, the court emphasized that it was "not setting law for the circuit."¹⁴⁷ Indeed, the court cited cases that contradict one another.¹⁴⁸

PART IV

Issue Analysis

The "exculpatory no" doctrine has brought forth a variety of issues surely not contemplated by the doctrine's originators. The five issues raised least often today shall be discussed in the footnotes. These are whether the doctrine may support a motion to dismiss,¹⁴⁹ whether the

140. *Id.*

141. *Id.* at 384.

142. *Id.*

143. *Id.*

144. North also attempted to rely on the *Morgan* line of cases proposing an adjudicative parallel, discussed *supra* notes 84-85. North argued that "because § 1001 does not apply to the non-administrative functions of the Judicial Branch, it *should* be held inapplicable to the non-administrative functions of Congress." *Id.* at 383-84. The court dismissed the analogy because Congress is a different entity from the judiciary. *Id.*

145. 887 F.2d 267 (D.C. Cir. 1989).

146. *Id.* at 274.

147. *Id.* at 273.

148. *Id.* at 274. The court cited an array of cases including *Cogdell*, *Medina de Perez*, *Hajecate*, *Fitzgibbon*, *Payne*, *Morris*, and *Chevoor*, designed to demonstrate the incongruity in the circuits over both the doctrine's parameters and its application.

149. The First and Second Circuits have found that the doctrine cannot support a motion to dismiss. See *supra* notes 44 & 47. The Fifth, Eighth, and Ninth Circuits hold otherwise. See *supra* notes 76, 110-11 & 118. The Seventh Circuit is split on the issue.

written false statement differs from the oral false statement for the doctrine's purposes,¹⁵⁰ whether the false statement must be incapable of

Compare United States v. Armstrong, 715 F. Supp. 242 (S.D. Ind. 1989) with United States v. Antonucci, 663 F. Supp. 243 (N.D. Ill. 1987). *See supra* note 107.

Rationales disfavoring the doctrine include the fact that "allegations of the indictment are controlling for the purpose of deciding motions to dismiss." United States v. Rendle, No. CR 85-149-T, slip op. at 4 (D. Mass. Jan. 4, 1985). *See supra* note 44. Therefore, the defendant's arguments are purely theoretical in nature and "must await full development of the relevant facts at trial." United States v. Citron, 221 F. Supp. 454, 456 (S.D.N.Y. 1963). *See supra* note 47.

Those cases acquitting defendants who made false statements give no rationale justifying the use of the doctrine at the motion to dismiss stage, although there is generally extensive discussion of the doctrine itself. Apparently, these courts believe that the elements of a section 1001 charge simply cannot be met where the elements of the doctrine are met. Distinguish this from the situation where the prosecution meets all the elements of the government's charge, and then the defense offers some justification or excuse.

This Note asserts that the doctrine can never be used to support a motion to dismiss. The doctrine can be reduced to a pattern of facts. Fairness dictates that the prosecution be given ample opportunity to dispute the fact pattern at trial, rather than be obliged to defend against the doctrine at the pleading stage.

150. United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972) outlined an early test for the application of the doctrine. The court defined the falsehoods as follows:

[O]ral, unsworn statements, unrelated to any claim of the declarant to a privilege from the United States or to a claim against the United States, given in response to inquiries initiated by a federal agency or department, except, perhaps, where such a statement will substantially impair the basic functions entrusted by law to that agency.

Id. at 111.

It is not entirely clear why the *Bedore* court limited the doctrine to oral falsehoods, since United States v. Beacon Brass, 344 U.S. 43 (1952) clearly extended section 1001 to both oral and written statements. *Id.* at 46. The rationale can be surmised from the tone of the *Bedore* opinion which places great weight on the element of impairing basic functions of government. *Bedore*, 455 F.2d at 1110-11. Arguably, the spontaneous oral lie does not carry the weight of a premeditated written lie. *See* Fiske, *White Collar Crime: False Statements*, 18 AM. CRIM. L. REV. 169, 276 n.905 (1980) ("oral statements are more likely to involve spontaneous and informal denials of guilt in response to questioning by agency representatives than are written statements").

This Note would limit the doctrine to the oral lie. This would comport with *Paternoastro* where the defendant's falsehoods were oral. This would also follow the dissent's recommendations in United States v. Bush, 503 F.2d 813 (5th Cir. 1974). In *Bush*, Judge Roney was dismayed that "lengthy written statements made by Bush [could be considered] the equivalent of the 'exculpatory "no"' dealt with in *Paternoastro*." *Id.* at 819 (Roney, J., dissenting). Although court decisions to the contrary exist (*see, e.g.*, United States v. Bush, 503 F.2d 813 (5th Cir. 1974) and United States v. Beer, 518 F.2d 168 (5th Cir. 1975) from the Fifth Circuit; *see supra* note 76), this Note maintains that writing down falsehoods requires a different state of mind from saying things one may very well regret later. Although signed affidavits of transcribed oral responses present some difficulty, this Note would argue that when the responsible authority begins to

perverting the authorized functions of government,¹⁵¹ whether the doctrine is a rule of evidence, precluding the use of false statements as evidence of consciousness of guilt,¹⁵² and whether the doctrine is an allowance for negligent lying.¹⁵³ Discussion of the more significant is-

transcribe the statements, the interrogee should be entitled to some kind of notification, be it *Miranda*, or otherwise. See *infra* note 167 and accompanying text.

151. The issue of whether the false statement must be incapable of "perverting the authorized functions of government could otherwise be framed as a question of materiality, which goes specifically to the elements of section 1001. If a statement is incapable of influencing a government agency or department, it falls outside of section 1001 altogether.

Section 1001 can be characterized as having two clauses. See *supra* note 3 (text of section 1001). The first is the "conceal or cover-up" clause, which involves concealing a material fact. The second clause concerns the making of false statements, without reference to materiality. The Second Circuit finds materiality to be an absent issue as to this second clause. See *United States v. Silver*, 235 F.2d 375, 377 (2d Cir.), cert. denied, 352 U.S. 880 (1956); *United States v. Pereira*, 463 F. Supp. 481, 486 (E.D.N.Y. 1978).

One might argue, then, at least in the Second Circuit, that the "perversion" element fills a void. However, this element of the "exculpatory no" doctrine has no utility if the only circuit to focus on this element is a circuit that has repudiated the doctrine. See also *United States v. Alzate-Restrepo*, 890 F.2d 1061, 1068 (9th Cir. 1989). The concurrence in *Alzate-Restrepo* argues not only that the perversion element is "redundant" in light of section 1001's materiality requirement, but that it has "resulted in some curious dicta in recent cases. *Id.* (citing *United States v. Myers*, 878 F.2d 1142, 1144 (9th Cir. 1989)). In *Myers*, the court stated "that a good investigator will expect the accused to lie and therefore will conduct his investigation in such a way as to get at the truth without having to rely on the accused's misrepresentations." *Myers*, 878 F.2d at 1144.

152. *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1975) explained that "[i]t is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force." *Id.* See also 2 WIGMORE, EVIDENCE § 278, at 133-41 (rev. 1979). Furthermore, in *United States v. Horton*, 873 F.2d 180 (8th Cir. 1989) the court recognizes that "the balancing of the probative value of such evidence against its prejudicial effect is [then] committed to the district court's discretion."

The "exculpatory no" was specifically rejected as a rule of evidence in *United States v. Cole*, 622 F.2d 98 (4th Cir. 1980). The *Cole* court limited application of the doctrine to section 1001, stating with respect to the misappropriated check, that "there could hardly be a more relevant indication of that intent than appellant's denial [of receipt]." *Id.* at 100.

153. Oft-cited in this Note is the *Bryson* proposition stating that although "[a] citizen may decline to answer the question, or answer it honestly, [he may not] with impunity, knowingly and willfully answer with a falsehood." *United States v. Bryson*, 396 U.S. 64, 72 (1969). This leaves unresolved whether negligent lying is permissible.

The wording of 18 U.S.C. § 1001 offers at least two interpretations. If one partitions the statute into two clauses, the "conceal or cover-up" clause and the "false statement" clause, one would find that there is no *mens rea* component to the latter clause, making any false statement punishable.

Should one, however, attach the knowingly or willfully *mens rea* to both the conceal-

sues follows below.

(1) Whether the "exculpatory no" doctrine contemplates a mere "no" or an affirmative misrepresentation.

A mere "no" is an oxymoron. Prosecutors do not prosecute under section 1001 persons who respond to the question "Did you commit this crime?" with a false "no."¹⁵⁴ Thus, the articulation of the First,¹⁵⁵ Second,¹⁵⁶ and Seventh¹⁵⁷ Circuits limiting the doctrine to "simple negative answers without affirmative discursive falsehood" must be read in a broader context.¹⁵⁸

Reliance on the doctrine must depend not only on the response to official questioning and its degree of elaboration, but also on the question asked and the intent behind the response. If these four factors are considered, a willful omission of material information from required records will continue to fall under section 1001.¹⁵⁹ Conversely, extensive falsehoods designed purely to avoid self-incrimination may fall outside the parameters of section 1001 and be protected by the doctrine.¹⁶⁰

A circuit that chooses to embrace the "exculpatory no" doctrine, however, should define the doctrine according to the terms provided by *Paternostro*.¹⁶¹ Following *Paternostro*, courts should limit the "exculpatory no" doctrine to negative responses without "any affirmative, ag-

ment and false statements, a negligent false statement would fall outside the scope of the statute.

Pragmatism, however, moots this analysis. The government does not usually prosecute the negligent false statement. *See, e.g.*, *United States v. Blackmon*, 839 F.2d 900, 916 (2d Cir. 1988) and *United States v. Fitzgibbon*, 619 F.2d 874, 900 (10th Cir. 1980) for the proposition that section 1001 only contemplates the willful falsehood, making willfulness an element of the crime.

154. *See supra* note 49 discussing why prosecutors are not likely to prosecute in this situation.

155. *United States v. Pandozzi*, 878 F.2d 1526 (1st Cir. 1989).

156. *See, e.g.*, *United States v. Capo*, 791 F.2d 1054 (2d Cir. 1986); *United States v. Barrett*, 639 F. Supp. 1342 (D. Vt. 1986).

157. *United States v. King*, 613 F.2d 670 (7th Cir. 1980).

158. *But see Medina de Perez*, 799 F.2d at 546 n.9 ("We fail to see, in the context of a post-arrest interrogation, any meaningful distinction between an exculpatory 'no, I am not guilty,' and a more complete, evasive exculpatory response to a direct question.").

159. *United States v. Goldfine*, 538 F.2d 815, 820 (9th Cir. 1976). *But see United States v. London*, 550 F.2d 206, 212 (5th Cir. 1977).

160. *See, e.g.*, *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988).

161. 311 F.2d 298 (5th Cir. 1962).

gressive or overt misstatement on the part of the defendant."¹⁶² When queried, the interrogee can answer "no", refuse to answer, or tell the truth.¹⁶³ Unfortunately, a "no" can grow under intense questioning.¹⁶⁴ Investigators might be tempted to force the subject of their inquiry to expand upon an initial negative response. Courts must consider this pressure when evaluating and implementing the doctrine. The possibility of an investigative questioning becoming a custodial interrogation should not be overlooked.¹⁶⁵

To best avoid ambiguity and misuse of the doctrine, courts should limit the "exculpatory no" defense to a simple "no" without affirmative discursive falsehood.¹⁶⁶ For those circuits which remain uneasy about interviewing sessions falling short of custodial interrogations that still place suspects in a position requiring lying to avoid self-incrimination, this Note advocates a new rule. As advanced in *Gomez*,¹⁶⁷ interrogating government agents should be required to say that although you are not in custody, you must answer those questions you choose to answer truthfully.¹⁶⁸ Failure to tell the truth may subject you to prosecution under the federal false statement statutes.¹⁶⁹

(2) Whether a false statement must be unrelated to a claim against the government or not in pursuit of a claim against the government in order to fall within the "exculpatory no" exception.

This issue has its origin in the *Cogdell*¹⁷⁰ formulation of the *Medina de Perez* test.¹⁷¹ Predicating section 1001 liability exclusively on false statements made in pursuit of a false claim against the government al-

162. *Id.* at 309 (emphasis added).

163. *Bryson v. United States*, 396 U.S. 64, 72 (1969). *See supra* note 34 explaining congressional recognition that section 1001 is far reaching.

164. *See supra* notes 1 and 2.

165. *See infra* note 189 and accompanying text.

166. Since *Paternostro*, the doctrine has been effectively applied only three times where the false statements arguably did not exceed mere "no's": *United States v. Hajeate*, 683 F.2d 894 (5th Cir. 1982); *United States v. Schnaiderman*, 508 F.2d 1208 (5th Cir. 1978); *United States v. Gomez* No. CR 86-1013-JSL (C.D. Cal. Feb. 7, 1987) (opinion withdrawn June 12, 1987) (LEXIS, Genfed library, Dist file).

167. No. CR 86-1013-JSL (C.D. Cal. Feb. 7, 1987) (opinion withdrawn June 12, 1987) (LEXIS, Genfed library, Dist file).

168. *Id.*

169. *Id.*

170. 844 F.2d 179 (4th Cir. 1988).

171. *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir. 1986). *See supra* notes 66-71 and accompanying text.

lows the exception to swallow the rule. No such limitation exists in section 1001.¹⁷² Requiring that a false statement merely be related to a false claim comports better with the spirit of the statute, although it still imposes limits on the statute that Congress never intended.¹⁷³ If Congress wanted to limit section 1001 to this class of claims, it would have done so. Section 1001 was not designed merely to protect the government from false claims.¹⁷⁴ Rather, it constitutes a necessary part of a statutory arsenal to combat the waste of government time, money, and energy. The doctrine must be formulated to permit prosecution of false statements other than those in pursuit of claims against the government.

Courts should reject the *Cogdell*¹⁷⁵ interpretation of the doctrine. In extending the "exculpatory no" doctrine to the defendant in *Cogdell*, the Fourth Circuit stated that the defendants' false statements were not made in pursuit of a false claim. Because the defendant already had received and cashed the IRS replacement check, all subsequent lies regarding whether she received the money were held not to be "in pursuit of" that money.¹⁷⁶ Had the Fourth Circuit applied the *Medina de Perez* test as written, the court would have found *Cogdell*'s false statements to be related to her false claims. The focus of the doctrine should be whether falsehoods that go beyond "mere no's" were calculated to mislead the government, and were capable of so doing.¹⁷⁷

(3) Whether the "exculpatory no" doctrine protects only those false statements made to a federal officer acting in an investigative capacity.

The *Medina de Perez*¹⁷⁸ test limits section 1001 to false statements

172. See *supra* note 3 for text of section 1001.

173. See *supra* note 3.

174. 18 U.S.C. § 287 is the statute for false claims. See *supra* notes 23-25 for a history of how false claims and false statements were separated.

175. *United States v. Cogdell*, 844 F.2d 179, 180 (4th Cir. 1988). Recall that in *Cogdell* a woman received and cashed a tax refund check. She then called the IRS and claimed to have never gotten the check. The IRS sent her a photocopy of her cancelled check and a claim form for her to fill out for a replacement check. She did so, and received a second check which she proceeded to cash as well. Then the Secret Service came to her door, at which time she continued to claim she had never gotten the first check. *Id.*

176. *Id.* at 184.

177. This simply becomes the question of materiality, addressed *supra* notes 29 and 151.

178. *United States v. Medina de Perez*, 799 F.2d 540, 544 (9th Cir. 1986).

made to federal administrators.¹⁷⁹ This investigative/administrative dichotomy originated with *United States v. Bush*.¹⁸⁰ The court in *Bush* perceived section 1001's historical evolution as requiring the prevention of false statements which subvert the administration of the government.¹⁸¹

Correspondingly, courts sympathetic to the doctrine have strained to demonstrate that the interrogating federal officer acted as an investigator rather than as an administrator.¹⁸² However, the courts offer no test for distinguishing the two functions.¹⁸³ Perhaps no neat distinction exists in practice, as observed by the First Circuit in *Poutre*.¹⁸⁴ Meanwhile, the courts muddle along.¹⁸⁵

(4) Whether an individual's status in police proceedings influences the success of the "exculpatory no" defense.

To determine how one's status in the criminal investigative process factors into the "exculpatory no" doctrine, four scenarios should be analyzed:

- (1) When the individual is a member of the world at large;
- (2) when the individual is a criminal suspect;
- (3) when the individual has been placed in custody;
- (4) when the individual has been placed under arrest.

In each successful application of the "exculpatory no" defense, the defendant was at least a suspect in an official investigation.¹⁸⁶ Once the

179. *Id.*

180. 503 F.2d 813 (5th Cir. 1974).

181. *Id.*

182. *See, e.g., United States v. Equihua-Juarez*, 851 F.2d 1222, 1225-26 (9th Cir. 1988); *Medina de Perez*, 799 F.2d at 545-46; *United States v. Tabor*, 788 F.2d 714, 718 (11th Cir. 1986).

183. *See, e.g., Medina de Perez*, 799 F.2d at 544 ("Rose did not explain what constitutes a 'routine exercise of administrative responsibility.'"); *United States v. Marusich*, 637 F. Supp. 521, 526 (S.D. Cal. 1986) ("the court is confronted with an absence of explanation by the court as to what is meant by the phrase, routine function of administrative duty.'").

184. 646 F.2d 685 (1st Cir. 1980).

185. *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988) provides an interesting twist on the investigative/administrative dichotomy. Confronted with the *Rodgers* opinion (*see supra* note 5) which reiterated the breadth of section 1001, the court interpreted *Rodgers* to hold that although false statements made to investigators can violate section 1001, they need not always violate section 1001. *Id.* This interpretation of *Rodgers* graphically demonstrates the need for the Supreme Court to address and reject the "exculpatory no" doctrine.

186. *See, e.g., Equihua-Juarez*, 851 F.2d at 1225 (post-arrest); *United States v. Bush*, 503 F.2d 813, 817 (5th Cir. 1974) ("It is incomprehensible to think that the IRS

individual has been placed either in custody or under arrest, the government cannot claim to have relied on the suspect's falsehoods.¹⁸⁷ Indeed, the court in *Medina de Perez* stated that a "stronger case" for the doctrine inheres once the defendant is placed under arrest.¹⁸⁸

Once an individual either has been placed in custody or arrested, he is entitled to *Miranda* warnings.¹⁸⁹ The *Miranda* warnings adequately protect most interrogees, but a gap in protection exists at the suspect stage.¹⁹⁰ A pre-*Miranda* suspect who lies to a federal agency can be prosecuted under section 1001, even where the agency cannot proceed on the substantive offense which first gave cause for suspicion.¹⁹¹

Theoretically, the "exculpatory no" doctrine protects individuals caught in this snare. In practice, however, only some fourteen individuals have successfully availed themselves of the doctrine.¹⁹² A closer look at these fourteen cases reveals that five of them arose under pre-*Miranda* forbears of the doctrine.¹⁹³ If these cases arose today the

did not suspect Bush" of making false statements); *United States v. Gomez*, No. CR 86-1013-JSL (C.D. Cal. June 12, 1987) (LEXIS, Genfed library, Dist file) (custodial interrogation).

187. *Cogdell*, 844 F.2d at 182.

188. *Medina de Perez*, 799 F.2d at 546.

189. *Miranda v. Arizona*, 384 U.S. 436, *reh'g denied*, 385 U.S. 890 (1966). The Supreme Court held that a person must be warned of the right to remain silent, that any statement he makes can be used against the individual as evidence, that the individual has a right to counsel, and if the individual cannot afford counsel one will be appointed for him or her. Should an individual not get this list of instructions prior to a custodial interrogation, any statements made during the interrogation may not be used as evidence against the individual at trial. *Id.* at 479.

With reference to *Miranda*, the central problem of the "exculpatory no" doctrine can be stated as follows: once an individual has become a suspect, some courts wish to accord the individual protections beyond those granted members of the world at large, but short of the constitutional protections granted under *Miranda*.

190. *See supra* note 190.

191. *See supra* note 31 describing the potential abuse of section 1001.

192. *United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990); *United States v. Steele*, 896 F.2d 998 (6th Cir. 1990); *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986); *United States v. Hajecate*, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); *United States v. Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978); *United States v. Bush*, 503 F.2d 813 (5th Cir. 1974); *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972); *United States v. Paternostro*, 311 F.2d 298 (5th Cir. 1962); *United States v. Russo*, 699 F. Supp. 1344 (N.D. Ill. 1988); *United States v. Jarvis*, 653 F. Supp. 1396 (S.D. Cal. 1987); *United States v. Philippe*, 173 F. Supp. 582 (S.D.N.Y. 1959); *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957); *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955); *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953).

193. *Paternostro*, *Philippe*, *Davey*, *Stable*, and *Levin* represent the five pre-*Miranda* cases applying the doctrine.

defendants could rely on *Miranda* and would not need the shelter of the "exculpatory no" doctrine. The remaining nine cases either involved the sort of lies to government that Congress designed section 1001 to prevent, or presented unusual circumstances.¹⁹⁴

As the concurrence in *Alzate-Restrepo*¹⁹⁵ indicated, the "exculpatory no" defense has been available only after *Miranda* rights are triggered.¹⁹⁶ This raises the question of whether the custodial status of the declarant should dictate when a section 1001 violation has occurred. One argument in support of such a *Miranda* rights test observes that courts have a greater understanding of its subtleties than those of the "exculpatory no" doctrine.¹⁹⁷

(5) Whether the "exculpatory no" doctrine should extend beyond section 1001 to other statutes.

The vast majority of courts addressing this issue treat the doctrine as "only a creature of section 1001."¹⁹⁸ In fact, *United States v. Payne*¹⁹⁹

194. *Tabor*, 788 F.2d at 718. *Tabor* invoked the doctrine to reverse a conviction for defendant's lies which included a statement that someone witnessed her notarizing a document, although the purported witness had been long dead. *Id.*

Hajecate, 683 F.2d at 900. *Hajecate* invoked the doctrine after having lied on his income tax forms. He argued successfully that the particular question to which he lied was investigative and not administrative. *Id.*

Schnaiderman, 568 F.2d at 1212-13. *Schnaiderman* invoked the doctrine to justify lies when telling the truth would not have incriminated the defendant. *Id.*

Bush, 503 F.2d at 818, 819. *Bush* invoked the doctrine not for "mere no's," but to justify sworn affidavits replete with falsehoods. *Id.*

Russo, 699 F. Supp. at 1347. *Russo* invoked the doctrine because he had already filled out a false police report and would be forced either to lie again to the FBI, or to confess he had lied to the police. The court found that the first lie justified the second. *Id.*

Jarvis, 653 F. Supp. at 1397, 1400-01. *Jarvis* lied during an FBI investigation into the alleged kicking of an individual by a border guard and a later conspiracy to cover up the assault. *Id.*

Bedore, 455 F.2d at 1111. *Bedore* simply misled the FBI as to his identity when agents came to serve him a subpoena. *Id.*

Steele, 896 F.2d 998 (6th Cir. 1990). *Steele* presented a series of false documents to support his fraudulent evasion of taxes. He initially was not a suspect when he began this documentation, but later became a suspect. *Id.* at 999-1000.

Taylor, 907 F.2d 801 (8th Cir. 1990).

195. 890 F.2d 1061, 1068 (9th Cir. 1989). See *supra* note 117 discussing the concurring opinion in *Alzate-Restrepo*.

196. 890 F.2d at 1069.

197. *Id.*

198. *United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). See also *United States v. Pandozzi*, 878 F.2d 1526, 1533 (1st Cir. 1989); *United States v. Cole*, 622 F.2d 98, 100 (4th Cir.), *cert. denied*, 449 U.S. 956

represents the sole federal case²⁰⁰ applying the "exculpatory no" doctrine to a statute other than section 1001.²⁰¹

The *Payne*²⁰² court gave a two-tiered rationale for extending the doctrine to 18 U.S.C. § 1006.²⁰³ The court dichotomized *Paternostro*²⁰⁴ and *Lambert*²⁰⁵ rationales. In the *Paternostro* application of the doctrine, "mere negative responses" fall outside the scope of section 1001.²⁰⁶ In contrast, the *Lambert* approach applies the doctrine where

(1980); *United States v. King*, 613 F.2d 670, 674 (7th Cir. 1980); *United States v. Galaniuk*, 738 F. Supp. 225 (E.D. Mich. 1990) (doctrine does not extend to 26 U.S.C. § 7207, which forbids the filing of false and fictitious invoices with the IRS).

199. 750 F.2d 844 (11th Cir. 1985).

200. It should be noted that the "exculpatory no" doctrine has migrated from the federal to the state courts. Many state courts erroneously conclude that the doctrine has met with near unanimous approval at the federal level. It would therefore be patently unfair to convict a defendant in state court for a crime that would result in an acquittal in federal court. *See, e.g., Wilke v. State*, 496 N.E.2d 616, 619 (Ind. Ct. App. 1986).

Several arguments run counter to this position, however. First, the "exculpatory no" doctrine was in part an effort to ameliorate the harsh penalties of 18 U.S.C. § 1001. Defendants misuse the doctrine where they seek its application in a crime or misdemeanor with a relatively light penalty, however. *See, e.g., MONT. CODE ANN. § 45-7-203* (1989), which carries a fine of not greater than \$500, or six months in jail, as opposed to section 1001's five year prison term and \$10,000 fine.

Second, 18 U.S.C. § 1001 is a far broader statute than many of its state counterparts. Third, and most importantly, the doctrine has not received unqualified endorsement in the federal courts. Federal circuits are applying significantly different tests in adopting, or limiting, the doctrine. State courts must be mindful of what version of the doctrine they adopt in following the "federal courts."

201. The United States Attorney's manual provides at 9-40.322 (1988) that whenever a false statement can be prosecuted under section 1001 or a more specific statute, the attorney should prosecute under the more specific statute, such as 18 U.S.C. § 1006. *See supra* note 49.

202. 750 F.2d 844 (11th Cir. 1985).

203. 18 U.S.C. § 1006 (1988) provides in pertinent part:

Whoever, being an officer, agent or employee of or connected in any capacity with . . . any land bank . . . [or] intermediate credit bank[,] . . . with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, . . . or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits though any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

204. *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962).

205. *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974).

206. *Paternostro*, 311 F.2d at 305.

one harbors a "latent distaste for an application of the doctrine which is uncomfortably close to the fifth amendment."²⁰⁷ Of the two, *Lambert's*, fifth amendment rationale convinced the *Payne* court to extend the doctrine to section 1006, over two government objections.²⁰⁸ First, the government pointed out that no court seriously had entertained extending the doctrine beyond § 1001.²⁰⁹ Second, the government noted that "the doctrine was designed to limit the broad scope of 18 U.S.C. § 1001, and would be inappropriate in the context of a narrow false statement statute, such as 18 U.S.C. § 1006."²¹⁰

This Note contends that the *Payne* court erred in three ways. First, Congress enacted a much narrower statute with section 1006 than § 1001, both in wording, and application. Specifically, an intent to defraud or deceive must accompany the false entries under the former statute.²¹¹ Section 1001 has no such caveat. The *Paternoastro* decision arguably added such a caveat to section 1001 by way of the "exculpatory no" doctrine.²¹² Whether or not a circuit accepts the doctrine as it applied to section 1001, it would be ill-advised to try to graft the unwieldy doctrine onto section 1006.

Second, dichotomizing the *Lambert* and the *Paternoastro* rationales does violence to the "exculpatory no" doctrine because fifth amendment concerns are irreparably integrated with the arena in which they occur. The *Paternoastro* exploration of the scope of the false statement cannot be disregarded.²¹³

Third, *Payne's* outright rejection of an investigative/administrative²¹⁴ distinction but professed "solicitude for fifth amendment values"²¹⁵ clarifies nothing where the court fails to explain its rejection. The *Payne* court writes off the distinction as a worthless construct, without quantification. The *Payne* court also goes to the heart of the issue in identifying fifth amendment concerns as the paramount issue. But in trying to maintain the viability of the "exculpatory no" doc-

207. *Lambert*, 501 F.2d at 946 n.4.

208. *United States v. Payne*, 750 F.2d 844, 861-63 (11th Cir. 1985).

209. *Id.* at 862. Five years after *Payne*, no other courts have adopted this position.

210. *Id.* Compare 18 U.S.C. § 1006 (1988) with 18 U.S.C. § 1001 (1988). See *supra* notes 3 & 203.

211. See *supra* note 203.

212. See *supra* note 9 and accompanying text.

213. See *supra* notes 76, 154-69 regarding mere "no's."

214. *United States v. Payne*, 750 F.2d 844, 863 n.21 (11th Cir. 1985).

215. *Id.* at 863.

trine, the *Payne* court analyzes purported "exculpatory no" elements, only to ground its decision on fifth amendment concerns in the final analysis. If the court meant to preserve the doctrine then it should have explained what stands between fifth amendment concerns and the rest of the elements imposed by other circuits, including the administrative/investigative distinction.²¹⁶

PART V

Conclusion

Courts should abandon the "exculpatory no" doctrine or, at least restrict its application. The concerns which led to its creation in the late 1950s have been largely alleviated by the *Miranda* decision. Where a gap still exists, the duty falls on Congress to remedy its statutory oversights. The courts, acting as super-legislatures, have created numerous and diverse tests, all of which purport to create the same "exculpatory no" doctrine. This Note, therefore, urges the federal circuits to reevaluate their positions on this doctrine. If section 1001 violates the fifth amendment, then it should be declared null and void. The Supreme Court, however, has held up the statute's constitutionality. Absent any constitutional infirmity, the federal courts are obligated to apply the statute as written by Congress.

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216. See *supra* notes 178-85 discussing the investigative/administrative dichotomy.

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COMMENTS

