

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: JOHN BRUCE HUBBARD, Petitioners v. THE UNITED  
STATES

CASE NO: No. 94-172

PLACE: Washington, D.C.

DATE: Tuesday, February 21, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN BRUCE HUBBARD, :  
Petitioner :  
v. : No. 94-172  
THE UNITED STATES :  
- - - - -X

Washington, D.C.  
Tuesday, February 21, 1995

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:10 a.m.

APPEARANCES:  
PAUL MORRIS, ESQ., Coral Gables, Florida; on behalf of the  
Petitioner.  
RICHARD P. BRESS, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in Number 94-172, John Bruce Hubbard v. The United  
States.

Mr. Morris.

ORAL ARGUMENT OF PAUL MORRIS  
ON BEHALF OF THE PETITIONER

MR. MORRIS: Mr. Chief Justice, and may it  
please the Court:

This case concerns the applicability of title  
18, United States Code, section 1001, often referred to as  
the false statement statute, to statements of the  
petitioner made in the course of bankruptcy court  
proceedings. Section 1001, of course, prohibits the  
making of knowingly false statements in any matter within  
the jurisdiction of any department of the United States.

Our position is essentially twofold. If there  
is an honest debate over whether the term "department"  
includes the courts, then the Rule of Lenity requires  
resolution of that ambiguity in favor of the accused, and  
secondly and alternatively, the petitioner seeks this  
Court's approval of the judicial function exception to  
1001 and/or related limitations placed upon section 1001  
by the various courts of appeals that have reached this

1 issue.

2 Very briefly, the petitioner's three convictions  
3 under section 1001 arose from three written responses made  
4 through counsel during the course of the bankruptcy  
5 proceedings. These responses were made to the bankruptcy  
6 trustee as a result of inquiries made by that trustee.

7 The first two convictions arose from answers to  
8 the bankruptcy trustee's complaint, and essentially those  
9 answers consisted of the words, "denied for the reason  
10 that the allegations in the complaint are untrue."

11 The third conviction arose as a result of a  
12 discovery dispute.

13 QUESTION: These answers were verified?

14 MR. MORRIS: The third conviction arose as a  
15 result of a discovery dispute.

16 QUESTION: None of these answers were verified?

17 MR. MORRIS: No, they were not. The answer to  
18 the complaint was signed by counsel and signed by the  
19 petitioner, but not under oath, and the discovery response  
20 was not signed by the petitioner at all, only signed by  
21 counsel.

22 The discovery response arose as a result of the  
23 trustee asking for the production of certain documents  
24 from the petitioner, and the discovery response filed by  
25 counsel stated that the petitioner had turned over those

1 documents to the prior trustee.

2 Later on in the bankruptcy court proceedings,  
3 the bankruptcy judge issued an order directing the  
4 petitioner to turn over those documents, and they were  
5 turned over. Nevertheless, the petitioner was indicted  
6 for 1001 as a result of that response in the discovery  
7 issue, and that comprised the third of the three  
8 convictions.

9 First, I would like to address the question that  
10 the determination of whether 1001 applies at all to the  
11 courts is a question that logically and necessarily  
12 precedes the determination of whether the judicial  
13 function exception applies to 1001. This issue is not  
14 just fairly included within the question presented for  
15 review, it is a necessary predicate to a determination of  
16 the propriety of the judicial function exception.

17 Ours is a plain language argument. Congress  
18 used the word in 1001, "department." Congress did not --

19 QUESTION: Well, Bramblett stands in your way.  
20 Do you say we have to overrule Bramblett?

21 MR. MORRIS: It is, Your Honor, dictum in  
22 Bramblett that stands in our way, and for that reason, we  
23 do not believe that the Court will run into the problem of  
24 stare decisis, as the Government would suggest. Stare  
25 decisis, of course, carries particular weight in a

1 statutory construction case, but not the kind of weight  
2 the Government suggests it should carry in this case,  
3 because, of course, we are addressing dictum, and we have  
4 asked the Court to recede from the dictum in Bramblett --

5 QUESTION: Well, it certainly has been followed  
6 in the intervening years, hasn't it?

7 MR. MORRIS: Well, the courts of appeals,  
8 because of Bramblett, have felt constrained to hold that  
9 such statement that -- to hold that 1001 applies to the  
10 courts because of the dictum in Bramblett, and it is with  
11 several misgivings that the courts of appeals have noted  
12 that. In fact, this is one such case, and the very first  
13 case after Bramblett was that type of case also.

14 QUESTION: What Bramblett decided, though, not  
15 really by way of dictum, was that it was not limit -- 1001  
16 was not limited to the executive branch.

17 MR. MORRIS: But the issue before Bramblett,  
18 Your Honor, was not a statement made to the judiciary, it  
19 was a statement made to the legislative branch, and in  
20 fact --

21 QUESTION: Yes, but once you say it doesn't  
22 apply to the -- it's not limited to the executive branch  
23 but it extends to the legislative branch, it seems to me  
24 it's very hard to carve out of the statute a meaning that  
25 says, it covers executive and legislative but not



1 judicial.

2 MR. MORRIS: But nevertheless, that is what the  
3 statute says. The plain language of the statute uses the  
4 word, "department," and Congress has defined the term,  
5 "department" for us in title 18, section 6, and that  
6 definition of department is the executive departments, and  
7 it was explained in the reviser's notes to that definition  
8 of department.

9 QUESTION: What about Congress?

10 MR. MORRIS: I'm sorry?

11 QUESTION: What about Congress? Is Congress  
12 within that definition?

13 MR. MORRIS: No, it states that --

14 QUESTION: Well, there goes your plain language  
15 argument out the window.

16 QUESTION: Bramblett held that it was applicable  
17 to Congress, didn't it?

18 MR. MORRIS: And we are asking, even if you are  
19 looking at the holding of Bramblett, if the holding of  
20 Bramblett is deemed at issue, we're asking the Court to  
21 recede from the holding of Bramblett.

22 QUESTION: So you're not really talking just  
23 about dicta.

24 MR. MORRIS: Well, technically, yes, we are,  
25 because Bramblett did not involve -- in the sense that

1 Bramblett did not involve a statement to the judiciary,  
2 yes. If the Court finds that there's no principal  
3 distinction between the legislature and the judiciary for  
4 the purposes of examining Bramblett, then yes, indeed,  
5 we're asking the Court to recede from the holding as well.

6 QUESTION: Well, there is certainly no principal  
7 distinction for purposes of making a plain language  
8 argument.

9 MR. MORRIS: Well, there isn't --

10 QUESTION: If you want to make a plain language  
11 argument, you must ask us to overrule Bramblett.

12 MR. MORRIS: Yes, and Bramblett runs counter to  
13 the plain language argument and to the definition supplied  
14 by Congress of the term "department."

15 QUESTION: Do you attach any --

16 QUESTION: When you say --

17 QUESTION: Excuse me. Go ahead.

18 QUESTION: When you say recede, you mean  
19 overrule?

20 MR. MORRIS: Yes, overrule, if we're going to  
21 view it as the holding of Bramblett is at issue, but  
22 recede if we're going to view Bramblett as only standing  
23 in the way of the petitioner's argument as far as the  
24 dictum is concerned.

25 QUESTION: Do you attach any significance to the

1 fact that Bramblett was not just any statement to Congress  
2 but rather was in support of a claim made to the  
3 disbursing office of the Congress?

4 MR. MORRIS: Yes, and that carries particular  
5 significance in drawing the distinctions between  
6 administrative and adjudicative functions that have been  
7 drawn in the judicial function exception.

8 If we are to understand why the courts of  
9 appeals have had such widespread acceptance of the  
10 judicial function exception and the justification for the  
11 distinction drawn between housekeeping functions and  
12 adjudicate functions, all we need to do is look at  
13 Bramblett and see why that happened.

14 And the Second Circuit in the Masterpol  
15 decision, when that circuit adopted the judicial function  
16 exception, probably set forth the most cogent explanation  
17 of that distinction, and the Masterpol decision stated  
18 that in viewing Bramblett and what it was limited to, it  
19 was limited to a statement made to the disbursing office.  
20 It was limited to the legislature as far as administrative  
21 function was concerned.

22 And, therefore, Masterpol said the reason why  
23 the courts of appeals are justified in drawing this  
24 judicial function exception is so that Bramblett applies  
25 to the legislature in the same way that 1001 will apply to

1 the judiciary, only insofar as the administrative  
2 functions of the courts are concerned, so in that  
3 respect --

4 QUESTION: There is no textual basis, though,  
5 for that distinction. You agree with that, I take it?

6 MR. MORRIS: Well --

7 QUESTION: I mean, that's a nice way to draw a  
8 line, but it doesn't reflect anything that's written in  
9 the statute. Isn't that fair to say?

10 MR. MORRIS: No, but the courts -- yes, it's  
11 fair to say, but the courts of appeals felt that that was  
12 a justified interpretation of the statute, because  
13 Congress never intended that that statute would apply to  
14 statements such as those made by the petitioner in this  
15 case, or certainly not to every misrepresentation made in  
16 every Federal court.

17 QUESTION: But, counsel, if similar statements  
18 had been made before an ALJ, for example, an  
19 administrative adjudicator, then you recognize that that  
20 would certainly be covered?

21 MR. MORRIS: If it fell within the adjudicative  
22 function, arguably --

23 QUESTION: Of an ALJ who was acting inside the  
24 executive branch but making a determination as a trier?

25 MR. MORRIS: Under that factual scenario, it may



1 be arguable that there would be an exception to the  
2 applicability of 1001 as well, because that is an  
3 adjudicative function of the ALJ even though it is within  
4 the executive branch.

5 QUESTION: So you say adjudicative functions  
6 cross the board --

7 MR. MORRIS: Yes.

8 QUESTION: -- even for something that plainly is  
9 an agency or department of Government?

10 MR. MORRIS: Well, though, of course --

11 QUESTION: Well, now you've turned out to be the  
12 enemy of plain language.

13 MR. MORRIS: Well --

14 QUESTION: There's nothing like that in the  
15 statute.

16 MR. MORRIS: Although that issue is not  
17 precisely before the Court, I think that argument can be  
18 made. If we are going to take the judicial function at  
19 its word, and what it represents in terms of how limited  
20 1001 should be in the judicial proceeding, I think an  
21 argument can be made for that.

22 QUESTION: And you distinguish between the  
23 two -- can you give any reason why, if you have an  
24 adjudicative function exception, it should apply to  
25 courts, but not administrative agency adjudications?

1 MR. MORRIS: I would rely upon what all the  
2 circuits have held, and that is that 1001 was -- there is  
3 no indication of congressional intent that 1001 would have  
4 that broad scope, that there have to be some limitations,  
5 and the reason --

6 QUESTION: Is there any -- once we get away from  
7 the plain language, is there any rationale for keeping the  
8 courts out but keeping the administrative adjudicators in?

9 MR. MORRIS: Only under -- only because of the  
10 rationale of the judicial function exception itself.  
11 Beyond that, no. That could be a problem in that  
12 scenario.

13 QUESTION: And you would exclude congressional  
14 adjudicative functions? What would they be?

15 MR. MORRIS: Well, as I stated, I think an  
16 argument can be made that if it is acting in an  
17 adjudicative function, that the rationale of the judicial  
18 function exception could apply to those situations.  
19 Now --

20 QUESTION: When does it act in an adjudicative  
21 capacity?

22 MR. MORRIS: When it takes on the --

23 QUESTION: Impeachment. What else?

24 MR. MORRIS: Well, when it's acting in the same  
25 fashion as a court, the same functions as a court.

1 QUESTION: I know that. When is that?

2 QUESTION: You mean when it's holding hearings,  
3 don't you?

4 MR. MORRIS: Yes. Holding hearings --

5 QUESTION: Holding hearings is an adjudicative  
6 function?

7 MR. MORRIS: Well, witnesses --

8 QUESTION: But your point is that it's not a  
9 claim against the Government in those situations.

10 MR. MORRIS: Correct.

11 QUESTION: Well, but I'm trying to know what  
12 you're carving out of the congressional coverage which we  
13 have said exists. You're carving out committee hearings.  
14 You think that is an adjudicative function?

15 MR. MORRIS: It may -- it may be, it may not be.  
16 I think it would turn on --

17 QUESTION: I know. Which do you say?

18 MR. MORRIS: -- the individual facts.

19 Well, I think it could be, and I think the  
20 argument could be made that it is, but --

21 QUESTION: We'll have to litigate this in the  
22 future, right --

23 MR. MORRIS: Yes.

24 QUESTION: -- and try to figure out where this  
25 line goes?

1 MR. MORRIS: Yes.

2 QUESTION: There's simply nothing in the  
3 statute, though, that suggests any sort of a judicial  
4 function exception for anything. The courts who have  
5 reached that result have tried to do it on the basis of  
6 comparing it with the coverage that Bramblett actually  
7 said extended to the legislative function, but without  
8 Bramblett, I don't think there ever would have been any  
9 effort to find a judicial exception.

10 MR. MORRIS: Well, without Bramblett I think the  
11 argument would have prevailed in the courts of appeals  
12 that Bramblett --

13 QUESTION: Without Bramblett you might well have  
14 come up and said this applies to the executive department  
15 only, but you would never say there's a judicial exception  
16 that extends through the executive department as well as  
17 excluding legislative and judiciary.

18 MR. MORRIS: Well, the judicial function  
19 exception, of course, is an outgrowth of the Bramblett  
20 decision, and it flowed from Morgan's discussion of  
21 traditional trial tactics and how those should not be  
22 within the ambit of 1001, and that --

23 QUESTION: Well, Mr. Morris, let me ask you in  
24 this case whether the false statements that were made in  
25 the course of the bankruptcy proceeding could be punished



1 under any other provision of Federal law?

2 MR. MORRIS: Arguably, yes. They could have  
3 been punished as perhaps obstruction of justice, as  
4 contempt. Certainly the discovery response would subject  
5 it to the contempt powers of the bankruptcy judge if there  
6 had been a violation of an order. Certainly Rules 11 and  
7 Rules 37. Rule 11 sanctions against the parties or the  
8 litigants, and Rule 37 sanctions for abuse of the  
9 discovery process.

10 QUESTION: The perjury statute wouldn't cover  
11 it, because they weren't under oath?

12 MR. MORRIS: That's correct, and therein lies  
13 one of the anomalies of the Government's interpretation of  
14 1001.

15 Perjury, which carries a greater penalty than  
16 1001, would create the anomaly that a person who makes a  
17 false statement in court not under oath would be subjected  
18 to a greater punishment than a person who is under oath  
19 and makes a false statement, and that's the type of  
20 unintended consequence that the courts of appeals were  
21 concerned with in carving out the judicial function  
22 exception, in particular coming to the conclusion that  
23 1001 is not a boundless statute, and Congress never  
24 intended it to be such.

25 QUESTION: Mr. Morris, do you know if this

1 statute has been applied to unsworn statements in  
2 committee hearings that turn out to be false?

3 MR. MORRIS: No, I do not, Your Honor.

4 The petitioner's statements, we would submit, if  
5 the Court is going to approve the judicial function  
6 exception, squarely falls within the adjudicative  
7 functions of the Court, and if the exception is approved,  
8 he should prevail.

9 There is also a related private civil --

10 QUESTION: Mr. Morris, I just wanted to make  
11 sure I understood you correctly. Did you mean to say that  
12 perjury is punished less severely than a false statement  
13 under --

14 MR. MORRIS: Well, my understanding is that the  
15 perjury statute carries 5 years and \$2,000, and then a  
16 violation of 1001 carries 5 years and \$10,000.

17 QUESTION: You said it the other way around.

18 MR. MORRIS: Oh, I'm sorry. I misspoke. I  
19 apologize.

20 The petitioner is also seeking relief under the  
21 private civil litigation exception, as it is so-called,  
22 from the Second Circuit's D'Amato case, which was also  
23 adopted by the Eleventh Circuit in London, and those cases  
24 held that 1001 does not apply to civil litigation where  
25 the Government is not a party. The rationale of those

1 decisions applies here as well.

2 And unless there are further questions, I will  
3 reserve the balance of my time for rebuttal.

4 QUESTION: Very well, Mr. Morris.

5 Mr. Bress, we'll hear from you.

6 ORAL ARGUMENT OF RICHARD P. BRESS

7 ON BEHALF OF THE RESPONDENT

8 MR. BRESS: Mr. Chief Justice, and may it please  
9 the Court:

10 There is no judicial function exception to  
11 section 1001. The so-called judicial function exception  
12 conflicts with the plain text of the statute. It has no  
13 basis in the history of the statute or in this Court's  
14 decisions, and it is not needed to protect constitutional  
15 rights or traditional trial tactics.

16 Before I get to those points, however, I  
17 recognize that petitioner now raises a broader challenge  
18 not raised in his petition for certiorari. Petitioner now  
19 says that Bramblett was incorrectly decided and that  
20 section 1001 does not apply to false statements made to  
21 the courts.

22 In Bramblett, this Court held squarely that  
23 section 1001 is not limited to false statements made to  
24 the executive branch, but that the term "department"  
25 extends broadly and includes all three branches of

1 Government.

2 QUESTION: Yes, but isn't it true that the  
3 history of this statute was one of false claims against  
4 the Government, usually monetary claims, and the  
5 particular false statement in Bramblett was in support of  
6 a monetary claim made to the disbursing officer, so isn't  
7 it conceivable that one could say the holding goes only to  
8 those departments of the judiciary or the legislature that  
9 perform similar functions to the departments in the  
10 executive branch that process claims against the  
11 Government?

12 MR. BRESS: No, Justice Stevens, and primarily  
13 for two reasons. First, the Court expressly declined to  
14 deny on the nature of the Government function being  
15 carried out in Bramblett. It was suggested, and the Court  
16 declined to rely on it. Secondly --

17 QUESTION: I'm no sure the opinion -- that's a  
18 correct reading of the opinion. Where did -- how do  
19 you -- what do you rely on for that statement?

20 MR. BRESS: In Bramblett it was argued, and the  
21 Court noted, that the matter involved -- and this is on  
22 page 509 of the opinion -- was within the jurisdiction of  
23 the Treasury Department, and the misstatements could be  
24 taken, therefore, to be misstatements to the Treasury,  
25 because the money would come out of the Treasury. That



1 was basically a disbursement rationale.

2 In other words, because the false statement  
3 would take money from the Government, it is like false  
4 claims, and the Court should approve it on that basis.

5 QUESTION: Yes, but that -- that's what you rely  
6 on for saying that it was -- you think the rationale would  
7 apply to an unsworn statement at a committee hearing?

8 MR. BRESS: Yes, and in fact the District of  
9 Columbia Circuit held as much in the Poindexter case.

10 The statutory reason for that interpretation is  
11 that the original false statement provision only went to  
12 false statements made to collect payment on false claims.  
13 That statute was amended, broadened to include false  
14 statements to cheat, defraud, or swindle the Government.

15 When this Court in the Cohn decision interpreted  
16 that phrase still only to reach monetary claims, the Court  
17 deleted the purpose element entirely and substituted the  
18 "in any matter" clause. That clause was interpreted  
19 later --

20 QUESTION: The Congress did.

21 MR. BRESS: Congress did. I'm sorry. That  
22 clause was interpreted later by the Court in United States  
23 v. Gilliland to remove the restriction to monetary frauds  
24 and to broaden the statute to false statements that might  
25 pervert any authorized Government function.

1           That lack of a functional distinction was echoed  
2 by this Court in United States v. Rodgers, where the Court  
3 rejected the notion that false statements to an  
4 investigatory agency -- in that case, it was the FBI and  
5 the Secret Service -- would not come within the scope of  
6 section 1001.

7           The Court held in that case that section 1001  
8 does not make functional distinctions, and that any matter  
9 means any matter.

10           QUESTION: Mr. Bress, suppose I think that the  
11 case was -- Bramblett was incorrectly decided. It would  
12 not be an unusual phenomenon for a court to narrow a bad  
13 prior holding in such a way that you're not overruling the  
14 case, but you nonetheless do not follow the full rationale  
15 of the case.

16           So why couldn't we simply say, if we think that  
17 Bramblett was incorrectly decided that "department"  
18 doesn't mean Congress, why couldn't we say, we will go  
19 along with Bramblett insofar as it has been applied to  
20 Congress, but we won't take the further step, which would  
21 be logical, if you believe Bramblett was right, of  
22 extending it to the judiciary as well? What would be so  
23 terrible about that?

24           MR. BRESS: Well, if the Court took the approach  
25 of only applying Bramblett to Congress, then the Court

1 would essentially be overturning the overarching rationale  
2 of the case.

3 QUESTION: Sure, but I'm saying, I'm under the  
4 impression that's quite a common thing. It's how the  
5 common law courts develop their law. You regard the  
6 holding of an earlier case that was a stinker of a case to  
7 be a very narrow holding, regardless of what it said.  
8 What it held -- what it held was that Congress is within  
9 the meaning of "department." It said that the -- I mean,  
10 implied the judiciary was as well, but that was -- you  
11 know, we don't have to follow that.

12 MR. BRESS: That approach we believe would  
13 suffer the same faults as overturning the case in its  
14 entirety, in the following sense. The Court's special  
15 regard for statutory stare decisis is based in part on  
16 Congress' ability, if it does not like the holding that  
17 the Court has with respect to a statute, to change the  
18 statute in reaction to that holding.

19 Congress did not change or amend section 1001 in  
20 response to this Court's decision in Bramblett, and in the  
21 40 years since Bramblett was decided, this Court and the  
22 lower Federal courts have based many decisions on this  
23 Court's interpretation of the statutory language in  
24 Bramblett.

25 For example, in Yermian and in Rodgers, this

1 Court based decisions on Bramblett's holding that the 1934  
2 amendment was not intended to narrow the scope of the  
3 statute. In addition, Federal prosecutors have for  
4 decades relied on this Court's interpretation of the  
5 statute in Bramblett to prosecute under section 1001 false  
6 statements made to the courts. For the Court to change  
7 course and essentially --

8 QUESTION: Yes, but you're asking us to change  
9 course on a lot of courts of appeals who have thought this  
10 was not really what was intended and have developed this  
11 kind of ironic judicial exception. Their stare decisis  
12 argument cuts both ways, is what I'm suggesting, because  
13 there is law out there that does support this exception.

14 MR. BRESS: There's law out there that supports  
15 the exception. We would --

16 QUESTION: By several courts.

17 MR. BRESS: We would contend that that law is  
18 not based on the text of the statute, not based on any  
19 discernible history, and not based on any legitimate  
20 policy rationale.

21 QUESTION: Well, can't one read the definition  
22 of "department," which says it means the executive  
23 department unless the context reads otherwise, and  
24 couldn't one say the context does indicate otherwise when  
25 there's a monetary claim against another branch of the



1 Government, such as the disbursing officer of the  
2 legislature, or one of our disbursing officers -- that's a  
3 similar claim. You could say that context indicates you  
4 ought to treat those legislative and judicial functions as  
5 departments for the purpose of this statute.

6 MR. BRESS: After the statute was amended in '34  
7 and in light of this Court's holding in Gilliland, we do  
8 not agree that you can read context to give any special  
9 sort of a notice to false statements made in connection  
10 with false claims. Whatever monetary attachment the false  
11 statement provision once had, it no longer has.

12 The context indicating otherwise was interpreted  
13 by this Court in Bramblett primarily to take account of  
14 the evolution of the statute over time.

15 QUESTION: Does the context refer literally only  
16 to the words of the statute, or does the context include  
17 the historical understanding behind those words?

18 For example, if you are going to apply it to the  
19 judicial branch across the board, then I suppose in theory  
20 a lawyer making a closing argument who allegedly  
21 misrepresents facts is going to be indictable under this  
22 statute. Would you agree?

23 MR. BRESS: If the lawyer intentionally  
24 misrepresents facts, the lawyer may be prosecutable under  
25 section 1001. However, in a closing statement, for



1 example, the lawyer is generally not taken to be stating  
2 facts that he believes exist, but rather to be summing up  
3 what has gone on during the trial.

4 QUESTION: Well, let's say that's one way --  
5 there's a difference, though, between a closing argument  
6 and the reference to facts there, and the factual  
7 implications of entering a plea, which in fact --

8 MR. BRESS: Yes.

9 QUESTION: -- is the distinction that you  
10 recognize.

11 Well, when we bear in mind the fact that  
12 historically a lawyer who is claimed to have made a  
13 misrepresentation in closing argument is usually dealt  
14 with by an objection, a statement by the judge saying to  
15 the jury, take your own recollection of the evidence, this  
16 is just argument, you don't have to accept his statement  
17 of the fact, that is for you to decide.

18 Isn't that part of the context in which we  
19 should determine whether the statute in fact applies, the  
20 context here being that there is a settled practice for  
21 dealing with these problems, and it would be rather  
22 startling to assume that suddenly this settled practice  
23 had been overlaid by a -- the creation of an indictable  
24 offense. Would that be a proper contextual argument as  
25 you are suggesting we should consider context, or as the

1 statute thinks we should consider context?

2 MR. BRESS: It might be a proper contextual  
3 argument, except that we would take the position that the  
4 overlap of section 1001 on top of, as you say, more  
5 specific context -- for example, this is -- the trial  
6 context exists not only in the judicial branch but also in  
7 the legislature and also in the executive branch.

8 QUESTION: So you're saying if you do what I was  
9 exploring, in fact you are going to read out a great deal  
10 of the ostensible application of the statute?

11 MR. BRESS: That is correct.

12 QUESTION: So we shouldn't do what I was  
13 suggesting?

14 MR. BRESS: That is my position.

15 QUESTION: Oh, is that your position?

16 (Laughter.)

17 MR. BRESS: To be more specific, section 1001  
18 does overlap many more specific prohibitions and ways of  
19 dealing with things in the judicial branch and outside of  
20 it. In the judicial branch, it overlaps perjury as has  
21 been suggested. Obstruction also overlaps perjury, for  
22 that matter.

23 Outside of the judicial context -- and this is  
24 an important point, we believe -- section 1001 also  
25 overlaps perjury there, because perjury applies to agency

1     hearings and false verifications. Moreover, section 1001  
2     overlaps with many more specific false statement  
3     prohibitions that exist outside of the judicial branch,  
4     mostly in the executive branch.

5             If section 1001 were read not to apply where a  
6     more specific prohibition applies, you would cut the guts  
7     out of the statute, which was intended to be a broad  
8     statute.

9             Moreover, as a general matter, this Court has  
10    never taken the position that criminal statutes ought to  
11    be interpreted narrowly to minimize or eliminate areas of  
12    overlap. That would, in our view, conflict with the  
13    strong presumption against implied repeal.

14            QUESTION: You are supposed to interpret an  
15    ambiguous statute in the direction of lenity, and why  
16    isn't it ambiguous? That is to say, where the term  
17    "department" means executive department unless the context  
18    shows the term is intended to describe executive,  
19    legislative, or judicial, and the context here would seem  
20    ambiguous in respect to judicial, wouldn't it?

21            If you look at the function of the judiciary,  
22    the percentage of instances in which people make  
23    statements in order to get money out of the Government I  
24    would imagine is much smaller than in the executive or the  
25    legislative branches. That is where the statute was

1 aimed.

2 But why isn't it at least ambiguous, given all  
3 of the considerations that have been brought up, and then  
4 once it's ambiguous, why can't you say, yes, executive,  
5 legislative, but not judicial because the context doesn't  
6 call for judicial?

7 MR. BRESS: Well, firstly, in terms of the  
8 context, we disagree that the context is ambiguous,  
9 particularly if you compare it with the legislative  
10 context. I don't believe there is any distinction you can  
11 make --

12 QUESTION: Well, I suppose the distinction might  
13 be that people very often go to Congress -- very often --  
14 in order to get money from the United States Government.  
15 When they come into court, the instances of their trying  
16 to get money from the United States Government, while  
17 significant, is smaller, significantly smaller than the  
18 instances in which they're trying to get money from  
19 Congress or the executive branch.

20 MR. BRESS: The 1934 amendment to the act was  
21 passed mostly at the urging of the Department of the  
22 Interior, which was concerned about falsifications of  
23 statements made in connection with hot oil shipments.  
24 Those false statements were not made in any respect to  
25 take money out of the Federal Government.

1           The amendment to the statute at that point, and  
2   I can't emphasize this too much, was meant to take out the  
3   need to prove monetary fraud, and rather to reach false  
4   statements that might pervert any authorized Government  
5   function. To view otherwise would be contrary to this  
6   Court's decision in Rodgers.

7           QUESTION: So when I go back to the legislative  
8   history I would find that money has nothing to do with  
9   this statute, that in fact what Congress wanted to do was  
10  to say, if you make a false statement to the postman, you  
11  say, hey, I used to live on Apple Street -- indictable  
12  offense, even though it's not under oath, because now he  
13  may go to the wrong place? That's what Congress intended  
14  to do?

15          MR. BRESS: The limitation that you are looking  
16  for, we believe, would be provided by the materiality  
17  requirement in section 1001. Materiality as defined by  
18  this Court in Kunjes, which itself relied on the District  
19  of Columbia Circuit's decision in Wein --

20          QUESTION: Because the postman will go to the  
21  wrong address. It's material. Extra work.

22          MR. BRESS: Well, I defer to the Court's  
23  decision on that matter, but I -- nonetheless, the point  
24  remains that in 1934 Congress did intend to reach  
25  nonmonetary fraud. The amendment in 1934 completely



1 removed the need to prove on the false statement was  
2 geared to take money from the Federal Government.

3 QUESTION: Mr. Bress, even if one accepts that  
4 the concern is making false statements to the Government,  
5 what about the distinction that the Second Circuit made in  
6 D'Amato that Mr. Morris brought up at the end of his  
7 argument? That is, at lease excise civil litigation  
8 between private parties. Unlike agency adjudication,  
9 where one of the parties is the Government, here we have  
10 no Government interests being adjudicated, only private  
11 parties. Why shouldn't that be taken out?

12 MR. BRESS: In our view, the decision of the  
13 Second Circuit in D'Amato was basically a different way of  
14 saying that the Second Circuit didn't agree with Bramblett  
15 in the first place, because the Second Circuit was  
16 essentially saying that a lie in a judicial context is  
17 only going to fall within 1001 if the lie was essentially  
18 to the Government as executive on the other side of the  
19 case, that the lie to the court, which might pervert the  
20 court's decisionmaking functions, would not fall within  
21 the statute.

22 We believe that that holding is fundamentally  
23 inconsistent with Bramblett, and that perversion of  
24 judicial functions, just as perversion of executive or  
25 legislative, falls within the statute.

1 QUESTION: Mr. Bress, I'd feel better if I  
2 thought Bramblett was right. Can you persuade me that  
3 Bramblett was right, then I wouldn't have all these  
4 problems? Was it, indeed, correct?

5 MR. BRESS: We believe that Bramblett was  
6 correctly decided. The Court in Bramblett was influenced  
7 heavily by looking back at the legislative -- or, the  
8 history of the statute through time.

9 QUESTION: I knew you were going to say that.

10 MR. BRESS: I was trying not to say, legislative  
11 history.

12 (Laughter.)

13 QUESTION: But in Bramblett the Court said that  
14 Congress could not have intended to leave frauds such as  
15 this without penalty, and this is with a characteristic  
16 false claim just like you usually make to the executive  
17 branch.

18 Why couldn't one say, well, Bramblett is kind of  
19 shaky, and that it's certainly sound to say it applies to  
20 claims like this in the judicial and legislative branch,  
21 but we don't have to read it as expansively as you suggest  
22 and still -- we'd still be faithful to the holding?

23 MR. BRESS: If that were the only, or the  
24 primary rationale for the decision in Bramblett --

25 QUESTION: It's not the primary rationale, but

1 it's the holding.

2 MR. BRESS: Well --

3 QUESTION: The holding is that Congress didn't  
4 intend frauds such as this, the claim for money made to  
5 the disbursing officer, to be uncovered by the statute.

6 MR. BRESS: Justice Stevens, we take the holding  
7 in Bramblett to be that section 1001 was not intended to  
8 be restricted to the executive branch but, rather, reach  
9 the legislative and judicial branches.

10 QUESTION: That's correct, but it doesn't  
11 necessary mean that it covers everything that happens in  
12 the judicial and legislative branches.

13 MR. BRESS: Yes, but the functional distinction  
14 that I believe you were making would be inconsistent with  
15 this Court's decision in Rodgers, because in Rodgers --

16 QUESTION: But Rodgers was an executive  
17 department case. You could say you have open season in  
18 the -- across the executive department. When you get out  
19 of the normal meaning of department, which is executive,  
20 then it's fraud such as this which Bramblett decided.

21 MR. BRESS: But then I believe you are caught by  
22 Bramblett's other hook, which is that the 1934 amendment  
23 was not intended to restrict the false statements to the  
24 executive branch.

25 Bramblett recognized that before 1934 the

1 statute applied to false statements made to any of the  
2 three branches.

3 QUESTION: But those were in support of false  
4 claims at that time.

5 MR. BRESS: Yes, and --

6 QUESTION: And not --

7 MR. BRESS: -- what the Court decided in  
8 Bramblett was that Congress in 1934 intended to broaden  
9 the types of false claims that could be prosecutable  
10 without narrowing the false claims to any particular  
11 branch of Government.

12 QUESTION: No, but the broadening could have  
13 covered the normal meaning of department, which is the  
14 executive, and also the old-fashioned meaning for  
15 legislative and judicial frauds.

16 MR. BRESS: The Court defined "department" in  
17 Bramblett to include all three, and did not purport to  
18 make a distinction based on the function that that  
19 department was then performing.

20 QUESTION: Gilliland is not a false claim  
21 statute, is it? It's a -- Gilliland is not anybody making  
22 a claim against the Government. That's the hot oil  
23 reports.

24 MR. BRESS: That's correct, Your Honor.  
25 Gilliland made a point, in fact, of holding that in

1 order -- of noting that in order to reach its conclusion  
2 it had to hold that the statute was not limited to false  
3 claims.

4 QUESTION: And that was decided in 1941.

5 MR. BRESS: Yes, only 7 years after the 1934  
6 amendments, and notably 7 years before the 1948 enactment  
7 of the definition of department in section 6.

8 QUESTION: I take it the Government argued in  
9 Bramblett that ultimately the Treasury would disburse  
10 these moneys, and so there was fraud upon the executive  
11 branch in any event.

12 MR. BRESS: The Government had a narrower  
13 argument than argument today in Bramblett. The Government  
14 argued that the disbursing office of Congress was an  
15 authority within the meaning of the term "agency" in the  
16 statute.

17 QUESTION: So under the Government's position,  
18 this conduct could have been punishable without the  
19 expansive reading that the Supreme Court gave in  
20 Bramblett?

21 MR. BRESS: That's correct. That is correct.

22 I'd like to turn now, if I may, to the question  
23 or the issue that was presented in this case, the  
24 existence of the judicial function exception to the  
25 statute.



1           As petitioner has conceded, there is no textual  
2 basis for that exception. There's no basis in the  
3 legislative evolution of the statute, and there's no basis  
4 in this Court's decisions. The exception, therefore,  
5 relies entirely on policy.

6           Petitioner says that a judicial function  
7 exception to the statute is necessary to protect  
8 constitutional rights, or traditional trial tactics. The  
9 Constitution and this country's traditions, however, have  
10 never protected a right knowingly to lie to the courts.  
11 It is simply not the case that section 1001 will impede a  
12 plea of not guilty. It is -- a plea of not guilty is not  
13 a statement of factual innocence.

14           It is similarly not the case that section 1001  
15 will interfere with the right against self-incrimination,  
16 because the right to remain silent does not include the  
17 right to lie.

18           It is also more broadly the case that section  
19 1001 won't unfairly hinder defense counsel. Defense  
20 counsel may still zealously challenge the probity or  
21 sufficiency of the Government's case without resorting to  
22 knowing falsehoods.

23           As this Court held in *Nix v. Whiteside*, the  
24 right to effective assistance of counsel does not include  
25 the right to cooperation of counsel in perjury.

1           QUESTION: Isn't one of the things that we  
2   should worry about is not what theoretically would be  
3   covered by this, but by the sort of interorum effect of  
4   the statute if it is going to have the meaning, the  
5   breadth that you give it?

6           Take my example a moment ago of the lawyer who  
7   becomes too exuberant in final argument. I suppose the --  
8   what we ought to worry about is not merely, and perhaps  
9   not at all, about the lawyer who just flatly lies to the  
10   jury in a patent way, but the lawyer who is close to the  
11   edge in a case against the Government and then finds  
12   himself next week being indicted with 6 months of  
13   litigation facing criminal penalties to follow.

14           Isn't that a reason for trying to trim the  
15   sails, and isn't the interorum effect perhaps a better  
16   reason than merely a solicitude for letting the judiciary  
17   take care of its own problems?

18           MR. BRESS: I've got a number of responses. I  
19   guess first of all there's no reason to confine that  
20   argument to the judicial branch. People are represented  
21   by attorneys in front of the legislature and certainly in  
22   lots of agency instances, so that argument would not  
23   support an argument -- would not support a theory that  
24   simply excepted judicial functions in courts.

25           Secondly, the fear here, which is of

1 prosecutorial overreaching, is not backed up by any  
2 statistics of Justice Department prosecutions. It's  
3 purely hypothetical.

4 QUESTION: Well, that's because they don't have  
5 the decision of this case as you want it handed down yet.  
6 Once they get it, they may be a little bit more  
7 aggressive.

8 MR. BRESS: We don't believe there's much reason  
9 to think so, because obstruction of justice under 1503  
10 could currently be a basis for making such charges against  
11 a lawyer who has knowingly made false statements in  
12 courts.

13 QUESTION: Do any of the separate States have  
14 statutes that specifically punish misrepresentations in  
15 judicial proceedings? Is there any State law  
16 jurisprudence?

17 MR. BRESS: Other than perjury, Your Honor?

18 QUESTION: Yes.

19 MR. BRESS: I do not know.

20 QUESTION: May I also ask you, going back to the  
21 legislature -- you cited the Poindexter case as one. Has  
22 the Government ever prosecuted anyone other than Admiral  
23 Poindexter for false statements in congressional hearings?  
24 Do you know?

25 MR. BRESS: I don't know --

1 QUESTION: Because there must have been a lot of  
2 them over the two odd ones.

3 (Laughter.)

4 QUESTION: I think Richard Kleindienst was  
5 prosecuted under the misdemeanor section of this statute.

6 QUESTION: Of 1001.

7 QUESTION: Of course, that is specifically  
8 covered by 18 U.S.C. 1505.

9 MR. BRESS: The obstruction statute for  
10 Congress?

11 QUESTION: Yes, and that statute has two parts,  
12 as I recall. It prohibits a misrepresentation to a  
13 department, and then it has a specific clause for  
14 congressional committees, which indicates to me that  
15 "department" does not include the Congress unless the  
16 statute specifically says so.

17 MR. BRESS: In that statute that may be so. We  
18 agree that 1505 would cover false statements made to  
19 Congress. I will note, however, that the District of  
20 Columbia Circuit in Poindexter did find otherwise, so it's  
21 not completely clear.

22 QUESTION: Is that a general view of your  
23 office, that those false statements that are prosecutable  
24 under 1001 in respect to a judicial or congressional  
25 proceeding must be such as they would support an

1 obstruction of justice conviction?

2 MR. BRESS: I think it would generally be the  
3 case. I don't --

4 QUESTION: Is it absolutely the case? That is  
5 to say, does it, or does it not, do you think, extend  
6 beyond whatever the scope is of obstruction of justice?

7 MR. BRESS: Well, obstruction of justice  
8 includes the term "corruptly," and so the question there  
9 would be whether "corruptly" adds anything to the term  
10 "intentionally." By its plain language, it may.

11 QUESTION: This may go well beyond, then, any  
12 kind of a false statement at all made to a clerk of a  
13 court, or what about a prisoner who writes a letter about  
14 prison conditions, knowing it will be attached, though  
15 unsworn?

16 MR. BRESS: If it's a --

17 QUESTION: What about the -- et cetera.

18 MR. BRESS: If it's an intentional false  
19 statement of fact, it would be prosecutable under section  
20 1001.

21 The Court has recognized that the criminal law  
22 has not grown by any sort of neat design, but in many  
23 cases, and especially in this area, more by accretion.

24 QUESTION: Then a prisoner who says, after all,  
25 the food has -- you know, has 90,00 different complaints,



1 and some of them are not true. Unsworn, in a letter  
2 attached to the -- that's all covered?

3 MR. BRESS: Intentional false statement would be  
4 covered so long as it was material, and the decision as to  
5 the breadth of 1001, as this Court pointed out in Rodgers,  
6 is not a decision for this Court, but is rather a decision  
7 for Congress.

8 QUESTION: What if the prisoner made a false  
9 statement to the warden? That would be covered under the  
10 narrowest reading of Bramblett, wouldn't it, part of the  
11 executive branch?

12 MR. BRESS: It certainly would, Your Honor.

13 If there are no more questions, my argument is  
14 concluded.

15 QUESTION: Very well, Mr. Bress.

16 Mr. Morris, you have 15 minutes remaining.

17 REBUTTAL ARGUMENT OF PAUL MORRIS

18 ON BEHALF OF THE PETITIONER

19 MR. MORRIS: Thank you, Your Honor.

20 The breadth of the statute which the Government  
21 is advancing today is truly extraordinary, and perhaps  
22 what all lawyers and litigants must be concerned about if  
23 the interpretation advanced by the Government is adopted  
24 by the Court is what happens if they lose a case in a  
25 Federal civil court proceeding?

1           Arguably, statements can be obtained during the  
2 course of those proceedings in unsworn pleadings or oral  
3 representations to a court or jury that would constitute  
4 probable cause sufficient for a charge of 1001. *ng lawyer,*

5           *winning a* QUESTION: Are you suggesting the consequences  
6 to the losing lawyer are different in a civil proceeding  
7 than in a criminal proceeding? *ly an equally and perhaps*

8           *more comp* MR. MORRIS: There are other implications  
9 involved in the criminal proceedings, namely the *th that's*  
10 constitutional implications that are not involved in the  
11 civil proceedings, and it would seem to me that they *be*  
12 consequences are much more far-reaching in civil because  
13 of the absence of those protections. *litigating, but into*

14           *civil lit* QUESTION: And how about lawyers who lose cases  
15 before administrative law judges in the executive *ent*  
16 branches? *his office on, say, the eleventh hour of a*

17           *statute of* MR. MORRIS: It would seem to me, under the  
18 Government's interpretation, that 1001 applies to those  
19 situations as well, but -- *twice about filing that*

20           *complaint* QUESTION: But under your interpretation it *be*  
21 would, too, would it not? *concerned today, because today*

22           *under Rule* MR. MORRIS: Yes.

23           QUESTION: So I mean we've -- lawyers are going  
24 to have something to worry about no matter how this case  
25 comes out. *MR. MORRIS: But the realities of the*

1           MR. MORRIS: Well, that brings us back to the  
2 Government's discussion of Bramblett.

3           QUESTION: Why are you worrying about losing  
4 lawyers? I'd be more worried if I were a winning lawyer,  
5 winning against the Government. Don't you think that's  
6 the real -- that's the real worry?

7           MR. MORRIS: Certainly an equally and perhaps  
8 more compelling grave concern would be the lawyers and  
9 litigants in that situation as well, so the breadth that's  
10 being read into this statute by the Government cuts  
11 virtually cross the board, and how can it reasonably be  
12 argued that Congress ever intended that 1001 would have  
13 such a reach into not just criminal litigation, but into  
14 civil litigation?

15           What happens when an attorney has a client  
16 appear in his office on, say, the eleventh hour of a  
17 statute of limitations and is seeking the filing of a  
18 civil complaint? Under the Government's view of 1001,  
19 that attorney has to think twice about filing that  
20 complaint. That attorney has to be concerned where the  
21 attorney is not that much concerned today, because today  
22 under Rule --

23           QUESTION: He just doesn't have to lie, that's  
24 all. He just doesn't have to lie.

25           MR. MORRIS: But the realities of the

1 situation --

2 QUESTION: The reality is, it's a criminal  
3 prosecution. It's not a more-likely-than-not kind of  
4 problem. You have to get a jury to unanimously decide  
5 that he was lying.

6 MR. MORRIS: But what happens, Your Honor, when  
7 the -- that client who comes to that lawyer at the  
8 eleventh hour is making misrepresentations that wind up in  
9 that complaint and the lawyer doesn't find that out till  
10 after it's filed? Under the present state of law --

11 QUESTION: Well, it's not based on negligence,  
12 it's based on a knowing and wilful falsification.

13 MR. MORRIS: Which -- which should once we look  
14 at the facts of this case, afford the Court small  
15 consolation. If we look at the discovery response  
16 statement that was indicted and convicted in this case,  
17 what was knowingly and false that protected this  
18 particular petitioner that's going to afford such great  
19 protections in future cases that come along before the  
20 U.S. Attorney's Offices throughout the United States, and  
21 the answer is, not much at all.

22 We have in this particular case the discovery  
23 response, oh, I turned those over to the prior successor,  
24 and then that's litigated in the bankruptcy court, and the  
25 documents are ultimately turned over after the bankruptcy

1 judge issues an order to turn them over. I think most  
2 people would be startled to come to the conclusion that  
3 that was deemed knowingly false, indictable, charged and  
4 convicted.

5 QUESTION: But that's a finding of fact that  
6 can't be challenged here.

7 MR. MORRIS: But it shows with what ease, Your  
8 Honor --

9 QUESTION: Well, this petitioner here did  
10 knowingly and intentionally fail to turn something over.

11 MR. MORRIS: Well, we're assuming that for the  
12 sake of this case, of course.

13 QUESTION: Well, you assume it because a jury  
14 found it unanimously in a criminal case.

15 MR. MORRIS: Correct, but that demonstrates the  
16 ease with which those terms can be interpreted and --

17 QUESTION: Well, I don't know that it does. I  
18 mean, it certainly doesn't back up the point that you were  
19 making a moment ago, in which you were concerned about the  
20 negligent lawyer. This was the person who either turned  
21 or didn't turn the documents over. He said he did. In  
22 fact, he was found not to have done so.

23 That's a pretty far cry from the lawyer that you  
24 were concerned with in your hypothetical a moment ago, who  
25 simply has a client misrepresent something to him and is



1 guilty, I suppose, of nothing more than negligence if  
2 there isn't time to check it out before the deadline.

3 MR. MORRIS: Yes, but some of the cases where it  
4 is easier to draw the line, and if this Court views this  
5 as one of those such cases, adopting the Government's  
6 argument, we are going to necessarily lead to those gray  
7 areas which necessarily impact upon the every day practice  
8 of law, and every --

9 QUESTION: If you want to carve out the  
10 judiciary, then do you have a problem in this case,  
11 because the bankruptcy judge is not an Article III judge?

12 MR. MORRIS: No, Your Honor, my understanding is --  
13 although that issue was not briefed and the Government has  
14 never challenged that the bankruptcy judge is part of a  
15 court, it's my understanding that the bankruptcy court is  
16 a division of the United States district courts, and  
17 that -- and it was never contested that this was a  
18 judicial proceeding.

19 QUESTION: What is so sacrosanct about lawyers?  
20 They're businessmen who all the time have to file  
21 responses to executive branch inquiries about this, that,  
22 or the other things, all sorts of regulations, and if they  
23 are found wilfully to have misrepresented, they're subject  
24 to 1001, so lawyers are being treated no differently from  
25 anybody else. Why do we establish a special rule for

1 lawyers?

2 MR. MORRIS: It's not that, Your Honor, that  
3 lawyers are so sacrosanct or that the litigants are, or  
4 that we're asking for an exception to be carved out of  
5 1001 for only their protection. What we're asking is that  
6 the reading of 1001 that's consistent with Congress'  
7 intent be applied to this statute, and Congress never  
8 intended that every unsworn misrepresentation made in a  
9 Federal court would subject the person who makes that  
10 statement to a 1001 --

11 QUESTION: Although you're perfectly willing to  
12 say that they assume that every unsworn representation  
13 made by any businessman when he fills out, you know, page  
14 2003 of some form that a Federal agency has sent to him --  
15 that Congress intended, but not that a lawyer should be  
16 held to honesty as well.

17 MR. MORRIS: Well, we -- of course --

18 QUESTION: It isn't self-evident to me, that's  
19 all I can say.

20 QUESTION: You must say that Congress did intend  
21 that the exact same sort of representations before an  
22 administrative adjudication in one of the agencies, it did  
23 intend the strictures of this statute to apply there, but  
24 it didn't to a judicial proceeding, and yet the earmarks  
25 of one are very similar to the earmarks of the other.

1 MR. MORRIS: Well, we submit that the  
2 Government's contention that disapproving or limiting  
3 Bramblett is going to cause a change of conduct, or a  
4 change of the course of the law, whether it's dramatic or  
5 otherwise, is really not borne out by what has happened  
6 since the Morgan decision in 1962.

7 In fact, the interpretation that we are seeking  
8 of 1001 in no way would constrain the prosecution. In  
9 fact, even the United States Attorneys Manual advises  
10 against using 1001 in situations such as these, where the  
11 statements are made in a judicial proceeding.

12 And returning to the context argument, the  
13 context of the word "department," under this Court's  
14 decision in Roland, context is limited to the text of the  
15 statute, and what the Government is relying upon here is  
16 its view of the evolution of the statute, which in essence  
17 is another way of saying the legislative history of the  
18 statute. It is going outside of what Congress intended.

19 QUESTION: Well, but it's relying on Bramblett,  
20 which is a decision of this Court, a statutory decision.

21 MR. MORRIS: Which we are seeking limitation  
22 of --

23 QUESTION: Yes.

24 MR. MORRIS: -- of course, in order to be  
25 consistent in our argument.

1 QUESTION: Do you happen to know, counsel, if  
2 any of the separate States have enacted and enforced  
3 statutes of the kind that we're considering here --

4 MR. MORRIS: My --

5 QUESTION: -- particularly against lawyers in  
6 judicial proceedings?

7 MR. MORRIS: My distant recollection in  
8 researching the case was that California had a similar  
9 case, a similar statute, and there might have been one or  
10 two other States, but I found no decisions applying those  
11 statutes to the judicial context.

12 QUESTION: So we can say, based on that  
13 research, and we can check it out, of course, ourselves,  
14 that the States have not found it necessary to police the  
15 legal profession by criminal statutes of this kind?

16 MR. MORRIS: That is correct, Your Honor. It is  
17 indeed --

18 QUESTION: Is your client a member of the legal  
19 profession?

20 MR. MORRIS: No. No, Your Honor, he's a  
21 litigant.

22 QUESTION: Yes.

23 MR. MORRIS: And -- but the same considerations  
24 that will apply to the legal professional will apply to  
25 the litigants, because it is the statements of the lawyers

1 that are so often --

2 QUESTION: Yes, but --

3 MR. MORRIS: -- factual assertions in court.

4 QUESTION: -- what we have here is not any  
5 statement of any lawyer, but a statement of a litigant.

6 MR. MORRIS: Correct, but we can rest assured  
7 that if the Government's interpretation is adopted, it  
8 will be extended to misrepresentations made in court --

9 QUESTION: Well, why should we rest assured that  
10 way? Bramblett has been on the books for 40 years.

11 MR. MORRIS: But the Government's reading of  
12 1001 is not limited to litigants. It's limited -- it's  
13 not limited to litigants. It applies to any person who  
14 makes any misrepresentation in the Federal court.

15 QUESTION: And that's true now, even under your  
16 theory, in the executive branch. Any -- a lawyer, bless  
17 their souls, even if they come in and make  
18 misrepresentations to the executive branch, is held liable  
19 under 1001.

20 MR. MORRIS: And if that's a choice that  
21 Congress made in drafting the statute, then that's  
22 Congress' doing. It's not the --

23 QUESTION: Yes, but Bramblett said it wasn't the  
24 choice that Congress made.

25 MR. MORRIS: And --



1 QUESTION: Bramblett said it goes beyond  
2 department.

3 MR. MORRIS: Yes, and we, of course, are arguing  
4 to the contrary, and the crux of our argument is that at  
5 the very least, 1001 raises an ambiguity as to its scope,  
6 certainly within the meaning of the term "department," and  
7 we request reversal of the decision below, based upon  
8 resolution of that ambiguity, in favor of the accused.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Morris.  
10 The case is submitted.

11 (Whereupon, at 11:02 a.m., the case in the  
12 above-entitled matter was submitted.)  
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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*JOHN BRUCE HUBBARD* Petitioners v. *THE UNITED STATES*

*CASE NO.: 94-172*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)