

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JAMES BROGAN, Petitioner v. UNITED STATES

CASE NO: 96-1579

PLACE: Washington, D.C.

DATE: Tuesday, December 2, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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PAGE

3 JAMES BROGAN, TIZMAN, ESQ. :

4 On b. Petitioner Petitions: 3

5 ORAL v. ARGUMENT OF : No. 96-1579

6 UNITED STATES, ESQ. :

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8 Washington, D.C.

9 Tuesday, December 2, 1997

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:08 a.m.

13 APPEARANCES:

14 STUART A. HOLTZMAN, ESQ., New York, New York; on behalf of
15 the Petitioner.

16 SETH P. WAXMAN, ESQ., Solicitor General, Department of
17 Justice, Washington, D.C.; on behalf of the
18 Respondent.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1579, James Brogan v. the United States.
5 Mr. Holtzman.

6 ORAL ARGUMENT OF STUART A. HOLTZMAN

7 ON BEHALF OF THE PETITIONER

8 MR. HOLTZMAN: Mr. Chief Justice, Your Honors,
9 may it please the Court:

10 The narrow issue presented by this case is
11 whether or not a simple exculpatory no, unelaborated upon
12 in any way, is actionable under 18 United States Code
13 1001. The answer to that question is no. It was never
14 the intention of Congress that it should be, and Congress'
15 intention is manifested by the 1934 incarnation of the
16 statute, which is basically the one that we're dealing
17 with here.

18 And I base my conclusions on the fact that in
19 United States v. Gilliland, a 1941 decision of this Court,
20 the Court held that the purpose of the statute, and
21 Congress' intention in passing it, was to protect the
22 authorized functions of governmental departments and
23 agencies from the perversion which might result from
24 deceptive practices which are described in the act itself.

25 QUESTION: Well, what part of the text of the

1 act do you rely on for the exculpatory no?

2 MR. HOLTZMAN: Well, the portion of the -- the
3 text itself does not have a provision excluding from its
4 coverage the exculpatory no.

5 However, it's my position that you cannot
6 divorce the meaning of the statute from what it was that
7 Congress intended the function -- the statute to serve
8 and, as I say, the Court in Gilliland recognized that, and
9 most recently in United States v. Woodward the Court again
10 indicated that that was the purpose of the statute and the
11 intention with which the statute was passed by the
12 Congress.

13 And, indeed, I might also add that United States
14 v. Lambert, which is a Circuit Court of Appeals case, the
15 perversion of governmental function was characterized as
16 the hallmark of a 1001 violation.

17 It's the petitioner's position that a simple
18 exculpatory no made in response to a Federal agent's
19 question as to whether or not the individual committed a
20 particular crime cannot have the effect of perverting
21 governmental functioning and, indeed, following Gilliland
22 there ensued a landscape of jurisdiction which came to be
23 conveniently called the exculpatory no doctrine which
24 began in the 1950's in the district courts and then the
25 Fifth Circuit in United States v. Paternostro in the early

1 1960's --

2 QUESTION: Mr. Holtzman, may I clarify what your
3 point is? It's not that you're saying it isn't a false
4 statement. Are you saying it isn't -- it can't be
5 material? Is that --

6 MR. HOLTZMAN: No. My point is that -- my point
7 is that the statement is false, or the statement can be
8 false --

9 QUESTION: So if it's in the words, makes any
10 false statement -- but there's materially before that, so
11 I was supposing maybe that's what you meant.

12 MR. HOLTZMAN: No, I think that's the new
13 statute, Your Honor.

14 QUESTION: Yes.

15 MR. HOLTZMAN: As opposed to the one that's the
16 subject --

17 QUESTION: Make any false statement.

18 MR. HOLTZMAN: Yes. The statute that we're
19 talking about is basically the 1934 incarnation of the
20 statute, which had some subsequent changes but not of any
21 significance in connection with the issues involved in
22 this case. In 1948, for example, the statute which, prior
23 thereto, included false claims as well as false statements
24 got divided up into two separate sections of the code.

25 QUESTION: But still, it's -- the words you're

1 dealing with is any false statement.

2 MR. HOLTZMAN: Yes. In fact, actually the
3 statute, Your Honor, says false -- when it refers to oral
4 utterances refers to statements in the plural, and I'd
5 like to reserve a little time to address that very
6 directly, if I may.

7 QUESTION: But your argument, then, is based on
8 legislative history that, as you said, no is a false
9 statement, and nonetheless it doesn't come under the
10 words, any false statement because?

11 MR. HOLTZMAN: Well, the courts have interpreted
12 statement to mean those statements which are capable of
13 perverting governmental functioning, and therefore the use
14 of the term statement in the statute cannot refer to the
15 type of statement that we're talking about, namely, the
16 exculpatory no.

17 QUESTION: Well, this Court hasn't said that,
18 certainly.

19 MR. HOLTZMAN: Pardon me?

20 QUESTION: This Court has never said that.

21 MR. HOLTZMAN: This Court has not said that
22 specifically, but in --

23 QUESTION: And in fact it is quite extraordinary
24 that a court would take this rather simple language and
25 derive some other meaning from it, isn't it?

1 I mean, we have plenty of cases from this Court
2 precedent saying the first thing we do is look at the
3 language of the statute.

4 MR. HOLTZMAN: I'm not disagreeing with that
5 proposition as a general matter. What I am saying,
6 however, is that this Court has repeatedly recognized that
7 where the application of the statute, plain meaning
8 application of the statute would pervert or thwart
9 Congress' intent or produce absurd results, then there is
10 the --

11 QUESTION: What would be absurd about the result
12 here?

13 MR. HOLTZMAN: Well, the absurd result that
14 would ensue here is the fact that, as Gilliland indicated,
15 the purpose of the statute, or the intention of the
16 Congress was to prevent the perversion of governmental
17 functioning. The kind of --

18 QUESTION: Well, Gilliland gives this Court's
19 opinion as to what Congress' intent was, but that simply
20 doesn't prevail over the language of the statute, which,
21 as Justice Ginsburg points out, your client's answer is
22 clearly within it.

23 MR. HOLTZMAN: No -- well, I respectfully
24 disagree on this ground. As I say, at one time as many as
25 eight circuits took the position that I'm articulating, to

1 wit that you had to look to Gilliland to find out what
2 the --

3 QUESTION: That's why we granted certiorari,
4 because there's a conflict between the Second Circuit and
5 the other circuits. That's why we're here, to resolve
6 that question.

7 MR. HOLTZMAN: Yes, I understand that. I
8 understand that very well.

9 The point that I was trying to make was that the
10 exculpatory no, in the context that we're talking about,
11 is incapable of, as a matter of law, and so the circuits
12 have held, of perverting governmental functioning.

13 QUESTION: But there's no requirement in the
14 statute that it pervert the governmental function.

15 MR. HOLTZMAN: No, but this Court, as I say, has
16 held in Gilliland that that is what the statute is about,
17 that the statute was passed with the intention of
18 preventing and punishing those false statements the effect
19 of which is to pervert governmental functioning, and the
20 juris -- this -- the juris -- excuse me, the jurisprudence
21 that has grown up surrounding this has pointed directly to
22 that.

23 In other words, that the reference to the term
24 statement does not embrace a statement that does not have
25 the potency, the power to undermine governmental

1 functioning in this particular --

2 QUESTION: Well, does that mean that in every
3 case in which the officer who hears the false statement
4 knows that it is false, that the false statement is
5 therefore outside the statute?

6 MR. HOLTZMAN: In substance, yes, it does,
7 because as the lower courts have indicated, that an
8 experienced Federal agent, when he hears the exculpatory
9 no, especially in this case -- this presents perhaps a
10 wonderful context in which to view it -- didn't ask the
11 question, and doesn't normally ask the question as to
12 whether or not the individual has committed the crime in
13 order to evaluate the truth or the falsity of the
14 statement. Instead, it's generally a -- an investigative
15 technique, and the --

16 QUESTION: Yes. I assume if your client had
17 given a truthful answer, the answer would have been used
18 and admitted against him, wouldn't it?

19 MR. HOLTZMAN: Indeed, I believe it would, Your
20 Honor.

21 QUESTION: So I assume it's a good reason to ask
22 the question.

23 MR. HOLTZMAN: It is a good reason, but on the
24 other hand in the circumstance --

25 QUESTION: It's not merely an investigatory

1 technique.

2 MR. HOLTZMAN: Well, it is an investigatory
3 technique in the sense that, certainly in this case, this
4 was a prelude, so to speak, to induce the cooperation of
5 the petitioner to perhaps testify against other
6 individuals that the Government had evidence against were
7 culpable in connection with this acceptance either of
8 bribes or gratuities.

9 QUESTION: But in any case, whether there is or
10 is not a statutory violation is a function of the
11 governmental agent's state of mind.

12 MR. HOLTZMAN: No, it's not a function of the
13 governmental --

14 QUESTION: Oh, I thought it was, because I
15 thought you said that if the governmental agent who hears
16 the false answer knows it's false, that it therefore does
17 not fall within the violation --

18 MR. HOLTZMAN: Well, certainly under those
19 circumstances it does not fall within them. That's one
20 circumstance.

21 QUESTION: So I assume the state of mind of the
22 governmental agent, therefore, is the touchstone.

23 MR. HOLTZMAN: Well, the touchstone is whether
24 or not the response is going to send the Government off on
25 a wild goose chase or, in the alternative, is the

1 exculpatory no response, nothing different than, really,
2 silence, and just sends the Government agent back to his
3 office to continue doing --

4 QUESTION: Well, Mr. Holtzman --

5 MR. HOLTZMAN: -- the investigative work that he
6 normally does.

7 QUESTION: -- in the Bryson case we said our
8 legal system provides methods for challenging the
9 Government's right to ask questions, but lying isn't one
10 of them. Now, what's your response to that?

11 MR. HOLTZMAN: Well, my response to that is,
12 first of all I don't take the position that lies are
13 protected as a general proposition. I think that the
14 Government took the view that the Fifth Amendment does not
15 protect lies.

16 I might say that the exculpatory no
17 jurisprudence, in addition to articulating the
18 considerations from Gilliland, have also expressed a
19 solicitude for the Fifth Amendment, although they've
20 never -- no court that I know of has indicated that a
21 violation of the Fifth Amendment occurs as a result of
22 cornering a suspect into either, on the one hand
23 incriminating himself, which is somewhat incompatible with
24 the accusatorial nature of our system of justice or, on
25 the other hand, committing a 1001 violation.

1 QUESTION: Well, he can just be quiet, can't he?

2 MR. HOLTZMAN: Well --

3 QUESTION: That's what Bryson said.

4 MR. HOLTZMAN: Well, in Bryson there's a
5 distinction because of the fact that -- as I recall the
6 facts in Bryson -- I think we're talking also perhaps
7 about Knox as well -- there was the opportunity by the
8 individuals in those cases to contest the questions that
9 they wound up answering falsely.

10 In other words, in Bryson, if I remember
11 correctly, it was a situation in which the individual had
12 to file an affidavit with the NLRB indicating that he was
13 not a communist. In Knox it was a case involving the
14 filing of tax forms with respect to gambling earnings and
15 employees, et cetera.

16 And in each of those cases certainly there's a
17 distinguishing factor in that each of those individuals
18 had the opportunity, by the process of litigation, if you
19 will, rather than being confronted by agents in their
20 house, of litigating the propriety of the questions being
21 posed to them and whether or not --

22 QUESTION: Well, didn't your client have --

23 MR. HOLTZMAN: -- there was a self-incrimination
24 factor.

25 QUESTION: Your client did not have the

1 opportunity to litigate that?

2 MR. HOLTZMAN: Well, the circumstances were such
3 here --

4 QUESTION: Do you have any reason to believe
5 they would have won the litigation in those other two
6 cases?

7 MR. HOLTZMAN: I don't know. I think in one of
8 those cases --

9 QUESTION: I don't --

10 MR. HOLTZMAN: I don't -- I think in one of
11 those cases there was an indication, and perhaps in both
12 of them that there was an indication that subsequent case
13 law indicated that the individuals in those cases would
14 ultimately have prevailed had they taken that course.
15 That is my recollection of those cases.

16 QUESTION: That is not my recollection, and not
17 my belief.

18 What -- why do you say, assuming that it's part
19 of the basis for this statute, and a necessary element for
20 conviction under this statute, that Government functioning
21 have been impaired? Why isn't the conduct of an
22 investigation concerning bribery and corruption within a
23 Government agency, why isn't that investigation part of
24 the Government's function?

25 MR. HOLTZMAN: It is part of the Government's

1 function, but the question is whether or not the false
2 exculpatory no response perverts that function, and I
3 suppose that one way in which I can dramatically
4 illustrate it is the Rogers case.

5 QUESTION: Had he told the truth, it would have
6 certainly facilitated the function, wouldn't it?

7 MR. HOLTZMAN: It would have facilitated it. I
8 don't deny that for a moment. But on the other hand, the
9 question is, did it pervert it? Did the Government do
10 anything different than they would have done had he simply
11 remained silent and, indeed, I might point out to you that
12 there was not a scintilla of evidence at this trial that
13 after the response from Grogan the Government went off and
14 did anything that they wouldn't otherwise have done had he
15 remained silent.

16 QUESTION: Why is the --

17 MR. HOLTZMAN: There was not offered any
18 evidence.

19 QUESTION: Why is the alternative that I have to
20 compare it with his remaining silent? Why isn't the
21 alternative his telling the truth? He chose not to remain
22 silent.

23 MR. HOLTZMAN: Correct.

24 QUESTION: Since he did, he had two options, to
25 tell the truth or to lie. By telling the truth, he would

1 have facilitated the investigation. By lying, he
2 prevented that facilitation from occurring. Why does that
3 not impede the investigation?

4 MR. HOLTZMAN: It doesn't pervert the
5 investigation. Perhaps we're talking semantics between
6 impeding. The Government investigative agent's job is to
7 go out and investigate the commission of crimes so as to
8 bring them to prosecution. If the --

9 QUESTION: People that ask questions, if they
10 would incriminate themselves have no obligation to answer.
11 That's fine. But if they choose to answer, they have to
12 tell the truth, and if they don't tell the truth, they are
13 impeding the investigation.

14 MR. HOLTZMAN: Well, when you say choose to
15 answer, with all due respect to Your Honor, perhaps that
16 something of -- and I say with all due respect to you,
17 perhaps a somewhat simplistic way to look at this, in the
18 sense that the jurisprudence that is emanated on this
19 subject, and when I refer to the subject I'm talking about
20 the mind set of the individual confronted by a police
21 officer in uniform, or an individual who appears at your
22 house and displays a badge indicating that he's an FBI
23 agent, and we've cited a series of cases in our brief, one
24 doesn't have the feeling that they are volunteering
25 responses to questions. One has the feeling that the

1 questions posed demand an answer, as opposed to, would you
2 like to answer or would you like not to answer, so it's
3 not as --

4 QUESTION: Mr. Holtzman --

5 QUESTION: Well, I think it would be rather an
6 extraordinary proposition for this Court to say that when
7 you see a uniformed officer we have a preference to lying
8 than to say nothing at all.

9 MR. HOLTZMAN: Well, I'm not saying --

10 QUESTION: That's an astounding proposition.

11 MR. HOLTZMAN: No, no, I'm not asking the Court
12 to hold that, by the way. I'd like to make that clear.

13 What I'm saying is that certainly there are
14 Fifth Amendment implications in this, as recognized by the
15 circuit courts of appeals over the course of 30 years and
16 while, as I said moments ago, no court of appeals has said
17 that this practice violates the Fifth Amendment, certainly
18 the courts have said that it comes uncomfortably close to
19 doing that.

20 And I don't know that the opinions of all of
21 these courts of appeals on that subject, namely the notion
22 of coming uncomfortably close, that the Government is
23 going to corner you and either force you in effect to
24 incriminate yourself or, alternatively, violate another
25 criminal statute, especially where there's an opportunity,

1 if the statute were to be so interpreted as to permit
2 that, where you can have all kinds of absurd results.

3 For example, in this case the very offenses with
4 respect to which the questioning occurred were ones, with
5 one exception, one payment, the statute of limitations had
6 passed.

7 QUESTION: Well, that's all the more reason for
8 him to tell the truth.

9 MR. HOLTZMAN: Well, I might say to Your Honor
10 that if he had been advised of that, that might be all the
11 more reason to tell the truth.

12 The Government, of course, I might say had a
13 theory about this case, namely that it was a continuing
14 offense, and that therefore the statute of limitations
15 hadn't passed, although the district court ultimately
16 ruled that it had.

17 But what I'm suggesting to Your Honor is that if
18 this statute is permitted to be wielded in this way, in
19 disregard, in effect, of what the intention of Congress
20 was in enacting it, then you have a situation in which it
21 is subject to tremendous abuse, and I might also
22 mention --

23 QUESTION: We don't limit statutes on the basis
24 of the particular evil that Congress was trying to remedy.
25 I mean, many statutes go beyond the narrow evil that

1 Congress was immediately concerned with. Their language
2 is a bit broader, and it includes some stuff on the
3 fringes, and that's simply the case here.

4 There is nothing whatever in the statute about
5 impeding the investigation. That's a substantial
6 limitation on the statute, and you want us to read it in
7 even though it's not expressed?

8 MR. HOLTZMAN: Yes, I do, because of the reasons
9 that I indicated, namely that --

10 QUESTION: Do you know any other laws we do that
11 to? We say, well, the law doesn't say anything about
12 this, but really -- really, what Congress was really
13 worried about was not what it expressed so expansively.
14 It was really worried about something more narrow, so
15 we're going to just read the statute that way. That's an
16 extraordinary way to read statutes.

17 MR. HOLTZMAN: Your Honor, I would respectfully
18 disagree that it would be an extraordinary way, because it
19 would divorce, in effect, the intention with which
20 Congress passed the statute from the way in which it's
21 being applied.

22 QUESTION: Where do you get Congress' intention
23 from, except the statute itself?

24 MR. HOLTZMAN: Right from Gilliland, Your Honor.

25 QUESTION: Well, but Gilliland --

1 MR. HOLTZMAN: Right from Gilliland.

2 QUESTION: But Gilliland --

3 QUESTION: Did Congress write Gilliland?

4 MR. HOLTZMAN: No, no. This Court interpreted
5 the statute in Gilliland.

6 QUESTION: Are there any words in the statute
7 that you --

8 QUESTION: Well now, it seems to me --

9 QUESTION: I mean, do you put any weight on
10 wilfully or knowingly at all, or --

11 MR. HOLTZMAN: No. I cannot -- I can't -- and I
12 cannot place any emphasis on any particular words in the
13 statute.

14 As I say, the exculpatory no jurisprudence
15 evolved as a result of this Court's decision in Gilliland
16 and the circuit courts of appeals' understanding as to how
17 this statute was to operate, and one of the ways it was
18 not to operate, and one of the things that Congress did
19 not intend, was for this statute to be used in the fashion
20 that it has been used.

21 And even the Government, I might say, in its
22 policy statement has eschewed the use of the statute in
23 this very way. If you look at the Government's policy
24 statement with respect to prosecutions under 1001, the
25 Government says that such prosecutions should not ensue

1 where there's just a simple exculpatory no response,
2 unadorned, unelaborated upon.

3 QUESTION: Well, maybe that's wrong. Nobody
4 would have standing to sue to make the Government do it
5 differently, would they?

6 MR. HOLTZMAN: No, but I would suggest to Your
7 Honor that it's of some significance that the Government's
8 own view, the agency that is in charge of prosecutions of
9 the Federal law, has adopted this policy, and --

10 QUESTION: It seems to me --

11 QUESTION: It is significant. I would worry
12 about it.

13 QUESTION: It seems to me that you're reading
14 Gilliland for far too much. The question in that case was
15 whether or not the statute should be confined to property
16 loss, or -- to the Government, and the Court said, oh, no.
17 This statute was designed to prevent perverting the
18 function of the Government, it applies to all agencies
19 with all jurisdiction of the Government, and that ended
20 it. It was basically a way to reject a narrowing
21 construction. It was not itself a narrowing construction,
22 or am I misreading Gilliland?

23 MR. HOLTZMAN: No. My understanding is the
24 enactment prior to 1934, which was interpreted in Cohn, or
25 the statute was interpreted in Cohn, the incarnation prior

1 to 1934, indicated it was directed only at pecuniary
2 losses.

3 The Secretary of the Interior, in order to aid
4 enforcement of New Deal legislation, went to Congress in
5 view of the Cohn decision and apparently urged that there
6 be a statute that would protect the Government against
7 something beyond or in addition to pecuniary interests,
8 and Gilliland indeed indicated that the statute, which was
9 the '34 enactment, was calculated to prevent and the
10 intention of the Congress was to prevent the perversion of
11 governmental functioning, and it's from that point of
12 departure --

13 QUESTION: Yes, but that was in the context of
14 rejecting a narrowing construction, much of the kind that
15 you're offering to us here.

16 MR. HOLTZMAN: No, no. It may have been -- it
17 may have been -- it may well have been in that context,
18 but the fact of the matter is that Gilliland certainly was
19 interpreted for 40 years in the way in which I'm
20 indicating.

21 Namely, the exculpatory no doctrine found its
22 origin in the 1950's, and by the 1960's, and I'm talking
23 about district courts in the fifties, but by 1960
24 Paternostro, the Fifth Circuit, based upon exactly what
25 I'm referring to, namely the language of the Gilliland

1 decision, interpreted the statute as not being applicable
2 to this type of situation.

3 QUESTION: I don't -- I agree with Justice
4 Kennedy. I think your reading of Gilliland is, I believe,
5 mistaken. I see only one sentence in there that -- in the
6 opinion that talks about the perversion, and it says the
7 amendment indicated the congressional intent to protect
8 the authorized functions of governmental departments and
9 agencies from the perversion which might result from the
10 deceptive practices described.

11 Now, it doesn't say that was the only intent of
12 Congress. It says that is one of the intents of Congress,
13 and I have great difficulty seeing how you can draw out of
14 that one sentence, one statement, in fact how the courts
15 of appeals have drawn out of that one statement --

16 MR. HOLTZMAN: I was about to say, I --
17 thankfully I'm not alone in this interpretation. There
18 have been eight courts of appeals which have taken the
19 same view that I have taken, or that I'm advocating at
20 this point, and it's based, certainly, on the Gilliland
21 decision coming from this august body.

22 QUESTION: That's a fair point, Mr. Holtzman.
23 They ought to be here with you. That's --

24 (Laughter.)

25 QUESTION: Could I ask you what --

1 MR. HOLTZMAN: If Your Honor would permit me I'd
2 like to go out, perhaps, and make a few phone calls.
3 Maybe that's what's appropriate at this juncture.

4 (Laughter.)

5 QUESTION: Could I ask you a question, please,
6 counsel?

7 MR. HOLTZMAN: Yes.

8 QUESTION: If -- on the Government's
9 interpretation, what is the most abusive, unfair, or
10 otherwise improper result that you could conceive of,
11 because you've several times said it would produce unfair
12 results.

13 MR. HOLTZMAN: Well --

14 QUESTION: Or could be used abusively, and --

15 MR. HOLTZMAN: Number 1 --

16 QUESTION: -- what is it -- I mean, one -- I --
17 well, I don't see -- assuming I don't think it's terrible
18 to make it a separate crime to lie to somebody about what
19 you've done before --

20 MR. HOLTZMAN: No, but you can use --

21 QUESTION: But what -- I'm not -- what is
22 your -- in your view --

23 MR. HOLTZMAN: Well --

24 QUESTION: -- what is the most abusive, unfair,
25 or inappropriate result?

1 MR. HOLTZMAN: The most abusive is to take a
2 situation, for example, such as existed in this case, in
3 which ultimately Judge Bryant in the district court held
4 that the statute of limitations had passed with respect to
5 these various payments, go to the guy's house, and in
6 effect revive these offenses with respect to which the
7 statute of limitations had passed.

8 QUESTION: They'll say it's because he committed
9 a new crime.

10 MR. HOLTZMAN: You could say that, but on the
11 other hand, you can also see that there is a widespread
12 opportunity for abuse if the statute is permitted to be
13 used in this fashion and, as I say, it was not Congress'
14 intention, and it may be that there is only one sentence
15 in Gilliland, but the sentence, Your Honor, Mr. Chief
16 Justice, is there, and --

17 QUESTION: I know you want to get back to that,
18 but I do want to be certain I have in my mind a list of
19 any of the things that in your view are abusive or unfair
20 that could result from the Government's interpretation.

21 MR. HOLTZMAN: You could take a situation, for
22 example, in which the Government suspects or strongly
23 suspects that an individual has committed a crime but for
24 one reason or another cannot prove, for example, a
25 particular element of that crime.

1 A convenient way to get that person, so to
2 speak, is to go and see him and ask whether or not he
3 committed the crime under circumstances analogous to the
4 ones I'm talking about here.

5 I'm not talking about calling someone in front
6 of a grand jury, where they get an appointment, et cetera.
7 I'm talking about knocking on the person's door and asking
8 this question directly in an atmosphere that's fraught --

9 QUESTION: Are you relying at all, Mr. Holtzman,
10 on what might have happened if he were taken in custody
11 and asked a question, and then he would have gotten
12 Miranda warning and could have had a lawyer there?

13 MR. HOLTZMAN: Well, indeed that would present a
14 different situation, obviously, but I won't take the
15 position --

16 QUESTION: Well, it sounded to me that what you
17 were developing was close to an entrapment kind of
18 argument that the Government -- you used the word corners,
19 I think.

20 MR. HOLTZMAN: Yes, and I think there is an
21 element of that, undoubtedly, just as there is an element
22 of -- as the circuit courts have articulated, of coming
23 uncomfortably close to a violation of the Fifth Amendment,
24 but I won't take the position and I don't take the
25 position that it's simply a question of cornering.

1 My position is that it's a question of whether
2 or not this statute embraces this type of conduct,
3 notwithstanding its expansive language, and I say that
4 because of the --

5 QUESTION: And yet you take -- every word
6 that -- you put no weight at all on any of the words of
7 the statute. So far you've relied just on this, an
8 interpretation of one case.

9 MR. HOLTZMAN: A Supreme Court of the United
10 States case, Your Honor, upon which, as Justice Scalia
11 pointed out -- not pointed out, but agreed with me that
12 numerous other circuit courts of appeals have also taken
13 that position.

14 QUESTION: Well, I would say to you --

15 MR. HOLTZMAN: To say that that's frivolous in
16 the face of that exculpatory no jurisdiction, I would
17 respectfully submit is inappropriate. It may be that this
18 Court will disagree with those --

19 QUESTION: What would happen, Mr. Holtzman, if
20 the question had been asked, and no answer given, and then
21 there wasn't the warning to your client that, do you know
22 that it's a crime to make a false statement to an agent of
23 the United States?

24 MR. HOLTZMAN: I'm not sure I understand your
25 question, Justice Ginsburg.

1 QUESTION: Well, here your client can say he
2 didn't know. The statute has a requirement that he act
3 knowingly and wilfully.

4 MR. HOLTZMAN: Yes.

5 QUESTION: And the agent tells him, after he
6 said no. I'm asking you, do you -- would it have made any
7 difference if he -- do you put any weight on his having
8 been told, after he says no, do you know it's a crime?

9 MR. HOLTZMAN: Well, having been told after he
10 says no is utterly irrelevant as far as I'm concerned,
11 because even if one were to contend, or were the Court to
12 hold that --

13 QUESTION: Well, is it relevant that he wasn't
14 told before he said no? That's --

15 MR. HOLTZMAN: Your Honor, I submit that it's
16 not, because it's a question of statutory interpretation
17 rather than giving warnings. The fact of the matter is
18 that the Second Circuit did comment on the fact that he
19 was told that it was a crime to lie to Federal agents,
20 but, of course --

21 QUESTION: I think you've answered the question,
22 Mr. Holtzman. Your time has expired.

23 Mr. -- General Waxman, we'll hear from you.

24 MR. HOLTZMAN: Thank you.

25 ORAL ARGUMENT OF SETH P. WAXMAN

1 ON BEHALF OF THE RESPONDENT

2 GENERAL WAXMAN: Mr. Chief Justice, and may it
3 please the Court:

4 Section 1001 makes it a crime for anyone
5 knowingly and wilfully to make any materially false
6 statements within the jurisdiction of a Federal agency.
7 That language, by its terms, applies to Mr. Brogan's
8 statements to investigative agents in this case.

9 Whatever policy justifications one might proffer
10 for an exculpatory no exception, there is no support for
11 it in the statute or, for that matter, in its legislative
12 history.

13 QUESTION: General Waxman, can I just -- this
14 was not on your watch, I'm sure, but I'm just curious as
15 to why it took so long for this issue to come before this
16 Court, and that there are so many circuit courts that have
17 adopted the exculpatory no doctrine over what, 20 years,
18 more than that, and the Justice Department itself has
19 provided in its manual to United States attorneys that
20 where the statement takes the form of an exculpatory no,
21 18 U.S.C. section 1001 does not apply regardless of who
22 asks the question. How did all this happen?

23 GENERAL WAXMAN: Well, that's a pretty broad
24 question, and I'll try and give as many answers to it as I
25 can.

1 As to why it hasn't come up before this Court
2 more often, I think one reason may be that the Government
3 frequently, in exercising its prosecutorial discretion
4 about which crimes to devote its prosecutorial resources
5 to, frequently prosecutes, tends to concentrate its
6 resources on criminal behavior where something more than a
7 mere exculpatory no was involved.

8 But even in cases where we prosecute a mere
9 exculpatory no -- for example, the Bryson case in this
10 Court, the Woodward case in this Court -- the doctrine of
11 exculpatory no is so obscure and, notwithstanding the
12 representation that there is some wall of authority out
13 there by the court of appeals recognizing it, which in our
14 view more resembles a rubble than a wall, it simply is not
15 a doctrine that has stood as a major impediment to the
16 kinds of prosecutions that the Government chooses to
17 bring.

18 QUESTION: But your manual for United States
19 attorneys recites it. Where the statement takes the form
20 of an exculp -- frankly, I wouldn't have known what an
21 exculpatory no was until this case came up, but your
22 manual --

23 (Laughter.)

24 QUESTION: You know, where the statement takes
25 the form of an exculpatory no, 1001 does not apply.

1 GENERAL WAXMAN: Justice Scalia, our policy
2 statement is just that. It is not -- does not purport to
3 be an interpretation of what the law requires. The
4 Justice Department has never taken the position in any
5 court that the exculpatory no is --

6 QUESTION: Well, it does purport to be that. It
7 doesn't say, where the statement takes the form of an
8 exculpatory no, leave the fellow alone. It doesn't say
9 that. It says, where it takes the form of an exculpatory
10 no, 1001 does not apply. I mean, so it does purport to be
11 an interpretation of the law.

12 GENERAL WAXMAN: With all due respect, I --

13 QUESTION: I thought it didn't say that.

14 GENERAL WAXMAN: No, it --

15 QUESTION: I thought it said it's not
16 appropriate to charge a section 1001 violation where a
17 suspect during an investigation merely denies his guilt in
18 response to questioning by the Government.

19 I had read that as not saying the statute is
20 inapplicable, but as a policy matter the Government -- the
21 Justice Department didn't want them to charge it. Now, is
22 that how you read it?

23 GENERAL WAXMAN: That is not only how we read
24 it, but it is what we appended to our brief in reply to
25 the petition for certiorari in this case, and the

1 language, the exact language is found at page 4a.

2 Now, the language of that --

3 QUESTION: Yet it was charged here.

4 GENERAL WAXMAN: It was charged here, and --

5 QUESTION: And do you -- can you tell us how
6 often it is used, and that charges are brought?

7 GENERAL WAXMAN: Our experience, and I think
8 this is reflected in pages 8 and 9 of our brief at the
9 petition stage, is that in light of this policy, which in
10 one form or another has been outstanding for several
11 decades, there -- it is relatively infrequent for the
12 Government to charge a defendant where there is nothing
13 more than a simple exculpatory no.

14 QUESTION: Well, if we were to agree with the
15 Government in this case, and reject the doctrine, is it
16 likely that the Justice Department would alter its
17 guidelines?

18 GENERAL WAXMAN: I -- I'm not in charge of
19 writing the guidelines. I would suggest that the answer
20 is no.

21 QUESTION: But presumably you have some voice in
22 what goes on over there.

23 GENERAL WAXMAN: If it were my decision, and I
24 think I do have a voice, I would say that we might alter
25 the language of the guideline a little bit. I don't like

1 the use of the word appropriate in the guideline, but the
2 U.S. Attorney's manual is full of policies that represent
3 just that, determinations by the Attorney General about
4 how to allocate what are, after all, scarce prosecutorial
5 resources.

6 Now, one of the reasons that motivated our
7 policy was that in the broad scheme -- realm of possible
8 Federal crimes a simple exculpatory no, or a false
9 statement to an agent, is not up in the pantheon, along
10 with many of the other things that we have to deal with,
11 but another reason --

12 QUESTION: But General Waxman, just to make
13 clear I was not making this up, I was quoting the
14 description of the manual in petitioner's brief at page
15 20. Now, that was the 1988 manual. Maybe it's been
16 revised since then, but at least in the 1988 manual it did
17 say that 1001 does not apply, so --

18 GENERAL WAXMAN: I --

19 QUESTION: Maybe that's been changed.

20 GENERAL WAXMAN: I --

21 QUESTION: You tell me the current manual does
22 not say that.

23 GENERAL WAXMAN: The current man -- the manual
24 that was in effect at the time the petition was filed
25 was -- is reprinted at pages 3a and 4a of our brief in

1 reply to the petition for certiorari.

2 The manual is frequently changed. In fact, I
3 only learned last week that in the new updated online CD-
4 ROM version of the manual, which came out 2 weeks ago,
5 there in fact has been a further change in this particular
6 provision, in that it deletes the words, that it is, and
7 the word appropriate.

8 Now -- but the point is that --

9 QUESTION: So that it now says what on the CD-
10 ROM?

11 GENERAL WAXMAN: It now says that it's the
12 Department's policy to -- it is the Department's policy
13 not to charge a section 1001 violation where a suspect
14 during an investigation merely denies his guilt in
15 response to questioning by the Government, and then it
16 just goes on as it's recited on page 4a.

17 QUESTION: May I --

18 GENERAL WAXMAN: But this is purely an
19 instruction to our prosecutors in the field about how to
20 allocate prosecutorial resources, and the --

21 QUESTION: General Waxman, may I ask if it's
22 simply a question that it's not a big deal, so we want to
23 aim at larger crimes, or is it some reflection of the
24 abuse that Mr. Holtzman was addressing? For example, the
25 statute of limitations runs on a crime, you go to the

1 suspect's house and you say, did you do it, and he says
2 no, so you get him for a false statement.

3 Is there any such thing? It doesn't fit the
4 definition of entrapment, but you have been saying so far
5 it's not a very serious crime, but is there also some
6 concern with abusive use of this question?

7 GENERAL WAXMAN: Well, first of all I'm not -- I
8 don't want to suggest that an exculpatory no, or, just to
9 take it out of the jargon, false statements knowingly and
10 wilfully given to investigative agents is not a serious
11 crime and, in fact, in certain circumstances it may be a
12 very serious crime --

13 QUESTION: But in a situation like --

14 GENERAL WAXMAN: -- depending on what the agents
15 are doing, but --

16 QUESTION: Here, as I understand it, the agent
17 knew, had evidence before the question was asked, that a
18 bribe had been taken by this defendant, so -- well --

19 GENERAL WAXMAN: Well, here -- if I can just
20 respond, here what the record shows is not that the agent,
21 or the agency, or the prosecutor had determined that Mr.
22 Brogan had committed a crime.

23 The agents came to his door, and this is
24 reflected in the relevant pages that are attached in the
25 joint appendix, came to his door and said, we are agents

1 of the Internal Revenue Service and the Department of
2 Labor, we're investigating possible misconduct with
3 respect to a company you used to work for and a union, may
4 we come in and talk to you. If you' -- he said yes.

5 They said, if you would like to cooperate with
6 us you should get an attorney, or we'll get an attorney
7 for you and you can come down to the U.S. Attorney's
8 Office, would you mind if we ask you a few questions, he
9 said no, and they didn't ask him, are you guilty of
10 bribery. They asked him whether he'd ever received any
11 money.

12 QUESTION: My only question was, is it there --
13 here is a policy. You read it to us. You gave one reason
14 that there are bigger fish to fry. My other question is,
15 is there anything behind this that has to do with good
16 prosecutorial conduct, or is it simply a question, as you
17 said, about allocation of resources?

18 GENERAL WAXMAN: It may be about things other
19 than an allocation of resources, and I'll address that in
20 a moment, but it is not about prosecutorial misconduct.
21 We have --

22 QUESTION: Well, is one of those things that it
23 can elevate a misdemeanor into a felony?

24 GENERAL WAXMAN: I --

25 QUESTION: I mean, if I tell the policeman on

1 the GW Parkway, oh, I was only going 40, I guess that's a
2 felony if I was going 45, so I get the ticket plus the
3 felony?

4 GENERAL WAXMAN: Well, the answer to your first
5 question is no, it's not about prosecutorial abuse in any
6 fashion.

7 Now, whether the Government could prove that
8 statement as a false statement would depend on our being
9 able to establish that --

10 QUESTION: Well, I mean, that's a danger in this
11 statute, is it not, that it can escalate a misdemeanor to
12 a felony?

13 GENERAL WAXMAN: This statute could -- I mean, I
14 suppose if you wanted to try and find dangers, it could
15 escalate completely innocent conduct into a felony.

16 QUESTION: Of course, the exculpatory no
17 doctrine wouldn't solve that problem on the GW Parkway. I
18 mean, you -- the policeman would have to go up and say,
19 were you going over 40? I mean, he wouldn't have to say,
20 you were going over 40. He would have to ask the
21 question.

22 GENERAL WAXMAN: That's correct, and one of the
23 reasons why a lot of --

24 QUESTION: And the motorist would say no, the
25 exculpatory no.

1 GENERAL WAXMAN: One of the reasons why a lot of
2 policy concerns that seem to revolve around the
3 exculpatory -- the champions of the exculpatory no
4 doctrine are really quite irrelevant to the exculpatory no
5 doctrine itself and why, among those courts of appeals
6 that at one time or another have adopted the exculpatory
7 no doctrine or genuflected in the direction of the
8 exculpatory no doctrine, have come up with so many
9 different formulations and tests, even among the seven
10 circuits that --

11 QUESTION: May I interrupt you with a
12 question --

13 GENERAL WAXMAN: Oh, sure.

14 QUESTION: -- about the text, Mr. Waxman.
15 Generally, the basic argument, you ought to read this
16 statute for what it says. Does it, in your view, cover
17 false statements by the agents during an investigation?
18 Its plain language clearly would.

19 GENERAL WAXMAN: False statements -- I'm sorry,
20 by the agents --

21 QUESTION: By the agents --

22 GENERAL WAXMAN: -- to the suspect?

23 QUESTION: Yes.

24 GENERAL WAXMAN: Sure --

25 QUESTION: It would.

1 GENERAL WAXMAN: -- if it's a statement that
2 is --

3 QUESTION: So that a false statement by the
4 agent who posed as a narcotics vendor would violate the
5 statute.

6 GENERAL WAXMAN: If the statement is material --

7 QUESTION: And it's material.

8 GENERAL WAXMAN: If it's made --

9 QUESTION: He says, I'm not a -- don't shoot me,
10 I'm not a police officer.

11 GENERAL WAXMAN: If it's made knowingly --

12 QUESTION: Does he not --

13 GENERAL WAXMAN: If it's made knowingly,
14 wilfully, and in a matter within the jurisdiction of a
15 Federal agency, and it is material to the matter that the
16 agency is investigating, it's an offense.

17 QUESTION: So undercover agents routinely
18 violate this statute?

19 GENERAL WAXMAN: In other words --

20 QUESTION: An undercover agent, by posing as not
21 being officers, routinely violate this statute, in your
22 view.

23 GENERAL WAXMAN: Well, I don't know whether a --
24 I think it would be quite arguable whether a ruse or a
25 misrepresentation, a false statement by an undercover

1 agent, could ever be deemed to be material for purposes of
2 the investigation.

3 In other words, the very purpose of the
4 undercover operation, and the very purpose of the
5 misrepresentation, is to facilitate the investigation that
6 the agency is engaging in.

7 QUESTION: In other words, the agent can lie in
8 the course of an investigation and not be covered by the
9 statute.

10 GENERAL WAXMAN: If it were deemed not material,
11 but I mean, I'm confident that this statute can be and has
12 been applied to Federal agents who are abusing their
13 authority and making knowing and wilful material
14 misstatements of fact.

15 QUESTION: But in the -- under the law --

16 GENERAL WAXMAN: I mean, we prosecute Federal
17 agents just as we prosecute people who aren't Federal
18 agents.

19 QUESTION: But under the statute as it existed
20 in this case, there was no express materiality
21 requirement.

22 GENERAL WAXMAN: That is true, and this case, of
23 course, was prosecuted and the jury was instructed after,
24 although it was just after this Court rendered its
25 decision in Gaudin. The jury was instructed that

1 materiality was an element of the offense, and -- you
2 know, on our request, and it was submitted to the jury as
3 an element of the offense.

4 QUESTION: That was always a -- it was always an
5 element of perjury offenses at common law anyway, and
6 would have been read into the statute even though it
7 wasn't expressed.

8 GENERAL WAXMAN: Well, it's interesting, at the
9 time that this Court decided Gaudin, all of the circuits,
10 except coincidentally the Second Circuit, had agreed that
11 materiality was an element of the false statement prong of
12 the statute as it had previously existed.

13 QUESTION: But if that is so, and if the
14 Government's position is that that was appropriate, then
15 how can the Government take the position here that the
16 only thing we're concerned with in this statute is just
17 what is plainly in the text? You're agreeing that
18 materiality comes in. Why doesn't the likelihood of
19 perversion come in, too?

20 GENERAL WAXMAN: Well, the word material does
21 appear in the text even as it existed at the time. The
22 only question is --

23 QUESTION: Where is -- where -- I didn't know --

24 QUESTION: No.

25 GENERAL WAXMAN: It says, whoever, in any matter

1 within the jurisdiction of any department or agency of the
2 United States knowingly and wilfully falsifies, conceals,
3 or covers up by any trick, scheme, or device a material
4 fact, or makes any false --

5 QUESTION: I beg your pardon. You're right.
6 You're right.

7 GENERAL WAXMAN: And the question, and it was a
8 good question --

9 QUESTION: Although material doesn't apply in
10 the next part.

11 GENERAL WAXMAN: Well, it doesn't, and that's
12 why there was a question, which I think this Court
13 actually didn't resolve in Gaudin, as to whether in fact
14 materiality was an element of the next phrase.

15 I mean, the Court did assume, had to have
16 assumed that it was an element, because it found that in a
17 false statement prosecution, which is what was at issue in
18 Gaudin, the jury had to be instructed on it, but as --

19 QUESTION: That was also the Government's
20 position? I mean --

21 GENERAL WAXMAN: It was the Government -- the
22 Government has always maintained that materiality is an
23 element -- although it appears before the comma, it is an
24 element of all three, probably because at common law, as
25 Justice Scalia pointed out, it was an element of perjury,

1 but I -- you know, even if --

2 QUESTION: General Waxman on materiality,
3 suppose it's crystal clear that the agent knows the
4 answer, has proof positive of the crime that he's asking
5 about, did you take a bribe, and the agent has the sworn
6 statement of the briber, and then there's the exculpatory
7 no, is that material if the agent already knows the
8 answer? Would that meet the materiality requirement?

9 GENERAL WAXMAN: Absolutely, and the lower
10 courts are uniformly concluded that. The reason is that
11 the decisionmaker for purposes of the materiality test
12 articulated in Kungis and Gaudin is the decisionmaking
13 agency, it's not the individual agent, and the cases are
14 legion --

15 QUESTION: But don't we attribute the agent's
16 knowledge -- he made a report to the agency. He says, the
17 employer said that these union representatives took
18 bribes, gave a list. Now it's in the records of the
19 agency. Would it still be -- meet the materiality
20 requirement?

21 GENERAL WAXMAN: We think -- that's far from
22 this case, but we think it would. Even if the agent was
23 bound and determined to charge Mr. Brogan with receiving
24 improper payments under the Labor Management Relations
25 Act, and just decided to swing by his house on the way to

1 the U.S. Attorney's Office to ask for an indictment to be
2 returned, and asked him the question knowing that the
3 answer would be -- well, I mean, knowing that he had done
4 it, I think it is material.

5 It may very well, you know, alter the judgment
6 of the agency itself in deciding whether to recommend, the
7 prosecutor in deciding whether this is a case that's worth
8 prosecuting and, as Justice Scalia pointed out in response
9 to my colleague's questions, his response to that
10 question, even assuming that the agent -- agents in this
11 case believed that he had taken bribes, or taken payments
12 prohibited by the Labor Management Relations Act, his
13 response, no, did -- was capable of influencing, and --

14 QUESTION: Suppose his response had been, not
15 guilty, instead of no.

16 GENERAL WAXMAN: Well, it wouldn't be a false
17 statement because it's not responsive.

18 In other words, we have to prove -- there is the
19 literally true doctrine that this Court recognized in
20 Bronsten, and presumably a -- an answer which amounts to a
21 non sequitur can't be prosecuted as a false statement. We
22 have to prove that it was false, and that it was knowingly
23 and wilfully so when he said --

24 QUESTION: But under your view, I take it that
25 an average motorist who is driving down the street, comes

1 to a stop sign, makes a rolling California stop --

2 (Laughter.)

3 QUESTION: The police officer is parked on the
4 corner behind a bush and comes around with the red light,
5 stops the motorist, says, sir, did you stop at that stop
6 sign back there on the corner? Yes, says the motorist,
7 yes, I did.

8 Now, the officer can charge him with a felony
9 under 1001. All the elements are there, I assume.
10 Material?

11 GENERAL WAXMAN: Well, assuming that the officer
12 was in fact -- that this happened, for example, on the GW
13 Parkway, within the jurisdiction --

14 QUESTION: Yes. Yes.

15 GENERAL WAXMAN: -- of the park police, you --
16 if you could prove -- and this, I think, would require
17 some proof. You would have to prove that the defendant in
18 the case knew that he or she did not come to a complete
19 stop. It would be an --

20 QUESTION: Well, even in California they prove
21 that all the time.

22 (Laughter.)

23 GENERAL WAXMAN: It would be an extraordinary, I
24 would submit, abuse of the Government's resources, and I'm
25 not aware, in terms of these parade of horrors --

1 QUESTION: Why does it --

2 GENERAL WAXMAN: -- where the Government has
3 ever actually done that.

4 QUESTION: Why does it shock you? I -- it
5 doesn't shock -- I -- the only difference is, I suppose,
6 that a lot of us, it is thought, don't always come to a
7 full stop, whereas very few of us take bribes, but the
8 principle --

9 (Laughter.)

10 QUESTION: But the principle is the same. You
11 shouldn't lie.

12 QUESTION: Well, there may be requirements
13 there. There may be requirements in respect to what you
14 have to tell the person, mightn't there be, that the
15 policeman has to say, I'm warning you, as the person did
16 here, there is a statute that makes it a crime for you to
17 answer the following question falsely, and if you do, et
18 cetera -- is there some requirement like that built into
19 the statute?

20 GENERAL WAXMAN: No.

21 QUESTION: No, okay.

22 GENERAL WAXMAN: Absolutely not.

23 QUESTION: If that's so, then let me go back to
24 where I think is -- what I think is -- at least convinced
25 me is the strongest argument against you, which I'm not

1 saying I'm accepting.

2 But what about a perjury case? Does the
3 Government prosecute perjury where all that's happened is,
4 the defendant's taken the stand, answered every question
5 truthfully but one. The one was, are you guilty of this
6 crime? No. Does the Government prosecute such cases?

7 GENERAL WAXMAN: We don't prosecute -- I'm not
8 aware that the Government has ever prosecuted --

9 QUESTION: All right. I think perhaps this
10 doctrine of the exculpatory no arose out of such cases.
11 I'm not clear as to precisely what the history of the
12 doctrine is, but I think it's pretty well established, and
13 I think it arose out of the problem of prosecuting a
14 person for precisely that kind of perjury, you know,
15 that -- in -- I don't think it happens. I just don't
16 think it happens, and I think the reason --

17 GENERAL WAXMAN: I'm only aware of one instance.

18 QUESTION: Yes.

19 GENERAL WAXMAN: One decided case. It's a case
20 called the United States v. Endo, I think in the Fourth
21 Circuit, where the question arose whether a plea of not
22 guilty --

23 QUESTION: This was -- a plea of not guilty
24 would not fall within it.

25 GENERAL WAXMAN: But the question you're raising

1 is, in fact, akin to it. I mean, the plea of not guilty
2 is the means by which our adversarial criminal justice
3 system uses --

4 QUESTION: Right. All right. So -- but now let
5 me --

6 GENERAL WAXMAN: -- to essentially invoke the
7 defendant's right.

8 QUESTION: I agree. Now, let me extrapolate a
9 little.

10 Once you accept that, like most statutes, this
11 statute won't be taken with complete literalness. Then
12 the next part of the argument, I take it, is, let's look
13 to where this statute -- what it was aimed at.

14 It was aimed at procurement, getting money from
15 the Government, and then Harold Ickes said, let's extend
16 it to all regulatory programs, and then no one thought at
17 the time, apparently, that one function of one Government
18 agency is to investigate crime, and therefore, by
19 happenstance, it makes every statement made to a criminal
20 investigator a separate crime.

21 I'm not saying it doesn't do that, but it could
22 have been happenstance.

23 GENERAL WAXMAN: Well --

24 QUESTION: So that being so, it wouldn't be so
25 surprising to exempt from that statute which makes making

1 statements not under oath the same evil as making perjury
2 under oath, under amazingly strict conditions.

3 And now we write a little exception into that
4 statute which is the same in the statute as the fairly
5 well-known prosecutorial exception for the exculpatory no
6 is in respect to perjury. In other words, carry it over,
7 all done sub silentio, without a word in the statute.

8 Now, I take it that that's what the courts of
9 appeals were doing, and it isn't totally without support,
10 is it?

11 GENERAL WAXMAN: I think -- I'm not -- I don't,
12 actually don't think that is what many of the courts of
13 appeals were doing, and I think it is totally without
14 support.

15 If you say, we could just write a little
16 exception in, if you're referring to we, Congress --

17 QUESTION: Well, there are some exceptions
18 implicitly. There are some exceptions implicitly in every
19 statute.

20 GENERAL WAXMAN: I --

21 QUESTION: So I take it your strongest case here
22 would be to say, take the prosecutorial history of the
23 perjury statutes, note the problem of abuse with the
24 exculpatory no there, and sub silentio bring it in here in
25 a statute that really, just by happenstance, covers all

1 crimes being investigated as opposed to what Harold Ickes
2 thought.

3 GENERAL WAXMAN: Well, if Congress wanted to
4 create an exculpatory no exception of some sort limited
5 to -- I mean, a guilty plea or a statement I'm not guilty
6 is not really a statement of fact, it's a statement that
7 you can't prove my guilt beyond a reasonable doubt, or I
8 challenge you to --

9 QUESTION: The new statute excludes that anyway.
10 Parties to judicial proceedings are excluded from the
11 amended statute.

12 QUESTION: General Waxman, I hope you're not
13 conceding the point that the Government will not prosecute
14 even a criminal defendant who chooses to take the stand
15 and perjures himself.

16 GENERAL WAXMAN: To the contrary. We not only
17 prosecute them if it's --

18 QUESTION: I assume that's why we have perjury
19 laws, to stop people from doing this.

20 GENERAL WAXMAN: In Grayson and Dunnegin this
21 Court has upheld the Government's efforts to require or
22 encourage judges to consider enhancement of sentences if
23 perjury was established --

24 QUESTION: There was an exception in the --

25 GENERAL WAXMAN: -- even if perjury is not

1 charged.

2 QUESTION: There was an exception in the
3 Sentencing Guidelines for the exculpatory no for the
4 instance where the person gets on the stand and might
5 otherwise tell a long story that would subject him to an
6 increase in the punishment.

7 GENERAL WAXMAN: Well --

8 QUESTION: And there were also -- now, I'm not
9 saying what the statute is. I'm just saying, it's --
10 there is a long history, it seems to me, of exculpatory no
11 that's relevant here. It's not just a doctrine that was
12 made up by six courts of appeals.

13 GENERAL WAXMAN: I think what's interesting,
14 Justice Breyer, is, if you look at the perjury cases there
15 is no exculpatory no doctrine under the perjury statutes.
16 It's not something that has arisen under the perjury
17 statutes, and the Government feels perfectly free, where
18 it can prove a knowing, false statement under oath in a
19 judicial matter, and it's something that comes within 1621
20 or 1623, to charge it. The --

21 QUESTION: General Waxman, perjury is a
22 statement under oath, and I was thinking in the
23 noncommunist affidavit case, when you have to write out
24 your signature, and you affirm that this is true, there's
25 a more deliberate quality to that than just blurting out

1 no.

2 So the cases that you were asked about that
3 involved an oath, it seems to me that there is more of a
4 deliberation involved on the defendant's part, and that's
5 why I thought you had the statement in the manual that
6 it's not appropriate. I didn't think that that was -- it
7 didn't sound to me like it was simply a resource
8 allocation decision.

9 GENERAL WAXMAN: Well, I'm happy, personally
10 happy to see that the word is gone, but in any event, you
11 know, it's interesting, your pointing out a distinction
12 that is between a false denial that's deliberative, as
13 opposed to one that's not quite deliberative. That's a
14 distinct -- the various courts of appeals that have
15 recognized some form of this "doctrine" have come up with
16 an amazing number of distinctions, but to my knowledge
17 that's not one of them.

18 QUESTION: Well, suppose the rule were, when you
19 just say no, that's an exculpatory no.

20 GENERAL WAXMAN: Well, that, of course, is not
21 the law in almost any of the circuits that have adopted
22 this doctrine, and it's also one that would be totally
23 artificial. I mean, what will we do, just train
24 Government agents to ask the follow-up question?

25 QUESTION: It is what's happened in this case,

1 is it not?

2 GENERAL WAXMAN: Well, it's what -- insofar as
3 what the judge allowed into the record it's what happened
4 in this case. That is not what happened in this case, and
5 it's also why this prosecution was not even in fact
6 inconsistent with this policy, but the judge excluded from
7 evidence the conversation that followed the so-called
8 "exculpatory no" in this case.

9 QUESTION: Do you think there's a --

10 QUESTION: General -- go ahead.

11 QUESTION: Do you think there's a distinction
12 under the statute between no answer to an investigator's
13 question, have you ever committed the crime of bribery, as
14 distinct from the investigator's question, did you ever
15 receive money from this company?

16 GENERAL WAXMAN: There is not a -- an absolute,
17 a priori distinction, but there is a -- there -- the
18 following distinction does exist. The latter question is
19 a pure question of fact. The former question is a mixed
20 question of fact and law, and in order for the Government
21 to convict somebody with respect to a false no in response
22 to the former question, presumably we would have to prove
23 that the defendant knew the elements of the crime of
24 bribery.

25 QUESTION: Knew law as well as fact, right.

1 QUESTION: Right.

2 QUESTION: Yes.

3 GENERAL WAXMAN: But I think that we could
4 prosecute it if we could carry that heavy burden.

5 QUESTION: General Waxman, in addition to
6 prosecutorial discretion which you've been assuring us
7 about, this is a felony, and you're entitled to a jury
8 trial, am I not right about that?

9 GENERAL WAXMAN: Yes.

10 QUESTION: And would you want to prosecute
11 somebody for rolling through a stop sign and making the
12 exculpatory no? You think it would enhance your record as
13 a winning prosecutor?

14 (Laughter.)

15 GENERAL WAXMAN: No, and it would be an
16 incredible waste of resources.

17 QUESTION: But there are prosecutors who have
18 brought prosecutions for motives that are not entirely
19 honorable. That's part of the problem with a statute like
20 this.

21 GENERAL WAXMAN: Well --

22 QUESTION: I'm not -- you're of course conscious
23 of that.

24 This case -- this statute, by the way, does not
25 require knowledge that the person who asked the question

1 was a Government agent, does it?

2 GENERAL WAXMAN: Absolutely not. I mean, this
3 Court so held in Yermian.

4 QUESTION: Yes.

5 GENERAL WAXMAN: But there -- I mean, in
6 response to your point about abuse with respect to this
7 statute, I mean, there -- if there are unscrupulous agents
8 and unscrupulous prosecutors, there are -- there is an
9 entire volume, title 18, that can be used in improper
10 fashions, and we have mechanisms within the Justice
11 Department, the bar has mechanisms, both using the
12 criminal law and under our professional ethics standards
13 for dealing with that.

14 This is a statute which I think the record shows
15 has been applied by the Government over the years in a
16 very responsible fashion. I mean, the fact that,
17 notwithstanding all the years that this has been in
18 effect, the petitioner is not able to come up with, even
19 hypothetically, let alone a real decided case in which the
20 Government has abused its authority speaks volumes.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

23 The case is submitted.

24 (Whereupon, at 11:08 a.m., the case in the
25 above-entitled matter was submitted.)

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:

JAMES BROGAN, Petitioner v. UNITED STATES
CASE NO: 96-1579

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BY Donna Marie Fedele-----

(REPORTER)