9. PERJURY AND FALSE STATEMENTS

As with obstruction of justice, perjury and false statement charges are "trans-substantive" in corporate crime. You should expect these offenses to be potentially in play any time a client or subject of an investigation testifies or speaks to the government, and therefore in virtually every investigation and prosecution—no matter what the underlying legal violation might be.

Many of the same policy issues that arise with obstruction charges are relevant with respect to perjury and false statement charges. As far as doctrine goes, perjury turns out to be narrower than most people think, while the federal false statements statute covers a much broader realm of conduct than most people would expect to be criminal.

A. Statutes

These are not as complicated as the obstruction statutes. Section 1621 is the modern version of the longstanding federal perjury statute. Section 1623 is a more recent statute intended to alter the law a bit in terms of how § 1621 had been interpreted. Section 1623 is, not surprisingly, used more often now. Section 1622 criminalizes subornation of perjury, which of course covers conduct that might be easier for a prosecutor to charge as obstruction (witness tampering) under § 1512. Section 1001 ("thousand and one," as it is called) is the federal false statements statute.

18 U.S.C. § 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. § 1001. Statements or entries generally

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

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

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

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

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

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

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

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

B. Perjury

The following Supreme Court case is the classic statement of the "literal truth defense" to perjury. ("Literal truth" is not a formal affirmative defense; the issue has to do with the government's burden of proof.) Factual precision is essential in talking about perjury charges. Exactly how were the words false, or not necessarily false? Exactly how could/should the questioner have posed the question(s) so that a perjury charge could be brought if a witness lied?

BRONSTON v. UNITED STATES, 409 U.S. 352 (1973)

Mr. Chief Justice BURGER delivered the opinion for a unanimous Court.

We granted the writ in this case to consider a narrow but important question in the application of the federal perjury statute, 18 U.S.C. § 1621: whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.

Petitioner is the sole owner of Samuel Bronston Productions, Inc., a company that between 1958 and 1964, produced motion pictures in various European locations. For these enterprises, Bronston Productions, opened bank accounts in a number of foreign countries; in 1962, for example, it had 37 accounts in five countries. As president of Bronston Productions, petitioner supervised transactions involving the foreign bank accounts.

In June 1964, Bronston Productions, petitioned for an arrangement with creditors under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 et seq. On June 10, 1966, a referee in bankruptcy held a § 21(a) hearing to determine, for the benefit of creditors, the extent and location of the company's assets. Petitioner's perjury conviction was founded on the answers given by him as a witness at that bankruptcy hearing, and in particular on the following colloquy with a lawyer for a creditor of Bronston Productions:

> 'Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> 'A. No, sir.
>
> 'Q. Have you ever?
>
> 'A. The company had an account there for about six months, in Zurich.
>
> 'Q. Have you any nominees who have bank accounts in Swiss banks?
>
> 'A. No, sir.
>
> 'Q. Have you ever?
>
> 'A. No, sir.'

It is undisputed that for a period of nearly five years, between October 1959 and June 1964, petitioner had a personal bank account at the International Credit Bank in Geneva, Switzerland, into which he made deposits and upon which he drew checks totaling more than $180,000. It is likewise undisputed that petitioner's answers were literally truthful. (a) Petitioner did not at the time of questioning have a Swiss bank account. (b) Bronston Productions, Inc., did have the account in Zurich described by petitioner. (c) Neither at the time of questioning nor before did petitioner have nominees who had Swiss accounts. The Government's prosecution for perjury went forward on the theory that in order to mislead his questioner, petitioner answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own-thereby implying that he had no personal Swiss bank account at the relevant time.

At petitioner's trial, the District Court instructed the jury that the 'basic issue' was whether petitioner 'spoke his true belief.' Perjury, the court stated, 'necessarily involves the state of mind of the accused' and 'essentially consists of willfully testifying to the truth of a fact which the defendant does not believe to be true'; petitioner's testimony could not be found 'willfully' false unless at the time his testimony was given petitioner 'fully understood the questions put to him but nevertheless gave false answers knowing

the same to be false.' The court further instructed the jury that if petitioner did not understand the question put to him and for that reason gave an unresponsive answer, he could not be convicted of perjury. Petitioner could, however, be convicted if he gave an answer 'not literally false but when considered in the context in which it was given, nevertheless constitute(d) a false statement' . . . [T]he jury returned its verdict, finding petitioner guilty on the count of perjury before us today and not guilty on another charge not here relevant.

In the Court of Appeals, petitioner contended, as he had in post-trial motions before the District Court, that the key question was imprecise and suggestive of various interpretations. In addition, petitioner contended that he could not be convicted of perjury on the basis of testimony that was concededly truthful, however unresponsive. A divided Court of Appeals held that the question was readily susceptible of a responsive reply and that it adequately tested the defendant's belief in the veracity of his answer. The Court of Appeals further held that, '(f)or the purposes of 18 U.S.C. § 1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury.' In this Court, petitioner renews his attack on the specificity of the question asked him and the legal sufficiency of his answer to support a conviction for perjury. The problem of the ambiguity of the question is not free from doubt, but we need not reach that issue. Even assuming, as we do, that the question asked petitioner specifically focused on petitioner's personal bank accounts, we conclude that the federal perjury statute cannot be construed to sustain a conviction based on petitioner's answer.

The statute, 18 U.S.C. § 1621, substantially identical in its relevant language to its predecessors for nearly a century, is 'a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury.'

There is, at the outset, a serious literal problem in applying § 1621 to petitioner's answer. The words of the statute confine the offense to the witness who 'willfully . . . states . . . any material matter which he does not believe to be true.' Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts. There is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.

The Government urges that the perjury statute be construed broadly to reach petitioner's answer and thereby fulfill its historic purpose of reinforcing our adversary factfinding process. We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert-

as every examiner ought to be-to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly. It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe (his answer) to be true.' To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of 'intent to mislead' or 'perjury by implication.' The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: 'that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.' . . .

Thus, we must read § 1621 in light of our own and the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony. While 'the lower federal courts have not dealt with the question often,' and while their expressions do not deal with unresponsive testimony and are not precisely in point, 'it may be said that they preponderate against the respondent's contention.' The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner-so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. . . .

It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution.

Here is one of the most famous examples of testimony and the issue of "literal truth."

PRESIDENT BILL CLINTON'S GRAND JURY TESTIMONY

Q: Mr. President, I want to before I go into a new subject area… The statement of your attorney, Mr. Bennett, at the Paul[a] Jones deposition, "counsel is fully aware…that Ms. Lewinsky has filed, has an affidavit which they are in possession of saying that there is no sex of any kind in any manner, shape or form, with President Clinton"? That statement was made by your attorney in front of Judge Susan Webber Wright, correct?

A: That's correct.

Q: That statement is a completely false statement. Whether or not Mr. Bennett knew of your relationship with Ms. Lewinsky, the statement that there was "no sex of any kind in any manner, shape or form, with President Clinton," was an utterly false statement. Is that correct?

A: It depends on what the meaning of the word "is" is. If the-if he-if "is" means is and never has been, that is not-that is one thing. If it means there is none, that was a completely true statement. But as I have testified, and I'd like to testify again, this is-it is somewhat unusual for a client to be asked about his lawyer's statements, instead of the other way around. I was not paying a great deal of attention to this exchange. I was focusing on my own testimony.

Grand Jury Testimony of President Clinton, August 17, 1998, pg. 57–58.

> "It is clear to the [House Judiciary] Committee that the President perjured himself when he said that Mr. Bennett's statement that there was 'no sex of any kind' was 'completely true' depending on what the word 'is' is."

Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105-830 (1998).

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In addition to reading the material above about President Clinton's grand jury testimony, watch the relevant three-minute excerpt of his testimony, which is available here: http://www.youtube.com/watch?v=xHlt1W83JFU. (Feel free, of course, to watch additional portions of the testimony available online for further context.) Under *Bronston*, is the assertion of the House Judiciary Committee in its articles of impeachment, excerpted above, correct?

The following (overblown) prosecution involving testimony in a civil forfeiture case explains materiality in the context of perjury and gives a bit more feel for "literal truth," as well as a sense of the defense argument of "ambiguous question."

UNITED STATES v. KROSS, 14 F.3d 751 (2d Cir. 1994)

FEINBERG, Circuit Judge:

Laura Kross appeals from a judgment of conviction entered in March 1993, after a jury trial in the United States District Court for the District of Vermont before Franklin S. Billings, Jr., J. Kross was indicted on five counts of making false declarations in a civil deposition in violation of 18 U.S.C. § 1623, and the jury found her guilty on three counts. . . . For the reasons set forth below, we affirm.

Earth People's Park (the Park), a 592-acre parcel of land in the extreme northeastern corner of Vermont, is owned by Earth People's Park, Inc., a California corporation (the Corporation). Since the founding of the Park in 1970, the Corporation has allowed people to come to the Park at no charge in order to live in harmony with nature. Kross resided in the Park from 1971 to 1979, when she moved to nearby Brownington, Vermont.

In 1990, the United States filed a civil forfeiture complaint against the Park pursuant to 21 U.S.C. § 881(a)(7). *United States v. Earth People's Park, Consisting of 592 Acres, More or Less, Located in Norton, Vermont, with all Appurtenances and Attachments Thereon*, Civil No. 90-273 (D. Vt.) (pending). The United States sought forfeiture on the grounds that the property was being used for the cultivation and distribution of marijuana. The Corporation asserted the defense of innocent ownership, claiming that it had no knowledge of illegal drug-related activity at the Park.

The Assistant United States Attorney conducting the forfeiture litigation deposed Kross in January 1991, at which time she was accompanied by an attorney representing the Corporation. The testimony of Kross at the deposition formed the basis for the three counts of the indictment (Counts III, IV and V) on which she was convicted. Count III set forth her responses to questions about her knowledge of illegal drug use in the Park, as follows:

Q: Did you ever see anyone smoking marijuana in the Park?

A: *Not to the best of my recollection. When I lived up there, I kept pretty much to myself.*

. . .

Q: With regard to Koslosky, Greenip and Brown and Gagliola, did you ever see them smoking marijuana in the Park?

A: *No, uh-uh.*

Q: Do you have any information as to whether they did smoke marijuana in the Park?

A: *No, nobody's ever come and said that to me.*

Count IV concerned her knowledge of marijuana cultivation in the Park:

Q: Did you ever see anyone grow marijuana on [Earth People's] Park property?

A: *No.*

Q: Even if you didn't see anyone grow it. Did you ever see anyone grow it there?

A: *No. It's a big 600 acres.*

. . .

Q: Did you ever have any information about [Koslosky, Greenip, Brown and Gagliola] growing marijuana in the Park?

A: *Definitely not.*

Count V concerned her prior criminal history:

Q: Have you ever been arrested?

A: *No.*

Q: Have you ever been charged by State or Federal authorities with any crime?

A: *No.*

Q: Really, I'm not asking whether you've been convicted; I'm asking whether you've been charged?

A: *No, not that I remember.*

At trial, the government presented testimony to show that Kross was aware of the use and cultivation of the marijuana by Park residents. Evidence also showed that Kross had been charged with felonies in Vermont state court in 1980 and 1990.

Kross argues that the district court erred in denying her pretrial motion to dismiss the indictment on the grounds that the information sought in the deposition was immaterial to the underlying forfeiture proceeding, that the deposition questions at issue were fundamentally ambiguous and that her statements were literally true. . . .

Kross contends that the indictment should have been dismissed because none of her allegedly false declarations were material to the civil forfeiture action. We disagree.

We have consistently held in the grand jury context that a false declaration is "material" within the meaning of § 1623 when it has "'a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation.'" *United States v. Kiszewski,* 877 F.2d 210, 218 (2d Cir. 1989) (quoting *United States v. Berardi,* 629 F.2d 723, 728 (2d Cir.), *cert. denied,* 449 U.S. 995, 101 S. Ct. 534, 66 L. Ed. 2d 293 (1980)). We have pointed out that in a § 1623 prosecution for false declarations to a grand jury,

> [m]atters arguably cumulative or collateral to the grand jury's objective in a given case are considered for their *potential* to aid that body, not for the *probability* of assistance from a truthful answer.

United States v. Gribben, 984 F.2d 47, 51 (2d Cir. 1993). Because the grand jury's function is investigative, materiality in that context is "broadly construed." *Id.* However, we have apparently not yet addressed the issue of materiality under § 1623 in the context of a deposition in a civil matter. The purpose of civil discovery is also investigative, and the scope of discovery includes any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

The Fifth Circuit has held that for purposes of § 1623, materiality in a civil discovery deposition is not limited to evidence admissible at trial, but includes matters properly the subject of and material to a deposition under Rule 26(b)(1). *United States v. Holley,* 942 F.2d 916, 924 (5th Cir. 1991), *cert. denied,* 510 U.S. 821, 114 S. Ct. 77, 126 L. Ed. 2d 45 (1993). The Ninth and Sixth Circuits have also adapted a materiality definition under § 1623 to the civil deposition context. *See United States v. Clark,* 918 F.2d 843, 846 (9th Cir. 1990); *United States v. Adams,* 870 F.2d 1140, 1146–48 (6th Cir. 1989). But the resultant definition is considerably narrower than that of the Fifth Circuit: it requires not merely discoverability under Rule 26(b)(1), but also the tendency of the false statement itself to affect the outcome of the underlying civil suit for which the deposition was taken. *See Clark,* 918 F.2d at 847; *Adams,* 870 F.2d at 1147.

The facts of the present case favor a broad construction of the definition of materiality similar to the approach we have already used in the grand jury context. While a government deposition in a forfeiture action under 21 U.S.C. § 881 is civil in form, forfeiture actions are predicated upon a nexus between the property and criminal activity. *See United States v. Premises and Real Property at 4492 S. Livonia Rd.,* 889 F.2d 1258, 1269 (2d Cir. 1989), *reh'g denied,* 897 F.2d 659 (1990). Under the circumstances of this case, we see no persuasive reason not to apply the broad standard for materiality of whether a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit.

We turn now to apply this broad standard to the facts of this case. With respect to Counts III and IV, Kross maintains that she was not an agent of the Corporation. Therefore, she argues, any knowledge she may have had concerning drug use or cultivation at the Park was not attributable to the Corporation and was thus immaterial to the forfeiture proceeding against the Corporation. At the time the questions were asked, however, the government was entitled to explore her knowledge based on the theory that she was an

agent. Certainly, Kross' denial of agency would not end the matter, in view of evidence that she had represented herself to the Assistant conducting the deposition as the agent of the Corporation and had acted as its agent in the past. In any case, even if Kross was not the Corporation's agent, the information sought was material in that it concerned not only her *knowledge* of drug activity at the Park, but also the *existence* of drug activity.

As to Count III, Kross further argues that the information sought was immaterial to the forfeiture suit because marijuana smoking is not a felony justifying forfeiture under Title 21. Thus, she argues, even if she had testified that she had knowledge of marijuana smoking, that would not have demonstrated that the Park was being used to facilitate the more serious narcotics crimes that could justify a forfeiture. We disagree with this reasoning. It is true that neither marijuana smoking nor knowledge thereof constitutes independent grounds for civil forfeiture. Nevertheless, evidence of marijuana smoking on Park property was material at the discovery stage of the forfeiture proceeding because such evidence might lead to evidence of cultivation or distribution of marijuana, which would justify forfeiture.

With respect to Count IV, Kross also argues that she "could reasonably have understood" the questions to refer to the time when she lived in the Park in the 1970s. Thus, she claims, her answer about marijuana cultivation was immaterial because it did not concern the drug crimes that formed the basis for the 1990 forfeiture proceeding, but rather concerned activity predating the five-year statute of limitations period for § 881 forfeiture actions. Kross' argument is unconvincing, however, because the questioner clearly asked Kross if she had "ever" seen or had information about marijuana cultivation in the Park. In addition, as the district court correctly found,

> Although evidence of pre-1985 drug crimes could not legally constitute a basis for forfeiture, evidence that [the Corporation] knew of illegal pre-1985 drug activity could certainly have led to information that the [C]orporation was not an "innocent owner," as well as an inference that the [C]orporation failed to satisfy its affirmative duty to safeguard the property from further drug activity.

Furthermore, the prior marijuana cultivation, while not the basis for the forfeiture proceeding, is nonetheless relevant to discovery regarding the later cultivation that did form the basis for the proceeding.

With respect to Count V, Kross argues that the statements regarding her prior criminal history were not material because they could have produced no useful testimony. Furthermore, she argues, the Assistant United States Attorney already knew of the prior charges against her.

Turning to the latter argument first, whether the questioner knows the answer to a question is irrelevant to materiality. *Cf. United States v. Lee,* 509 F.2d 645, 646 (2d Cir.) (per curiam), *cert. denied,* 422 U.S. 1044, 95 S. Ct. 2645, 45 L. Ed. 2d 696 (1975). As

to the usefulness of truthful responses, the 1990 charges eventually resulted in a conviction. Since Kross was convicted of welfare fraud, a crime involving "dishonesty or false statement," evidence of the conviction might have been admissible at trial of the forfeiture action to impeach Kross's credibility if she were a witness. Fed. R. Evid. 609(a)(2). Though matters relating to the credibility of a prospective witness might not always be material within the meaning of the perjury statute, *see United States v. Freedman,* 445 F.2d 1220, 1227–28 (2d Cir. 1971), in this case there was evidence that Kross represented herself to the prosecutor as an agent of the owner of the defendant property. In such circumstances, matters affecting her credibility were material. *Cf. United States v. Salinas,* 923 F.2d 339, 340–41 (5th Cir. 1991) (witness's credibility material where witness was defendant in underlying action); *United States v. Sablosky,* 810 F.2d 167, 169 (8th Cir. 1987) (same).

Although the 1980 charges were ultimately dismissed, the charges concerned marijuana possession. Thus, truthful testimony concerning those charges might have led to evidence of other drug-related activity by Kross.

Kross contends that her statements referred to in Counts III and IV of the indictment cannot have been perjurious because the questions asked were fundamentally ambiguous. She argues that because the questions were asked in the context of other questions about the year 1975, she assumed the questions referred to marijuana smoking and cultivation in the year 1975. According to Kross, the indictment alleges that she grew marijuana sometime between *1976* and 1990 and thus fails to allege that her answer was false.

While it is true that answers to "fundamentally ambiguous" questioning may be insufficient to support a perjury conviction, *United States v. Lighte,* 782 F.2d 367, 375 (2d Cir. 1986), Kross' argument is wholly without merit. The indictment in fact alleges that Kross knew of and participated in marijuana cultivation between 19*7*5 and 1990. Moreover, in both instances, the questioner clearly asked Kross if she had "*ever*" seen anyone smoking or growing marijuana in the Park. We agree with the district court that "ever" is not an imprecise word. . . .

What should be done about the witness who avoids testifying truthfully by being deliberately evasive rather than uttering provable falsehoods? Sometimes, in such a case of what one might call "near perjury," a prosecutor will charge the witness with obstruction of justice rather than perjury. This is a famous case in which such an effort failed. Whether you agree with this decision or not, it should be clear why a distinction needs to be maintained between the crimes of perjury and obstruction of justice, and the obstruction of justice statutes prevented from being used as a way to prosecute "sort of perjury."

UNITED STATES v. BONDS, 784 F.3d 582 (9th Cir. 2015) (en banc)

Per Curiam Opinion; Concurrence by Judge KOZINSKI; Concurrence by Judge N.R. SMITH; Concurrence by Judge REINHARDT; Concurrence by Judge W. FLETCHER; Dissent by Judge RAWLINSON

During a grand jury proceeding, defendant gave a rambling, non-responsive answer to a simple question. Because there is insufficient evidence that Statement C was material, defendant's conviction for obstruction of justice in violation of 18 U.S.C. § 1503 is not supported by the record. Whatever section 1503's scope may be in other circumstances, defendant's conviction here must be reversed. . . .

KOZINSKI, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, GRABER, CALLAHAN and NGUYEN join, concurring:

Can a single non-responsive answer by a grand jury witness support a conviction for obstruction of justice under 18 U.S.C. § 1503?

Defendant [Barry Bonds], who was then a professional baseball player, was summoned before a grand jury and questioned for nearly three hours about his suspected use of steroids. He was subsequently charged with four counts of making false statements and one count of obstruction of justice, all based on his grand jury testimony. The jury convicted him on the obstruction count and was otherwise unable to reach a verdict.

The jury instructions identified seven of defendant's statements that the government alleged obstructed justice. The jury, however, found only one statement obstructive. That statement was referred to as Statement C at trial and is italicized in the passage below:

Q: Did Greg[, your trainer,] ever give you anything that required a syringe to inject yourself with?

A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each others' personal lives. We're friends, but I don't—we don't sit around and talk baseball, because he knows I don't want—don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends. You come around talking about baseball, you go on. I don't talk about his business. You know what I mean?

Q: Right.

A: That's what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see.

Defendant was again asked about injectable steroids immediately following this

exchange and a few other times during his testimony. He provided direct responses to the follow-up questions. For example, he was asked whether he ever "injected [him]self with anything that Greg . . . gave [him]." He responded "I'm not that talented, no." The government believed that those answers were false but, as noted, the jury failed to convict defendant on the false statement counts. . . .

[S]ection 1503's coverage is vast. By its literal terms, it applies to all stages of the criminal and civil justice process, not just to conduct in the courtroom but also to trial preparation, discovery and pretrial motions. Indeed, it arguably covers conduct taken in anticipation that a civil or criminal case might be filed, such as tax planning, hiding assets or talking to police. And the text of the omnibus clause, in concert with our definition of corruptly, encompasses any act that a jury might infer was intended to "influence, obstruct, or impede . . . the due administration of justice." That's true even if no actual obstruction occurs, because the clause's use of "endeavors" makes "success . . . irrelevant." *See United States v. Richardson*, 676 F.3d 491, 503 (5th Cir. 2012) (internal quotation marks omitted).

Stretched to its limits, section 1503 poses a significant hazard for everyone involved in our system of justice, because so much of what the adversary process calls for could be construed as obstruction. Did a tort plaintiff file a complaint seeking damages far in excess of what the jury ultimately awards? That could be viewed as corruptly endeavoring to "influence . . . the due administration of justice" by seeking to recover more than the claim deserves. So could any of the following behaviors that make up the bread and butter of litigation: filing an answer that denies liability for conduct that is ultimately adjudged wrongful or malicious; unsuccessfully filing (or opposing) a motion to dismiss or for summary judgment; seeking a continuance in order to inflict delay on the opposing party; frivolously taking an appeal or petitioning for certiorari—the list is endless. Witnesses would be particularly vulnerable because, as the Supreme Court has noted, "[u]nder the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive." *Bronston v. United States*, 409 U.S. 352, 358, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973).

Lawyers face the most pervasive threat under such a regime. Zealous advocacy sometimes calls for pushing back against an adversary's just case and casting a despicable client in a favorable light, yet such conduct could be described as "endeavor[ing] to . . . impede . . . the due administration of justice." Even routine advocacy provides ample occasion for stumbling into the heartland of the omnibus clause's sweeping coverage. Oral arguments provide a ready example. One need not spend much time in one of our courtrooms to hear lawyers dancing around questions from the bench rather than giving pithy, direct answers. There is, for instance, the ever popular "but that is not this case" retort to a hypothetical, which could be construed as an effort to divert the court and thereby "influence . . . the due administration of justice."

It is true that any such maneuver would violate section 1503 only if it were done "corruptly." But it is equally true that we have given "corruptly" such a broad

construction that it does not meaningfully cabin the kind of conduct that is subject to prosecution. As noted, we have held that a defendant acts "corruptly," as that term is used in section 1503, if he does so "with the purpose of obstructing justice." *Rasheed*, 663 F.2d at 852. In the examples above, a prosecutor could argue that a complaint was filed corruptly because it was designed to extort a nuisance settlement, or an answer was filed corruptly because its principal purpose was to pressure a needy plaintiff into an unjust settlement, or that the lawyer who parried a judicial hypothetical with "but that is not this case" was endeavoring to distract the court so it would reach a wrong result. That a jury or a judge might not buy such an argument is neither here nor there; a criminal prosecution, even one that results in an acquittal, is a life-wrenching event. Nor does an acquittal wipe clean the suspicion that a guilty defendant got off on a technicality.

We have no doubt that United States Attorneys and their Assistants would use the power to prosecute for such crimes judiciously, but that is not the point. Making everyone who participates in our justice system a potential criminal defendant for conduct that is nothing more than the ordinary tug and pull of litigation risks chilling zealous advocacy. It also gives prosecutors the immense and unreviewable power to reward friends and punish enemies by prosecuting the latter and giving the former a pass. The perception that prosecutors have such a potent weapon in their arsenal, even if never used, may well dampen the fervor with which lawyers, particularly those representing criminal defendants, will discharge their duties. The amorphous nature of the statute is also at odds with the constitutional requirement that individuals have fair notice as to what conduct may be criminal. *See United States v. JDT*, 762 F.3d 984, 996 (9th Cir. 2014) (citing *Skilling v. United States*, 561 U.S. 358, 402–03, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010)).

Because the statute sweeps so broadly, due process calls for prudential limitations on the government's power to prosecute under it. Such a limitation already exists in our case law interpreting section 1503: the requirement of materiality. *See United States v. Thomas*, 612 F.3d 1107, 1128–29 (9th Cir. 2010). Materiality screens out many of the statute's troubling applications by limiting convictions to those situations where an act "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body." *See Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (internal quotation marks omitted); *Thomas*, 612 F.3d at 1124. Put another way, the government must prove beyond a reasonable doubt that the charged conduct was capable of influencing a decisionmaking person or entity—for example, by causing it to cease its investigation, pursue different avenues of inquiry or reach a different outcome. *See United States v. McKenna*, 327 F.3d 830, 840 (9th Cir. 2003) (finding statement material because it could have affected the "decision-making process"); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956) (noting that, to be material, a statement "must have some weight in the process of reaching a decision").

In weighing materiality, we consider "the intrinsic capabilities of the . . . statement itself," rather than the statement's actual effect on the decisionmaker, *see United States*

v. Serv. Deli Inc., 151 F.3d 938, 941 (9th Cir. 1998) (internal quotation marks omitted), and we evaluate the statement in "the context in which [it was] made," *United States v. Rigas*, 490 F.3d 208, 231 (2d Cir. 2007); *see also United States v. McBane*, 433 F.3d 344, 352 (3d Cir. 2005); *Weinstock*, 231 F.2d at 703 (noting that in context, a statement was "rob[bed] . . . of any materiality—any possible influence upon the [decisionmaker] in reaching its decision").

We start with the self-evident proposition that Statement C, standing alone, did not have the capacity to divert the government from its investigation or influence the grand jury's decision whether to indict anyone. Here it is again:

> That's what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see.

The statement says absolutely nothing pertinent to the subject of the grand jury's investigation. Even when paired with the question that prompted it,

> Did Greg ever give you anything that required a syringe to inject yourself with?

Statement C communicates nothing of value or detriment to the investigation. Had the answer been "I'm afraid of needles," it would have been plausible to infer an unspoken denial, with the actual words serving as an explanation or elaboration. But, as given, the answer did not enlighten, obfuscate, confirm or deny anything within the scope of the question posed.

The most one can say about this statement is that it was non-responsive and thereby impeded the investigation to a small degree by wasting the grand jury's time and trying the prosecutors' patience. But real-life witness examinations, unlike those in movies and on television, invariably are littered with non-responsive and irrelevant answers. This happens when the speaker doesn't understand the question, begins to talk before thinking (lawyers do this with surprising frequency), wants to avoid giving a direct answer (ditto), or is temporizing. Courtrooms are pressure-laden environments and a certain number of non-responsive or irrelevant statements can be expected as part of the give-and-take of courtroom discourse. Because some non-responsive answers are among the road hazards of witness examination, any one such statement is not, standing alone, "capable of influencing . . . the decision of [a] decisionmaking body." *See Thomas*, 612 F.3d at 1124.

This is true even if, as the government now argues, Statement C is literally false. An irrelevant or wholly non-responsive answer says nothing germane to the subject of the investigation, whether it's true or false. For example, if a witness is asked, "Do you own a gun?" it makes no difference whether he answers "The sky is blue" or "The sky is green." That the second statement is false makes it no more likely to impede the

investigation than the first.

Statement C does not, however, stand alone. It was a small portion of a much longer examination, and we must look at the record as a whole to determine whether a rational trier of fact could have found the statement capable of influencing the grand jury's investigation, in light of defendant's entire grand jury testimony. If, for example, a witness engages in a pattern of irrelevant statements, or launches into lengthy disquisitions that are clearly designed to waste time and preclude the questioner from continuing his examination, the jury could find that the witness's behavior was capable of having some sway.

On careful review of the record, we find insufficient evidence to render Statement C material. In conducting this review, we are mindful that we must give the jury the benefit of the doubt and draw all reasonable inferences in favor of its verdict. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). At the same time, we must conduct our review with some rigor for the prudential reasons discussed above. *See* pp. 583–85 *supra*.

The government charged a total of seven statements, only one of which the jury found to be obstructive. Two of these statements (including Statement C) appear to be wholly irrelevant—verbal detours with no bearing on the proceedings. One statement is "I don't know," followed by a brief explanation for the lack of knowledge. The rest are direct answers that the government claimed were false, all concerning whether defendant's trainer had provided or injected him with steroids. In the context of three hours of grand jury testimony, these six additional statements are insufficient to render the otherwise innocuous Statement C material. If this were enough to establish materiality, few witnesses or lawyers would be safe from prosecution.

N.R. SMITH, Circuit Judge, with whom Circuit Judges WARDLAW, CALLAHAN, and FRIEDLAND join, concurring:

I agree that no reasonable juror could have found Bonds guilty of violating 18 U.S.C. § 1503. . . .

Congress could not have intended § 1503 to be so broadly applied as to reach a single truthful but evasive statement such as Statement C. Our conclusion that Statement C could not have "the natural and probable effect" of impeding the grand jury's investigative function stems from two sources: (1) the Government's duty to clarify merely misleading or evasive testimony and (2) relevant precedent indicating that the Government must show that truthful but misleading or evasive testimony must amount to a refusal to testify before it is material. Taken together, these two sources lead to the conclusion that a single truthful but evasive or misleading statement cannot satisfy § 1503's materiality requirement.

The Supreme Court's decision in *Bronston v. United States*, 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973), requires the conclusion that Statement C does not violate §

1503. Although *Bronston* dealt with a conviction for perjury, the Supreme Court's language regarding the government's duty to conduct competent and thorough questioning is illuminating. In short, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id.* at 360, 93 S. Ct. 595. Extending § 1503's reach to transient evasive or misleading statements would obviate the prosecutor's duty to thoroughly examine the witness. *Id.* at 358, 93 S. Ct. 595 (noting that competent cross-examination should be conducted "by counsel alert—as every examiner ought to be—to the incongruity of [the witness's] unresponsive answer"). It would be contrary to the statute's purpose to allow the government to permit an evasive or misleading statement to go unchallenged, in the hopes of obtaining an obstruction of justice conviction later. The government is obligated to do all it can to obtain a direct statement in response to its questioning. The truth-seeking function of the grand jury may be impaired by lax questioning as much, if not more than, an inarticulate or wandering answer.

Bronston counsels that, to convict a defendant for violating § 1503, the jury must find more than that the witness uttered an evasive or misleading statement at some point during his testimony—the "natural and probable effect" of a single truthful but evasive or misleading statement is merely to prompt follow-up questions. Given this burden, Statement C did not have the natural or probable effect of interfering with the due administration of justice, because the Government had a duty to clarify any single misleading or evasive statement Bonds made.

The Supreme Court's materiality standard reinforces *Bronston*'s core holding: we should not find liability for a single statement that is merely misleading or evasive. The judicially-created materiality requirement is a primary objective limitation on § 1503's expansive reach. *See United States v. Thomas*, 612 F.3d 1107, 1128–29 (9th Cir. 2010). This materiality standard necessarily takes into account the context of the charged conduct, evaluating whether the misleading or evasive statement could have "the natural and probable effect of interfering with the due administrative of justice" given the entirety of a witness's examination. *Aguilar*, 515 U.S. at 599, 115 S. Ct. 2357 (internal quotation marks omitted). The Government may not isolate a single statement, prove it misleading or evasive, and argue that the statement is material based solely on that fact.

Evasive or misleading statements are different from false statements. Instead of providing the tribunal with bad information, information that can be evaluated for its capability to influence, a misleading or evasive statement is meant to divert or slow the truth-seeking function in the first instance; it does not so much influence an investigation as divert it by depriving the question of its force. In this sense, offering evasive or misleading testimony is closely analogous to the destruction of evidence. *See United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) ("the destruction or concealment of documents can fall within the prohibition of the statute" by "suppress[ing] evidence"). We should evaluate the materiality of evasive or misleading testimony the same way: for its capability to impede the investigative function of the grand jury.

The Fifth Circuit's explanation of the materiality standard in *United States v. Griffin* is particularly persuasive precedent. A false, misleading, or evasive statement may be material, taken in the context of the entire examination, when it amounts to "a flat refusal to testify." *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979). Evasive or misleading testimony, in this light, can only obstruct the due administration of justice when it completely thwarts the investigative nature of the tribunal—when it derails the grand jury "as effectively as if [the witness] refused to answer the question at all." *Id.* The proper question is not whether a statement had the intrinsic capability to influence the grand jury, but whether the statement, viewed in the context of the witness's testimony as a whole, "closed off entirely the avenue of inquiry being pursued by" the grand jury. *United States v. Brown*, 459 F.3d 509, 531 (5th Cir. 2006) (internal quotation marks omitted); *see also United States v. Cohn*, 452 F.2d 881, 884 (2d Cir. 1971) ("The blatantly evasive witness achieves th[e] effect [of impeding the gathering of relevant evidence] as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.").

Applying the materiality standard a single truthful but evasive or misleading statement can never be material. Our examination of Statement C—a single evasive or misleading statement—reveals why. No rational juror could have found that Statement C amounted to a refusal to testify, such that Bonds's testimony thwarted the grand jury's investigative function.

In summary, the "natural and probable effect" of a single true but evasive response to the government's questioning is not to impede the grand jury but, rather, to prompt follow-up questioning. A statement that "goes off into the cosmos" merely triggers the prosecutor's duty to pin the witness down and elicit a clear response. Indeed, that is exactly what happened in this case. Faced with a rambling response, the prosecutor restated the same question and elicited a direct, unambiguous answer from Bonds: "No." No rational juror could conclude that Bonds refused to answer the question; it is plain in the record that Bonds gave his testimony to the grand jury. Further, this is thus not a situation in which a witness testified evasively for so long and with such persistence that the grand jury's investigation would likely have been thwarted, as would be required for the testimony to be material. Statement C was therefore not material, and Bonds's conviction must be reversed. . . .

C. False Statements (18 U.S.C. § 1001)

The federal false statements statute, set out at the beginning of this chapter, is one of the broadest of all federal criminal prohibitions in terms of the conduct it may cover—given the vast realm of all communications between individuals and the federal government. The following case is about the jurisdictional element of § 1001. The issue is whether the defendant needs to know that the lie involves something within federal jurisdiction. The Court says no. Was this correctly decided as a matter of policy and statutory text?

UNITED STATES v. YERMIAN, 468 U.S. 63 (1984)

Justice POWELL delivered the opinion of the Court.

Respondent Esmail Yermian was convicted in the District Court of Central California on three counts of making false statements in a matter within the jurisdiction of a federal agency, in violation of § 1001. The convictions were based on false statements respondent supplied his employer in connection with a Department of Defense security questionnaire. Respondent was hired in 1979 by Gulton Industries, a defense contractor. Because respondent was to have access to classified material in the course of his employment, he was required to obtain a Department of Defense Security Clearance. To this end, Gulton's security officer asked respondent to fill out a "Worksheet For Preparation of Personnel Security Questionnaire."

In response to a question on the worksheet asking whether he had ever been charged with any violation of law, respondent failed to disclose that in 1978 he had been convicted of mail fraud, in violation of 18 U.S.C. § 1341. In describing his employment history, respondent falsely stated that he had been employed by two companies that had in fact never employed him. The Gulton security officer typed these false representations onto a form entitled "Department of Defense Personnel Security Questionnaire." Respondent reviewed the typed document for errors and signed a certification stating that his answers were "true, complete, and correct to the best of [his] knowledge" and that he understood "that any misrepresentation or false statement . . . may subject [him] to prosecution under section 1001 of the United States Criminal Code."

After witnessing respondent's signature, Gulton's security officer mailed the typed form to the Defense Industrial Security Clearance Office for processing. Government investigators subsequently discovered that respondent had submitted false statements on the security questionnaire. Confronted with this discovery, respondent acknowledged that he had responded falsely to questions regarding his criminal record and employment history. On the basis of these false statements, respondent was charged with three counts in violation of § 1001.

At trial, respondent admitted to having actual knowledge of the falsity of the statements he had submitted in response to the Department of Defense security questionnaire. He explained that he had made the false statements so that information on the security questionnaire would be consistent with similar fabrications he had submitted to Gulton in his employment application. Respondent's sole defense at trial was that he had no actual knowledge that his false statements would be transmitted to a federal agency.

Consistent with this defense, respondent requested a jury instruction requiring the Government to prove not only that he had actual knowledge that his statements were false at the time they were made, but also that he had actual knowledge that those statements were made in a matter within the jurisdiction of a federal agency. The District Court rejected that request and instead instructed the jury that the Government must prove that respondent "knew or should have known that the information was to be

submitted to a government agency." . . . [T]he jury returned convictions on all three counts charged in the indictment. . . .

The only issue presented in this case is whether Congress intended the terms "knowingly and willfully" in § 1001 to modify the statute's jurisdictional language, thereby requiring the Government to prove that false statements were made with actual knowledge of federal agency jurisdiction. The issue thus presented is one of statutory interpretation. Accordingly, we turn first to the language of the statute.

The relevant language of § 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully ... makes any false, fictitious or fraudulent statements or representations, . . . shall be fined. . . ."

The statutory language requiring that knowingly false statements be made "in any matter within the jurisdiction of any department or agency of the United States" is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern. Jurisdictional language need not contain the same culpability requirement as other elements of the offense. Indeed, we have held that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." Certainly in this case, the statutory language makes clear that Congress did not intend the terms "knowingly and willfully" to establish the standard of culpability for the jurisdictional element of § 1001. The jurisdictional language appears in a phrase separate from the prohibited conduct modified by the terms "knowingly and willfully." Any natural reading of § 1001, therefore, establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious or fraudulent statements," and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency.

Once this is clear, there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction. The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be "knowingly made in a matter within federal agency jurisdiction," or "with the intent to deceive the Federal Government." On its face, therefore, § 1001 requires that the Government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that those statements were made with actual knowledge of federal agency jurisdiction. Respondent's argument that the legislative history of the statute supports a contrary interpretation is unpersuasive. . . .

Respondent argues that absent proof of actual knowledge of federal agency jurisdiction, § 1001 becomes a "trap for the unwary," imposing criminal sanctions on "wholly innocent conduct." Whether or not respondent fairly may characterize the intentional

and deliberate lies prohibited by the statute (and manifest in this case) as "wholly innocent conduct," this argument is not sufficient to overcome the express statutory language of § 1001. . . . In the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this Court to amend the criminal statute.

The next case is a pivotal Supreme Court decision dealing with the treatment of an "exculpatory no" under § 1001. Is there any persuasive way to get the policy argument to line up with the argument about statutory language here?

BROGAN v. UNITED STATES, 522 U.S. 398 (1988)

Justice SCALIA delivered the opinion of the Court.

While acting as a union officer during 1987 and 1988, petitioner James Brogan accepted cash payments from JRD Management Corporation, a real estate company whose employees were represented by the union. On October 4, 1993, federal agents from the Department of Labor and the Internal Revenue Service visited petitioner at his home. The agents identified themselves and explained that they were seeking petitioner's cooperation in an investigation of JRD and various individuals. They told petitioner that if he wished to cooperate, he should have an attorney contact the United States Attorney's Office, and that if he could not afford an attorney, one could be appointed for him.

The agents then asked petitioner if he would answer some questions, and he agreed. One question was whether he had received any cash or gifts from JRD when he was a union officer. Petitioner's response was "no." At that point, the agents disclosed that a search of JRD headquarters had produced company records showing the contrary. They also told petitioner that lying to federal agents in the course of an investigation was a crime. Petitioner did not modify his answers, and the interview ended shortly thereafter.

Petitioner was indicted for accepting unlawful cash payments from an employer in violation of 29 U.S.C. §§ 186(b)(1), (a)(2) and (d)(2), and making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001. He was . . . found guilty. . . . We granted certiorari on the issue of the "exculpatory no." . . .

By its terms, 18 U.S.C. § 1001 covers "any" false statement-that is, a false statement "of whatever kind," The word "no" in response to a question assuredly makes a "statement," *see, e.g.,* Webster's New International Dictionary 2461 (2d ed.1950) (def. 2: "That which is stated; an embodiment in words of facts or opinions"), and petitioner does not contest that his utterance was false or that it was made "knowingly and willfully." In fact, petitioner concedes that under a "literal reading" of the statute he loses.

Petitioner asks us, however, to depart from the literal text that Congress has enacted, and to approve the doctrine adopted by many Circuits which excludes from the scope of § 1001 the "exculpatory no." The central feature of this doctrine is that a simple denial of

guilt does not come within the statute. There is considerable variation among the Circuits concerning, among other things, what degree of elaborated tale-telling carries a statement beyond simple denial. In the present case, however, the Second Circuit agreed with petitioner that his statement would constitute a "true 'exculpatory n[o]' as recognized in other circuits," but aligned itself with the Fifth Circuit in categorically rejecting the doctrine.

Petitioner's argument in support of the "exculpatory no" doctrine proceeds from the major premise that § 1001 criminalizes only those statements to Government investigators that "pervert governmental functions"; to the minor premise that simple denials of guilt to Government investigators do not pervert governmental functions; to the conclusion that § 1001 does not criminalize simple denials of guilt to Government investigators. Both premises seem to us mistaken. As to the minor: We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard of. Moreover, as we shall see, the only support for the "perversion of governmental functions" limitation is a statement of this Court referring to the *possibility* (as opposed to the certainty) of perversion of function-a possibility that exists whenever investigators are told a falsehood relevant to their task.

In any event, we find no basis for the major premise that only those falsehoods that pervert governmental functions are covered by § 1001. Petitioner derives this premise from a comment we made in *United States v. Gilliland*, 312 U.S. 86 (1941), a case involving the predecessor to § 1001. That earlier version of the statute subjected to criminal liability "'whoever shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States . . . .'" The defendant in *Gilliland*, relying on the interpretive canon *ejusdem generis*, argued that the statute should be read to apply only to matters in which the Government has a financial or proprietary interest. In rejecting that argument, we noted that Congress had specifically amended the statute to cover "'any matter within the jurisdiction of any department or agency of the United States,'" thereby indicating "the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." Petitioner would elevate this statement to a holding that § 1001 does not apply where a perversion of governmental functions does not exist. But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to

remedy-even assuming that it is possible to identify that evil from something other than the text of the statute itself. . . . And even the relied-upon dictum from *Gilliland* . . . acknowledges the reality that the reach of a statute often exceeds the precise evil to be eliminated. There is no inconsistency whatever between the proposition that Congress intended "to protect the authorized functions of governmental departments and agencies from the perversion which might result" and the proposition that the statute forbids *all* "the deceptive practices described."

The second line of defense that petitioner invokes for the "exculpatory no" doctrine is inspired by the Fifth Amendment. He argues that a literal reading of § 1001 violates the "spirit" of the Fifth Amendment because it places a "cornered suspect" in the "cruel trilemma" of admitting guilt, remaining silent, or falsely denying guilt. This "trilemma" is wholly of the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a "lemma."). And even the honest and contrite guilty person will not regard the third prong of the "trilemma" (the blatant lie) as an available option. . . . Whether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. "[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely." . . .

Petitioner repeats the argument made by many supporters of the "exculpatory no," that the doctrine is necessary to eliminate the grave risk that § 1001 will become an instrument of prosecutorial abuse. The supposed danger is that overzealous prosecutors will use this provision as a means of "piling on" offenses-sometimes punishing the denial of wrongdoing more severely than the wrongdoing itself. The objectors' principal grievance on this score, however, lies not with the hypothetical prosecutors but with Congress itself, which has decreed the obstruction of a legitimate investigation to be a separate offense, and a serious one. It is not for us to revise that judgment. . . .

In sum, we find nothing to support the "exculpatory no" doctrine except the many Court of Appeals decisions that have embraced it. . . . Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language of § 1001 admits of no exception for an "exculpatory no," we affirm the judgment of the Court of Appeals.

Justice GINSBURG, with whom Justice SOUTER joins, concurring in the judgment.

. . . At the time of Brogan's offense, § 1001 made it a felony "knowingly and willfully" to make "any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001 (1988 ed.). That encompassing formulation arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt. . . .

[Section] 1001 may apply to encounters between agents and their targets "under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction." Because the questioning occurs in a noncustodial setting, the suspect is not informed of the right to remain silent. Unlike proceedings in which a false statement can be prosecuted as perjury, there may be no oath, no pause to concentrate the speaker's mind on the importance of his or her answers. As in Brogan's case, the target may not be informed that a false "No" is a criminal offense until *after* he speaks.

At oral argument, the Solicitor General forthrightly observed that § 1001 could even be used to "escalate completely innocent conduct into a felony." More likely to occur, "if an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers. If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove." If the statute of limitations has run on an offense-as it had on four of the five payments Brogan was accused of accepting-the prosecutor can endeavor to revive the case by instructing an investigator to elicit a fresh denial of guilt. Prosecution in these circumstances is not an instance of Government "punishing the denial of wrongdoing more severely than the wrongdoing itself," it is, instead, Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable. It is doubtful Congress intended § 1001 to cast so large a net. . . .

The Court's opinion does not instruct lower courts automatically to sanction prosecution or conviction under § 1001 in all instances of false denials made to criminal investigators. The Second Circuit, whose judgment the Court affirms, noted some reservations. That court left open the question whether "to violate Section 1001, a person must know that it is unlawful to make such a false statement." And nothing . . . this Court said suggests that "the mere denial of criminal responsibility would be sufficient to prove such [knowledge]." Moreover, "a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent," and a jury could be instructed that it would be permissible to draw such an inference. Finally, under the statute currently in force, a false statement must be "materia[l]" to violate § 1001.

The controls now in place, however, do not meet the basic issue, *i.e.*, the sweeping generality of § 1001's language. Thus, the prospect remains that an overzealous prosecutor or investigator aware that a person has committed some suspicious acts, but unable to make a criminal case-will create a crime by surprising the suspect, asking about those acts, and receiving a false denial. Congress alone can provide the appropriate instruction.

Lies to corporate counsel as crimes? In the 2000s, the Justice Department appeared to be experimenting with a controversial application of Section 1001 and the obstruction statutes in corporate crime investigations.

The government's idea was that corporate employees could be charged with making false statements in a federal matter if they lied to company counsel conducting an internal investigation into criminal wrongdoing—on the theory that, under the current regime for investigating and negotiating corporate criminality, employees know that their statements to internal investigators will be provided to government agents and prosecutors and will likely influence their conduct.

Sanjay Kumar and Stephen Richards, former senior executives of New York-based Computer Associates, were indicted on this theory in 2004, based on allegedly having crafted a false story for others in the management group to provide to investigators from an outside law firm, with the hope of curtailing an investigation into accounting fraud. Kumar and Richards moved to dismiss the obstruction charges and the trial court denied their motions to dismiss, finding the legal theory sufficient to warrant trial. Kumar and Richards then pled guilty. Similarly, in 2006, the Justice Department charged Greg Singleton, a Houston-based energy trader, with obstruction of justice for lying to his employer's own investigators in a matter involving energy price manipulation. Singleton pled guilty in the case and the obstruction issues were never litigated.

Although it appears that the Justice Department has not pressed this theory in recent years, it is not known whether the Department has threatened or warned witnesses of the possibility of the theory's continued application. What would be the implications for the government, corporations, and individuals if the Justice Department were to press this legal theory in the future?

Problem 9-2

(a) Consider the breadth of prosecutorial discretion under the false statements statute. Recall the Martha Stewart fact pattern in Problem 8-3. Stewart was also prosecuted for violating 18 U.S.C. § 1001 based on her statements in the interviews with government investigators. Should she have been so prosecuted? Is this an example of Justice Ginsburg's concern in her opinion in *Brogan*?

(b) Consider the question of prosecutorial discretion more broadly. To take FY2009 as an example, the federal government prosecuted about 300 cases of perjury and false statements nationally. How many times would you estimate that each of these crimes was committed? How should one estimate those numbers? How might one assess whether the government is prosecuting too many, too few, or the right number of perjury and false statements cases? What criteria should prosecutors use for selecting which such cases to prosecute?