

Obscene Harpies and Foul Buzzards? The FBI's Use of Section 1001 in Criminal Investigations

Several federal courts have recently upheld criminal prosecutions under the federal false statements statute¹ for statements made to the Federal Bureau of Investigation in its role as criminal investigator. No doubt the courts were well-intentioned: they may have hoped to conserve the resources of the FBI by minimizing useless activities initiated on the basis of false information, or they may have desired to protect innocent third parties from false complaints or statements made to the FBI. These decisions, however, radically expand the use of Section 1001 of the Criminal Code beyond what Congress intended and raise serious questions about the extent to which lying—even lying to government officials—ought to be punished criminally.

I. History of Section 1001

The Federal government has long legislated against fraud by those whom it regulates or with whom it does business. As early as 1863,² a False Claims Act was enacted that prohibited knowing use of false vouchers to obtain government funds. This Act was codified as Section 35 of the Criminal Code and was amended in 1918 to penalize false statements made “for the purpose and intent of cheating and swindling or defrauding the government.”³ In 1926, however, the Supreme Court limited the scope of the 1918 amendment to frauds involving “the wrongful obtaining of money and other property of the Government.”⁴

Responding partially to the Court-imposed restriction and partially

1. § 1001. *Statements or entries generally.*

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

18 U.S.C. § 1001 (1964).

2. Act of March 2, 1863, ch. 67, 12 Stat. 696.

3. Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015.

4. *United States v. Cohn*, 270 U.S. 339 (1926). The Court read the Act's phrase “defrauding the government” as restricted to “the wrongful obtaining of money and other property of the Government,” with no reference to the impairment of government functions. Cohn was acquitted of making false statements on a bond given a customs inspector for release of a shipment of foreign merchandise, because this infraction involved only the hampering of a government function and not the loss of government property.

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to the New Deal's delegation of important responsibilities to government administrative agencies, Congress amended the law in 1934 to cover deception of government departments generally. But Congress' intent was quite narrow. In passing what became Section 1001, it intended to safeguard the final decisions of the new federal regulatory agencies by punishing the submission of false information on which the agencies' decisions must rest. Section 1001 was never intended to address the problem of false statements made to a government investigator during an investigation.

The 1934 amendments originated in the efforts of the Interior Department to reach

a large number of cases involving the shipment of "hot" oil, where false papers are presented in connection therewith, and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages which are paid. . . .⁵

During the debate on the bill which emerged from the Senate Judiciary Committee, Senator Ashurst explained that it was designed to allow prosecution of the "obscene harpies [and] foul buzzards" who "knowingly make false certificates and supply fictitious bids" to every department of the Government.⁶ President Roosevelt vetoed the act for reasons not relevant here,⁷ but when a subsequent House-passed amendment to Section 35⁸ reached the Senate, the Judiciary Committee incorporated the protections desired by the Department of the Interior,⁹ using language similar to the vetoed bill. The amended provisions were approved by both houses of Congress¹⁰ and in 1948 were recodified

5. Letter from Secretary of the Interior to Senate Judiciary Committee, S. REP. NO. 1202, 73d Cong., 2d Sess. 1 (1934).

6. 78 CONG. REC. 2858 (1934). Originally designed to protect the agencies of the Interior Department, the bill was amended on the Senate floor to include statements made to "any department or agency of the United States."

7. 78 CONG. REC. 6778-79 (1934).

8. 78 CONG. REC. 8136-37 (1934).

9. The following explanation of the bill's purpose was offered when it was introduced onto the Senate floor for debate:

There is nothing which permits us to make an investigation and prosecute persons who are engaged in the "kick back" practice. They made false returns, claiming they paid certain amounts to their employees, when they have not done so. This bill just amends the law so as to give the Federal Government authority to deal with that class of cases.

78 CONG. REC. 11270 (1934).

10. The measure was passed with minimal debate in the Senate, 78 CONG. REC. 11271 (1934), and the Senate amendments were approved without debate in the House, 78 CONG. REC. 11513 (1934).

as Section 1001 of the Criminal Code.¹¹ While the Supreme Court has interpreted the Section broadly, allowing prosecutions in cases involving informal oral statements¹² and legislative as well as administrative agencies,¹³ the focus of both courts and prosecutors has been on statements such as production reports and wage claims which are central to the government's regulatory decisions and business transactions.

Both the original conception and the enforcement policy of 30 years behind Section 1001 thus rest heavily on the narrow justification of protecting the final determinations of government agencies. Recently, however, Section 1001 has been applied to persons making statements to government agents involved in criminal investigations. The Second Circuit warmly embraced such use of Section 1001 recently in *United States v. Adler*¹⁴ without adequately considering the unfortunate con-

11. Various minor amendments of form and a reduction of the maximum imprisonment from ten to five years in 1948 produced the current Section 1001. At that time the section was split so that false claims are covered by 18 U.S.C. § 287 and false statements by 18 U.S.C. § 1001. The Supreme Court has held that this division implied no substantive change in the statute. *United States v. Bramblett*, 348 U.S. 503 (1955). The civil nature of the Section's goals is emphasized by the Reviser's Note to the 1948 amendment, which points out that the penalty was being reduced to conform to other "comparable sections." The sections cited all involved false entries or actions in collecting monetary claims on the government or in administering federally-insured financial institutions—such criminally-oriented statutes as the perjury or misprision of felony laws were not cited. H.R. REP. NO. 304, 80th Cong., 1st Sess. A25, A81 (1948).

12. *Marzani v. United States*, 168 F.2d 133 (D.C. Cir. 1948), *aff'd mem. by an equally divided court*, 335 U.S. 895 (1948) (Douglas, J., not sitting), involved false statements made in an informal State Department interview regarding termination of employment. The ambiguity over the word "statement" arose from a subtle difference between the words of the original vetoed bill and those of Section 35 as finally amended. The original bill prohibited the making or presentation of "any false or fraudulent affidavit, declaration, certificate, vouchers, paper, or writing to be such," while the final wording simply forbade "any false or fraudulent statements." There is no indication in the legislative history that alteration in the wording was made for any but reasons of brevity. The following exchange occurred during the House debate on the bill:

Mr. Eltse: It does not provide for false verbal testimony, then?

Mr. McKeown: No. That would be a different offense.

Mr. Eltse: If he appears before any board or commission or agency or administration, as it is provided in this bill, and gives testimony that is false, why should it not apply to him just the same as it does the man who makes a written bid?

Mr. McKeown: The trouble is, there is always a dispute as to whether he said it or whether he did not, but when he puts it on paper, there is no dispute about it.

.....
It is the purpose of the Department [of the Interior] to print this statute right on every proposal so as to deter persons from getting into this trouble rather than punish them after they get into it.

Mr. Eltse: If you are going to make the bill effective, why do you not extend it to verbal testimony?

Mr. McKeown: It is an unheard of proposition to try to convict a man for a mere statement unless he has testified under oath. If he has testified under oath, then there is a penalty for this [under the perjury laws].

78 CONG. REC. 3724 (1934).

13. *United States v. Bramblett*, 348 U.S. 503 (1955) upheld a conviction under Section 1001 for false statements in pay voucher to the House Dispersing Office.

14. 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967) (Black, J., dissenting).

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sequences of such an unwarranted expansion of the statutes to cover both false complaints made to the FBI¹⁵ and false statements made during its investigations.

II. False Complaints Starting Investigations

The *Adler* case involved a false complaint to the FBI. The defendant appeared at the New York office of the FBI and told an agent that he hoped the Bureau would "reprimand" various government officials who had solicited bribes from "a friend" in return for allowing the continuation of the friend's federal construction project. The agent elicited Adler's admission that the "friend" was actually Adler himself and then warned the defendant of his right to silence. Adler refused to make any further statement and remained silent throughout most of the subsequent FBI and grand jury investigations of the matter. More than two years after the original interview, two FBI agents were in Adler's office checking his business records in connection with the continuing inquiry; Adler again initiated a discussion of his difficulties with his government contracts. The agents warned him of his right to remain silent, but, in the words of the court, Adler

[w]ent on to say that the bribery accusation he had made in 1963 was false, that he had made the accusation to "get even" with the government personnel handling his contract because they had been giving him a "rough time," and that he had hoped that an investigation by the FBI might keep the officials "off his back."¹⁶

The Second Circuit held that these facts established an offence under Section 1001, since the statement was known to be false, was made to a government agency, and concerned a matter within its jurisdiction.

This conclusion is vulnerable to a number of challenges. In other cases involving the use of the Section to police criminal investigations, the element of falsity has been read strictly to require that it concern a "material fact,"¹⁷ and some courts have restrictively defined a govern-

15. Although the FBI is usually the agency involved, special agents for other Government bodies also conduct criminal investigations. Cf. note 47 *infra*.

16. 380 F.2d at 920.

17. *United States v. Brandow*, 268 F.2d 559 (9th Cir. 1959); *Freidus v. United States*, 223 F.2d 598 (D.C. Cir. 1955); *United States v. Rice Growers Ass'n*, 110 F. Supp. 667 (N.D. Cal. 1953); cf. *United States v. Quirk*, 167 F. Supp. 462 (E.D. Pa. 1958), *aff'd* 266 F.2d 26 (3d Cir. 1959). In *Brandow* Judge Barnes of the Ninth Circuit observed that "[t]his requirement of materiality has been described as essential by the greater weight of authority. . . ." 268 F.2d at 565. But see *United States v. Rinaldi*, 393 F.2d 97 (2d

ment "department or agency."¹⁸ But more important is the challenge to the *Adler* concept of "jurisdiction" raised by cases such as *Friedman v. United States*,¹⁹ an Eighth Circuit false complaint decision handed down shortly before *Adler*.

In a written complaint to the FBI, Friedman stated that he had been beaten while in the custody of the Missouri State Highway Patrol. As the court of appeals noted, the patrolman admitted that he had "scuffled" with Friedman, and Friedman had sustained "small, observable injuries." But the resulting FBI investigation gave rise to no prosecution of the officer; instead, Friedman was indicted and convicted under Section 1001.²⁰

The court of appeals reversed. Judge Gibson held for the majority that the alleged offence did not fall "within the jurisdiction" of the FBI. The court pointed out that the purpose of Section 1001 was "to contain the flow of false information to the newly created regulative agencies," and that if "the Congress wanted unsworn statements to investigative officials to serve as the basis for severe criminal punishment, . . . it would have said so in clear, direct and positive terms."²¹

The court stated that an agency could consider a false statement to be made "within its jurisdiction" in the meaning of Section 1001 only when exercising (1) "the power to allow the privilege or to grant the award" desired or (2) "the power to enact binding regulatory requirements and determine if, and to what extent, an individual comes within the regulatory proscriptions."²² FBI criminal investigations would thus not be included, since only the trier of fact can finally determine whether an individual is criminally liable.²³ The Eighth Cir-

Cir. 1968), *petition for cert. filed*, June 6, 1968, 37 U.S.L.W. 3059, in which the court held that materiality need not be proved in a case involving oral and written statements before the Immigration and Naturalization Service. See also *United States v. McCue*, 301 F.2d 452, 456 (2d Cir. 1962).

18. *United States v. Allen*, 193 F. Supp. 954 (S.D. Cal. 1961). The court held that the statements involved, which had been made before a grand jury, were not made to an "agency" within the ambit of Section 1001. See also *Terry v. United States*, 131 F.2d 40 (8th Cir. 1942), which held that statements on loan applications to institutions insured by the FHA were not made to a government agency until the FHA had actually taken some action in regard to the loan. There is no real question that in its civil functions the FBI qualifies as an "agency" and could, for instance, legitimately use Section 1001 against a contractor who submitted false information on his bid to supply the FBI with materials, etc. See *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955), which includes an extensive discussion of the origin of the FBI and its role in criminal investigations.

19. 374 F.2d 363 (8th Cir. 1967).

20. 374 F.2d at 365.

21. 374 F.2d at 367, 369.

22. 374 F.2d at 369.

23. Several other decisions have dealt with the proper breadth to be given "jurisdiction" in Section 1001. *United States v. Moore*, 185 F.2d 92 (5th Cir. 1950), held a false statement in an investigation under the Fair Labor Standards Act was not covered by

cuit's opinion seems accurately to reflect Congress' motivation in enacting Section 1001. For society is more concerned that the final decision of agencies be free from errors than that all information given to investigators be true.

The *Adler* opinion argued that a false complaint leading to an unnecessary investigation "perverts"²⁴ the operations of the FBI and wastes its resources. The court felt that Section 1001 was enacted to promote administrative efficiency, and found no evidence "that Congress in enacting § 1001 intended to conserve the energies of only certain agencies."²⁵ Not only does this overlook the point, suggested by the *Friedman* court, that Section 1001 was enacted to prevent only deception of government agencies making final determinations on the basis of documents alone, but the Second Circuit's balancing of this interest against that of free access to make complaints to the FBI is hardly compelling. *Adler* merely asserts that "individuals, acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the FBI."²⁶ However, the definition of the intent necessary for a conviction under Section 1001 would hardly encourage a person to report a possible deprivation of his rights.²⁷ In line with the proof requirements for false complaints in

Section 1001, since the investigation was only an exploratory search to ascertain whether the agency had jurisdiction. There are several cases holding that an investigation is not within the meaning of "jurisdiction" in Section 1001 since the FBI does not have power to determine whether a crime has been committed. *United States v. Davey*, 155 F. Supp. 157 (S.D.N.Y. 1957); *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955); *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1955). *Contra*, *United States v. Van Valkenberg*, 157 F. Supp. 599 (D. Alas. 1958). But some employment security cases hold that false statements on such questionnaires are within the jurisdiction of the agency involved even if not relied on by the agency or presented directly to it. *Blake v. United States*, 323 F.2d 245 (8th Cir. 1963); *Ogden v. United States*, 303 F.2d 724 (9th Cir. 1962). In *Ogden* an Air Force Security Questionnaire was given to a private employer; the defendant was convicted although the Air Force never saw the form or took any action on the request.

24. "The making of intentionally false statements to the FBI calculated to provoke an investigation by that agency may cause more 'perversion' of authorized agency functions—and more harm to individuals—than false pecuniary and property claims which are clearly covered by the statute." 380 F.2d 917, 922. The Second Circuit's use of "perversion" is a misreading of the Supreme Court's comment in *United States v. Gilliland* that Section 1001 showed Congressional intent "to protect the authorized function of governmental departments and agencies from the perversion that might result from the deceptive practices employed." 312 U.S. 86, 93 (1941). While the Second Circuit sees the unnecessary investigation as the "perversion," the *Gilliland* opinion had only mentioned this point to show that a government agency's functions have been perverted when it is deceived in making determinations besides those involving governmental pecuniary or property loss.

25. 380 F.2d at 922.

26. *Id.*

27. No evil intent need be alleged and only the making of the statement and its known falsity need be shown. *See Hirsch v. Immigration and Naturalization Service*, 308 F.2d 562 (9th Cir. 1962), which holds that since Section 1001 requires no proof of evil intent, conviction under it does not necessarily indicate conviction of a crime involv-

various state statutes²⁸ and those suggested by the Model Penal Code,²⁹ the courts³⁰ should also require, at the very least, the specific intent to start an investigation of a third party.³¹

ing moral turpitude which could justify an alien's deportation. *See also* McBride v. United States, 225 F.2d 249, 253 (5th Cir. 1955); United States v. Uram, 148 F.2d 187, 190 (2d Cir. 1945); United States v. Lohman, 127 F. Supp. 432 (S.D. Ohio 1953). The *Adler* opinion itself suggests a further criterion: that the false statement be "calculated to provoke an investigation by" the FBI, but the court used this phrase to describe the particular facts, and said that the statute in general required only that the defendant knew his words to be false. 380 F.2d at 920.

28. *See, e.g.*, MD. ANN. CODE art. 27, § 150 (1957); NEB. REV. STAT. § 28-744 (Supp. 1957); WIS. STAT. ANN. § 946.41(2)(b) (1958). The Maryland provision ("with intent to deceive and with intent to cause an investigation or other action to be taken as a result thereof") and the Nebraska law ("with the intent to instigate an investigation of an alleged criminal matter, or to impede an investigation of an actual criminal matter") are examples of the specificity of these statutes. A general discussion of some of the statutes in this area can be found in Broeder, *Silence and Perjury Before Police Officers: An Examination of the Criminal Law Risks*, 40 NEB. L. REV. 63 (1960).

29. The Model Penal Code covers "Unsworn Falsification to Authorities" in Section 241.3:

(1) *In General.* A person commits a misdemeanor if, with purpose to mislead a public servant in performing his official function, he:

- (a) makes any written false statement which he does not believe to be true; or
- (b) purposely creates a false impression in a written application for any pecuniary or other benefit, by omitting information necessary to prevent statements therein from being misleading; or
- (c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or
- (d) submits or invites reliance on any sample, specimen, map, boundary-mark, or other object which he knows to be false.

(2) *Statements "Under Penalty."* A person commits a petty misdemeanor if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(3) *Perjury provisions applicable.* Subsections (3) to (6) of Section 241.1 apply to the present section.

Section 241.4. False Alarms to Agencies of Public Safety.

A person who knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property commits a misdemeanor.

Section 241.5. False Reports to Law Enforcement Authorities.

(1) *Falsely Incriminating Another.* A person who knowingly gives false information to any law enforcement officer with purpose to implicate another commits a misdemeanor.

(2) *Fictitious Reports.* A person commits a petty misdemeanor if he:

- (a) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or
- (b) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

American Law Institute, Model Penal Code (Proposed Official Draft 1962) (emphasis except title headings supplied).

30. The courts have already begun the process of tightening the intent requirements of Section 1001. *Cf.* United States v. Jaben, 224 F. Supp. 603 (W.D. Mo. 1963), *aff'd*, 349 F.2d 913 (8th Cir. 1965). One decision implies that specific intent to deceive must be proved: United States v. United States Cartridge Co., 95 F. Supp. 384, 395 (E.D. Mo. 1950), *aff'd*, 198 F.2d 456 (8th Cir. 1952).

31. Protecting third parties from investigations instigated by false complaints is a justification often advanced for the use of Section 1001 to sanction false reports. While such protection is a commendable goal, Section 1001 is an inept tool to this end. The third party has no standing to instigate the suit, which is instead the government's prerogative, and there is no guarantee that persons harassed by FBI investigations are ones

The danger of *Adler's* application of Section 1001 to false complaints to the FBI, particularly if the section is not qualified by a requirement of specific intent, is made apparent by *Friedman* in which the defendant was convicted for a complaint of police brutality which was held to be false. Clearly the enforcement of federally-guaranteed rights will be hampered if citizens hesitate to bring forward complaints of possible deprivations of their rights out of fear that they might face prosecutions in which they will have to prove the truth of the circumstances which they had originally asked the FBI to investigate.³² While it is unlikely that the FBI would initiate Section 1001 prosecutions to the extent of drying up all its sources of information,³³ the existence of this discretion emphasizes the possibility that the statute may be abused by discriminatory enforcement depending on local prejudice or generalized dislike of certain groups.³⁴

III. False Statements During Investigations

The *Adler* decision raises a yet more unpleasant specter, however, in its expansive view of the use of Section 1001 to punish inaccurate statements made during FBI investigations. Unfortunately, the *Adler* case is not alone in the suggestion. In *Brandow v. United States*,³⁵ the defendant was successfully prosecuted under Section 1001 for signing a statement before Internal Revenue Service Special Agents (whose investigative function parallels that of the FBI) denying that he had offered to disclose the government's tax evasion case against a third person. At the time, the defendant was the center of an investigation on this issue. There apparently was no prosecution of the defendant for any substantive crime, yet he was convicted of a felony under Section

whom the government will move speedily to protect. In addition, suits for libel or malicious prosecution under state statutes already provide remedies for such third parties. See p. 169 *infra*. This need for court-supplied specific intent merely provides a further example of the strained interpretations of Section 1001 necessary to conform it to use in FBI criminal investigations.

32. The *Friedman* case illustrates the burden being placed on complainants. Although the officer admitted that he had scuffled with the defendant and that the defendant had noticeable injuries, the jury nevertheless found the complaint to be knowingly false.

33. This concern of the FBI would be particularly apparent in those cases, often consensual crimes such as vice and narcotics prosecutions, in which a strong informer network is seen by law enforcement officials as vital. Cf. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* ch. 6 (1966).

34. Negroes complaining of a deprivation of their civil rights or members of politically or socially deviant groups (such as war protestors or "flower children") suffering official harassment, might be deterred by such possibilities from pressing for federal enforcement of their rights.

35. 268 F.2d 559 (9th Cir. 1959).

1001 for denying his guilt. The court specifically declined³⁶ to follow the reasoning of *United States v. Levin*³⁷ and *United States v. Stark*,³⁸ both of which hold that such "exculpatory no's" cannot be defined as "statements" under an investigative agency's "jurisdiction" under Section 1001. The suggestion of the *Brandow* holding and the *Adler* dictum that false statements of witnesses and denials of guilt by prospective defendants can lead to felony convictions under Section 1001,³⁹ not only goes against legislative history but in many circumstances may contravene recent Supreme Court decisions on self-incrimination.

Congress has sharply limited the power of the Federal Bureau of Investigation, compared with other federal investigating units,⁴⁰ to administer oaths during inquiries and to sanction false statements through the perjury laws.⁴¹ The possibilities for entrapment which are inherent in the *Adler* view of Section 1001 suggest that these limita-

36. *Id.* at 564.

37. 133 F. Supp. 88 (D. Colo. 1953).

38. 131 F. Supp. 190 (D. Md. 1955).

39. Underlying much of the concern about the use of Section 1001 in criminal investigations is the harsh penalty possible under its terms, which might almost rise to the level of "cruel and unusual punishment." Prosecutors are not immune to this concern. One former Assistant U.S. Attorney has written of the lengths to which his office went to find alternative statutes to prosecute persons who made certain false statements but did not deserve a felony conviction. In one case it used a state statute in connection with the Federal Assimilative Crimes Act. Kaplan, *Prosecutorial Discretion—A Comment*, 60 Nw. U.L. Rev. 174, 189 (1965). There is no guarantee, of course, that other prosecutors will be so inventive.

The sanctions in Section 1001 are heavier than those provided by either the similar state statutes or federal perjury law. The federal Section 1001 allows a maximum of five years' imprisonment, for example, while the most severe state penalty, Wisconsin's, provides for one year's imprisonment. Wis. STAT. ANN. § 946.41(1) (1958). The federal perjury statute, 18 U.S.C. § 1621 (1964), allows a five year prison term, but the maximum fine is only \$2000, compared with Section 1001's \$10,000 limit. Section 1001's provision for heavy punishment, together with lower proof requirements in comparison to the perjury laws, accounts for at least one prosecutor's substituting use of Section 1001 for the customary perjury charge in connection with false statements made under oath in the case. *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955). The "two-oath rule"—that at least two affidavits alleging perjury are necessary in a perjury prosecution—does not apply to Section 1001 cases. *Fisher v. United States*, 254 F.2d 302 (9th Cir. 1958); see also *United States v. McCue*, 301 F.2d 542 (2d Cir. 1962).

40. *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953), catalogues the far wider powers of other government agencies to administer oaths, grounded in 5 U.S.C. § 303 (1964), as amended (Supp. II, 1966).

41. The FBI does have the power to administer oaths when it investigates "attempts to defraud the United States, or any irregularity or misconduct of an employee or agent of the United States." 5 U.S.C. § 303 (1964), as amended (Supp. II, 1966), which is applied to the FBI by 28 U.S.C. § 535(a) (1964), as amended (Supp. II, 1966). But this power does not extend to the agency's general criminal investigations. The administration of an oath prior to a confession may be held to be so coercive on the suspect as to exclude the confession from the subsequent trial. F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS*, 203-04 (2d ed. 1967) [hereinafter cited as INBAU & REID]. One commentator advocates the suspension of all oath administration, arguing that it is an anachronistic practice incompatible with democratic society and modern rationality. Silving, *The Oath*, 68 YALE L.J. 1527, 1576-77 (1959). See note 66 *infra*.

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tions on the FBI are sensible and should be read into Section 1001. In fact, they should apply to the use of Section 1001 by all government units conducting investigations and particularly those conducting criminal investigations.⁴² Many factors make the use of Section 1001 against a witness both unwise and unfair. When an FBI agent takes a witness's statement, the state has deliberately created a situation in which the person interrogated may desire only to rid himself quickly of the investigator and any connection with the investigation.⁴³ He is seeking nothing from the FBI in contrast to a person requesting a license or paycheck from a federal agency. The FBI has sought him out; he may make a false statement simply to prevent future demands on his time. Particularly in the case of a witness, an agent may urge the person to talk and may attempt to disparage any harm that might result to the witness from his statements; an agent in these circumstances could easily enhance a witness's possible inclination to lie.⁴⁴

The untoward effect which Section 1001 would have on *witnesses* is further exacerbated when *suspects* are being interrogated. The use of the false statements statute to prosecute suspects runs clearly contrary to high court decisions recognizing a suspect's right to refuse to answer incriminating questions during investigations, in the absence of an immunity statute or valid waiver of fifth amendment rights.⁴⁵ Section 1001 carries the implication in such situations that the suspect has a

42. Cf. note 47 *infra*.

43. The Second Circuit, in *United States v. Bulfalino*, 285 F.2d 403 (2d Cir. 1960), stated unanimously:

even an otherwise law-abiding citizen who is stopped and interrogated by the police, and who is given no reason for his detention and questioning, may feel it is his right to give as little information as possible and even perhaps to respond evasively if he believes he might thereby be earlier rid of police inquiry. That others may at times go to the brink of truth, or beyond, is likely, particularly when . . . they know that the existing law does not require them to give a truthful account to police officers.

285 F.2d at 415. Cf. *United States v. Davey*, 155 F. Supp. 175, 178 (S.D.N.Y. 1957).

44. Cf. Duke, *Prosecution for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966). See also INBAU & REID 119-23, on techniques of interviewing witnesses in general, including the necessity of minimizing their fears of possible retaliation for their cooperation with law enforcement agencies. Faculty Note, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967), describes some of these techniques in practice. The normal Section 1001 prosecution is for false statements made on government forms which, although not filled out under oath, bear a printed warning of the statutory penalties for false statements, but neither the oath nor the printed warning exists in the case of an oral FBI interview. Under civil law practice oaths are not administered during criminal investigations "to protect the declarant not only against the danger of criminal prosecution for perjury, but also against being required to relate 'events in which he played a more or less odious role.'" Silving, *supra* note 41, at 1535-36.

45. See *In re Groban*, 352 U.S. 330 (1957). Cf. *Hannah v. Larche*, 363 U.S. 420 (1960), upholding various *investigative* procedures of the Civil Rights Commission, while pointing out that the procedures would be unconstitutional in an *adjudicative* hearing.

duty to confess his guilt, on a possibly vague charge, during the initial interview.⁴⁶ While the elaborate safeguards necessary to assure that only voluntary statements are obtained by the police need not attach before a criminal investigation has focused on a suspect,⁴⁷ it would be a major departure to subject such statements to the "hundred-percent truthfulness" standard of Section 1001.

A number of cases suggest the seriousness of this danger in any derogation, caused by the use of Section 1001, of a suspect's right to answer or refuse to answer any questions as he chooses. For example, in *United States v. Levin*,⁴⁸ the trial court dismissed the section of the indictment involving Section 1001 in which the defendant had been accused of falsely denying any knowledge of an emerald ring during an FBI interrogation:

Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted.⁴⁹

46. Section 1001 applies to anyone who "wilfully . . . conceals or covers up" a material fact, as well as to one making false statements (emphasis added).

47. Cf. *Miranda v. Arizona*, 384 U.S. 436, 439 n.7 (1966); *INBAU & REID* 182-83. The problems here are accentuated by the mixed functions of many government investigating units; for example, an FTC or IRS agent may ask questions and request information on the grounds of the need to develop a study of general conditions in a given industry or on a tax matter, and then use the information to initiate a prosecution against the individual. See *Hanna v. Larche*, 363 U.S. 420 (1960); *Pollock, Pre-Complaint Investigations by the Federal Trade Commission*, 45 CHI. B. REC. 379, 380 (1964); Note, *The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings*, 72 YALE L.J. 1227 (1963); *Duke, Prosecution for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966). But see *Newman, Due Process, Investigations and Civil Rights*, 8 U.C.L.A.L. REV. 735 (1961).

The FBI actually presents an easier case for, unlike the FTC and IRS, it only investigates, then turns the information it has gathered over to the United States Attorney or other government official for prosecution. See *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955); Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 NW. U.L. REV. 333 (1954); Hoover, *The Civil Investigations of the FBI*, 1 SYRACUSE L. REV. 380 (1950); Powers, *FBI Investigations*, 65 COM. L.J. 326 (1960).

48. 133 F. Supp. 88 (D. Colo. 1953).

49. 133 F. Supp. at 90. Other cases involving such denials of guilt contain similar rationales. See *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955) (defendant falsely

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It is unfortunate that this rejection of the use of Section 1001, when a suspect's statement consists solely of an "exculpatory no" was disapproved by *Adler* in dicta. Moreover, even the "exculpatory no" limitation is itself inadequate in that it turns on the phrasing of a question regarding the defendant's guilt and on the number of words used in his reply. Any distinction between a negatively phrased false statement and an affirmatively phrased one is at best arbitrary and is most certainly not substantial enough to justify the application of Section 1001 in one case and not the other.⁵⁰

Some discussions of Section 1001⁵¹ have dismissed the dangers of its use against false statements by suggesting that the statute could be confined to false complaints. But the logic of applying Section 1001 to complaints must lead to its application to statements generally since it is nearly impossible to distinguish the two or to justify a distinction. It has been suggested that false complaints cause greater harm and are motivated most clearly by an evil intent. But a false complaint may start an investigation that is quickly ended; a false statement during an investigation could easily balloon it unwarrantably to include innocent people and wasted manhours. And a wilfully false statement may be motivated by an intent as evil as that behind a false complaint. The key issue is whether Section 1001 ought to be used during criminal investigations at all.

denied involvement in a bribery attempt of an official of the Federal Housing Authority); *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957) (defendant was indicted for denying to FBI agents that he had used an alias when registering under the Selective Service Act); *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962) (defendant denied involvement in New Orleans police graft in interview with Internal Revenue Service Special Agent); *United States v. Phillippe*, 173 F. Supp. 582 (S.D.N.Y. 1957) (defendant denied to IRS Special Agent that he had received unreported "kick back" income for making hotel supply purchases). *Contra*, *Brandow v. United States*, 268 F.2d 559 (9th Cir. 1959).

50. For example, is it justifiable to convict a man who, being asked "You don't know who committed this crime, do you?" answers "Yes, that's right" (an affirmative statement), but not one who when asked "Do you know who committed this crime?" says "No, I don't" (an exculpatory no). Or is there any rational basis to differentiate between these three false answers to "Did you meet Joe on the corner last Wednesday?": A) "No." B) "I don't know Joe." or C) "I was at my mother's house Wednesday afternoon."

And what of the "exculpatory yes?" For instance, if an FBI agent questions a young man suspected of turning in his draft card, "Do you have your card on your person?" and is falsely told "Yes," has Section 1001 been violated, while it would not have been had the agent asked, "Did you turn in your card?" and was falsely told "No."

There are positions on either side of the "exculpatory no" rationale as well. On the one hand, the Second Circuit would include all of the above hypotheticals as "statements" under Section 1001, *United States v. McCue*, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962), and on the other, the district court in *United States v. Allen*, 193 F. Supp. 954 (S.D. Cal. 1961), held that any answer to a question is not a "statement" (alternative holding).

51. See Note, 14 WAYNE L. REV. 642 (1968); Case Note, 37 U. CIN. L. REV. 238 (1968); cf. Note, 5 HOUSTON L. REV. 548 (1968).

IV. Alternatives

Even if the section is eliminated from the investigative activities of government agencies like the FBI, the agencies are not left wholly unprotected. First, the desire of most citizens to cooperate with law enforcement officials should not be overlooked.⁵² Second, false statements on wage, employment, or other such forms would still be covered by Section 1001. Third, other remedies are open to both the FBI and innocent individuals who are injured by false statements or complaints. For example, the federal misprision of felony statute punishes "whoever, having knowledge of the actual commission of a felony" under federal law "conceals and does not as soon as possible make known the same [to a] person in civil or military authority under the United States."⁵³ Although a mere failure to inform is not an offense,⁵⁴ the statute has been applied to one who deliberately induces "cover investigations" or makes misleading statements to throw suspicion from a known felon.⁵⁵

The accessory-after-the-fact statute can also be employed to cover assistance given to violators of any provision of the federal Criminal Code. The statute punishes "[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment."⁵⁶ False statements to investigating officers have been found to constitute active aid.⁵⁷

When more than one person is involved, the federal statute punishing conspiracies to "commit an offense" against the United States or to

52. Cf. Broeder, *supra* note 28, at 103.

53. 18 U.S.C. § 4 (1964).

54. See, e.g., *Bratton v. United States*, 73 F.2d 795 (10th Cir. 1934).

55. In *Neal v. United States*, 102 F.2d 643 (8th Cir. 1939), the fact that the defendant had given federal investigating officers misleading statements was grounds for the jury to infer that the defendant failed to disclose the details of the crime within his knowledge. A new trial was ordered in *Neal* because the government failed to prove active concealment of evidence, an essential element under the misprision of felony statute. *Id.* at 650.

56. 18 U.S.C. § 3 (1964).

57. *Hiram v. United States*, 354 F.2d 4 (9th Cir. 1965). There are also three obstruction of justice sections in the Criminal Code, 18 U.S.C. § 111 (1964) ("Assaulting, resisting or impeding certain officers or employees"); 18 U.S.C. § 1503 (1964) ("Influencing or injuring officer, juror or witness generally"); 18 U.S.C. § 1501 (1964) ("Assault on process server"). But judicial construction has foreclosed their use because physical force is required, *Long v. United States*, 199 F.2d 717, 719-20 (4th Cir. 1952); because a judicial tribunal must be directly involved, *United States v. Bulfalino*, 285 F.2d 408, 416 (2nd Cir. 1960) (FBI agents not a judicial tribunal); and because a mere false statement to an officer has been explicitly held insufficient, *Miller v. United States*, 230 F.2d 486 (5th Cir. 1956). The court commented that the perjury statute, with its stringent proof requirements, should suffice. A useful discussion of these statutes is contained in Broeder, *supra* note 28, at 69-80.

"defraud the United States" is available.⁵⁸ The phrase "defraud the United States" has been so broadly defined under this section that separate prosecutions of those conspiring to make false statements are possible on the fraud count alone.⁵⁹ The FBI can also obtain the protection of the perjury laws through its power to administer oaths in investigations involving "frauds on, or attempts to defraud the government, or any irregularity or misconduct of any officer or agent of the United States."⁶⁰ In addition to these substantive offenses, the information-gathering interest of the prosecution is protected by the subpoena power available to the grand jury and at the preliminary hearing.

The individual who might be needlessly implicated in a government inquiry because of a false complaint or statement also has statutory protection in the form of libel and malicious prosecution laws. Although these statutes afford private remedies under the laws of the various states, they would nevertheless act as deterrents to reckless involvement of persons in federal investigations. For example, a recent Wisconsin case, *Otten v. Schutt*,⁶¹ allowed compensatory and punitive damages for defendant's false allegations to the police about plaintiff's alleged shoplifting. The statement was held to be libelous; the normal privilege given communications to police about criminal matters did not apply because defendant intended no prosecution and must therefore have made the statements "maliciously." Similar statements were held libelous in New York because the defendant lacked a "reasonable basis" for making them.⁶² In the event process is issued or an arrest is made, the injured party can also sue on a tort theory of malicious prosecution.⁶³ He must be able to prove that the criminal process has been used for private purposes⁶⁴ or that it has been invoked by a complaint without probable cause.⁶⁵ In all these situations, the one making the false complaint or false statement, and not the government agency, is held for damages.

58. 18 U.S.C. § 371 (1964).

59. A recent statement of this doctrine can be found in *Dennis v. United States*, 384 U.S. 855, 860-61 (1966). The trend was analyzed, and deplored, in Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

60. See note 41 *supra*.

61. 15 Wis. 2d 497, 113 N.W.2d 152 (1962).

62. *Eisenberg v. Reasenberg*, 252 N.Y. 490, 169 N.E. 656 (1930). Although the libel suit is available in these false complaint or false statement situations whenever special damages can be shown, the statements are libel *per se* only when they allege the defamed person was involved in an indictable offense or one involving moral turpitude. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.10 at 376 (1956).

63. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 4.11 at 337 (1956).

64. See, e.g., *Byers v. Ward*, 368 Pa. 416, 84 A.2d 307 (1951) (effort to gain coal lease); *Peters v. Hall*, 263 Wis. 450, 57 N.W.2d 723 (1953) (effort to collect debt).

65. *Rupp v. Summerfield*, 161 Cal. App. 2d 657, 326 P.2d 912 (1958) (grand theft

The existence of this arsenal has a double significance. It creates further doubt that the Congress meant to include unsworn statements to investigate agencies under the heavy sanctions of Section 1001. And even if the statutory history be deemed ambiguous on that issue, these alternative statutes make even more dubious the wisdom of wholesale judicial expansion of Section 1001 to include false complaints and false statements made during criminal investigations.

V. Conclusion

While, as a moral proposition, society generally disapproves of lying, and lying to officers of the government may be a valid concern of the law, Section 1001 was not designed to address the problem of false statements made to a government investigator during the investigation of a crime. Use of the statute in such situations creates problems that are too serious⁶⁶ to allow such an expansion without an explicit mandate from Congress. Federal prosecutions, therefore, should be restricted to substantive criminal offenses, and the government should not be allowed to charge citizens with felonies simply because federal officials expend resources investigating questionable complaints or acting on doubtful answers to questions.

If a criminal sanction is thought necessary for a limited range of specific situations, it should be more sharply focused than Section 1001 presently is. It should be limited, through a requirement of specific intent, to circumstances where the person making the statement or complaint is both aware of its falsity and is lying in order to bring about an investigation of an innocent third party.⁶⁷ There also appears to be no reason for the crime to be more than a misdemeanor. Finally, the investigator should be required to impress the person being inter-

charge); *Jackson v. Beckham*, 217 Cal. App. 2d 264, 31 Cal. Rptr. 739 (1963) (petty theft charge); *Sims v. Union News Co.*, 284 App. Div. 335, 131 N.Y.S.2d 837 (1954) (assault complaint).

66. One of the important considerations underlying the issues raised in this Note was raised by Silving, in her discussion of the perjury laws:

The present tendency to increase perjury penalties and relax the materiality requirement has resulted from the policy of "government think." This policy is based on the assumption that the state has an abstract right to man's "truth"—a right that is not dependent on any concrete social interest calling for protection. This assumption militates against the basic democratic tenet that the state is not the keeper of its subjects' consciences. Unless a clear social interest can be shown to exist, the state should not punish a man for abstract lying. And the punishment for lying should be proportionate to the social harm it produces.

Silving, *The Oath*, 68 YALE L.J. 1527, 1576-77 (1959).

67. See, e.g., the proposals of the American Law Institute, *supra* note 29.

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viewed with the possibility of criminal liability through a warning⁶⁸—differing slightly from the *Miranda* warning—that “anything you say which is untrue may constitute a crime.”

68. This would serve the same deterrent function as the warning which already appears on the forms of the government agencies which use Section 1001 to protect their decision-making. Since the severity of the penalties is explained by the role of the statute as deterrent, the unannounced use of Section 1001 by the FBI is not only unauthorized but fails to achieve the law's real aim. For legislative history on this point, see the comments of Rep. McKeown, *supra* note 12.