Congressional Response to Hubbard v. United States: Restoring the Scope of 18 U.S.C. § 1001 and Codifying the "Judicial Function" Exception

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NOTES

CONGRESSIONAL RESPONSE TO HUBBARD v. UNITED STATES: RESTORING THE SCOPE OF 18 U.S.C. § 1001 AND CODIFYING THE "JUDICIAL FUNCTION" EXCEPTION

Although the authority to create federal legislation rests solely with Congress, the Supreme Court possesses the ultimate power to interpret this legislation. These two distinct functions naturally conflict, often resulting in the need for one branch to correct the actions of the other. For example, the Court may determine a congressional enactment unconstitutional.

1. See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). Congress has enacted legislation in the past, however, that arguably delegates something similar to lawmaking power to the executive branch. See generally Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 124 (1994) (arguing that Congress's delegation of regulatory powers to the Executive branch results in the President having de facto "lawmaking" powers far exceeding those envisioned by our Founding Fathers).

2. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). There are many instances, however, where the executive and congressional branches, as well as state governments, have challenged the basis on which the presumptive power of the judiciary as ultimate arbiter is founded. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586-89 (1952) (holding that the president does not have the authority to seize the nation's steel mills without explicit congressional approval of such action); Ex parte McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1869) (accepting congressional power to revoke the Supreme Court's appellate jurisdiction over certain subject matter); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351-52 (1816) (affirming the Supreme Court's appellate jurisdiction over state supreme court decisions when a federal law is at issue). There are scores of cases, treatises, and articles that examine the historical foundation of judicial review in America. See generally David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888 chs. 3-4 (1985) (analyzing the origins of judicial review and federal jurisdiction); Gerald Gunther, Cases and Materials on Constitutional Law § 1 (10th ed. 1980) (analyzing the nature and sources of Supreme Court authority); 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure chs. 1-2 (2d ed. 1992) (same).

tional and, therefore, invalidate the legislation.\textsuperscript{4} In comparison, Congress may overrule the Court by passing a more precise law to cure any defect that may have led the Court to rule against the imperceptible or imprecise intent of Congress.\textsuperscript{5}

Most disputes between these two branches of government, however, do not reach constitutional proportions. Many disagreements simply concern congressional intent and the Court's statutory interpretations.\textsuperscript{6} This

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\item \textsuperscript{4} See United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (invalidating the Gun Free School Zones Act as unconstitutional because it exceeded the commerce clause powers); United States v. Eichman, 496 U.S. 310, 312 (1990) (invalidating the Flag Protection Act of 1989 as an unconstitutional abridgement of the First Amendment right to free speech); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (invalidating the National Industrial Recovery Act of 1933 as an unconstitutional delegation of legislative power to the president, and for exceeding Congress's power to regulate interstate commerce).
\item \textsuperscript{6} Generally, the Court interprets either constitutional or statutory law. See generally Chester James Antieau, \textit{Constitutional Construction} (1982) (providing a thorough analysis of the canons of constitutional construction); C. Edward Fletcher III, \textit{Principle Models in the Analysis of Constitutional and Statutory Texts}, 72 Iowa L. Rev. 891 (1987) (arguing that textual analysts should abandon conical and cylindrical principle models in favor of a reflexive model to interpret statutory and constitutional texts); Michael J. Perry, \textit{The Legitimacy of Particular Conceptions of Constitutional Interpretation}, 77 Va. L. Rev. 669, 719 (1991) (concluding that questions of constitutional theory should no longer concern conceptions of constitutional interpretation, but should focus on politics and the judicial role in our system of government); David L. Shapiro, \textit{Continuity and Change in Statutory Interpretation}, 67 N.Y.U. L. Rev. 921 (1992) (arguing that the canons of statutory interpretation ordinarily are employed as necessary to achieve statutory objectives, but that overreliance on the canons may frustrate the statute's legislative purpose). Frequently at issue when interpreting or construing statutory law is whether the Court should interpret statutes narrowly according to the presumptive definitions and the plain language of the text, or broadly according to the presumed legislative intent. See Shapiro, supra, at 931-34, 941-50 (discussing the plain meaning and legislative purpose approaches utilized by the Court in its statutory interpretations). Although the terms "interpretation" and "construction" often are used interchangeably, the strict usage of the terms require distinction. See Black's Law Dictionary 818 (6th ed. 1990) (distinguishing "interpreta-
type of disagreement recently led Congress to pass legislation amending 18 U.S.C. § 1001, commonly referred to as the “False Statements Statute.”

Interpretation involves the “ascertainment of the meaning of the maker of the written document,” while “construction” may go further and explain the legal consequences and effects of the ascertained intention of the document in question or it may provide courts with guidance “in the absence of express or implied intention.” In re Union Trust Co., 151 N.Y.S. 246, 249-50 (N.Y. Sur. Ct.) (emphasis added), modified by 156 N.Y.S. 32 (N.Y. Sup. Ct. 1915), modified by 114 N.E. 1048 (N.Y. 1916).

Moreover, once the Court selects the method of interpreting a statute, it must then consider the implications of stare decisis if its method will result in a different result than a previous Court’s interpretation of the same statute. Stare decisis is defined as a [d]octrine that, when [a] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same.

or

[a] doctrine, [such that] when [a] point of law has been settled by decision, it forms precedent which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where [a] decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it.

BLACK’S LAW DICTIONARY, supra, at 1406 (citing Horne v. Moody, 146 S.W.2d 505, 509-10 (Tex. Civ. App. 1940) (first quotation); Colonial Trust Co. v. Flanagan, 25 A.2d 728, 729 (Pa. 1942) (second quotation)).

The Supreme Court is extremely reluctant to disturb its prior statutory interpretations. See Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). The Patterson Court stated:

[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

Id. The only realistic method of overturning prior constitutional rulings, however, is for the Court to overrule itself. See id. Conversely, if Congress determines that the Court misconstrued a statute, the legislature has the power to remedy the misconstruction by amending the law in order to make congressional intent explicit. See id. The Court, therefore, need not alter its previous statutory rulings when it is within congressional power to do so. See id. Precedent, however, does not always preclude reevaluative interpretation of statutory provisions.

7. The 104th Congress passed legislation amending 18 U.S.C. § 1001, to overrule explicitly the Supreme Court’s decision in Hubbard v. United States, 115 S. Ct. 1754 (1995). See H.R. Res. 535, 104th Cong., 142 CONG. REC. H11246 (daily ed. Sept. 26, 1996) (enacted) (agreeing to suspend the rules and to pass House Resolution 535, which provided for the concurrence of the House, with an amendment, in the amendments of the Senate to the bill H.R. 3166 by a recorded vote of 424 yeas); 142 CONG. REC. S11,605, S11,608-609 (daily ed. Sept. 27, 1996) (reporting the Senate’s concurrence to the amendment by voice vote, clearing the measure for the president); see also infra notes 219-54 and accompanying
Prior to the 1996 Amendment, 18 U.S.C. § 1001 proscribed making false statements to any “agency” or “department” of the United States in any matter within the agency or department’s jurisdiction. Specifically, § 1001 criminalized the act of willfully and knowingly falsifying or concealing any material fact, or making any false or fraudulent statement, or knowingly making or using any false writing or document in any matter within the jurisdiction of any department or agency of the United States.

In 1955, the Supreme Court determined, in United States v. Bramblett, that the term “department” as used in § 1001 applied to all three branches of the government. Thus, for forty years it was understood that § 1001 applied to false statements made during judicial proceedings. This broad interpretation of the term “department” and the penalties available under § 1001 provided federal authorities a formidable

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8. See 18 U.S.C. § 1001 (1994). The pre-1996 statute read: 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 under this title or imprisoned not more than five years, or both. Id.

9. See id.


11. See id. at 509. The Bramblett Court concluded that “[t]he development, scope and purpose of the section shows that ‘department,’ as used in this context, was meant to describe the executive, legislative and judicial branches of the Government.” Id. While it is generally understood that this particular definitional language is dictum, it nevertheless was read as requiring application of § 1001 to all three branches of government. See United States v. Masterpol, 940 F.2d 760, 764 (2d Cir. 1991) (stating that Bramblett’s conclusion that “department” includes the judicial branch was dictum); Brief for the United States at 9, Hubbard v. United States, 115 S. Ct. 1754 (1995) (No. 94-172) (conceding that the Bramblett language “in a formal sense” was merely dictum, but arguing that the underlying rationale of the Court’s holding does not allow distinction among the branches of government).

12. See Bramblett, 348 U.S. at 509; see also United States v. Plascencia-Orozco, 768 F.2d 1074, 1076 (9th Cir. 1985) (holding that a criminal defendant who gives a false name to a magistrate trying the defendant’s case is in violation of 18 U.S.C. § 1001); United States v. Abrahams, 604 F.2d 386, 392, 395 (5th Cir. 1979) (concluding that the § 1001 phrase, “matter within the jurisdiction of any department or agency,” includes the judiciary; however, the statute does not apply to a defendant making false statements during a bail hearing), overruled in part by United States v. Rodriguez-Rios, 14 F.3d 1040, 1041, 1043 (5th Cir. 1994); Stein v. United States, 363 F.2d 587, 590 (5th Cir. 1966) (holding that the Tax Court is an “agency” within the scope of 18 U.S.C. § 1001); United States v. Abrahams, 453 F. Supp. 749, 750 (D. Mass. 1978) (concluding that a defendant accused of giving a false name and other false information to a United States Magistrate during a bail hearing may be charged with a violation of 18 U.S.C. § 1001).

13. Section 1001 provides for relatively stiff penalties. See 18 U.S.C. § 1001 (1994). If convicted, a defendant could be imprisoned up to five years, fined, or both. See id.
weapon with which to prosecute persons who knowingly and willfully made false statements to any of the three branches of government.14

In Hubbard v. United States,15 the Supreme Court reconsidered the Bramblett Court's interpretation of § 1001.16 Specifically at issue in Hubbard was whether § 1001 applied to judicial proceedings.17 The Hubbard Court faced the following options: (1) adhere to the doctrine of stare decisis by allowing Bramblett's broad statutory interpretation to stand; (2) apply presumptive definitions to the words "agency" and "department" as used in 18 U.S.C. § 1001 and as defined by 18 U.S.C. § 6,18 thereby overruling Bramblett; or (3) allow federal circuits to continue using the judicial function exception to Bramblett's broad interpretation, thus avoiding the problem of overturning long-standing precedent.19

The petitioner in Hubbard filed two unsworn written documents during bankruptcy proceedings with the Bankruptcy Court; one responded to an amended complaint and the other to a motion to compel surrender of relevant business records.20 Both responses contained false state-

14. See United States v. Rose, 570 F.2d 1358, 1363 (9th Cir. 1978) (concluding that § 1001 serves as a "catch-all, reaching those false representations that might 'substantially impair the basic functions entrusted by law to [the particular] agency,' but which are not prohibited by other statutes") (quoting 18 U.S.C. § 1001) (alteration in original); United States v. Smith, 523 F.2d 771, 780 (5th Cir. 1975) (holding that a defendant is not denied due process when prosecuted under § 1001 for a felony, rather than under an overlapping misdemeanor statute, as the prosecutor has the discretion to determine what statute to employ).


16. See id. at 1758.

17. See id. at 1756.

18. Section 6 of title 18 defines "department" as "one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government." 18 U.S.C. § 6. Section 6 defines "agency" as "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." Id.


20. See id. at 1756. In 1985, the petitioner filed for bankruptcy under Chapter 7 of the Bankruptcy Code. See id. The trustee, believing that the petitioner had provided false information, filed a complaint seeking to prevent the petitioner from discharging his debt. See Brief for the United States at 3, Hubbard v. United States, 115 S. Ct. 1754 (1995) (No. 94-172). A successor trustee filed an amended complaint and a motion to compel the petitioner to surrender relevant business records. See id. The amended complaint alleged that the petitioner was storing a well-drilling machine at his residence and various parts of the machine in a warehouse. See id. The petitioner's written response to the Bankruptcy Court denied the allegations. See id. In written response to the trustee's motion to compel surrender of the petitioner's business books and records, the petitioner denied withholding the requested documentation by asserting that he had submitted the requested documents to the previous trustee. See id. Both of the petitioner's written responses were found to contain falsehoods by the trier of fact. See id. at 4.
ments. The petitioner was indicted and charged with bankruptcy fraud, mail fraud, and three counts under § 1001 for making false statements in a matter within the jurisdiction of the federal bankruptcy court. The petitioner was found guilty on all counts.

The petitioner appealed to the United States Court of Appeals for the Sixth Circuit, contending that his false statements to the bankruptcy court were beyond the scope of § 1001. Specifically, the petitioner argued that the false statements were made while the court was exercising its "judicial functions," or alternatively, that the plain language of the statute did not encompass his activity. The court of appeals rejected the judicial function exception to § 1001 liability known as the "judicial function" exception. The exception purposely protects "traditional trial tactics" from § 1001's "conceals or covers up" provision.

22. See United States v. Hubbard, 16 F.3d 694, 696 (6th Cir. 1994) (charging petitioner with four counts of bankruptcy fraud), rev'd in part, Hubbard v. United States, 115 S. Ct. 1754 (1995); see also 18 U.S.C. § 152 (1994) (criminalizing the concealment of assets from "creditors or the United States Trustee, any property belonging to the estate of a debtor").
23. See Hubbard, 16 F.3d at 696 (charging petitioner with three counts of mail fraud); see also 18 U.S.C. § 1341 (criminalizing the use of any public or private postal service for fraudulent purposes).
24. See Hubbard, 115 S. Ct. at 1756-57; Respondent's Brief at 3, Hubbard (No. 94-172); see also supra note 20 (providing the factual context within which the false statements were made to the Bankruptcy Court).
26. See Hubbard, 16 F.3d at 696-97.
27. See id. Hubbard's most powerful argument rested upon a judicially-created exception to § 1001 liability known as the "judicial function" exception. See id. at 698-700. The "adjudicative/judicial function" exception was created to allow unsworn false statements to be made without fear of prosecution, while the courts' perform their "adjudicative" functions. See infra text accompanying notes 99-134 (providing an analysis of the judicial function exception). The exception, however, does not create an exemption from prosecution for false statements made to the courts while they are performing their administrative functions. See Hubbard, 115 S. Ct. at 1757. Some courts, however, reached different conclusions in distinguishing between "administrative" and "adjudicative." Compare United States v. Holmes, 840 F.2d 246, 248-49 (4th Cir. 1988) (concluding that false statements made to a magistrate judge during a plea hearing were subject to § 1001 prosecution because they were made while the court performed its "administrative" functions), with United States v. Abrahams, 604 F.2d 386, 393 (5th Cir. 1979) (concluding that false statements made to a magistrate at a bail hearing were made while the court was performing an adjudicative function, and therefore were not subject to prosecution under § 1001), overruled in part by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994). Still other courts applied the exception without clearly distinguishing between administrative or adjudicative functions. See United States v. Deffenbaugh Indus., Inc., 957 F.2d 749, 751-54 (10th Cir. 1992) (holding that the exception applies to false affidavits submitted to the United States Department of Justice in connection with grand jury investigations).

The exception purposely protects "traditional trial tactics" from § 1001's "conceals or covers up" provision. See United States v. Masterpol, 940 F.2d 760, 766 (2d Cir. 1991) (adopting the judicial function exception, and finding the submission of a false letter of recommendation during a sentencing hearing clearly adjudicative and not subject to § 1001 liability). The phrase "conceals or covers up" is ambiguous enough to cause concern among some that defense attorneys may be targeted for prosecution because of "vigorous
cial function exception. Further, the court concluded that Bramblett controlled on the issue of the statute’s scope, and it affirmed the petitioner’s § 1001 convictions.

The Supreme Court granted certiorari to resolve a split in the circuits on the issue of the judicial function exception and to determine the applicability of § 1001 to judicial proceedings. In a six to three decision, the Supreme Court reversed the petitioner’s convictions brought

representation” of their clients’ interests. Hubbard, 115 S. Ct. at 1765 (Scalia, J., concurring in part and concurring in judgment) (reasoning that if § 1001 is applied to judicial proceedings it “will deter vigorous representation of opposing interests in adversarial litigation”).

The petitioner’s other contentions, which were not at issue in the Supreme Court’s decision, were that his false statements were “trivial falsehoods and thus not material as required by § 1001,” and that his statements fell “within the ‘exculpatory ‘no’’ exception to liability under § 1001.” Hubbard, 16 F.3d at 697 (footnote omitted). The circuit court in Hubbard found that the false statements were material under the standard applied in United States v. Steele, 933 F.2d 1313, 1319 (6th Cir. 1991) (en banc) because the statements had “the capability of influencing the bankruptcy court’s function in determining what assets the debtor had and where those assets were so that they could be made available for the repayment of creditors.” Hubbard, 16 F.3d at 698. Further, the court rejected the petitioner’s “exculpatory ‘no’” argument as a rejected doctrine in the Sixth Circuit. See id. (citing Steele, 933 F.2d at 1319-22).

28. See Hubbard, 16 F.3d at 701.
29. See id. at 701-03.
31. The Sixth Circuit was the only one to reject the exception outright, although both the Seventh Circuit and the District of Columbia Circuit questioned the basis of the exception. Compare United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991) (questioning the rationale of the exception and denying extension of any such exception to false statements made during legislative inquiries), and United States v. Barber, 881 F.2d 345, 349-50 (7th Cir. 1989) (questioning the basis for the judicial function exception, and holding that an attorney’s transmittal of false letters to the court regarding sentencing of client did not fall within the exception, if one existed, because the false statements were not made during the attorney’s own proceeding), with United States v. Wood, 6 F.3d 692, 694-95 (10th Cir. 1993) (adopting the exception and holding that false statements made to FBI agents acting under auspices of a federal grand jury were not subject to § 1001 liability), Masterpol, 940 F.2d at 766 (adopting the judicial function exception, and finding the submission of a false letter of recommendation during a sentencing hearing is clearly adjudicative and not subject to § 1001 liability); Holmes, 840 F.2d at 248 (adopting the judicial function exception, but finding a false signature on a form where the defendant consented to appear before magistrate was made during execution of magistrate’s administrative functions, and therefore subject to § 1001 liability); United States v. Mayer, 775 F.2d 1387, 1390-92 (9th Cir. 1985) (per curiam) (adopting the exception and finding the submission of false letters of recommendation to the sentencing judge within the court’s adjudicative functions), and Abrahams, 604 F.2d at 393 (adopting the exception, and finding a defendant’s false statements providing a false name and denying aliases and previous arrests before a magistrate judge during removal proceedings within the court’s adjudicative functions).
32. See Hubbard, 115 S. Ct. at 1757.
33. See id. at 1756. Justice Stevens announced the judgment of the Court and delivered its opinion. See id. He was joined by Justices Scalia, Kennedy, Thomas, Ginsburg, and Breyer with respect to Parts I, II, III, and VI, and by Justices Ginsburg and Breyer
under § 1001. Moreover, the Court found Bramlett’s broad interpretation and expansive construction of § 1001 to be erroneous.

The majority found it unnecessary to determine the validity of the judicial function exception because it applied the presumptive definitions of “agency” and “department” in construing the statute. Section 6 of title 18 defines “department” as “one of the executive departments . . . unless the context shows that such term was intended to describe [another] branch[ ] of the government,” and “agency” as “any department, independent establishment, commission, administration, authority, board or bureau of the United States . . . unless the context shows that such term was intended to be used in a more limited sense.” These statutory definitions provided the Court with the foundation on which it based its holding.

Justice Stevens’s plurality opinion, joined by Justices Ginsburg and Breyer, examined the basis for departing from stare decisis in statutory interpretation cases. Justice Stevens reasoned that the judicial function exception was an intervening development of the law that justified overruling Bramlett. The majority concluded that the judiciary did not fall within the meaning of “agency” or “department” as used in § 1001; thus, false statements made during judicial proceedings were not subject to § 1001 liability.

In a concurring opinion, Justice Scalia, joined by Justice Kennedy, agreed with the outcome, but reasoned that Bramlett should be overruled not because of an intervening development of law, but because Bramlett’s erroneous reading of the law created an unacceptable risk. Justice Scalia explained that Bramlett created an increased potential for criminal prosecution under its expansive interpretation of § 1001. Accordingly, that potential for criminal prosecution would have a chilling

with respect to parts IV and V. Justice Scalia filed an opinion concurring in part and concurring in judgment, in which Justice Kennedy joined. See id. Chief Justice Rehnquist filed a dissenting opinion, in which Justices O’Connor and Souter joined. See id.
effect on lawyers, particularly those representing criminal defendants, which might lead to less than vigorous advocacy of their clients' interests.\textsuperscript{46}

Chief Justice Rehnquist, joined by Justices O'Connor and Souter, dis- sented, arguing that the principle of stare decisis should control.\textsuperscript{47} The Chief Justice asserted that if Bramblett's construction of § 1001 is erroneous, it is within the province and power of Congress to redress the problem.\textsuperscript{48} Therefore, the Court erred in overruling Bramblett.\textsuperscript{49}

This Note examines the potential ramifications that Hubbard would have had on judicial proceedings and legislative affairs absent congressional response to the ruling. First, this Note reviews the historical development of 18 U.S.C. § 1001, culminating with the 1955 Bramblett decision. Next, this Note presents an overview of the reasoning and purposes behind the "judicial function" exception. This Note then analyzes the Supreme Court's majority, plurality, concurring, and dissenting opinions in Hubbard, and examines the considerations the Hubbard Court faced in evaluating the principle of stare decisis. This Note then examines the impact the decision would have had on judicial proceedings and the immediate impact it did have in the legislative realm, as well as the congressional response to the Court's interpretation of § 1001. This Note concludes that the Court's application of the presumptive definitions to the statute's terms was the correct approach to statutory interpretation and that the ruling sent to Congress a clear message that congressional intent must be explicit in the text of the statute.

I. PROGENITORS AND HISTORICAL INTERPRETATION OF § 1001

A. The False Claims Acts

Congress passed the first false claims act in response to the chaos created by the Civil War, which provided unscrupulous individuals with the opportunity to defraud the United States Government by presenting inflated claims or claims for services or products that were never actually provided.\textsuperscript{50} Congress addressed this problem by passing the false claims

\textsuperscript{46}See id.

\textsuperscript{47}See id. at 1766 (Rehnquist, C.J., dissenting); see also supra note 6 (providing the reasoning behind the Court's reluctance to overturn prior statutory interpretations).

\textsuperscript{48}See Hubbard, 115 S. Ct. at 1769; see also Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) (discussing the rationale underlying the Court's reluctance to overrule its prior statutory interpretations).

\textsuperscript{49}See Hubbard, 115 S. Ct. at 1769.

\textsuperscript{50}See United States v. Bramblett, 348 U.S. 503, 504 (1955) ("Section 1001 had its origin in a statute passed almost 100 years ago [during the Civil War] in the wake of a spate
The 1863 Act categorized the presentation of a false claim for payment to the federal government as a criminal offense. In addition, the 1863 Act proscribed false statements made in an attempt to facilitate a payment for a false claim.

The false statement prohibition of the 1863 Act was more narrow in scope than pre-1996 amendment § 1001. Prior to the 1996 amendment, § 1001 proscribed anyone from willfully or knowingly making false statements "in any matter within the jurisdiction of any department or agency of the United States." Thus, the purpose of the 1863 Act was to prevent financial fraud against the federal government, while pre-1996 amendment § 1001's purpose was to prevent false statements made in connection with any matter within the jurisdiction of any "agency" or "department" of the government.
The scope of the 1863 Act was expanded incrementally over the years, but remained essentially unchanged until 1918. In that year, Congress amended the 1863 Act with legislation (1918 Act) that criminalized false claims made against not only the federal government and its departments, but also against any corporation in which the United States was a stockholder. While the 1918 Act brought government corporations under the umbrella of the statute, the focus of the Act remained not on false statements per se, but on false statements or claims intended to further financial frauds against the federal government.

The Act of June 18, 1934 (1934 Act) revised the 1918 Act to include language essentially the same as that of pre-1996 amendment § 1001.

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*United States v. Cohn*, 270 U.S. 339, 346-47 (1926), had concluded that the fraudulent statements must relate to pecuniary or property loss.

58. The 1863 Act was codified in 1873 and the scope was extended to cover "every person"—not just those in the "land or naval forces of the United States." See 18 Stat. 1054, § 5438 (representing a codification and revision of the 1863 Act). The Court in *Hubbard* points out, however, that the *Bramblett* Court had "incorrectly stated that the 1863 Act only penalized misconduct by members of the military. In fact, § 3 of the Act established criminal and civil penalties for false claims and other misdeeds committed by 'any person not in the military or naval forces of the United States.'" *Hubbard*, 115 S. Ct. at 1760 n.7 (quoting ch. 67, 12 Stat. at 698) (emphasis added).


59. See Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015. The amended statute provided as follows:

> [W]hoever, for the purpose of obtaining or aiding to obtain the payment or approval of [a false] claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact . . . 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 . . . [shall be punished].

*Id.* at 1015-16.

60. See *Hubbard*, 115 S. Ct. at 1760 (stating that the scope of the "statute remained relatively narrow: it was limited to false statements intended to bilk the government out of money or property") (citing United States v. *Cohn*, 270 U.S. 339 (1926) (declaring the false claims provision applicable only in cases causing monetary or property loss to the government)).

61. Act of June 18, 1934, ch. 587, 48 Stat. 996 (amending then § 35 of the Criminal Code). In pertinent part, the Act stated:

> [W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or 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
The Act of June 25, 1948, revised and bifurcated the 1934 Act into a "false claims" provision and a "false statements" provision. The false statements provision remained essentially unchanged from the 1934 Act until the 1996 amendment.

The pre-1996 amendment language of § 1001 swept broadly, and included all material willfully and knowingly false or fraudulent statements entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder . . . [shall be punished].

Id. at 996-97 (emphasis added). The 1934 revision was enacted primarily at the urging of the Secretary of the Interior in order to reach not only false papers presented in connection with a claim against the government, but also nonmonetary frauds, such as those involved in the "hot-oil" shipments. See Gilliland, 312 U.S. at 93-94 (holding that the relevant part of § 35 of the U.S. Criminal Code, as amended by the Act of June 18, 1934, is not restricted to cases involving pecuniary or property loss to the United States).

In Gilliland, the Court examined the legislative history of the 1934 Act. See id. The Secretary of the Interior sought the amendment to aid the Department of Interior with enforcement of the National Industrial Recovery Act of 1933 (1933 Act) relating to the transportation of "hot oil." See id. at 94. Because the 1933 Act did not proscribe the "presentation of false papers" in connection with the reporting requirements of the Act, the Secretary was concerned with circumvention of the Act. See Letter from Harold Ickes, Secretary of the Interior, to Henry F. Anhurst, Chairman of the Senate Judiciary Committee, in 78 Cong. Rec. 2859 (1934) (expressing the Secretary's concern about loopholes available under the 1933 Act), and in S. Rep. No. 73-288, at 1 (1934), and in H.R. Rep. No. 73-829, at 2 (1934). The initial bill, which Congress passed at the behest of the Secretary of the Interior, required an "intent to defraud the United States." See 78 Cong. Rec. 3724 (1934) (providing text of original bill). President Roosevelt returned the initial bill without approval, explaining that existing law already covered the offenses as the proposed law defined and, moreover, provided more severe penalties than those proposed. See 78 Cong. Rec. 6778 (1934) (discussing the President's refusal to sign the proposed bill). The Secretary proposed a new measure satisfying the President's concern while still accomplishing the objective of reaching the submission of false papers in relation to "hot oil" shipments. See Gilliland, 312 U.S. at 94 (providing legislative history of 1934 Act). When signed into law, the 1934 Act, as revised by the Secretary, omitted the language underlying the Court's holding in United States v. Cohn, 270 U.S. 339 (1926), that the 1918 Act reached only those frauds causing pecuniary or property loss to the United States Government. See Act of June 18, 1934, ch. 587, 48 Stat. 996; see also 78 Cong. Rec. 11,271 (1934) (providing the text of the enacted bill). The report of the Senate Judiciary Committee stated the purpose of the amendment as, "reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith." S. Rep. No. 73-1202, at 1 (1934).


proffered to any federal government "agency" or "department." This broad sweep made it all the more important that the Supreme Court prudently define the terms "agency" or "department" in construing the statute's scope.65

B. United States v. Bramblett: Construing 18 U.S.C. § 1001 to Fit the Court's Conception of "Congressional Intent"

United States v. Bramblett66 was the seminal case construing the scope of § 1001 for forty years.67 Bramblett, a former United States Congressman charged with violating § 1001,68 was found guilty of making false and fraudulent representations to the Disbursing Office of the House of Representatives.69 After conviction, Bramblett presented a motion in arrest of judgment,70 claiming that the indictment failed to state an offense against the United States because the indictment failed to charge him with falsifying any fact "within the jurisdiction of a [federal] department or agency."71 Bramblett asserted that the House of Representatives Dis-

65. See Bramblett, 348 U.S. at 508-10 (concluding that the terms "agency" and "department" were intended to apply to all three branches of the federal government).
67. See United States v. Hubbard, 16 F.3d 694, 699 (6th Cir. 1994) (following Bramblett's instruction that the terms "any department or agency" as used in § 1001 apply to the legislative and judicial branches), rev'd in part, Hubbard v. United States, 115 S. Ct. 1754 (1995).
69. See Bramblett, 348 U.S. at 504. Bramblett was charged with eighteen counts of violating 18 U.S.C. § 1001. See id. at 503-04. At trial, a judgment of acquittal was ordered on eleven counts and the jury returned a guilty verdict on the remaining seven counts. See id. at 504. These seven counts charged Bramblett with falsely representing that a certain woman was entitled to compensation as his official clerk. See id.
70. See Bramblett, 120 F. Supp. at 858. A motion in arrest of judgment allows a judge to either stay or refuse to enter a judgment if, in the court's determination, the indictment or information is insufficient in some manner. See Fed. R. Crim. P. 34. Specifically, Rule 34 provides:

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 7-day period.

Id.

In the alternative, the defendant moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, or for a new trial under Federal Rule of Criminal Procedure 33. Bramblett, 120 F. Supp. at 857-58. Bramblett's motions for judgment of acquittal and for a new trial were denied. See id.
71. Bramblett, 120 F. Supp. at 858.
bursing Office did not fall within the meaning of "any agency or department of the United States," and therefore he could not be charged under § 1001 for making a false statement to this office.72

After analyzing the legislative history of § 1001,73 the definitions of "agency" and "department" provided in 18 U.S.C. § 6,74 and other relevant sections of the Code,75 the United States District Court for the Dis-

72. Id.
73. See supra note 61 and accompanying text (providing discussion of the legislative history of the Act).
74. See supra note 18 (providing statutory definitions of "agency" and "department").
75. See Act of Aug. 10, 1949, ch. 412, § 4, 63 Stat. 579 (formerly 5 U.S.C. § 1, codified as amended at 5 U.S.C. § 101 (1994)) (providing a list of all executive departments); see also Bramblett, 120 F. Supp. at 862-65 (referring to other acts' interpretations of "department" or "agency"). Because the definition of "department" in 18 U.S.C. § 6 specifically states that it refers to one of the executive departments listed in § 1 of title 5 (currently 18 U.S.C. § 101), unless the context shows that the term was intended to describe another branch, the court reviewed numerous sections in title 18 where the context clearly shows that the term "department or agency" was intended to describe a branch other than the executive. See id. at 862-63. For example, the court reviewed § 201, which provides:

Whoever promises, offers, or gives any money or thing of value ... for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof . . . .


The court also reviewed § 283, since repealed and supplanted in 18 U.S.C. § 205, which then stated: "Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, acts as an agent or attorney for prosecuting any claim against the United States . . . ." Act of June 25, 1948, ch. 645, § 283, 62 Stat. 697 (codified as amended at 18 U.S.C. § 205 (1994)) (emphasis added).

Additionally, the court reviewed § 602, which then stated:

Whoever, being a Senator or Representative in, or Delegate or Resident Commissioner to, or a candidate for Congress, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States . . . .


Finally, the court reviewed § 1505, which at the time provided:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or in any committee of either House, or any joint committee of the Congress . . . .

District of Columbia concluded that Congress did not intend the legislative branch to fall within the meaning of "agency" or "department" for § 1001 purposes. Accordingly, the court granted the motion in arrest of judgment. The court determined that the language in § 1001, which was changed by the 1934 Act, was not "all-inclusive," whereas § 287 (false claims provision), whose language remained essentially unchanged in the 1934 Act from its previous rendering in the 1918 Act, was intended to be "all-inclusive" language. The court reasoned that the change in language to the false statements provision limiting the scope of jurisdiction to any department or agency of the United States, together with the § 6 definitions of "agency" and "department," and the reviser's notes, was conclusive evidence of congressional intent to restrict the scope of § 1001 to the executive branch.

Because these statutes specifically provided context showing congressional intent to go beyond "any agency or department of the United States," the court concluded that if Congress had wanted § 1001 to include the legislature, it would have explicitly stated, just as it had in the foregoing statutes. See Bramblett, 120 F. Supp. at 865.

The court further examined the government's argument that 18 U.S.C. § 1017, which criminalized fraudulently affixing official seals, should not be limited solely to the executive branch. See id. at 863. The government contended that to hold otherwise would allow legislative and judicial seals to be "used with impunity," while criminalizing the same act using the executive seal. See id. The court, however, found this argument to work in favor of the defendant. See id. at 863-64. Section 505 of Title 18, which relates to seals of the courts, provided punishment for forging or counterfeiting the seal of a court. See Act of June 25, 1948, ch. 645, § 505, 62 Stat. 714 (codified as amended at 18 U.S.C. § 505 (1994)). Section 506 allowed punishment for one fraudulently affixing the seal of any "departments or agencies" of the federal government. See § 506, 62 Stat. at 714. The court concluded that if Congress had intended the terms "department or agency" in § 506 to be inclusive of the judicial branch, then § 505 would be superfluous, because it provides precisely the same penalties as § 506. See Bramblett, 120 F. Supp. at 863-64.

76. See Bramblett, 120 F. Supp. at 865.
77. See id.
78. See id. at 861. The court noted that the language of the false statements provision had been changed from "false statements or representations made 'for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof,'" to "'in any matter within the jurisdiction of any department or agency of the United States.'" Id. at 860.
79. See supra note 18 (providing statutory definitions of "agency" and "department").
80. See Bramblett, 120 F. Supp. at 862. The court deemed the reviser's notes to 18 U.S.C. § 6 to be significant. See id. In pertinent part, the notes read:

This section defines the terms "department" and "agency" of the United States. The word "department" appears 57 times in Title 18, U.S.C., 1940 ed., and the word "agency" 14 times. It was considered necessary to define clearly these words in order to avoid possible litigation as to the scope or coverage of a given section containing such words.

81. See Bramblett, 120 F. Supp. at 861-64.
The government appealed directly to the Supreme Court of the United States pursuant to 18 U.S.C. § 3731. The Supreme Court reversed the district court, noting that the 1863 Act did not specify any particular group to whom the false statements must be made. The Court maintained that the “false claims” provision of the 1863 Act, which criminalized the “presentation of false claims to ‘any person or officer in the civil or military service of the United States,’” could reasonably apply to the “false statements” provision.

After analyzing the 1934 revisions to the Act, the Court determined that the insertion of the phrase “in any matter within the jurisdiction of any department or agency of the United States” did not render the statute inapplicable to the legislative or judicial branches. The Court concluded that the purpose of the phrase was to broaden the statute to include not only false statements furthering a pecuniary fraud, but also false statements involving non-monetary frauds.

82. See United States v. Bramblett, 348 U.S. 503, 504 (1955), overruled by Hubbard v. United States, 115 S. Ct 1754 (1995). The appeal was taken directly to the Supreme Court because, prior to 1971, the United States could appeal from a district court directly to the Supreme Court. See The Omnibus Crime Control and Safe Streets Act Amendments, Pub. L. No. 91-644, tit III, § 14(a)(1), 84 Stat. 1890 (1971) (codified as amended at 18 U.S.C. § 3731 (1994)). The appeal was allowed from decision or judgment setting aside, or dismissing any indictment or information, or any count thereof and from decisions arresting judgment of conviction for insufficiency of indictment or information, where such decision or judgment was based upon invalidity or construction of the statute upon which the indictment or information was founded.

18 U.S.C.A. § 3731 (1985) (Reviser’s Note). Section 3731 currently reads in pertinent part:

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

....

The provisions of this section shall be liberally construed to effectuate its purposes.


83. See Bramblett, 348 U.S. at 510.

84. See id. at 505.

85. See id. (quoting Act of Mar. 2, 1863, ch. 67, 12 Stat. 696). The Court reasoned that there would be no justification in limiting the scope of the false statements provision more narrowly than the false claims provision. See id.

86. See id. at 506.

87. See id. at 507. The Court's conclusion seems supportable given the fact that the 1934 Act was aimed at preventing false reporting in relation to "hot-oil" shipments, not pecuniary frauds per se. See supra note 61 and accompanying text (providing legislative history surrounding the 1934 Act). The Court, however, seems to have given insufficient consideration to the 1948 revision which changed the statute to its present form. See infra note 90 and accompanying text (arguing that congressional intent may have been to limit the scope of the false statements provision of the 1934 Act).
The Court found that the legislative history failed to indicate Congress's intent to restrict the scope of the statute, and that there was no indication that the new phrase applied solely to the executive branch. The Court concluded that the new phrase compensated for the deleted language in the statute by clarifying that only false statements made to government entities were prohibited by the Act. Moreover, the Court insisted that the 1948 revision did not substantively change the 1934 Act. It found that the false statements section of the Act retained a "scope at least as broad as the false claims section" and, accordingly, the statute extended to false statements made to any branch of the federal government, not merely the executive branch.

The Court also considered the § 6 definitions of "department" and "agency," and declared that the context in which these terms are used required an "unrestricted interpretation." The Court concluded that Congress must have intended to prohibit frauds directed to the legislative or judicial branches. The Court contended that congressional intent would be thwarted by limiting the statute's scope to only falsifications made to executive departments. The Court noted, in dictum, that the context in which the term "department" was used in the provision indicated that Congress intended the Act's scope to encompass "the executive, legislative and judicial branches of the Government."

The Court emphasized the legislative history of the Act and determined that the difference in language between §§ 287 and 1001 was immaterial in its construction. Finally, while the Court acknowledged the

88. See Bramblett, 348 U.S. at 507 (citing S. Rep. No. 73-1202 (1934); H.R. Rep. No. 73-1463 (1934); 78 Cong. Rec. 8136, 11,270, 11,513 (1934)).
89. See id. at 507-08; see also supra note 78 and accompanying text (noting the change in the language of the false statements provision in the 1934 Act).
91. Bramblett, 348 U.S. at 508.
92. See id. at 509.
93. See id. The Court, however, seems to have ignored the possibility that Bramblett's conduct may have been punished under § 287, the false claims statute, because Bramblett had presented a false claim to the Disbursement Office of the House of Representatives; conduct, according to the reasoning in United States v. Cohn, 270 U.S. 339, 345-346 (1926), which should have fallen within the scope of § 287. See Hubbard, 115 S. Ct. at 1759 n.5.
94. See Bramblett, 348 U.S. at 509.
95. Id. (emphasis added).
96. See id.; supra notes 50-63 and accompanying text (describing legislative history surrounding the 1934 Act and the revisions made to the false statements provision of the statute).
propriety of strict constructionism, it nevertheless concluded that its rendering of the legislative purpose was correct, despite the plain language and presumptive definitions contained in the Act. 97

1. Judicial Reluctance: Creation of the “Judicial Function” Exception as a Means of Escaping Bramblett’s Broad Construction

The lower courts faced a dilemma with the Supreme Court’s construction of § 1001 in Bramblett. 98 Namely, the courts were concerned that aggressive trial tactics traditionally utilized by defense attorneys might be restrained, and effectiveness thereby impaired, by the prospect of overzealous prosecutors threatening or using the statute against the defense attorneys themselves. 99 Some circuits resolved this dilemma by creating a “judicial” or “adjudicative” function exception to Bramblett’s broad interpretation and liberal construction of § 1001. 100

When utilizing the judicial function exception, courts delineated between statements made to a court performing “house-keeping” or “administrative” functions, and statements made to a court performing “adjudicative” functions. 101 If an unsworn false statement was made while the court was performing an “adjudicative” function, there would

97. See Bramblett, 348 U.S. at 509-10. The Court stated: “That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.” Id. (citing United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943); Spivey v. United States, 109 F.2d 181 (5th Cir. 1940)).

98. See United States v. Masterpol, 940 F.2d 760, 764 (2d Cir. 1991). The lower courts were faced with two options after the Bramblett decision. See id. First, with Bramblett’s broad construction, the lower courts could conclude that any misrepresentation made to a federal court was within the scope of § 1001. See id. Alternatively, the lower courts could conclude that Bramblett’s holding only applied to misrepresentations made within the court’s administrative province, and therefore false statements made to the judicial branch would only be covered by § 1001 if the statements were made while the court was performing its administrative duties. See id. The courts preferred the latter, more narrow construction. See id.

99. See Morgan v. United States, 309 F.2d 234, 237 (D.C. Cir. 1962) (“We are certain that neither Congress nor the Supreme Court intended [§ 1001] to include traditional trial tactics within the statutory terms ‘conceals or covers up.’”); see also Hubbard v. United States, 115 S. Ct. 1754, 1765 (1995) (Scalia, J., concurring in part and concurring in the judgment) (expressing concern over the possibility of overzealous prosecutors utilizing § 1001 to intimidate defense attorneys from vigorously representing their clients’ interests).

100. See supra note 31 (providing list of cases adopting or rejecting the judicial function exception).

101. See Masterpol, 940 F.2d at 766 (adopting the judicial function exception and holding that § 1001 does not apply because the submission to the court of a false letter of recommendation during sentencing proceedings falls within the courts adjudicative functions); Morgan, 309 F.2d at 237 (holding that a defendant who falsely held himself out as an attorney and actually represented criminal defendants before the court was liable under § 1001).
be no liability under § 1001; however, an unsworn false statement made while the court was performing functions in its "administrative" capacity gave rise to liability under § 1001.\textsuperscript{102} This delineation begged the question of what was "administrative" and what was "adjudicative."\textsuperscript{103}

The judicial function exception originates from dictum in \textit{Morgan v. United States}.\textsuperscript{104} In \textit{Morgan}, the defendant assumed the name of a member of the District of Columbia bar and falsely claimed to be an attorney.\textsuperscript{105} Over fourteen months, the defendant made several appearances in courts representing criminal defendants.\textsuperscript{106} The defendant was charged with violating § 1001 for concealing his name, identity, and non-admission to the bar before the district court.\textsuperscript{107} The defendant was convicted for these and other violations charged in the indictment.\textsuperscript{108}

The United States Court of Appeals for the District of Columbia Circuit affirmed the convictions.\textsuperscript{109} In dictum, however, the court expressed its certainty that neither Congress nor the \textit{Bramblett} Court intended § 1001's statutory terms "conceals or covers up" to include traditional trial tactics.\textsuperscript{110} In support of this understanding the court posed some rhetorical questions: If a defendant pleads not guilty when he knows the opposite to be true, has he "covered up" a material fact? When an attorney knows testimony to be true, but moves to exclude it as hearsay, has he "covered up" a material fact? When an attorney knows his client to be guilty, but nonetheless makes an impassioned summation in his client's behalf, has the attorney "covered up" a material fact?\textsuperscript{111}

\textsuperscript{102} See United States v. Mayer, 775 F.2d 1387, 1392 (9th Cir. 1985) (adopting the judicial function exception and concluding that the sentencing process is part of the trial court's adjudicative functions, and therefore, the defendant's submission of false letters of recommendation during a sentencing proceeding does not fall within § 1001).

\textsuperscript{103} See supra note 27 (providing cases with contradictory determinations of what is "administrative" and what is "adjudicative").

\textsuperscript{104} 309 F.2d 234 (D.C. Cir. 1962).

\textsuperscript{105} See id. at 235.

\textsuperscript{106} See id.

\textsuperscript{107} See id.

\textsuperscript{108} See id. at 235-36. Morgan also was charged with four counts of falsely impersonating another person under D.C. CODE ANN. § 22-1303 (1996); one count of perjuring himself in taking an oath of admission under D.C. CODE ANN. § 22-2501 (1996) (repealed 1982); one count of forging a registration card under D.C. CODE ANN. § 22-1401 (1996) (repealed 1982); two counts of taking money from clients while pretending he was a licensed attorney under D.C. CODE ANN. § 22-1301 (1996) (repealed 1982); and three counts of forging a name on public records under 18 U.S.C. § 494 (1994). See id. Sentences were imposed for a total of three to ten years to run concurrently. See id. at 236.

\textsuperscript{109} See id. at 238.

\textsuperscript{110} See id. at 237.

\textsuperscript{111} See id. No attorney, of course, would consider these actions to be criminal in nature. The point of the questions is that the combination of a rigid reading of the statutory language, with the \textit{Bramblett} Court's holding that the judiciary falls within the scope of
These actions, of course, fall within the purview of "traditional trial tactics," and the court concluded that Bramblett's broad construction could not possibly include such actions. Accordingly, there must exist some allowance for attorneys to utilize tactics that would best serve their clients' interests without fear of prosecution. Thus, Morgan's dictum created the "adjudicative [or judicial] function exception." In the years following Morgan, a number of circuits adopted the exception, while others questioned its underlying rationale.

For example, in United States v. Erhardt, the Sixth Circuit acknowledged Morgan's dictum on the judicial function exception and implicitly adopted the exception. In Erhardt, the defendant was convicted of violating § 1001 for introducing and giving false testimony during a criminal proceeding. The Sixth Circuit reversed the defendant's § 1001 conviction, holding that § 1001 did not apply to false documents introduced as evidence in criminal proceedings. The court reasoned that to hold

§ 1001, and an aggressive prosecutor with a grudge against an attorney, could lead to unnecessary intimidation of the defense bar. See infra note 178 and accompanying text (noting Justice Scalia's concern that prosecutors will attempt to intimidate criminal defense attorneys with the threat of § 1001 charges).

112. See Morgan, 309 F.2d at 237.

113. See infra text accompanying note 178 (noting Justice Scalia's concern about the chilling effect § 1001 may have on traditional trial tactics if applied to judicial proceedings).

114. See United States v. Masterpol, 940 F.2d 760, 766 (2d. Cir. 1991) (adopting the adjudicative function exception).

115. See supra note 31 (providing a list of the federal circuits adopting or questioning the judicial function exception).

116. 381 F.2d 173 (6th Cir. 1967).

117. See id. at 175. The adoption of the judicial function exception was implicit because the court's primary concern was the two-witness rule in perjury prosecutions; its reversal of the conviction was based primarily on that rule. See id. at 174-75. The court did, however, follow Morgan's dictum in holding that "§ 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding." Id. at 175. In Hubbard, however, the Sixth Circuit questioned Erhardt's holding concerning § 1001. See United States v. Hubbard, 16 F.3d 694, 701 (6th Cir. 1994), rev'd in part, 115 S. Ct. 1754 (1995). The court concluded that Erhardt's foundation had been weakened by the abolition of the two-witness rule in perjury prosecutions. See id. The two-witness rule was the primary concern of the Erhardt court. See id. The Sixth Circuit rejected the contention that its Erhardt decision had implicitly adopted the judicial function exception because the Morgan dictum, on which the exception was based, did not create any such exception. See id.

118. See Erhardt, 381 F.2d at 174. In an earlier proceeding the defendant was charged and acquitted of possession of stolen government property. See id. At the first trial the defendant testified that he had purchased the property from a third party, and then produced a receipt the third party signed purportedly reflecting the purchase. See id. The government brought an action against the defendant under § 1001 contending that both the receipt and the testimony were false. See id.

119. See id. at 175.
otherwise would undermine the effectiveness of the perjury statute, 18 U.S.C. § 1621. 120

The Ninth Circuit also adopted the judicial function exception in United States v. Mayer. 121 The defendant in Mayer submitted four fictitious letters of recommendation to a district court during sentencing in a separate proceeding. 122 The defendant was charged with violating § 1001 for submitting the false letters to the court and was convicted by a jury. 123 The court reviewed Morgan and Erhardt and determined the judicial function exception to be a valid doctrine. 124 The court stated that because this exception had existed since Morgan, and Congress had not repudiated or refined the limitation, it was settled that the exception was now part of the judicial landscape. 125 The court concluded that the sentencing process was part of the trial court’s adjudicative functions and that the defendant’s conduct did not violate § 1001. 126 At least four other circuits were in accord with the Mayer court in adopting the judicial function exception. 127

The Seventh Circuit, however, questioned the rationale underlying the exception and refused to adopt it in United States v. Barber. 128 The de-

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120. See id.; infra note 207 (providing the text of the perjury statute).
121. 775 F.2d 1387 (9th Cir. 1985). The Ninth Circuit previously addressed and implicitly accepted the exception in a case where an individual was convicted of violating § 1001 for giving a false name to a magistrate at an arraignment on unrelated charges so as to conceal his prior criminal record. See id. at 1391 (citing United States v. Plascencia-Orozco, 768 F.2d 1074 (9th Cir. 1985)). The court in Plascencia-Orozco upheld the conviction because the magistrate’s inquiry concerning the defendant’s identity was a function of his administrative duties and not an exercise of his judicial powers. See United States v. Plascencia-Orozco, 768 F.2d at 1076.
122. See Mayer, 775 F.2d at 1388.
123. See id. The defendant’s pretrial motion to dismiss was denied. See id. The defendant was found guilty and moved successfully for a new trial. See id. Upon retrial he again was found guilty on four counts of violating § 1001. See id.
124. See id. at 1389-90.
125. See id. at 1390.
126. See id. at 1392.
127. See United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993) (holding that false statements made to FBI agents acting under auspices of a federal grand jury were not subject to § 1001 liability because the statements were “made in connection with a judicial proceeding”); United States v. Masterpol, 940 F.2d 760, 766 (2d Cir. 1991) (finding the submission of a false letter of recommendation during a sentencing hearing to be clearly adjudicative and not subject to § 1001 liability); United States v. Holmes, 840 F.2d 246, 248-49 (4th Cir. 1988) (adopting the exception, but finding that the use of a false name given to a magistrate and the filing of a form consenting to proceed before the magistrate under the false name were administrative matters and therefore subject to liability under § 1001); United States v. Abrahams, 604 F.2d 386, 393 (5th Cir. 1979) (holding that § 1001 is not the proper basis for charging a defendant with making a false statement during a bail hearing).
128. 881 F.2d 345 (7th Cir. 1989).
fendant in Barber, a former attorney on probation from a previous conviction for fraud, submitted fraudulent letters to a district court and the United States District Attorney's Office impeaching a former client who was about to be sentenced for an unrelated fraud. The defendant argued that the judicial function exception should apply. The court noted that the exception had yet to be accepted in the circuit, and thus, the court found it unnecessary to directly address the "so-called 'trial tactics' exception." The court declined to distinguish between the various roles of a federal court because the defendant's false statements were made during someone else's proceeding, not his own. Because the false statements were made in connection with someone else's trial, the statements were not used as a "trial tactic" for his own defense. Accordingly, the policy concerns presented in Morgan were not present, and therefore the exception was inapplicable to the defendant.

With the Sixth Circuit's Hubbard decision explicitly rejecting its prior implicit adoption of the exception in Erhardt, and with some circuits questioning the exception's underlying rationale, a split among the circuits created an issue ripe for the Supreme Court to resolve in Hubbard v. United States.

129. See id. at 347. Barber's former client had conspired with Barber to defraud an insurance company in an arson case so that Barber could collect his fees from the client for representing the client in various civil, criminal, and bankruptcy matters. See id. at 346. The former client became apprehensive of the conspiracy and began to cooperate with law enforcement authorities—cooperation that eventually helped convict Barber of mail fraud and bankruptcy fraud. See id.

130. See id. at 349.
131. Id. at 350.
132. See id.
133. See id.
134. See id. The court also concluded that the presentation of letters to a judge with respect to a third party was not easily suitable to the perjury statutes, presumably because of the difficulty in having the letters sworn to or certified, therefore, § 1001 presented the most logical avenue for the deterrence of such frauds. See id.
135. See supra notes 116-20 and accompanying text (discussing the Erhardt decision).
136. It is noteworthy that the District of Columbia Circuit, which is credited with creating the judicial function exception in Morgan, has criticized the circuits that have relied on the Morgan dictum to establish the exception. See United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991) (refusing to "extend the putative 'judicial function' exception" to false statements made in the course of a legislative inquiry).
2. Traditional Stare Decisis in Light of Bramblett's Broad Construction

The Supreme Court will not overrule precedent without compelling justification.\(^{138}\) The doctrine of stare decisis is deeply ingrained in the American system of jurisprudence and is relied upon to provide consistency in legal conclusions.\(^{139}\) Absent special justification, the Court will not depart from the doctrine of stare decisis.\(^{140}\) The Court's support of its prior holdings is even more pronounced in statutory construction decisions.\(^{141}\)

One type of special justification used to overrule precedent exists when, in the absence of a significant reliance interest,\(^{142}\) there is an “intervening development of the law.”\(^{143}\) The judicial function exception, as well as the Department of Justice's reluctance to use § 1001 for false

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\(^{138}\) Cf. Welch v. Texas Dep't. of Highways & Pub. Transp., 483 U.S. 468, 494 (1987) ("[T]he doctrine of stare decisis is of fundamental importance to the rule of law.")

\(^{139}\) See Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (stating that stare decisis ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

\(^{140}\) See Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (holding that "any departure from the doctrine of stare decisis demands special justification").

\(^{141}\) See Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). The Court stated:

> [T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

*Id.* (second emphasis added) (citing as examples, Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)).

\(^{142}\) See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-56 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (refusing to overturn precedent where there was significant reliance interest in maintaining access to abortions); see also Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (holding that stare decisis has special force when legislators or citizens "have acted in reliance on a previous decision").

\(^{143}\) Patterson, 491 U.S. at 173. The *Patterson* Court declared that the primary reason the Court overrules statutory precedent is because there has been an "intervening development of the law," either through congressional action or judicial evolution "[w]here such changes have removed or weakened the conceptual underpinnings from the prior decision." *Id.* (citing as examples, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480-81 (1989); Andrews v. Louisville & Nashville Ry., 406 U.S. 320, 322-23 (1972)).
statements made during judicial proceedings,\textsuperscript{144} provided the \textit{Hubbard} plurality the special justification with which to overrule \textit{Bramblett}.\textsuperscript{145}

II. \textit{HUBBARD v. UNITED STATES: OVERRULING \textit{BRA MBLETT} IN VINDICATION OF A 1954 DISTRICT COURT'S INTERPRETATION OF 18 U.S.C. § 1001

A. The Majority Opinion: Applying Plain Meaning and Presumptive Definitions to Interpret § 1001

In \textit{Hubbard v. United States},\textsuperscript{146} the Supreme Court clarified the existing split among the circuits over the scope of § 1001 and the validity of the "judicial function" exception.\textsuperscript{147} Justice Stevens, writing for the majority,\textsuperscript{148} held that under § 1001, the judiciary did not fall within the meaning of agency or department.\textsuperscript{149} Moreover, the Court concluded that "Bramblett must be acknowledged as a seriously flawed decision."\textsuperscript{150}

The Court first examined the terms "agency" and "department."\textsuperscript{151} It referred to the Sixth Circuit's notation that ordinary usage suggested the terms were inapplicable to the judicial or legislative branches.\textsuperscript{152} The

\textsuperscript{144} See infra note 168 and accompanying text (providing the language and the reasoning behind the Department of Justice Manual's recommendation concerning § 1001 prosecutions for false statements made during judicial proceedings).


\textsuperscript{146} 115 S. Ct. 1754 (1995).

\textsuperscript{147} See \textit{id}. at 1765.

\textsuperscript{148} Parts I, II, III and VI were joined by a majority of the Court. See \textit{id}. at 1756. Part I provided the relevant facts and procedural history. See \textit{id}. at 1756-57. Part II examined § 1001 and its terms, the definitions provided in § 6, and the basis for construing the statute according to the presumptive definitions. See \textit{id}. at 1757-58. Part III examined the legislative history of the Act and the \textit{Bramblett} decision. See \textit{id}. at 1758-61. Part VI provided the holding of the Court, reversing the court of appeals's decision with respect to the § 1001 conviction, and overruling \textit{Bramblett}. See \textit{id}. at 1765.

Justices Ginsburg and Breyer also joined parts IV and V of Justice Stevens's opinion. See \textit{id}. at 1756. Justice Scalia, joined by Justice Kennedy, filed an opinion concurring in part and concurring in the judgment. See \textit{id}. Chief Justice Rehnquist, joined by Justices O'Connor and Souter, filed a dissenting opinion. See \textit{id}.

\textsuperscript{149} See \textit{id}. at 1765.

\textsuperscript{150} \textit{Id}. at 1758. The Court found it a significant error that the \textit{Bramblett} Court did not attempt to reconcile its interpretation with the presumptive definition of "department," and instead relied on a questionable review of legislative history. See \textit{id}.

\textsuperscript{151} See \textit{id}. at 1757.

\textsuperscript{152} See \textit{id}. The Sixth Circuit noted:

At first glance, one might be tempted to believe that the plain language of the statute prohibits application of § 1001 to the case at bar. In terms of ordinary usage, "department" and "agency" connote the divisions of the executive branch, e.g., the Treasury Department, the Department of Justice, the Environmental Protection Agency, etc., and not the whole or any divisions of the judicial or legislative branches—Congress is not the Department of Lawmaking, nor is the U.S.
The Court acknowledged that the word "department" occasionally had been used to refer to the judiciary, but that it is not the ordinary usage. The Court concluded that the statutory definitions of "agency" and "department" in § 6 are consistent with the ordinary meaning of the terms, thus creating a presumption in favor of such usage. Moreover, the Court stated that an historical analysis of a statute should not outweigh the plain meaning of the final text.

The Court declared that under the definition supplied by § 6, it is unquestionable that "agency" does not refer to the courts. The term "department," however, could apply to the judicial branch if the "context" of § 1001 showed that Congress intended such application. The Court referred to its decision in Rowland v. California Men's Colony, which provides the method for determining when the presumptive definition must accede to a different definition based on the statutory term's "context." Rowland requires an examination of "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." The Court found it unnecessary to review the legislative history of the Act because the § 6 definition of "department" allows deviation only if the "context" of the text itself provides for such deviation. Using the Rowland analysis, the Hubbard Court maintained that nothing in the text of the statute or related legislation showed that Congress did not intend the presumptive definition of "department" to ap-

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153. See Hubbard, 115 S. Ct. at 1757 (citing Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1867), as one example of the Court referring to the judicial branch as a "department").
154. See id.; supra note 18 (providing statutory definitions of "department" and "agency").
155. See Hubbard, 115 S. Ct. at 1759.
156. See id. at 1757.
157. See id. at 1757-58. Section 6 provides that the term "department" applies to the executive branches enumerated in 5 U.S.C. § 1 (recodified as 18 U.S.C. § 101), "unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government." 18 U.S.C. § 6 (1994) (emphasis added).
158. See Hubbard, 115 S. Ct. at 1758 (citing Rowland v. California Men's Colony, 506 U.S. 194, 199 (1993) (requiring a court to examine "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts").
159. See id.
161. See Hubbard, 115 S. Ct. at 1758. The Court stated that "[i]f Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context.'" Id. (quoting Rowland, 506 U.S. at 200).
The Court suggested that because the statute's definition did not extend to the courts, there may be no basis for the judicial function exception. The plurality, however, determined that it first had to address Bramblett's broad interpretation of the statute and the issue of stare decisis before determining the validity of the judicial function exception.

The plurality asserted that because there was an intervening development of the law, the "judicial function exception," there was justification for disregarding stare decisis. Moreover, the plurality noted that the reliance interests at stake were modest in view of the fact that numerous other statutes exist to penalize false statements made within the judicial branch.

The plurality expressed doubt that prosecutors have relied on § 1001 as a principal weapon in prosecuting those who make false statements to the judicial branch. The plurality pointed to evidence in the United States Attorney's manual, which states that United States Attorneys should not prosecute persons under § 1001 for making false statements to federal courts. The plurality further noted the fact that of the 2247 convictions secured under § 1001 in the previous five years, false statements made to the judiciary or legislature were connected to only five of those cases.

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162. See id.
163. See id.
164. See id.
165. See id. at 1764. Generally, the Court will overrule a decision based on statutory construction only if there has been an "intervening development of the law" and there will be no undue burden placed on those who have relied on the previous interpretation. See id.; see also supra note 143 and accompanying text (discussing "intervening development of the law" rationale for overruling precedent).
166. See Hubbard, 115 S. Ct. at 1764. The plurality listed four examples: "18 U.S.C. § 1621 (perjury); § 1623 (false declarations before grand jury or court); § 1503 (obstruction of justice); § 287 (false claims against the United States)." Id.
167. See id.
168. See id. The Department of Justice Manual directs its prosecutors instead to proceed under § 1621 (perjury) or § 1503 (obstruction of justice). See DEPARTMENT OF JUST. MANUAL tit. 9, § 9-69.267 (Supp. 1993). The government argued that the Manual's language is a recommendation which is not binding upon prosecutorial discretion or statutory construction, and further, that this recommendation was logical in light of the circuits' adopting the judicial function exception. See Brief for the United States at 20 n.9, Hubbard v. United States, 115 S. Ct. 1754 (1995) (No. 94-172).
169. See Hubbard, 115 S. Ct. at 1764 n.15 (1995). The dissent identified five convictions: United States v. Holmes, 840 F.2d 246 (4th Cir. 1988) (affirming the defendant's conviction under § 1001 for signing a false signature on a consent form filed with a magistrate judge); United States v. Rowland, 789 F.2d 1169 (5th Cir. 1986) (affirming the defendant's conviction for violating § 1001 by filing a false performance bond in his personal and corporate bankruptcy proceedings); United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985) (affirming the conviction of a defendant under § 1001 for omissions made in financial disclosure statements filed with the legislative branch under the Ethics in Government Act of 1978); United States v. Powell, 708 F.2d 455 (9th Cir. 1983) (affirming defendant's convic-
In light of this, it concluded that no reliance interest was in jeopardy and, accordingly, overruling Bramblett would not upset the balance in this area of the law. Thus, Hubbard's § 1001 convictions were reversed and Bramblett was overruled.

B. Justice Scalia's Partial Concurrence: Looking to the "Unacceptable Consequences" of Bramblett's Broad Interpretation as Sufficient Reason to Disregard Stare Decisis

Justice Scalia, joined by Justice Kennedy, concurred in part and concurred in the judgment. Justice Scalia agreed that Bramblett should be overruled, but he did not agree with the plurality's reasoning for overruling precedent in this instance. He did not agree that the lower courts' creation of the judicial function exception was an intervening development requiring the Court to elect between two conflicting lines of authority. Rather, he argued that the significance of the judicially-created exception was that it demonstrated the lower courts' recognition of the "unacceptable consequences" created by Bramblett.

Justice Scalia acknowledged that the "conceals or covers up" provision of § 1001, a concern declared upon the creation of the judicial function exception, is violated only when there is a duty to disclose. Nevertheless, he expressed concern that the threat of criminal prosecution under such a broad interpretation of § 1001 could have a chilling effect on
vigorous advocacy by criminal defense attorneys. Furthermore, he found no support in the text of the statute for the judicial function exception. Thus, Justice Scalia determined that the only principled alternative to the unacceptable consequences created by Bramblett's broad interpretation of § 1001 was to overrule Bramblett.

Additionally, Justice Scalia dismissed the argument that any reliance interest necessitated adherence to Bramblett's interpretation of § 1001. He acknowledged that some convictions obtained under Bramblett's interpretation may be overturned, and that some defendants might go free who could have been charged under another statute. Nevertheless, Justice Scalia maintained it was better to risk those results rather than to allow prosecutors to intimidate defense attorneys with the possibility of criminal charges for "concealing or covering up" the truth during adversarial proceedings.

C. Chief Justice Rehnquist's Dissent: Arguing for Strict Adherence to Stare Decisis

In his dissent, joined by Justices O'Connor and Souter, Chief Justice Rehnquist argued forcefully for adherence to stare decisis. The Chief Justice insisted that the plurality and concurrence offered justifications for overruling precedent that fell "far short of the institutional hurdle erected by our past practice against overruling a decision of this Court interpreting an act of Congress." The Chief Justice rejected the "intervening development of law" rationale as an outright subversion of the very principle of stare decisis.

178. See Hubbard, 115 S. Ct. at 1765 (Scalia, J., concurring in part and concurring in judgment). These concerns are essentially the same as those posed by the United States Court of Appeals for the District of Columbia in Morgan. See Morgan v. United States, 309 F.2d 234, 237 (D.C. Cir. 1962).
179. See Hubbard, 115 S. Ct. at 1766 (Scalia, J., concurring in part and concurring in judgment).
180. See id.
181. See id.
182. See id.; see also infra note 213 (listing cases where charges were dismissed or convictions reversed as a direct result of the Hubbard decision).
183. See Hubbard, 115 S. Ct. at 1766. Justice Scalia stated: Some convictions obtained under Bramblett may have to be overturned, and in a few instances wrongdoers may go free who could have been prosecuted and convicted under a different statute if Bramblett had not been assumed to be the law. I count that a small price to pay for the uprooting of this weed.
Id.
184. See id. at 1766-69 (Rehnquist, C.J., dissenting); see also supra note 6 (providing the definition of stare decisis).
185. Hubbard, 115 S. Ct. at 1766 (Rehnquist, C.J., dissenting).
186. See id.
The intervening development of law is justified only if the "intervening development" was in the case law of the Supreme Court, not a development of the lower courts, such as the judicial function exception.\(^{187}\) Moreover, he argued that the plurality's basis for dismissing the reliance interest was debatable, if not erroneous.\(^{188}\)

In discussing the importance of the doctrine of stare decisis in statutory interpretation, the Chief Justice argued that if Bramblett was to be overturned, it should be at the hands of Congress.\(^{189}\) The Chief Justice concluded that the Court should refrain from so easily dismissing long-standing precedent.\(^{190}\)

### III. License to Lie or Protection of Traditional Trial Techniques?

For some, the Hubbard decision opened a loophole in the law that would give carte blanche to those determined to lie to Congress or the courts.\(^{191}\) The Court's holding, however, though applauded by defense attorneys and their clients,\(^{192}\) did not leave prosecutors without means to target persons who knowingly and willfully lied to the federal government.\(^{193}\) Notably, § 1001 still applied to false statements made to agencies or departments of the executive branch.\(^{194}\) The plurality in Hubbard noted that the government had secured two thousand convictions under § 1001 over the last five years; however, the dissent could identify only five of those convictions as brought in connection with false statements.

\(^{187}\) See id. at 1767; see also supra note 31 (listing cases adopting the judicial function exception).

\(^{188}\) See Hubbard, 115 S. Ct. at 1766 (Rehnquist, C.J., dissenting).

\(^{189}\) See id. at 1766-67.

\(^{190}\) See id.

\(^{191}\) See Hearings on H.R. 1678 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong. (1995) (statement of Bill Martini, Congressman), 1995 WL 410918 (F.D.C.H.) (June 30, 1995). Congressman Martini, a former prosecutor, stated that "without a viable federal False Statement Statute government officials and others will be able to engage in acts of fraud and misconduct against the legislative and judicial branches of government without fear of prosecution." Id.

\(^{192}\) Cf. Naftali Bendavid, Campaign Creeps Up On Senate Crime Bill, N.J. L.J., July 24, 1995 at 37 (providing comments by defense attorneys disconcerted with congressional efforts to overrule the Hubbard decision).

\(^{193}\) See 18 U.S.C. § 401 (1994) (criminalizing and sanctioning contempt); id. §§ 1501-1517 (providing criminal sanctions for obstruction of justice); id. § 1621 (criminalizing and sanctioning perjury); id. § 1622 (providing criminal sanctions for subornation of perjury); id. § 1623 (providing criminal sanctions for false declarations). Additionally, Rule 11 of the Federal Rules of Civil Procedure requires certification for submitted documents, by which submission of insupportable contentions or facts may give rise to sanctions. See Fed. R. Civ. P. 11(b)(3)-(4).

\(^{194}\) See 18 U.S.C. § 6 (defining the term "department" as one of the executive departments enumerated in 5 U.S.C. § 101 (1994)).
made to the judiciary or legislature. This statistic illustrates the proposition that the Court's decision did not seem to pose a significant threat to our adversarial system of justice.

A. The Hubbard Decision: Limited Effect on Judicial Proceedings

Despite the dire warnings of some, Hubbard's ruling would not have significantly affected the procedures or tactics normally utilized in adversarial proceedings. The circuits had already adopted the judicial function exception to exclude "traditional trial tactics" from the scope of § 1001. Further, despite Justice Scalia's concern that the threat of criminal prosecution under § 1001 might have a chilling effect on "vigorous representation of opposing interests in adversarial litigation," there is no evidence that prosecutors used § 1001 against defense attorneys for representing clients vigorously.

Moreover, it is impossible to prevent willing lawyers from skirting the truth while representing clients, regardless of statutory prohibition.

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195. See supra note 169 (citing the five convictions the dissent identified).
196. Undoubtedly, few people believe that crimes should go unpunished simply because of perceived loopholes in the laws. However, as Justice Scalia concluded in his concurrence, it is sometimes necessary to allow wrongs to go unpunished rather than to allow bad laws to stand. See Hubbard v. United States, 115 S. Ct. 1754, 1766 (1995) (Scalia, J., concurring in part and concurring in judgment).
197. Some of the "tactics" that might be construed as "conceal[ing] or cover[ing] up" under § 1001 include: general denials in answers to complaints, see Harvey Berkman, Bill to Ensnare "Liars" May Widen Criminal Net, NAT'L L.J., July 10, 1995, at A9; or narrowly interpreting discovery requests or subpoenas duces tecum, and therefore, turning over fewer documents than the adversarial party expects, see United States v. Deffenbagh Indus., Inc., 957 F.2d 749, 754 (10th Cir. 1992) ("To give the Department of Justice power to prosecute allegedly false statements under § 1001 in connection with ... a subpoena would give the government a more powerful weapon than we believe Congress intended.").
198. See supra note 31 (listing circuits adopting or rejecting the exception).
199. Hubbard, 115 S. Ct. at 1765 (Scalia, J., concurring in part and concurring in judgment). Surprisingly, while Justice Scalia supported his reasoning for overruling Bramblett with this concern, he offered no concrete examples of abuses that would give rise to this concern. Surely, prosecutorial abuses would have manifested themselves over the 40 years in which Bramblett was law. While Justice Scalia's concern may be valid, the legal community expects one of the preeminent Justices of our time to provide concrete examples to sufficiently support and illustrate his argument.
200. Cf. Brief for the United States at 29, Hubbard v. United States, 115 S. Ct. 1754 (1995) (No. 94-172) (claiming that “[s]ection 1001 does not penalize traditional trial tactics . . . because such tactics have never included the making of intentionally false statements of fact”).
While this type of conduct was no longer prosecutable under § 1001 after *Hubbard*, there were other ways to penalize such conduct, such as monetary sanctions provided for under Rule 11 of the Federal Rules of Civil Procedure.\textsuperscript{202} Admittedly, this type of penalty may not strike the same degree of fear into attorneys as the prospect of imprisonment. The possibility, however, of severe monetary sanctions,\textsuperscript{203} disbarment,\textsuperscript{204} or suspension\textsuperscript{205} should provide most attorneys with sufficient incentive to uphold their duty to remain truthful in their representations as officers of the court.\textsuperscript{206}


\textsuperscript{203}See Fed. R. Civ. P. 11(c)(2) (providing judges with the power to penalize attorneys monetarily for violation of the Rule); Georgene M. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* § 9.03[a] (2d ed. 1995) (discussing monetary sanctions for Rule 11 violations); see also Laitram Corp. v. Cambridge Wire Cloth Co., 919 F.2d 1579, 1584 (Fed. Cir. 1990) (imposing monetary sanctions where both parties sought to obfuscate the truth); El-Gharabli v. INS, 796 F.2d 935, 939-40 (7th Cir. 1986) (imposing a $500 fine upon counsel for deliberately misleading the court); Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209-10 (11th Cir. 1985) (imposing a $50,000 fine upon counsel for intentional misconduct, including lying to the court).

\textsuperscript{204}See In re Spicer, 126 F.2d 288, 292 (6th Cir. 1942) (affirming the disbarment of an attorney for subornation of witnesses); Holmes v. Mississippi State Bar Ass'n, 498 So. 2d 837, 841 (Miss. 1986) (disbarring an attorney under Rule 6(a) of the Mississippi Rules of Discipline for testifying falsely during grand jury proceedings); In re Rouss, 116 N.E. 782, 786 (N.Y. 1917) (affirming the disbarment of an attorney for obstruction of justice); In re Kerr, 548 P.2d 297, 302 (Wash. 1976) (ordering the disbarment of an attorney for subornation of perjury); In re Bixby, 198 P.2d 672, 674 (Wash. 1948) (same).

\textsuperscript{205}See DCD Programs, Ltd. v. Leighton, 846 F.2d 526, 528 (9th Cir. 1988) (suspending an attorney for two months for making false and misleading statements to the court regarding the record of the case); In re Metzger, 31 Haw. 929, 934-36 (1931) (affirming the suspension of an attorney who deliberately misrepresented an exhibit while cross-examining a handwriting expert); Mississippi Bar v. Mathis, 620 So. 2d 1213, 1222 (Miss. 1993) (suspending an attorney for one year for deceiving the court and opposing counsel); In re Lindsey, 810 P.2d 1237, 1240 (N.M. 1991) (increasing Disciplinary Board's recommendation of probation to six months suspension for deliberately deceiving the court and opposing counsel).

\textsuperscript{206}See Model Rules of Professional Conduct Rule 3.3 (1992). Rule 3.3 requires complete candor from the attorney to the court. *Id.* The rule states in part:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
If prosecutors and courts wished to maintain the possibility of criminal sanctions against persons who knowingly and willfully made false statements during judicial proceedings, they needed only to be diligent in demanding that all such statements be made under oath and certified as true. Such action would subject persons making these statements to perjury charges if such statements were proven false.207

B. Effect on the Legislative Branch

Absent congressional response, Hubbard's effect on the legislative branch would have been less acceptable than on the judicial branch. Because the Hubbard Court construed § 1001's terms according to their presumptive definitions, namely, that "agency" and "department" apply only to the executive branch, it followed that § 1001 no longer applied to false statements made by the legislative branch.

(4) offer evidence that the lawyer knows to be false.

Id.; see also Model Code of Professional Responsibility DR 7-102(A)(5) (1980) (providing that a lawyer shall not "[k]nowingly make a false statement of law or fact").

One scholar has stated that "the [Hubbard] decision did not make it legal to lie in court. False testimony is subject to perjury laws. Judges can give those lawyers who lie fines and jail time; state disciplinary boards can bar or suspend lawyers who misrepresent facts."


207. The perjury statute, found at section 1621 of title 18, states:

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.


There is, moreover, a companion statute covering false declarations made before a grand jury or court, which is found at section 1623 of title 18. The statute states:

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.

Id. § 1623(a).
statements made to the legislative branch. Indeed, *Hubbard* overruled a case in which an ex-Congressman was charged under § 1001 with making false statements to the Disbursing Office of the House of Representatives.

The ruling had immediate repercussions in the legislative domain. For example, the United States Court of Appeals for the District of Columbia Circuit asked the district court to reconsider motions to dismiss six counts charging former Congressman Dan Rostenkowski with § 1001 violations for making false statements to Congress and the Federal Election Commission. Following *Hubbard*, the district court granted the motions to dismiss the counts for false statements made to Congress.

That ruling, and others like it, increased pressure on Congress to amend § 1001 so that false statements made to Congress would be prosecutable. Indeed, legislation was quickly introduced during the

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208. The majority stated that "there is nothing in the text of the statute, or in any related legislation, that even suggests—let alone 'shows'—that the normal definition of 'department' was not intended." *Hubbard* v. United States, 115 S. Ct. 1754, 1758 (1995). The normal definition the Court was referring to is that provided in § 6 of title 18, which defines "department" as "one of the executive departments . . . unless the context shows that such term was intended to describe [another] branch[ ] of the government." 18 U.S.C. § 6 (emphasis added).


210. *See United States v. Rostenkowski*, 59 F.3d 1291, 1301-13 (D.C. Cir. 1995) (remanding to the District Court for the District of Columbia to entertain such motions as the parties may make in light of *Hubbard*).

211. *See id.* at 1313.

212. *See United States v. Rostenkowski*, Crim. No. 94-0226, 1996 WL 342110, at *3 (D.D.C. Mar. 12, 1996) (dismissing the counts charging the congressman with making false statements to the House Finance Office in violation of § 1001). Indeed, dropping the § 1001 charges may have made it easier for the parties to agree to a plea bargain in which Rostenkowski was charged only with two counts of felony mail fraud. *Cf.* David E. Rosenbaum, *Rostenkowski Pleads Guilty to Mail Fraud*, N.Y. TIMES, Apr. 10, 1996, at A20. Ex-Congressman Rostenkowski was sentenced to a seventeen month prison sentence and fined $100,000. *See id.*

first session of the 104th Congress to accomplish that result.\textsuperscript{214} The "Government Accountability Act of 1995," informally titled the "Hubbard Bill," proposed to amend the language of § 1001 from "any department or agency of the United States," to "the executive, legislative, or judicial branch, or any department thereof."\textsuperscript{215} That change in language would have explicitly brought cases like \textit{Rostenkowski} within the realm of § 1001 liability.\textsuperscript{216} In light of the Supreme Court's decision in \textit{Hubbard} and the high-profile case of ex-Congressman Rostenkowski, it was unquestionable that some form of congressional action would be taken to criminalize unsworn false statements made to the legislative branch.\textsuperscript{217}

\section*{C. Congressional Response to Hubbard v. United States: Avoiding Vulnerability and Allowing for a Judicial Proceedings Exception}

Congress swiftly reacted to the \textit{Hubbard} decision.\textsuperscript{218} Both chambers during the second session of the 104th Congress introduced bills to restore § 1001's scope to its pre-\textit{Hubbard} dimension; thus again making

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1995, at 3 ("[T]he Supreme Court may have just taken away the most powerful weapon in prosecuting those who lie to Congress.").
\textsuperscript{215} See id.
\textsuperscript{216} Paul Morris, the attorney who represented Hubbard, expressed his concern over the proposed legislation: "'If this legislation is passed, every lawyer has to wonder every time he writes the word "denied" in an answer to a complaint . . . whether he can be charged with a crime.'" See id. (omission in original).
\textsuperscript{217} See infra notes 219-54 and accompanying text (discussing legislation extending § 1001's reach to false statements made to the legislative and judicial branches).
\textsuperscript{218} Indeed, legislation to overrule \textit{Hubbard} was introduced during the 1st Session of the 104th Congress by Congressman William Martini. See Abramowitz, \textit{Criminal Cases}, supra note 214, at 11 n.24. The bill would have changed the language of § 1001 from any "department or agency of the United States," to "the executive, legislative, or judicial branch, or any department thereof." Id. The bill was introduced as H.R. 1678, the "Government Accountability Act of 1995." See Rocco Commarere, \textit{Federal Defense Lawyers Face Jail for Half-Truths}, N.J. Law., July 10, 1995, at 1. The introduction of the bill created an uproar with defense attorneys, and it seemed a certainty that an exception would need to be created for defense attorneys when defending their clients if the bill was to have any chance of passing. Cf. Bendavid, supra note 192, at 37. The defense lawyers' main concern was the broad language of the bill. See \textit{id}. That language, they feared, would provide overzealous prosecutors with an opportunity to intimidate defense lawyers such that their "zeal for mounting an energetic defense" might be crippled. \textit{id.}; cf. \textit{Hubbard} v. United States, 115 S. Ct. 1754, 1765 (1995) (Scalia, J., concurring in part and concurring in judgment) (reasoning that \textit{Bramblett} has unacceptable consequences which may "deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of § 1001 prosecution"). The bill did not make it to the floor during the 1st session, but was reintroduced during the second session as H.R. 3166, with a subsection providing for a judicial function exception. See infra note 221 (providing text of H.R. 3166 as introduced).
\end{verbatim}
\end{scriptsize}
\end{quote}
material false statements made to the judicial and legislative branches prosecutable.219 The bills attempted, however, to accommodate the concerns of defense attorneys and judges regarding statements made to the judiciary.220

Subsection (a) of the original House amendment to § 1001, introduced as H.R. 3166, proscribed false statements from being made “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.”221 Subsection (b) provided that “[s]ubsection (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 in that proceeding.”222

The original Senate bill, S. 1734,223 proscribed false statements “in any matter within the jurisdiction of the executive, legislative, or judicial


220. See infra notes 227-37 and accompanying text (discussing the two chambers’ attempts to create a satisfactory judicial function exception).

221. The version of the House bill as introduced provided:

SECTION 1. SHORT TITLE.
This Act may be cited as the “Government Accountability Act of 1996”.

SECTION 2. RESTORATION OF FALSE STATEMENT PENALTIES.
Section 1001 of title 18, United States Code, is amended to read as follows:

“§ 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 or willfully—
“(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
“(2) makes any material 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 or imprisoned not more than five years, or both.
“(b) Subsection (a) does not apply—
(1) 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 in that proceeding.”.


222. See id. (providing text of bill as originally introduced).

223. The Senate bill provided as follows:

SECTION 1. SHORT TITLE.
This Act may be cited as the “False Statements Penalty Restoration Act.”

SEC. 2. RESTORING FALSE STATEMENTS PROHIBITION.
Section 1001 of title 18, United States Code, is amended to read as follows:

“1001. Statements or entries generally
“(a) PROHIBITED CONDUCT.—
branch of the United States Government, or any department, agency, committee, subcommittee, or office thereof." 224 The Senate’s original version of the judicial function exception was stated differently than the House’s. 225 The Senate’s amendment to § 1001, subsection (a)(2), stated

“(1) In General.—A person shall be punished under subsection (b) if, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States Government, or any department, agency, committee, subcommittee, or office thereof, that person knowingly and willfully—

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

“(B) makes any material false, fictitious, or fraudulent statement or representation; or

“(C) makes or uses any false writing or document, knowing that the document contains any materially false, fictitious, or fraudulent statement or entry.

“(2) Applicability.—This section shall not apply to statements, representations, writings, or documents submitted to a court in connection with the performance of an adjudicative function.

“(b) Penalties.—A person who violates this section shall be fined under this title, imprisoned for not more than 5 years, or both.”


Section 3 of the Senate version also amended § 1515 of title 18 of the United States Code to define the term “corruptly” in order to clarify the prohibition on obstructing Congress. The amendment inserted in section 3 states: “(b) As used in section 1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another, including, but not limited to, making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” See id. This provision was intended to reverse the decision of United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1991), where the court reversed the obstruction of justice conviction of former National Security Advisor John Poindexter, holding that the term “corruptly” is too vague to provide constitutionally adequate notice that the statute prohibits lying to Congress. See Prepared Statement of Robert S. Litt, supra note 213, at 7-9 (discussing reasons necessitating the amendment of § 1515).

Further, section 4 of the Senate’s version amended § 1365(a) of title 28 to target explicitly the Executive Branch, making a senate subpoena unenforceable only when the person under subpoena is a person in the Executive Branch of the Federal Government acting within his or her official capacity, if the head of the department or agency employing the officer or employee has directed the officer or employee not to comply with the subpoena or order and identified the Executive Branch privilege or objection underlying such direction.

S. 1734, § 4 (as introduced); see also Statement of Robert S. Litt, supra note 213, at 10 (objecting to expansion of the Senate’s authority to enforce subpoenas against the executive branch).

Finally, section 5 of the Senate bill amended § 6005 of title 18 which addresses compelling truthful testimony from immunized witnesses. See S. 1734, § 5. The amendment added the phrase “or ancillary to” after the phrase “any proceeding before” in subsections (a) and (b). Id.

224. S. 1734, § 2.

that “[t]his section shall not apply to statements, representations, writings, or documents submitted to a court in connection with the performance of an adjudicative function.”

Thus, the proposed amendments attempted to accommodate the judicial function concerns expressed by defense attorneys and the courts. The Senate’s approach distinguished between false statements made to a court while performing its adjudicative functions and false statements made to a court while performing other functions. The House version made no attempt to make the adjudicative/administrative distinction. Rather, it excepted from the false statement prohibition all statements made to a judge by a party, or that party’s counsel, during a judicial proceeding.

On the one hand, the Senate’s exception was more narrow than the House’s exception in that the Senate’s version only applied to false statements made in connection with a court’s adjudicative functions, whereas the House’s version applied to false statements made by a party during a judicial proceeding. On the other hand, the Senate’s version was broader because it applied to statements made to a court performing an adjudicative function, while the House’s exception only applied if

226. S. 1734, § 2.
227. See supra notes 98-134 (discussing the judicial function exception).
228. See S. 1734, § 2; see also Statement of Robert S. Litt, supra note 213, at 3-7 (explaining why the Senate’s proposal to make the exception apply only while the courts perform their “adjudicative” functions was unworkable). Deputy Assistant Attorney General Litt, in a prepared statement to the Senate Judiciary Committee, explained why the distinction between the courts’ “administrative” functions and “adjudicative” functions would not be an acceptable method of meeting the concerns of the legal profession. See id. at 5. He noted that the courts themselves had difficulty determining what was “adjudicative” and what was “administrative.” See id. As examples of this difficulty, he compared United States v. Plascencia-Orozco, 768 F.2d 1074 (9th Cir. 1985), where the court held that giving a false name to a magistrate judge during a plea hearing was prosecutable because it was “administrative,” with United States v. Abrahams, 604 F.2d 386, 395 (5th Cir. 1979), where the court held that giving a false name to a magistrate judge during a removal/bail hearing was “adjudicative” and, therefore, outside the scope of § 1001. See id.
229. See H.R. 3166, § 2.
230. See id.
231. See S. 1734, § 2; Statement of Robert S. Litt, supra note 213, at 3 (discussing the Senate’s proposed “adjudicative” function exception).
232. See H.R. 3166, § 2.
233. See S. 1734, § 2; Statement of Robert S. Litt, supra note 213, at 3-5. Assistant Attorney General Litt noted that the House version would limit the scope of the exception because only those statements made to a “judge” would be subject to the exception. See id. at 3. He stated that the limitation was important for two reasons. First, the Department of Justice felt that the false statements made to other entities within the judicial branch, such as the Administrative Office of the Courts, grand juries, and the United States Probation Office, should be subject to prosecution. Second, the Department of Justice felt it imperative that false statements made to law enforcement officers made in connection
the false statement was made to a judge. The final bill incorporated the main text of the House version, with some amendments to other sections of the United States Code from the Senate version. There also was one revision to the judicial proceedings subsection of the original House version: the term "or magistrate" was added after the word "judge." 

with judicial proceedings be subject to prosecution under § 1001. See id. at 6-7. Mr. Litt noted the consequences of a broad judicial exception, pointing out the decision in United States v. Wood, 6 F.3d 692 (10th Cir. 1993), where the court reversed the conviction of a person who lied to FBI agents conducting a grand jury investigation. See id. at 7.

234. See H.R. 3166, § 2; Statement of Robert S. Litt, supra note 213, at 6 (discussing the preference of having the exception apply to statements made to "judges" rather than "other entities within the judicial branch").

235. The relevant text of the bill as passed provides as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "False Statements Accountability Act of 1996".

SEC. 2. RESTORING FALSE STATEMENTS PROHIBITION.

Section 1001 of title 18, United States Code, is amended to read as follows:

"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 material false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

"(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."


236. See supra note 223 (providing text of amendments affecting other sections of the United States Code).

The final version also included a subsection addressing false statements made to the legislative branch.\textsuperscript{238} The new subsection prohibited false statements made to the legislature concerning administrative matters, such as procurement, payment claims, and personnel or employment claims;\textsuperscript{239} or statements made during any congressional investigation or review.\textsuperscript{240}

Although the amended 18 U.S.C. § 1001 includes a judicial proceedings exception,\textsuperscript{241} it is likely the provision will create uncertainty in several areas. First, it allows unsworn false statements to be made to a judge or magistrate during judicial proceedings.\textsuperscript{242} This raises the issue of whether the exception applies only to statements made to Article III judges,\textsuperscript{243} but not statements made to administrative law judges (ALJs).\textsuperscript{244} If the judicial function exception does not apply to ALJs, an attorney may be prosecuted for making a false statement to an ALJ during adjudicative proceedings in the executive branch, but the same statement made to an Article III judge would not subject the attorney to prosecution.\textsuperscript{245} The rationale underlying the exception, however, applies whether an attorney is advocating in front of an Article III judge or an ALJ.\textsuperscript{246} The subsection fails to address this anomaly, and instead creates an exception only for statements made to “a judge or magistrate.”\textsuperscript{247} Thus, false statements made to a judicial clerk or a clerk of the court technically do not qualify for the exception. Therefore, an attorney making a false statement to a

\textsuperscript{238} See supra note 235 (providing text of subsection (c) of the enacted amendment exempting from punishment certain false statements made to Congress).

\textsuperscript{239} This particular provision clarifies the statute’s scope by expressly stating that only false statements made in a specific context to the legislative branch are punishable. See supra note 235 (providing text of amended § 1001(c)(1)); see also 142 Cong. Rec. S11,605-06 (daily ed. Sept. 27, 1996) (remarks of Sen. Specter explaining the scope of the false statements provision for false statements made to Congress).

\textsuperscript{240} See supra note 235 (providing text of amended § 1001(c)(2)); see also 142 Cong. Rec. S11,605-06 (daily ed. Sept. 27, 1996) (remarks of Sen. Specter explaining the scope of the false statements provision for false statements made to Congress during congressional investigations or reviews).

\textsuperscript{241} See H.R. Res. 535 (amending § 1001(b)).

\textsuperscript{242} See id.

\textsuperscript{243} See U.S. Const. art. III, § 1 (authorizing appointment of federal judgeships).

\textsuperscript{244} “Administrative Law Judges [(ALJs)] preside at [executive] agency hearings.” 1 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 6.01, at 6-3 (1996). ALJs have immense judicial power much like those afforded Article III trial judges. See id. § 6.01, at 6-6. ALJs, however, “deliver recommendations [rather than] final decision[s],” as their power is subordinate to that of the agency for whom they serve. Id. § 6.01, at 6-3.

\textsuperscript{245} See H.R. Res. 535 (providing in the amendment of § 1001(b) that the judicial proceeding exception only applies to false statements made to “judges or magistrates”).

\textsuperscript{246} See supra notes 98-134 and accompanying text (discussing the rationale underlying the judicial function exception).

\textsuperscript{247} H.R. Res. 535 (amending § 1001(b)).
judge's clerk or to a clerk of the court may fall outside the subsection (b) exception.\textsuperscript{248}

Second, the term "judicial proceeding" could be considered ambiguous.\textsuperscript{249} To some, the term might contemplate any judicial activity occurring after a civil complaint is filed\textsuperscript{250} or a criminal indictment is handed down.\textsuperscript{251} To others, it could mean only those activities that occur during the trial or hearing phase of a proceeding.\textsuperscript{252} Thus, questions may arise concerning the precise meaning of the term "judicial proceeding." For example, some might argue that a pre-trial conference\textsuperscript{253} technically is not a judicial proceeding, while others would argue that such a conference is a judicial proceeding. Ultimately, the courts will be called upon to determine the scope of the judicial proceeding exception.\textsuperscript{254}

\textbf{D. Stare Decisis: Alive and Well}

Chief Justice Rehnquist based his dissent on stare decisis.\textsuperscript{255} His concern was that the justification the plurality relied upon to support its decision to overrule \textit{Bramblett}—that the judicial function exception was an intervening development of the law—was entirely subversive to the principle of stare decisis.\textsuperscript{256} He argued that by accepting the "intervening

\begin{itemize}
\item \textsuperscript{248} See id. (providing in amended § 1001(b) that only false statements made to "a judge or magistrate" are subject to the judicial function exception); cf. \textit{Statement of Robert S. Litt, supra} note 213, at 6 (noting that only false statements made to a judge are exempt from prosecution).
\item \textsuperscript{249} The term "judicial proceeding" is not defined in title 18 of the United States Code. The only provision that provides some type of definition is 28 U.S.C. § 1827(j), which defines the term "judicial proceedings instituted by the United States." That provision provides:

\begin{quote}
\[\text{As used in this section [the term] refers to all proceedings, whether criminal or civil, including pretrial and grand jury proceedings (as well as proceedings upon a petition for a writ of habeas corpus initiated in the name of the United States by a relator) conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court.}\]
\end{quote}

18 U.S.C. § 1827(j) (1994) (emphasis added).\textsuperscript{250}
\item \textsuperscript{251} See \textit{FED. R. CIV. P.} 3-10 (establishing protocol for the filing of complaints in civil cases).
\item \textsuperscript{252} In defining the term "judicial proceeding," Black's Law Dictionary cross-references the word "trial." See \textit{BLACK'S LAW DICTIONARY} 849 (6th ed. 1990).\textsuperscript{253}
\item \textsuperscript{253} See \textit{FED. R. CIV. P.} 16 (providing the court with discretionary authority to require all parties to a civil proceeding to conduct a pre-trial conference in order to facilitate the quick and efficient administration of justice).
\item \textsuperscript{254} See \textit{supra} note 2 and accompanying text (discussing the judicial branch's role as the ultimate interpreters of the law).
\item \textsuperscript{255} Hubbard v. United States, 115 S. Ct. 1754, 1766 (1995) (Rehnquist, C.J., dissenting).
\item \textsuperscript{256} See id.
development of the law” that the lower courts created, the Court was inducing the lower courts to create bodies of law attempting to effectively overrule Supreme Court decisions with which they disagree.\textsuperscript{257} He reasoned that this possibility was enough in itself to warrant the upholding of precedent, even though that precedent may be “really wrong” according to sitting justices.\textsuperscript{258}

This concern over the potential harm to the doctrine of stare decisis may seem valid; however, even if the lower courts attempt to overrule a Supreme Court holding by creating an “intervening development of law,” the Court itself has the authority to strike the “intervening development.”\textsuperscript{259} Further, to the extent that current justices may utilize an “intervening development” to overrule precedent, one need not doubt that a majority of justices intent on overruling bad law could avoid stare decisis by reasoning other than an “intervening development of the law.”\textsuperscript{260} The doctrine of stare decisis is so ingrained in our jurisprudential system\textsuperscript{261} that it cannot convincingly be argued that the overruling of one case interpreting an obscure criminal statute poses any real threat to the doctrine itself.

\textbf{E. The Method of Statutory Interpretation in Hubbard}

The Hubbard majority determined that it was appropriate to strictly construe § 1001 by applying the statutory definitions to the plain language of the text.\textsuperscript{262} The Court’s strict construction of the statute is indicative of the Court’s recent jurisprudence.\textsuperscript{263} It is not difficult to conclude

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{257} See id.
\item \textsuperscript{258} Id. at 1769 (“The opinion of one justice that another’s view of a statute was wrong, even really wrong, does not overcome the institutional advantages conferred by adherence to \textit{stare decisis} in cases where the wrong is fully redressable by a coordinate branch of government.”).
\item \textsuperscript{259} See id. at 1765 (Scalia, J., concurring in part and concurring in judgment) (“Such ‘intervening developments’ by lower courts that we do not agree with are ordinarily disposed of by reversal.”) (citing as an example, McNally v. United States, 483 U.S. 350 (1987)).
\item \textsuperscript{260} See id. (concluding that precedent posing “unacceptable consequences” that can only be judicially avoided by creating exceptions with no basis in law, or by irrational limitations, should be overruled with little hesitation); see also Saul Brenner & Harold J. Spaeth, \textit{Stare Indecisis}, apps. I-II (1995) (listing and discussing overruled and overruling decisions of the Supreme Court from 1948-1992).
\item \textsuperscript{261} See generally Brenner & Spaeth, supra note 260 (providing in-depth analysis of the common law’s reliance on the doctrine of stare decisis).
\item \textsuperscript{262} See Hubbard, 115 S. Ct. at 1759 (“We are convinced that the [Bramblett] Court erred by giving insufficient weight to the plain language of §§ 6 and 1001.... [A] historical analysis normally provides less guidance to a statute’s meaning than its final text.”).
\item \textsuperscript{263} See Shapiro, supra note 6, at 922 n.2 (providing cases in which the current Court is narrowing the focus of its “consideration to the statutory text and its ‘plain meaning’”).
\end{enumerate}
\end{footnotesize}
that the law is more predictable and reasonable when the Court construes statutory law according to the plain meaning of the text.\textsuperscript{264} It is equally clear that this “plain meaning” approach to statutory interpretation is the favorable method of interpretation among the Justices of the current Court,\textsuperscript{265} as it is conspicuous that no mention or objection was made to this approach by any of the Court’s members. The only argument the dissent offered was based on stare decisis and not interpretational methodology.\textsuperscript{266}

IV. Conclusion

Contrary to the concerns expressed by Chief Justice Rehnquist, the Hubbard decision did not damage the doctrine of stare decisis. The Hubbard Court justifiably corrected Bramblett’s erroneous interpretation of § 1001. Our system of checks and balances is designed such that the will of the people should be fulfilled through their chosen representatives who enact the laws of the land. It is therefore imperative that the judiciary remain faithful to its solemn trust to interpret the law, not create it. This can be accomplished by construing the laws as they are written, not by how a particular judge thinks they should have been written.

The Hubbard decision gave Congress notice that it must be explicit in its intentions when drafting legislation. While the amendment to 18 U.S.C. § 1001 explicitly encompasses all three branches of government, and addresses the concerns expressed by the legal community, it creates some ambiguities that will force the courts once again to interpret some of its terms and construe its scope. And thus, we inevitably return to the institutional tension inherent in our system of government.

\textit{Christopher E. Domínguez}

\footnotesize{\textsuperscript{264} Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in judgment) (arguing that the Immigration and Naturalization Service’s interpretation of the Immigration and Nationality Act is not reasonable and therefore not entitled to deference because its interpretation is not supported by the plain meaning and structure of the statutory text).}

\footnotesize{\textsuperscript{265} Cf. Shapiro, supra note 6, at 922 n.2 (providing a list of recent Supreme Court cases focusing on the plain language of the text being interpreted). But see Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. \\& Pub. Pol’y 401, 401 (1994) (proclaiming that Justice Scalia’s “plain meaning” approach to statutory interpretation “has not worn general acceptance on the Court”).}

\footnotesize{\textsuperscript{266} See supra text accompanying notes 184-90 (providing the rationale underlying the dissenting opinion).}