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**EXCULPATORY NO IN MILITARY LAW
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A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, or any other government agency.

Michael E. Finnie
Major
U. S. Marine Corps

42D JUDGE ADVOCATE GRADUATE COURSE
April 1994

EXCULPATORY NO IN MILITARY LAW
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Michael E. Finnie
Major
U.S. Marine Corps

ABSTRACT: This is a comparative analysis of the exculpatory no doctrine in the federal circuit courts. It concludes that continued recognition of this defense to a violation of Article 107, UCMJ is no longer warranted in military law. The Fifth and Sixth Circuit United States Courts of Appeals have rejected this exception as not conforming to the established rules of law. This defense has gained only limited acceptance among the other federal circuits. The legal rationale advocated in support of this exception is not longer persuasive in light of United States Supreme Court decisions recognized as controlling in this area by the United States Court of Military Appeals. The doctrine is also inconsistent with basic tenets of military law. For these reasons the Court of Military Appeals should no longer place reliance on federal court recognition as justification for the continued acceptance of exculpatory no in military law. Military case law has severely restricted the availability of this defense. Complete renunciation of this doctrine in military justice practice will promote judicial economy and efficiency by removing the need to consider an archaic and ill-advised exception to the clear rule of law.

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EXCULPATORY NO DOCTRINE IN MILITARY LAW
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BY MAJOR MICHAEL E. FINNIE, USMC

I. Introduction

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Judge Learned Hand¹

The exculpatory no doctrine can be described as a legal anomaly. It is an affirmative defense to making a false statement in violation of 18 U.S.C. § 1001 under certain circumstances.² This judicially created exception, recognized in a number of federal circuits, in effect provides legal permission for the telling of lies.³ In contrast, focusing on the consequence of application of this doctrine, a number of federal courts remain unconvinced of the merits of the exculpatory no defense. These courts have either refused to adopt the defense or interpreted the defense in such a circumscribed fashion as to render it meaningless. The United States Supreme Court [hereinafter

Supreme Court] has probed other issues concerning interpretation of § 1001, but has not ruled on the conflict between the circuits concerning the exculpatory no defense.⁴ Congress recognized the problem of various interpretations of section 1001 in regard to this defense.⁵ Senator Kennedy sponsored a bill to settle this question.⁶ However, the bill failed to pass both Houses as have other Congressional attempts at total revision of the federal code of criminal laws and procedures.⁷

The exculpatory no doctrine extends beyond privilege and confers a form of legal immunity for what would otherwise constitute a criminal act.⁸ The courts have used differing rationale to arrive at this conclusion.⁹ The doctrine first appeared based on statutory construction of § 1001.¹⁰ A number of federal jurisdictions have accepted the exculpatory no defense as warranted based on "solicitude" for the penumbra affect of the Fifth Amendment protection against compelled self-incrimination.¹¹ Other federal courts do not recognize the defense as justified by either statutory interpretation or constitutional implications. In February of this year, the Fifth Circuit Court of Appeals reversed thirty two years of precedent and rejected application of the exculpatory no defense in that circuit.¹² The Sixth Circuit Court of Appeals has also rejected this defense.¹³ Unfortunately, even the recognized exculpatory no doctrine in the federal circuits has developed through often inconsistent interpretations by federal courts on a case by case

basis. For virtually every factual scenario recognizing this defense to section 1001, there is a contrary federal case on a similar set of facts holding the doctrine inapplicable. The exculpatory no doctrine has developed as a legal theory only slightly less complicated than the rule against perpetuities. This ad hoc development of the law has left a complicated rule of almost indeterminant scope. This is the problem. "Complex, confusing and even conflicting, laws and procedures have all too often resulted in rendering justice neither to society nor to the accused. Laws that are not clear, procedures that are not understood, undermine the very system of justice which they are the foundations."¹⁴

The exculpatory no defense is pertinent to military law because of the relationship between the federal false statement offense and the military false statement offense.¹⁵ The analagous military law provision is Article 107, Uniform Code of Military Justice, 10 U.S.C. § 907 [hereinafter UCMJ]. As a result of the judicially determined relationship between the two false statement offenses, the federally recognized exculpatory no doctrine has also been grafted on to military law. Participants in the military justice system have been duly informed by case decisions to consider the exculpatory no defense. The Court of Military Appeals placed defense counsel on notice concerning the defense by the dicta in *United States v. Sievers*.¹⁶ "Despite the resolution of the granted issue, we must express our

bewilderment concerning the decision of appellant to plead guilty to this offense under Article 107. . . . [P]otential problem we perceive in this case is applicability of the 'exculpatory no' doctrine to appellant's prosecution under Article 107."¹⁷ The Army Court of Military Review indicated to trial counsels in pleading violations of Article 107 "to include all false averments in the specification" in part to avoid this issue.¹⁸ The appellant in *United States v. Hudson*,¹⁹ raised a claim of ineffective assistance of counsel for failing to cause full litigation of the defense. The review court in *Hudson* held the military judge erred for failing to secure a satisfactory disclaimer from the appellant as to the defense, and therefore, ruled the plea to violation of Article 107 improvident.²⁰ Partly, the cause of this review issue is that the military courts have not announced an intelligible standard for the defense under military law. As in the federal courts, the issue has been discussed on a case by case basis. Trial counsels, defense counsels, accuseds, and military judges may be left in a quandary concerning charging, pleas, and proof regarding violations of Article 107 and the exculpatory no doctrine.²¹

The military review courts were not far removed from the fray in struggling to apply this doctrine. The Army Court of Military Review issued three decisions in *United States v. Prater*,²² vacillating over application of exculpatory no. Judge Giuntini summarized the real crux of the court's dilemma. "Like my

Brothers, I am put off by a defense which seems to sanction the telling of lies. However, I cannot ignore the rationale behind the 'exculpatory no' doctrine and its acceptance by the federal courts, including the United States Court of Military Appeals."²³ He noted that most of the federal circuits had adopted a test for application of the defense, but military courts had not.²⁴ Reviewing *Prater* the Court of Military Appeals restated recognition of exculpatory no as a possible defense to a charge under Article 107.²⁵ The court cited various federal circuit decisions concerning the defense. Still, the court did not make clear the scope of the exception in military law.

Recently, the Army Court of Military Review grappled again with the exculpatory no defense in *United States v. Sanchez*.²⁶ The Army review court expressed reluctance to acknowledge this "technical defense," but did so because of the precedence of Court of Military Appeals holdings.²⁷ "Our reluctance to apply the exculpatory no doctrine should not, however, be perceived as a refusal to recognize it. The Court of Military Appeals having spoken, we cannot refuse to apply the doctrine in the appropriate case."²⁸ Yet, the court's decision in *Sanchez* clearly sounds the deathknell of the doctrine in military law. The review court need not have been reluctant. The defense was dead on arrival by the time of the *Sanchez* decision. Although the opinions have been enigmatic, the Court of Military Appeals has indicated the defense is not favored in military practice. The military court

of last resort should follow the lead of the Fifth and Sixth Circuit Courts of Appeals and put the issue to rest. Military courts should avoid the morass of determining the availability of the doctrine on a case by case basis; before "[w]e rush in, therefore, if foolishly, at least where others have been treading though the tracks are far from clear."²⁹ The solution submitted here is to reject exculpatory no as a defense.

The doctrine presents a significant question. Any notion of immunity is highly significant in criminal justice practice. The discussion here maintains that the rectitude of the military criminal justice system does not require continued sanctioning of the exculpatory no doctrine. The legal system is represented by a blindfolded statue holding the scales of justice. Blind justice represents impartiality, not a desire to avoid the truth. This article will examine the underpinnings of the debate underlying the exception to a conviction for a false statement. The intent is to recommend which of the conflicting federal precedent the military courts should place reliance on. Notwithstanding the current state of the law, this discussion will address whether continued recognition of the defense in military law is consistent with the traditional and fundamental concepts in the administration of military justice.

II. False Statement Offenses

A. False Statement the Federal Offense

18 U.S.C. § 1001

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

There are a number of federal false statement provisions.³⁰ The principal false statement offense is 18 U.S.C. § 1001. To establish a violation under this statute, generally the proof requires as follows. The statement made was false. The false statement was material. It was made knowingly and willfully. Also, the statement was in relation to a matter within the jurisdiction of a department or agency of the United States.³¹ Section 1001 protects a "myriad of governmental activities."³² The form of the statement is immaterial. The provision has been held to cover oral as well as written statements.³³ Nor must the statement be under oath.³⁴ The statement need only be partially false to be punishable.³⁵ Only a general intent to deceive is required.³⁶ Knowingly and willfully is only the mens rea

requirement.³⁷ The defendant need not know the statement made is a matter within federal agency jurisdiction.³⁸ A majority of jurisdictions require the false statement be material.³⁹ A statement is material if it has "a tendency to influence or was capable influencing the decisionmaking body to which it is addressed."⁴⁰ The false statement need not be successful to constitute an offense.⁴¹ Unlike perjury, the two witness rule does not apply to violations of § 1001.⁴²

Some history of 18 U.S.C. § 1001 is pertinent to understanding the exculpatory no doctrine. Courts have constantly turned to legislative history to interpret the statute.⁴³ Section 1001 began as a military offense.⁴⁴ It appeared as a violation for the first time during the Civil War in 1863 to protect the public treasury from false or fraudulent claims against the government. In 1874 this law was included as part of the revised criminal code.⁴⁵ It was redesignated section 35 of the criminal code and extended to cover corporations in which the United States held stock in 1909.⁴⁶ In 1918 the Congress modified the statute to require a purpose to cheat and swindle or defraud the government and redesignated as section 40. Congress amended the act in 1934 and redesignated as section 48. This was at the request of the Secretary of Interior to assist in enforcement of the National Industrial Recovery Act (NIRA).⁴⁷ The amendment brought under the sanction of the act a false statement made "in any matter within the jurisdiction of any

department or agency of the United States."⁴⁸ This amendment was intended by Congress to include false statements which did not involve pecuniary claims against the government.⁴⁹ In 1940 the statute was redesignated as 18 U.S.C. § 80. False claims and false statements were separated into distinct statutes in 1948. False claims became 18 U.S.C. § 287. False statements were codified as 18 U.S.C. § 1001. This false statement statute has continued substantially unchanged until the present.

B. False Statement the Military Justice Provision

Article 107, UCMJ

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

Military law also has various provisions for prosecuting false statements.⁵⁰ Article 107, UCMJ is the primary military false statement offense. The essential elements of the offense are as follows. The accused signed a certain document or made an official statement. The document or statement was false in some respect. The accused knew the document or statement was false. A document must be signed or statement made with the intent to deceive.⁵¹ All documents signed or statements made in the line of duty are considered official.⁵² It is not required the false

matter be material. The false submission must only be made with the intent to deceive.⁵³ The accused must have actual knowledge of the false representation. However, knowledge may be proved by circumstantial evidence.⁵⁴

A nexus between the military and federal offense of false statement is obvious given the similar language of the two statutes.⁵⁵ Arguably, they may share a common background in the military Articles of War.⁵⁶ The military offense has been interpreted and applied in a fashion similar to the federal offense because of the Court of Military Appeals determination "of the close relationship between Article 107, UCMJ and 18 U.S.C. § 1001."⁵⁷ Military courts have found a "general analogy" between the language of the two statutes.⁵⁸ The courts have frequently looked to interpretation of section 1001 by federal courts to determine what constitutes a violation of Article 107. Military courts have also attempted to interpret Article 107 in a manner consistent with Supreme Court interpretation of section 1001.⁵⁹ There are differences between § 1001 and Article 107.⁶⁰ Moreover, the problem lies in the fact that the various federal circuits courts have issued conflicting opinions in interpretation of section 1001 relating to the exculpatory no doctrine. Consequently, due to the judicially determined connection between § 1001 and Article 107, military courts have had to make a choice between the inconsistent federal precedents concerning the exculpatory no exception as to which apply to

military false official statement offenses.⁶¹

III. The Exculpatory No Doctrine In The Federal Courts

A. Source of the Exculpatory No Doctrine

Understanding the exculpatory no doctrine is assisted by examining the seminal cases carving out this exception. The original cases adopting an exception to a literal reading of section 1001 did so based on slightly different legal reasons. Together these first cases provide the basic legal propositions in support of the defense. They represent the significant thread of continuity in the development of the exculpatory no doctrine. Interestingly, the case that named this doctrine did not recognize the exception. Later cases accepting this defense tend to merely analyze whether the facts of the case fit the doctrine's criteria. Many of the later cases have not undertaken an extensive examination of the underlying legal basis for the exception.

United States v. Levin,⁶² was the first case to carve out this particular exception to section 1001. Levin made a false statement to a Federal Bureau of Investigation [hereinafter FBI] agent denying knowledge of the real owner of stolen property in his possession. The court reversed the conviction. *Levin* held the application of § 1001 for a false statement was limited under

certain circumstances.⁶³ The defendant was a suspect, and therefore, had no legal obligation to provide a statement. Also, the court found the FBI was not an agency included in the terms of the statute, because it lacked dispositive authority. Thus, *Levin* held section 1001 inapplicable to the defendant's false statement. The court reasoned that Congress could not have intended the statute include false statements from a suspect not under oath. Section 1001 required a lesser standard of proof, but imposed a greater punishment than the perjury statute.⁶⁴ A literal reading of section 1001 would obviate the need for the perjury statute under 18 U.S.C. § 1621.

The *United States v. Stark*,⁶⁵ is the most often cited case for the genesis of the exculpatory no doctrine.⁶⁶ *Stark* was published before *Levin*.⁶⁷ The case examined false oral statements to the FBI denying knowledge of bribes to Federal Housing Administration officials. The statements were made after defendants were informed of their "constitutional rights with respect to answering questions or refusing to do so, and that any answers given by them might possibly thereafter be used against them in a criminal proceeding."⁶⁸ In addition, unlike *Levin*, the defendants were placed under oath prior to making the statements. Judge Chestnut held § 1001 did not apply because the defendants were the subjects of a criminal investigation. *Stark* used statutory construction to determine that legislative intent was to exclude from the reach of the statute false statements not

volunteered for the purpose of making a claim or inducing government action. As in *Levin* the court noted the the statements were not legally required. The court also determined the FBI and Department of Justice had no adjudicative jurisdiction. As a result, *Stark* held the false statements were outside the jurisdiction of a department or agency as intended by the statute.

United States v. Davey,⁶⁹ completed the seminal trinity of cases establishing this defense to a violation of § 1001 which ultimately would be named the exculpatory no exception. The defendant in this case lied to FBI agents about an alias in an unsworn oral statement. Judge Bottle found the decisions in *Levin* and *Stark* authoritative in holding the false statement was not punishable under section 1001. The court characterized *Stark* as standing for the proposition that "negative answers" given to the FBI while under investigation were not statements or a matter within the agency's jurisdiction for purposes of the statute. The court's factual determination was the defendant "either said 'no' or made some other equivalent denial."⁷⁰ *Davey* concluded this language was not covered by § 1001. "Whether or not a simple 'no' is a statement from the standpoint of grammar and syntax, I do not construe it to be a statement within the contemplation of section 1001."⁷¹ This seemingly inane language in *Davey* created the later significance of "no" in the exculpatory no defense.

Levin, Stark, and Davey formed the legal foundation for an exception to section 1001 for a false statement to a criminal investigator by an individual under suspicion of having committed an offense. Yet, a case that considered these holdings and declined to accept this defense is responsible for the phraseology which gave the exception a name. In *United States v. McCue*,⁷² the defendants were charged with lying to special agents of the Internal Revenue Service [hereinafter IRS]. The Second Circuit Court of Appeals upheld their conviction for violation of section 1001. In the court's opinion § 1001 revealed no ambiguity necessitating reliance on statutory construction to determine the meaning. The plain meaning of the statute included false statements in any matters within the jurisdiction of any federal government department or agency. Judge Hays, writing for the court, cited Supreme Court decisions as supporting broad interpretation of section 1001.⁷³ In dicta *McCue* posed a question not presented by the case. "The case of a citizen who replies to the policeman with an "exculpatory 'no'" can be left until it arises."⁷⁴ Hence, the exception to prosecution for a violation of section 1001 eventually became the "exculpatory no" defense.

A few months after the decision in *McCue*, the Fifth Circuit Court of Appeals adopted the exculpatory no defense.⁷⁵ Other federal circuit courts subsequently adopted this defense to false

statement under section 1001. However, a significant number of federal courts considering the defense have either declined to adopt or expressly rejected the doctrine. There exists a noticeable split in the federal circuits in regard to the exculpatory no doctrine.

B. Recognition of the Exculpatory No Doctrine in the Federal Circuits

The scope of the exculpatory no defense recognized in the federal circuits is difficult to determine. Although the various district courts and appeals courts use similar language and purport to apply similar rules, they arrive at what can be viewed as entirely different conclusions as to application of this exception. The positions of the circuits will be set out briefly following. First, it would be beneficial at this point in the discussion to set out the most generally recognized criteria for application of the defense. This reference framework is the test for the exception established by the Ninth Circuit Court of Appeals. A false statement alleged in violation of § 1001 is viewed against the following five part criteria for application of the exculpatory no exception:

- (1) the false statement must be unrelated to pursuit of a claim to a privilege or a claim against the government;
- (2) the false statement must have been in response to inquiries initiated by a federal agency or department;
- (3) the false statement must not impair the basic

- functions entrusted by law to the agency;
- (4) the false statement must have been made in the context of an investigation rather than a routine exercise of administrative responsibility; and
 - (5) it was made in a situation in which a truthful answer would have incriminated the declarant.⁷⁶

A number of the other federal courts have generally looked to the Ninth Circuit's exculpatory no test.⁷⁷ However, these courts have often deviated from or added additional restrictions to the basic template. The practical result is the absence of a general test or consensus on the requirements for invoking the defense in the federal courts.

The First Circuit Court of Appeals addresses that circuit's position on the exculpatory no doctrine in *United States v. Chevoor*.⁷⁸ *Chevoor* used the exculpatory no doctrine to support prosecution of the defendant for perjury before the grand jury. The defendant was not a suspect nor the target of the grand jury at the time of the false statement. His unsworn false responses were to informal questioning by FBI agents and an Assistant U.S. Attorney denying knowledge of loan sharking activities of another individual. Chevoor was not criminally involved in the activity. He was paying the loan shark. This interview was prior to his false testimony before the grand jury. The defendant claimed the government ensnared him into perjury. The question presented was whether Chevoor was forced to lie to the grand jury so as not to

reveal his earlier false statement during the interview. The court found the following facts concerning the false interview statement pertinent to their determination. Cheevor was not given *Miranda* warnings or advised of his rights under the Fifth and Sixth Amendment. However, truthful answers to the questions would not have incriminated him. Cheevor was not thrust upon the horns of a triceratops-- facing perjury, self-incrimination, or contempt.⁷⁹ He was not placed in situation where he was unaware of his only "safe harbor," that being to remain silent.⁸⁰ This was because the court determined the false statement fell within the exculpatory no exception. The defendant had not presented a false claim against the government. The questioning was informal, but in the course of a criminal investigation. Further, the defendant had not initiated the questioning and merely gave negative responses to questions. Additionally, no oath was given. *Chevoor* considered the exculpatory no decisions of other circuits in making this determination. The court held the defendant's statements outside the scope of section 1001 under these circumstances. The Court of Appeals stated the same rationale as *Levin*. Including this type of false statement under § 1001 was not the intent of the Congress. It would undermine the safeguards normally provided with perjury prosecutions, primarily the formality of the oath, while permitting sanctions as severe.⁸¹ The First Circuit's position in *Chevoor* deviates substantially from the exculpatory no doctrine in a number of other circuits. Specifically, the court departs from the

standard requirement a truthful response must have incriminated the defendant. Most courts hold the doctrine does not apply when truthful responses would not incriminate the declarant or the declarant does not reasonable believe that truthful responses will incriminate.⁸² It is important to note that Cheever applied exculpatory no not to preclude a conviction, but in order to maintain the charge.

The *Davey* decision described earlier came from a court sitting in the Second Circuit. Nevertheless, the Second Circuit Court of Appeals was the first appeals court declining to adopt the exculpatory no exception.⁸³ Although not recognized in the circuit, the Second Circuit has considered the defense in numerous § 1001 prosecutions. This is in part because the *McCue* decision suggested the need to consider the defense in the appropriate situation.⁸⁴ Still, "the Second Circuit has been among the least hospitable to the exculpatory no exception."⁸⁵ If the adopted, the courts have indicated that it will be narrowly construed.⁸⁶ The circuit's decisions have primarily focused on the circumstances and nature of the response.

- (1) Defendant has not volunteered but appeared at the request of the government;
 - (2) Defendant's answer is in response to questioning initiated by the government;
 - (3) An honest answer by the defendant would incriminate;
- and

(4) Defendant must merely answer inquiries in the negative.

A point to highlight is that the Second Circuit strictly construes a mere negative response. The response must be "no" and no more. "Any statement beyond a simple no does not fall within the exception."⁸⁷ Also, arguably the circuit courts have indicated a *Miranda* warning or formal advice of any kind may be sufficient to remove any subsequent false statement from the exculpatory no exception.⁸⁸ This circuit's courts have continually looked to the plain meaning of the statute. *McCue* was the first case to note that the Supreme Court had rejected any theory of narrow application of section 1001.⁸⁹ As a result, the exculpatory no defense is so strictly construed in the Second Circuit as to have little chance of being available to a criminal defendant.

The Third Circuit Court of Appeals addressed the exculpatory no doctrine in *United States v. Barr*.⁹⁰ Barr was convicted *inter alia* of false oral and written statements in violation of 18 U.S.C. § 1001. Barr had served as an Assistant Attorney General of the United States. He lied about his prior use of cocaine on a Standard Form 86 and in an interview with a FBI agent as part of his application for employment and to secure a security clearance required for the position. Prior to this case, the circuit had neither adopted nor rejected the exculpatory no defense. The court weighed the Ninth Circuit Court of Appeals

test for exculpatory no. Also, *Barr* took into account that the Sixth Circuit expressly declined to accept the defense. The resulting decision applied one of the Ninth Circuit conditions that the false statement not relate to claiming a privilege from the government. Accordingly, the defense was not available as Barr's false statements were "to secure or accept a prestigious appointment with the Office of the Attorney General of the United States."⁹¹ Still, the Third Circuit reserved opinion on adopting the exculpatory no doctrine. "Moreover, because we decline to apply the exculpatory no doctrine to the facts of this case, we need not decide whether the doctrine is viable under other circumstances."⁹² The *Barr* decision indicates reservation by the Third Circuit Court of Appeals in regard to the exculpatory no exemption.

Stark was decided by a court in the Fourth Circuit, but the exculpatory no doctrine was not examined by the Fourth Circuit Court of Appeals until *United States v. Cogdell*.⁹³ Cogdell cashed her income tax refund check at a local grocery store. She later contacted the IRS complaining of not receiving the check. Subsequently, she applied for and received a replacement check. The matter was referred to the Secret Service for investigation. The Secret Service talked to the grocer who cashed both tax refund checks for Cogdell. As a result, the defendant was arrested. After being advised of her *Miranda* rights, she gave a false statement denying culpability. This was the basis of a

charge under section 1001 among other charges. The appeals court reversed the conviction. The opinion applied the Ninth Circuit's criteria for the exculpatory no doctrine. Most of the factors considered by the court are readily apparent. However, two areas are worthy of additional examination. *Cogdell* held the false denials by the defendant were not made in pursuit of the false claim. She had already cashed the check. Therefore, her false statements were to defend against the government's prosecution. The false statements to the investigator were not in pursuit of the claim.⁹⁴ Also, the court found that a false statement by a criminal suspect did not pervert the agency's function. A trained agent should expect the suspect to deny guilt, and therefore, continue to pursue the investigation despite any false statements.⁹⁵ The Fourth Circuit adopted the exculpatory no doctrine on the stated rationale of balancing the "need for protecting the basic functions of government agencies with the concern that a criminal suspect not be forced to incriminate himself in order to avoid punishment under section 1001."⁹⁶ *Cogdell* provides an expansive reading of the exculpatory no defense in any investigative context.

The Fifth Circuit was one of the leading circuits for the exculpatory no doctrine. The Court of Appeals was the first appellate court to adopt this exception.⁹⁷ A number of opinions in the other circuits referenced Fifth Circuit cases on the defense.⁹⁸ The doctrine as interpreted in the Fifth Circuit

provided "a generally negative and exculpatory response made by a subject of a criminal investigation in reply to questions directed to him by investigating officers is not a crime under § 1001."⁹⁹ However, the Fifth Circuit Court of Appeals recently reexamined the doctrine. In *Rodriguez-Rios*¹⁰⁰ the defendant was observed leaving a plane at an airport in Santa Teresa, New Mexico. He subsequently placed a suitcase in the trunk of a car driven by a young woman and proceeded to the port of entry between El Paso, Texas and Juarez, Mexico. Customs agents stopped him before crossing the border. The agents inquired whether he was leaving the country with more than \$10,000. Rodriguez-Rios falsely denied exceeding the currency reporting requirement. A search revealed he was carrying \$598,000. He was indicted for failure to complete the prescribed report and a violation of 18 U.S.C. § 1001. The failure to report offense was dismissed, but the defendant was convicted of the false statement. The court of appeals panel, bound by circuit precedent as to the exculpatory no doctrine, reversed the conviction. A rehearing en banc was granted to re-examine the exception. The Fifth Circuit Court of Appeals, in a nine to four decision, rejected the continued validity of the exculpatory no defense to a violation of section 1001 in *Rodriguez-Rios*.¹⁰¹ The court examined the history of the false statement statute. In a clear break with past holdings, the appeals court found the plain reading of the provision and legislative history failed to evidence congressional intent to restrict operation of section

1001 in any fashion. The court also determined that the Fifth Amendment privilege against self-incrimination failed to support the exception. Circuit Judge Smith wrote for the majority. "Finding no such reason to deviate from the plain language of § 1001, we now discard the exculpatory no doctrine in this circuit."¹⁰²

The Sixth Circuit Court of Appeals addressed the doctrine for the first time in *United States v. Steele*.¹⁰³ Defendant Steele was a certified public accountant in a professional partnership. He was responsible for sale of a partnership parcel of land to Duerr, who identified himself to Steele as a drug dealer. Duerr sought to conceal the purchase price of the property to avoid IRS attention. Steele executed paperwork to reflect a lower purchase price for the transfer. Steele failed to report the actual payment price on the partnership income taxes. During an IRS investigation of Duerr, Steele supplied IRS agents a copy of the false documentation regarding the property. The defendant was convicted *inter alia* of a false statment in violation of § 1001. A panel of the Court of Appeals held the false statement within the exculpatory no exception to section 1001.¹⁰⁴ The court granted the government's petition for a rehearing en banc. In a twelve to three decision, the court reversed and affirmed the conviction.¹⁰⁵ Steele considered the legislative history of § 1001, the old Fifth Circuit opinions concerning the exculpatory no defense, and the Ninth Circuit test

for the exculpatory no exception. Nevertheless, the Sixth Circuit Court of Appeals declined to accept the defense. The court reasoned that legislative history failed to communicate a congressional intent to restrict the scope of the statute. Further, the court determined that the Fifth Amendment concerns failed to justify creating the exception.

The Seventh Circuit has not adopted the doctrine. Only a few court opinions have discussed the defense. "That the exculpatory no defense has received little, if any, acceptance in this circuit is consistent with the fact that none of the purported rationales for the defense withstands scrutiny."¹⁰⁶ The Seventh Circuit Court of Appeals discussed the doctrine in *United States v. Issacs*.¹⁰⁷ *Issacs* concerned the case of then sitting federal judge and former Governor of Illinois, Otto Kerner. Kerner was charged among other things with false statements to IRS agents. The defendant asserted that an unsworn oral response to an investigative agent was covered by the exculpatory no defense. The court rejected his claim. The appeals court held Kerner had volunteered information, and therefore, his statement was more than a mere denial. The appeals court examined exculpatory no again in *United States v. King*.¹⁰⁸ Defendant King made a false statement on a Social Security form verifying his eligibility. During the interview with his claims representative, he was informed of his *Miranda* rights. The court found King failed to meet two parts of the Ninth Circuit test.

The false statement was for the purpose of making a claim for benefits. Also, the defendant had initiated the contact for the purpose of making the claim. Additionally, the court found the reading of *Miranda* rights made it clear to the defendant that he was under investigation. These cases indicate the Seventh Circuit restricts any application of the defense. It is limited to simple negative answers without affirmative discursive falsehood. The circumstances must indicate the defendant is unaware of an investigation. Also, the the defendant must not be making a claim against or seeking employment with the government. The language of the court's opinions indicate that the Seventh Circuit may not be favorably inclined toward applying the defense even if the requisite conditions exist.

The Eight Circuit adopted the basic postulates of the exculpatory no doctrine in *Friedman v. United States*.¹⁰⁹ Friedman, accompanied by his attorney, gave a false statement to the FBI accusing a highway patrol officer of violating his civil rights by assaulting him. The Eight Circuit Court of Appeals held the false statement was not included under the "jurisdiction" of § 1001. The court referenced *Davey, Levin, and Stark* as supporting the holding. The Court of Appeals applied this same rationale in *United States v. Rodgers*,¹¹⁰ to affirm the lower court's dismissal of an indictment alleging violation of section 1001 for the false report of a crime. However, the Supreme Court rejected this rationale and reversed.¹¹¹ Still, the

Eight Circuit Court of Appeals adopted a substantially broader interpretation of the exculpatory no doctrine than many of the federal circuits in *United States v. Taylor*.¹¹² *Taylor* addressed a defendant's false statement to the bankruptcy court judge. *Taylor* forged his wife's name on the bankruptcy petition. When questioned by the judge, *Taylor* denied knowledge of the pleading and forgery. The court found that *Taylor's* statements were simple exculpatory denials that satisfied all five parts of the Ninth Circuit requirements. The Eight Circuit agreed with *Cogdell* that a false denial of guilt does not affect the investigative function. Additionally, the *Taylor* holding indicates that any questioning seeking information concerning possible criminal allegations constitutes an investigation.

The Ninth Circuit criteria for the exculpatory no doctrine previously described was set out in the *United States v. Medina De Perez*.¹¹³ Defendant *Perez* was detained at the border checkpoint between the United States and Mexico. She was driving a truck found to contain marijuana hidden in the camper shell. The defendant was advised of her *Miranda* rights and questioned about the truck by Drug Enforcement Administration [hereinafter DEA] agents. *Perez* twice told DEA agents that she had borrowed the truck from a friend to shop for bargains in Tijuana. She later recanted this statement. *Perez* admitted that Jose had offered her money to drive the truck across the border. Along with importation and possession of marijuana, she was charged

with two counts of false statement in violation of section 1001. Perez was acquitted of the marijuana offenses and convicted of the false statements. The Ninth Circuit Court of Appeals held the exculpatory no defense required reversal of the conviction. The court found her statements were not in relation to a claim to a privilege or a claim against the United States. The false statements were a result of a police investigation. Truthful responses would have been potentially incriminating to her on the marijuana charges. Finally, Perez's false statement did not impair the DEA's function. The court's rationale was that false statements by a suspect are expected. These false statements will not hamper an investigative agency. The Court of Appeals referenced the legislative history of § 1001 and the Fifth Amendment privilege against self-incrimination in support of the holding. This case articulated the Ninth Circuit's criteria for application of the exculpatory no exception.

The Tenth Circuit Court of Appeals discussed the exculpatory no doctrine in *United States v. Fitzgibbon*.¹¹⁴ Fitzgibbon was charged with making a false statement to a customs official that he was not carrying more than \$5,000 in currency through customs. The court found the exculpatory no defense inapplicable. Carrying more than \$5,000 into the country was not a crime. The only requirement was to declare the amount in excess. A truthful answer to the question by Fitzgibbon would not have incriminated him. The Tenth Circuit was not required to adopt the exculpatory

no doctrine to reach this decision. However, in agreement with the majority of the federal circuits, *Fitzigbbon* established as a predicate for consideration of the defense that a truthful response must incriminate the defendant.

The Eleventh Circuit was split off from the Fifth Circuit effective 1 October 1981. The circuit has generally followed the earlier precedent set by the Fifth Circuit regarding the exculpatory no doctrine. The leading case is *United States v. Tabor*.¹¹⁵ Tabor was a notary public who had notarized some real estate documents containing forged signatures. She was questioned without warning by an IRS agent. She described her procedure as only notarizing documents of individuals who personally appeared before her. She falsely indicated the signatures on the fraudulent document had been signed by the individuals in her presence. This was the basis of the charge in violation of § 1001. The Eleventh Circuit Court of Appeals held the exculpatory no exception required reversing the conviction. *Tabor* described the defense as available for a false statement essentially constituting an exculpatory denial of guilt. The statement was obtained by police agents acting in an investigative mode. Further, the statement was sought from unwarned an individual. The Eleventh Circuit adopted the old Fifth Circuit rationale that Congress did not intend section 1001 to cover the type of statement so described. Also, Fifth Amendment considerations limited application of the statute under these circumstances.¹¹⁶

The District of Columbia Circuit has neither explicitly adopted or rejected the exculpatory no defense.¹¹⁷ The circuit courts have considered the exception in a number of cases of high ranking government officials seeking shelter in the defense. The District of Columbia Circuit has also noted the Ninth Circuit criteria for application of the doctrine.¹¹⁸ However, the cases have not justified application of the exception on the facts presented.

Any attempt at a general overall characterization of the position of the federal courts in relation to the exculpatory no doctrine can be misleading. Many of the courts have no more than acknowledged that the doctrine exists in some other jurisdictions. In *Steele* Judge Krupansky characterized the federal precedent regarding exculpatory no as "receiving widespread acceptance by federal courts of appeals."¹¹⁹ It turned out to be an overbroad generalization on his part. He was certainly wrong about his brethren on the Sixth Circuit Court of Appeals. Judge Smith was more specific in *Rodriguez-Rios*. "Seven other circuits have embraced the exculpatory no exception in one form or another. Some circuits have neither adopted nor rejected the doctrine. One circuit has eschewed the exception."¹²⁰ Still, this characterization is subject to clarification on closer inspection. It is easy to take exception to the word embraced in describing the circuit positions on

exculpatory no. I would summarize the position of the federal circuits on the doctrine as follows. The First Circuit Court of Appeals interjected the exculpatory no exception in *Chevoor* only to establish an albeit temporary safe harbor for the defendant. Realistically, this merely prevented more detailed inquiry into the necessity of dismissing the actual pending charges of false declarations to the grand jury. Application of the defense by the First Circuit did not result in the reversal of a conviction for a violation of § 1001. In a later case, the appeals court, sitting en banc, retreated from fully embracing the exception.

The judicial engrafting of an exculpatory no exception on a facially all-inclusive statute is supported by the rationale that the statute, if taken literally, would do all the work traditionally expected of perjury statutes free of the latter's burdens and safeguards. We nevertheless acknowledge the arbitrariness of a court-drawn line between affirmative and exculpatory negative responses. We are also aware that legislative therapy for § 1001 seems an increasing likelihood as the revision of Title 18 of the United States Code inches closer to final resolution. *We therefore are not eager to consider further development of the exculpatory no doctrine at this time.*¹²¹

The Second Circuit Court of Appeals has not adopted the exculpatory no doctrine.¹²² The Third Circuit Court of Appeals "has not taken a position on the exculpatory no

doctrine."¹²³ The Fourth Circuit Court of Appeals has adopted the defense and applied it using the Ninth Circuit test to reverse a conviction.¹²⁴ The Fifth Circuit has rejected the earlier acceptance of the defense.¹²⁵ The Sixth Circuit has also rejected the exculpatory no doctrine.¹²⁶ "[T]he Seventh Circuit has never adopted the exculpatory no doctrine. On the two occasions it has examined the issue, it has discussed the matter in such a limited fashion as to exclude its application to the cases before it."¹²⁷ The Eighth Circuit has adopted the defense and the Ninth Circuit test for application.¹²⁸ The Ninth Circuit is the leading circuit on the exculpatory no doctrine.¹²⁹ The Tenth Circuit has considered the exculpatory no doctrine, but rejected the defense on the facts.¹³⁰ The Eleventh Circuit has adopted the defense along the line of the old Fifth Circuit position.¹³¹ The District of Columbia Circuit has neither accepted nor rejected the defense. I would characterize the overall position of the federal circuits on the exculpatory no doctrine as follows. Five circuits have adopted the defense. This includes the now somewhat reluctant embrace of the First Circuit Court of Appeals. Two circuits reject the defense. Five circuits have recognized the defense, but neither accepted nor rejected the exception. A majority of the federal courts have not been favorably disposed to apply the exception to reverse a conviction for violation of 18 U.S.C. § 1001. Generally, the federal circuits which have

accepted the defense apply the Ninth Circuit Court of Appeals criteria in some fashion.

C. Controversy concerning exculpatory no in the Federal Circuits

The Supreme Court has never considered the exculpatory no doctrine. Although, the Court has interpreted section 1001 or the predecessor statute in three cases on related issues.¹³² The first case for this consideration is *United States v. Gilliland*.¹³³ *Gilliland* upheld a prosecution for filing false reports not tied to a monetary claim against the government under Section 35, a predecessor to § 1001. Defendant and others were charged with false reports concerning the amount of petroleum produced from certain oil wells. The defense claimed the conduct was outside the reach of the statute. The Court found the intent of the statute was to prohibit false statements which might pervert the authorized functions of government. *Gilliland* held this included the false report in question. Chief Justice Hughes writing for the court rejected statutory construction to limit the plain meaning of the provision in light of the 1934 amendment.¹³⁴ "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be

frustrated by construction."¹³⁵ *Gilliland* held the statute was not limited to cases involving pecuniary or property loss to the government.

United States v. Bramblett,¹³⁶ upheld prosecution under § 1001 for false representations to the House Disbursing Office. The defendant, a Congressman, had made false representations to the House Disbursing Office that a woman was entitled to compensation for clerical work. The issue presented was whether this was a matter within the "jurisdiction" of any department or agency of the United States. *Bramblett* found the context in which the language was used called for unrestricted interpretation. Section 1001 included departments of the executive, legislative and judicial branches of government. Justice Reed wrote the opinion of the Court. "That criminal statutes are to be construed strictly is a proposition which calls for citation of no authority. But this does not mean every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature."¹³⁷ In holding a fraudulent representation to an agency of the House covered by the statute, the Court referenced *Gilliland* for the proposition that Congress gave "no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted."¹³⁸ The conviction was upheld because the statute indicated a

great variety of false statements were meant to be included.

A false report of a crime was examined by the Court in *United States v. Rodgers*.¹³⁹ Rodgers lied to FBI and Secret Service Agents in violation of § 1001. He reported to the FBI his wife had been kidnapped. He told the Secret Service his wife was involved in a plot to kill the President. Each agency wasted in excess of 100 hours investigating the allegations. The Eight Court of Appeals reversed the conviction as outside the "jurisdiction" of section 1001. The Supreme Court reversed and upheld the conviction. Justice Rehnquist delivered the opinion. He cited *Gilliland* and *Bramblett* as characterizing the Court's precedent that section 1001 should be given a broad interpretation. "In all our prior cases interpreting this statutory language we have stressed that the term "jurisdiction" should not be given a narrow or technical meaning for purposes of § 1001."¹⁴⁰ The Court rejected the Eight Circuit's failure to give the statute a "literal interpretation."¹⁴¹ *Rodgers* held false statements to an investigative agency were included under the prohibition of section 1001.

The exculpatory no exception has been based on statutory construction of 18 U.S.C. § 1001 by the lower federal courts.¹⁴² The Supreme Court has not ruled on the doctrine. Those courts recognizing the defense have felt

compelled to fathom the congressional intent as to the statute. "[W]hen a false statement does not fall within that 'class of cases' that Congress conceivably could have intended to reach, courts have declined to apply section 1001, under varying rationales."¹⁴³ For these courts the results of application of the law dictate against a literal reading of section 1001. The foci of statutory construction has been on interpretation of "jurisdiction" and "statement." Statements made to investigative agencies or departments are interpreted as outside the statutory sanctions. A number of decisions held this type of government entity not to have the authority to make decisions. Therefore, they had no "jurisdiction." Thus, false statements made to them were precluded from prosecution under the statute.¹⁴⁴ Secondly, "statements" has been read to require some type of affirmative representation to be included under the sanctions of § 1001.¹⁴⁵

Levin said a reasonable construction of the statute limited "jurisdiction" to "representatives of an agency or department of the United States who have authority to finally dispose of the matter being investigated."¹⁴⁶ *Stark* followed a similar rationale in holding false statements to the FBI outside the "jurisdiction" intended by section 1001. Judge Chestnut referenced a Fifth Circuit definition. "Jurisdiction means the right to say and the power to act."¹⁴⁷ He found the FBI and Justice Department lacked

administrative or enforcement authority. This particular position was adopted only by the Eight Circuit Court of Appeals.¹⁴⁸ In *Friedman* the Eight Circuit described the FBI's authority as "[n]o power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry."¹⁴⁹ These courts interpreted jurisdiction to preclude § 1001 application to a false statement to a federal investigative agency.

Another limiting interpretation of 18 U.S.C. § 1001 is in reference to "statements." This is based on the premise that a literal reading of the statute would be overbroad and create a potential for "absurd consequences or flagrant injustices."¹⁵⁰ This view is grounded on reading *Gilliland* and *Bramblett* as interpreting section 1001 as being directed at two purposes, fraudulent claims and "to protect governmental departments and agencies from preversion of their normal functioning."¹⁵¹ As noted before, the cases reference legislative history in support of this proposition. Based on this rationale Congress could not have intended to include false statements by suspects. Inclusion of these statements would not further the purpose of the law. A false statement by a suspect is not apt to pervert the function of an investigative agency.¹⁵² Also, literal reading of the statute would abolish the crime of perjury by substituting a more easily proven offense with a greater punishment.¹⁵³ Additionally, a broad reading of § 1001 could make "virtually any

false statement, sworn or unsworn, written or oral, made to a Government employee . . . a felony."¹⁵⁴

Federal courts which recognize the exculpatory no doctrine, also raise the inference the defense is supported by the Fifth Amendment privilege against self-incrimination. No court has held § 1001 violates the Fifth Amendment.¹⁵⁵ Moreover, no court has clearly articulated or developed a Fifth Amendment argument in support of the exculpatory no exception. Judge Chestnut in dicta in *Stark* made an observation that would cause subsequent cases to make an obligatory reference to the Fifth Amendment support for this exception. "The 5th Amendment provides no person shall be compelled to be a witness against himself in criminal cases. While not strictly applicable here, the construction of section 1001 here sought by the government seems inconsistent with this great bulwark of individual liberty."¹⁵⁶ *Cogdell* states § 1001 was "offensively close" to the Fifth Amendment privilege against self-incrimination.¹⁵⁷ Fifth Circuit Court of Appeals earlier decisions describe exculpatory no as resulting "from a latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment."¹⁵⁸ *Taylor* declared the exception "evolved out of concerns for a defendant's privilege against self-incrimination."¹⁵⁹ Typically, this is the full extent of the case comments concerning Fifth Amendment support for the exculpatory no defense. The argument has consisted of mere platitudes.

Statutory interpretation has been one basis for the exculpatory no doctrine. The other ground asserted for this exception has been the Fifth Amendment privilege against self-incrimination. These have been the two primary rationales advocated to support a limited construction of § 1001. The Fourth and Eight Circuit Courts of Appeal have taken the position that the exculpatory no doctrine is a "narrow yet salutary limitation on a criminal statute which, because of its breadth, is subject to potential abuse."¹⁶⁰

Second Circuit courts have questioned the continued validity of the exculpatory no doctrine.

The viability of the exception is, however, called into question by such cases as *United States v. Rodgers*, (citation omitted), in which the Supreme Court made clear that the prohibitions of § 1001 are 'sweeping' and extend to virtually 'all matters confided to the authority of [any federal] agency or department.' It cautioned courts were not to question whether Congress actually intended what the plain language of § 1001 so clearly imports.¹⁶¹

The Fifth Circuit and Sixth Circuit Courts of Appeal in rejecting exculpatory no, also reference *Rodgers*. They cite *Rodgers* for the proposition that the statute should be read broadly.¹⁶² Further, the Court's holding, in the opinion of the Fifth and

Sixth Circuit Courts of Appeals, invalidates the fourth criteria of the Ninth Circuit's exculpatory no test. This argument has merit when considered against the basis of the exculpatory no exception. *Rodgers* held a false statement to a federal criminal investigator of a federal investigative agency was within the sanction of 18 U.S.C. § 1001. Arguably, *Rodgers* did not address a false statement by a suspect in response to a government initiated question as protected by the exculpatory no. Still, a fair reading of the case is that no distinction exists between a false statement to an investigative agency or administrative agency. This is consistent with the notion of broadly interpreting the statute. *Rodgers* unequivocally articulates the Supreme Court's penchant for a broad interpretation of the statute. This reading does effectively preclude statutory construction restricting jurisdiction in section 1001 as a basis for the exculpatory no doctrine. Section 1001 would apply to any type of federal agency action, investigatory or otherwise in any circumstance. This *a fortiori* indicates a limited construction of "statement" is also inconsistent with a proper reading of § 1001. The word jurisdiction carries legal connotations much more susceptible to interpretation than the word statement. This premise concerning an investigative agency to support statutory construction of 18 U.S.C. § 1001 to read in an exculpatory no exception appears without foundation in light of the clear impact of the decision.¹⁶³

The Supreme Court indicated much more that is relevant to consideration of the exculpatory no exception in the *Rodgers* opinion. In addition, the Court rejected two of the "policy arguments" offered against a literal reading of section 1001.¹⁶⁴ The Court rejected the Eighth Circuit position in *Friedman*, that § 1001 should not be given a literal reading because that would preclude the need for a perjury statute. By analogy this reasoning would hold true for this same rationale offered by *Levin*, *Stark*, and *Davey* in support of the exculpatory no exception. Justice Rehnquist noted "[a] similar argument was made and rejected in *United States v. Gilliland*."¹⁶⁵ Nor was the Court persuaded by the policy argument that section 1001 is overbroad. "However meritorious a court's arguments may be for limiting the statute's reach, [r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."¹⁶⁶ This was another of the rationales supporting exculpatory no rejected by *Rodgers*.

Furthermore, the Fifth and Sixth Circuit Courts of Appeal offer additional cogent arguments for rejecting the exculpatory no defense. *Rodriguez-Rios* points out that the defense is not present in the plain language of section 1001. "A literal interpretation of the statute does not countenance the exculpatory no exception."¹⁶⁷ The Fifth Circuit Court of Appeals found no reason to continue to deviate from the plain language of the provision.¹⁶⁸ Additionally, these cases argue the statute is

not overbroad because some restraints are included within the language. Prosecution is precluded under § 1001 except for material false statements within the jurisdiction of the United States.

Both *Steele* and *Rodriguez-Rios* point out that Fifth Amendment concerns fail to justify the exception.¹⁶⁹ The courts reasoned that the privilege against self-incrimination does not provide protection against false answers to an investigation.¹⁷⁰ Each cites *Bryson v. United States*.¹⁷¹ There the Supreme Court stated "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."¹⁷² The Sixth Circuit in *Steele* notes that Fifth Amendment concerns fail to justify either criteria four or five of the Ninth Circuit exculpatory no test. Expanding on *Steele's* Fifth Amendment argument leads to the conclusion that the exculpatory no doctrine unjustifiably provides much broader protection than contemplated by the privilege against compelled self-incrimination. *Miranda v. Arizona*¹⁷³ is the cornerstone decision in the Fifth Amendment area. *Miranda*, a term now ingrained in our legal lexicon, was an expansive enough reading of the Fifth Amendment to garner only a bare five to four Court majority. *Miranda* requires prior to any questioning, the person must be advised of the right to remain silent, that any statement made may be used as evidence against them, and of the right to the presence of an attorney, either retained or

appointed.¹⁷⁴ However, the Court interprets the Fifth Amendment as requiring this protection only when the person is subject to custodial interrogation.¹⁷⁵ If the defendant is properly advised, the prosecution may use any statement obtained, whether exculpatory or inculpatory.¹⁷⁶ On the scene questioning and other general questioning were not affected by the *Miranda* holding.¹⁷⁷ Then Chief Justice Warren's opinion recognized questioning as a legitimate procedure of law enforcement. "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."¹⁷⁸ Nonetheless, the exculpatory no exception starts with simple questioning under the second Ninth Circuit criteria. The doctrine seeks to extend the Fifth Amendment protection far beyond the custodial setting. It extends the protection beyond the right to remain silent. The exception is applied to preclude conviction for false statements obtained, even if *Miranda* warnings are given.¹⁷⁹ Exculpatory no requires accepting the premise that Congress intended to provide a broader Fifth Amendment protection in section 1001 than that afforded by the Supreme Court in *Miranda*.

The first criteria of the five part test also requires a similar logical leap. The first inquiry for exculpatory no is whether the statement relates to pursuit of a claim of privilege or a claim against the government. The problem with this requirement is § 1001 has been twice removed from the false claim

requirement. First, Congress intentionally included false statements irrespective of any connection to a claim against the government under the statute. *Gilliland* held punishing false statements unrelated to monetary claims against the government was consistent with the intent of the Congress under the statute. Second, the false statement portion of the statute was divorced from the false claims statute to produce the present provision. Yet, the initial inquiry for exculpatory no starts with a concern about claims. None of the supporting cases present a satisfactory argument in support of this proposition.

The argument of those federal courts rejecting the defense is more persuasive on the issue. Their view is more consistent with the Supreme Court's broad interpretation of 18 U.S.C. § 1001. Further, it prevents providing the defendant an undeserved advantage merely because law enforcement officials have used a traditional and legitimate investigative technique in an otherwise lawful manner. Neither statutory construction nor Fifth Amendment considerations justify this exception and deviation from the plain meaning of the section 1001.

IV. The Exculpatory No Doctrine In Military Law

A. Development of the Exculpatory No Doctrine in Military Law

What follows is a seriatim examination of the exculpatory no

defense in military justice practice. There are only a few reported cases. This may reflect the fact that an equivalent exception to the defense was first recognized in military practice since 1957. The premise of the defense precluding prosecution under Article 107, UCMJ for certain false statements made by an individual suspected of committing an offense has been contained in the *Manual For Courts-Martial* since 1969.¹⁸⁰ The majority of reported cases discussing this exception have been in recent years. This result may reflect a shift in charging decisions to allege false statements of an accused arising from investigation of offenses.

Military law first recognized what was to become the exculpatory no defense in *United States v. Aronson*.¹⁸¹ Aronson was responsible for a base trailer park fund. He was questioned when a shortage was discovered. After being advised of his rights, the appellant gave oral and written statements denying stealing the money. Subsequently, he confessed to the crime and was convicted of larceny and two specifications of false statement in violation of Article 107. The Court of Military Appeals upheld the conviction. The court considered that *Levin* and *Stark* found § 1001 inapplicable to a defendant's false statements when under investigation. Aronson distinguished the facts of the case from *Levin*. The defendant, in the former, was "under no legal obligation to give information."¹⁸² Aronson was found to have a legal duty to account for the money entrusted to

his care, and therefore, his statement was official.¹⁸³ Also, in dicta the court referenced the fact Article 31, UCMJ, 10 U.S.C. § 831 provided the appellant a right to remain silent.¹⁸⁴ The court's reasoning is consistent with the legal notion that a custodian by assumption of public office to an extent impliedly waives the privilege of self-incrimination as to matters entrusted to their care.¹⁸⁵ The court identified the exception within the exception of *Levin*, the legal obligation. However, the Court of Military Appeals in dicta indicated that a statement of suspect with no independent duty to respond was not an "official" statement under Article 107.¹⁸⁶

The Court of Military Appeals soon applied the rule announced in *Aronson* in *United States v. Osborn*.¹⁸⁷ After an acquittal on charges of submitting false travel vouchers, Osborn was interviewed to provide personal background information supposedly for higher authorities. Irregularities in the information he submitted caused him to be advised of his rights under Article 31, UCMJ and questioned by his commanding officer. His statements to the commanding officer became the basis of charges of violating Article 107. The court reversed the conviction citing *Levin* and *Aronson*.

Here accused could most certainly be prosecuted for any and all false statements entered in his Personal History Statement, or any other official statements. However, the situation is radically different when he is suspected of

having made false statements in these forms and thereafter questioned as to the suspected offenses involved. While a military person has a duty to correctly fill in required official forms, there is no corresponding duty which obligates him to speak truthfully regarding false entries which are the subject of inquiry as a basis for possible criminal prosecution.¹⁸⁸

The *Aronson-Osborn* cases in essence adopted in military law what would eventually be named the exculpatory no exception in the federal courts as a limitation on application of Article 107. Consequently, this line of cases is currently reflected in the *Manual For Courts-Martial, United States (1984)* language explaining Article 107. "A statement made by an appellant or suspect during an interrogation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak."¹⁸⁹ This language is not controlling on the issue. The President's grant of authority does not extend to defining crimes.¹⁹⁰ The validity of the provision is still subject to judicial determination.

The Army Court of Military Review was the first military court to examine the exculpatory no defense by name in *United States v. Collier*.¹⁹¹ Collier was convicted *inter alia* of a violation of Article 107. Appellant made a false report to the military police of theft of a stereo reverbator unit from his car. Appellate defense counsel argued appellant had no duty to

make the report, and therefore, no violation of Article 107 occurred. The review court upheld the conviction. The court distinguished *Collier* from the *Aronson-Osborn* line of cases in that appellant was not a suspect. The court considered the Eighth Circuit opinion in *Freidman*¹⁹² which applied exculpatory no to reverse a § 1001 conviction under similar circumstances for a statement to the FBI falsely accusing police of a criminal civil rights violation. On the other hand, the Second Circuit rejected a similar contention because the defendant was not a suspect.¹⁹³ The court noted that the Ninth Circuit was also interpreting the exculpatory no doctrine in this type situation.¹⁹⁴ The Army Court of Military Review did not make an exculpatory no analysis in *Collier*. The court accepted the broader reading of § 1001 which by analogy held for application of Article 107 to a false report of a crime. This was the more logical application of Article 107 to the military court. "In fact, even more compelling reasons for such an interpretation exists in the military when one considers the possible implications arising from false statements made in a combat environment."¹⁹⁵ The Court of Military Appeals reviewed the decision and in similar language agreed with the Army Court of Military Review.¹⁹⁶ These cases predated the Supreme Court opinion in *Rodgers* that determined beyond peradventure the application of section 1001 to a false report of a crime.

The next reported military case examining exculpatory no is

United States v. Kupchik.¹⁹⁷ Private Kupchik impersonated a commissioned officer in order to defraud another soldier. He was a suspect and had been advised of his rights. During the course of the investigation, Specialist Sutton gave a statement to investigators implicating the appellant. Kupchik secured a false written statement from Sutton recanting the earlier information. Appellant submitted the false statement to the Criminal Investigative Division [hereinafter CID] investigator which was the basis of a charge under Article 107. *Kupchik* held the exculpatory no defense did not apply in this situation. The court found the appellant was not under interrogation in any fashion and no statement had been sought from him. This holding was consistent with federal court interpretations of the exception that it does not apply to voluntary statements which violate section 1001.¹⁹⁸

The Court of Military Appeals initially addressed the doctrine in *United States v. Davenport*.¹⁹⁹ Davenport escaped from correctional custody. When the noncommissioned officer [hereinafter NCO] arrived to take him back to the correctional center, he was asked his name. Davenport gave a false name. Among other offenses, he was convicted of a violation of Article 107 for the false statement to the NCO. The court upheld conviction on the charge. The court considered a Ninth Circuit decision which held exculpatory no precluded a conviction under § 1001 for providing a false name to an FBI agent.²⁰⁰ The military

appeals court agreed that Article 107 should be construed narrowly like section 1001 and that the exculpatory no exception should be recognized. However, the court concluded the exception was inapplicable in *Davenport*, because of his obligation to account for his personal services owed to the military. Then Chief Judge Everett wrote the opinion of the court. He cited *Aronson* in noting the appellant here faced no Hobson's choice. *Davenport* had the right to remain silent. However, if he answered, he had to do so truthfully.

The Army Court of Military Review was first to examine whether the exception applied to the offense of false swearing in violation of Article 134, UCMJ, 10 U.S.C. § 934. *United States v. Harrison*,²⁰¹ found the defense unavailable to a violation of Article 134. *Harrison* looked to the Eleventh Circuit for the boundaries of the defense. That circuit's test precluded prosecution for a false negative answer in response to a government inquiry where a truthful answer would have incriminated the individual.²⁰² Here the appellant met the test. Notwithstanding, the Army review court refused to find the exculpatory no defense precluded conviction. *Harrison* held violating the sanctity of the oath was the gravamen of the offense. The court also indicated significant aversion to the defense. "If applied to the offense of false swearing, the exculpatory no exception may be viewed as an open invitation to criminal suspects to forego their right to silence and to

substitute therefor active falsification and deceit."²⁰³ *United States v. Davis*,²⁰⁴ considered this same question. This panel agreed that *Harrison* was a correct statement of the law. The Court of Military Appeals considered this issue in *United States v. Gay*.²⁰⁵ The conviction under Article 134 was upheld. Again the emphasis was placed on violating the sanctity of the oath. These holding are consistent with the majority of federal court opinions limiting exculpatory no only to violations of § 1001.²⁰⁶

United States v. Jackson,²⁰⁷ examined a nonsuspect providing false information to investigators. During the course of a murder investigation, appellant was questioned by Army CID. The inquiry was when she had last seen the primary suspect in the case. Jackson gave a false response. She was convicted of violating Article 107 for the false statement. The Court of Military Appeals found that the statement was an "official" statement. The court referenced the Supreme Court decision in *Rodgers*. *Rodgers* indicated to the court that § 1001 should be broadly construed. The court interpreted Article 107 in the same fashion. This provided the false statement in question with the officiality required without an independent duty to answer. "[W]hen investigators from a military organization such as the CID are seeking to locate a murder suspect and a service-member gives misleading information about the person's whereabouts, Article 107 has been violated. Certainly, Congress never intended that this Article would fail to provide the military

investigators the support available to FBI and Secret Service agents under 18 U.S.C. § 1001."²⁰⁸ In a footnote the military appeals court indicated that some federal appellate courts continued to recognize the "exculpatory no" exception. The court did not discuss why the defense did not apply. *Jackson* follows the position of the majority of federal circuits. These courts hold the exculpatory no doctrine only comes in to play in a situation where a truthful answer would incriminate the declarant.²⁰⁹ Still, under the First Circuit's rationale in *Cheever*, the exculpatory no defense would have been possible.

At this point it would be helpful to examine the case of *United States v. Sievers*.²¹⁰ Doing so deviates only slightly from sequential order in which exculpatory no decisions have been issued. This is because the *Prater* decisions to be discussed following occur before and after *Sievers*. *Sievers* was assigned as a security officer. He and another individual broke into a car and stole some items. When the victim reported the theft, *Sievers* was responsible for filling out the Incident/Complaint Report form. The appellant listed "unknown" on the form where it required the names of suspects. He was prosecuted and pled guilty to making a false report in violation of Article 107 along with other offenses. The issue presented on review was whether the Fifth Amendment privilege against self-incrimination protected him from identifying himself or his accomplice on the military police report. The Court of Military Appeals upheld the

conviction. The court held the Fifth Amendment privilege did not extend to falsifying information on the report. However, in some fairly sharp language, the court criticized the guilty plea to the Article 107 offense.²¹¹ The court sua sponte interjected the issue of exculpatory no. Nevertheless, the court recognized the appellant did not invoke the exculpatory no defense at trial, and therefore, no basis to reject the plea was raised. *Siever* also indicates the possibility of considering under the exculpatory no exception language other than "no" as required by the Second Circuit. "Here appellant's false statement was essentially that he knew of no suspect concerning the theft he was investigating. Arguably, this was a statement by appellant not extending 'beyond a mere denial.'"²¹² Then Chief Judge Everett, concurring in part and dissenting in part, would have set aside the finding of guilty to the violation of Article 107.

The situation here is somewhat akin to those in which the exculpatory no doctrine has been applied. Under that doctrine a suspect who simply denies his own guilt to investigators without giving details is not subject to prosecution under Article 107. Likewise, appellant's statement--which under one reading, might be viewed as false--cannot be made the basis for such a prosecution.²¹³

The Army Court of Military Review contemplated the exculpatory no defense in some detail in a trilogy of cases which the court referred to as *Prater I*,²¹⁴ *Prater II*,²¹⁵, and *Prater*

III.²¹⁶ Prater pled guilty to larceny, three specifications of false statement, two specifications of false swearing, adultery, wrongful cohabitation, obstruction of justice and two specifications of conspiracy to obstruct justice in violation of Articles 81, 107, 121, and 134, UCMJ, 10 U.S.C. §§ 881, 907, 921, and 934. The woman Prater married was still in fact married to another man. He claimed this woman as his wife for receipt of dependent allowances. She told of him of the bigamy shortly before leaving him. Prater did not report the invalid marriage to Army officials and continued to collect dependent benefits from 1 February 1983 until 1 September 1987. Contemporaneous with the first putative Mrs. Prater leaving, Prater began cohabiting with another woman, Joyce. He held Joyce out as his wife for the period from 1 February 1983 to June of 1987. A question arose concerning the legality of his marriage and qualifying for dependent allowances when Joyce sought health care for a sexual assault. The three violations of false official statement were the result of Prater falsely maintaining he and Joyce were married. In *Prater I* the Army Court of Military Review summarily dismissed the appellants claim of error based on the exculpatory no defense to the violation of Article 107. The court cited *Jackson* and *Rodgers* as authority for broadly construing Article 107. *Prater I* held where a suspect makes a properly warned false statement to investigators the exculpatory no doctrine does not apply. On a defense request for reconsideration, the review court reversed the conviction based

on prior precedence and the exculpatory no defense in *Prater II*. The Army Court of Review subsequently granted the government's petition for reconsideration and upheld the conviction in *Prater III*. The majority considered the *Aronson-Osborn* line of cases which focused on the duty to account, and the *Jackson* precedent which focused on the officiality of the statement. The court held the defense did not apply. Here the false statement was made during the course of an official investigation into the allegation of sexual assault. This made the statement official under the *Jackson* analysis. *Prater's* responses concerned dependent benefits for the putative spouse, and therefore, he had a "duty to account" under *Aronson*. In the final analysis the review court relied on *Sievers*. The appellant had pled guilty and failed to raise the defense. As a result, there was no substantial basis to reverse the guilty pleas. Judge Giuntini's dissent provided a more detailed analysis of the possible exculpatory no defense in the case. The dissent in essence substantially applied the five part Ninth Circuit test. His factual determinations under the test were as follows:

(1) the appellant's statement to police investigators was not made by him as part of his false claim for allowances from fianance; (2) his statement was not initiated by the appellant but was made in response to inquiries initiated by police investigators; (3) the appellant's false statements, as an ordinary suspect, about his marital status were made to police investigators, not to

finance or personnel officials as part of a routine exercise of administrative responsibility; therefore, his false statements did not pervert the basic functions entrusted by law to any agency; (4) the statement was made in the context of a criminal investigation rather than of a routine exercise of administrative responsibility; (5) the statement was made in a situation in which a truthful answer would have incriminated the declarant.²¹⁷

Judge Giuntini's analysis using this criteria found the exception applied. His analysis accepted the more expansive rationale of *Cogdell*, which he referenced, relative to the false statements relation to pursuit of a claim against the government. Still, the dissent was not an unreasonable application of the doctrine under the criteria set by the federal circuits which recognize the exception.

The Court of Military Appeals considered the exculpatory no question presented by *Prater*. The Court of Military Appeals upheld the conviction for false statements. Chief Judge Sullivan authored the opinion concurred in by Judges Cox and Everett. The decision is consistent with the precedent of *Siever*. *Prater* held the appellant failed to show a substantial basis in law and fact for questioning the guilty plea. The court noted that seven federal circuits recognized the defense, while three others had considered it without accepting or rejecting.²¹⁸ Chief Judge

Sullivan cited a number of federal precedents limiting the defense in situations akin to Prater's. He also indicated there were contrary holdings. The court listed three exceptions precluding availability of exculpatory no. Prater's response was in relation to a claim. His response had been more than "no." The appellant had been advised of his rights under Article 31, UCMJ. The court failed to distinguish the contrary federal cases. In dicta it also alluded to the possibility of additional facts which might establish entitlement to the defense if presented in a contested case. Prater did not explicitly overrule the *Arsonson-Osborn* cases. It did, however, add a major new factor to the exculpatory no equation. "[W]here warnings under Article 31 are given to the criminal suspect, as in the present case, his duty to respond truthfully to criminal investigators, if he responds at all, is now sufficient to impute officiality to his statement for purposes of Article 107."²¹⁹ Judge Everett's concurring opinion was somewhat cryptic. He referred to his opinions in *Sievers*, *Davenport*, and *Jackson*. A fair reading of his opinions is as follows. *Jackson* stands for the proposition that a servicemember who lies to an investigator is guilty of a violation of Article 107.²²⁰ The premise of *Sievers* is that a suspect who lies to an investigator is not guilty of a violation of Article 107 because of the exculpatory no defense.²²¹ *Davenport* indicates that an accused who lies after receiving advice pursuant to Article 31 is subject to prosecution for a false statement under Article 107.²²²

The Court of Military Appeals discusses the impact of Article 31, UCMJ on a false statement offense in *United States v. Frazier*.²²³ Frazier broke into his roommate's locker and stole a wallet containing a substantial amount of money. When questioned by military police, after being advised of his rights under Article 31, Frazier denied the theft and indicated his possession of a large sum of money resulted from cashing a money order from home. This statement proved false and became the basis of a charge of violation of Article 107. Frazier was a suspect at the time of the false statement. He had no independent duty to account. This squarely presented the issue whether the false statement was official under Article 107. The Court of Military Appeals distinctly answers one question about the meaning of their decision in *Prater*. *Frazier* clearly overrules the *Aronson-Osborn* cases in relation to Article 31 and the effect on officiality under Article 107. Judge Cox wrote the opinion of the court. Frazier was warned of his rights, and therefore, his duty to respond truthfully to the investigators is "sufficient to impute officiality to his statements for purposes of Article 107."²²⁴ The Court of Military Appeals in *Frazier* adopted Judge Latimer's dissenting position in *Osborn*. "[B]efore being interrogated, the person involved is entitled to be warned under Article 31, that does not render the questions and answers unofficial."²²⁵ One shortcoming of the *Frazier* decision is the failure to clearly articulate what if any relation existed

between Article 31 and the exculpatory no doctrine. Nevertheless, the clear implication of the holding is advising an accused of Article 31, UCMJ rights precludes raising an affirmative defense of exculpatory no.

In fact, the Army Court of Military Review has so interpreted *Prater* and *Frazier* to the effect if an accused has been advised of his rights under Article 31 the exculpatory no defense is no longer available. This position is consistent with their opinion in *Prater I*. In *United States v. Sanchez*,²²⁶ the Army court directly examined this issue. Sanchez stole two pool cues. Three soldiers from his unit confronted him at his off-base quarters and recovered the stolen property. Sanchez was questioned by his company commander. After being advised of his rights, he made a false statement denying the theft. He also denied being confronted at his apartment and insisted he was at the movies with his wife and cousin. Sanchez was prosecuted for the larceny and false statement. The court discussed how Article 31 rights provides the accused evidence of knowledge of the officiality surrounding the false statement. More importantly, the review court addressed the crux of the problem.

Reading Article 31, UCMJ, rights to a suspect establishes more than just knowledge of officiality. It also ensures a suspect is aware of the option to remain silent and provides an opportunity for reflection. Absent some showing of government overreach, which would

probably be resolved by a finding of involuntariness or inadequacy of warnings anyway, there is no need to apply the exculpatory no doctrine in such a case--even to a mere denial that one has committed an offense. We conclude specifically that the reading of rights under Article 31, UCMJ, warnings is sufficient by itself to overcome the doctrine.²²⁷

Sanchez establishes an easily understood boundary for application of the exculpatory no doctrine. The Army Court of Military Review position is that providing Article 31 rights advice prevents raising the defense. This interpretation is consistent with and a logical extension of the Court of Military Appeals holdings in *Prater* and *Frazier*.

B. Test for Application of Exculpatory No in Military Practice

When a suspect provides a false statement as a result of questioning by an investigator, the exculpatory no defense does not always provide a defense. The Court of Military Appeals made this point clear. "[W]e too have never suggested that it applies to all questioning of a suspect by criminal investigators."²²⁸ Recognizing the defense has some limitations, this is an appropriate point in the discussion to attempt an extrapolation of the military rule for this exception. Comparing the military cases against the generally accepted criteria in the federal circuits is as convenient a method as any to accomplish this

purpose. This examination will use the Ninth Circuit standard for exculpatory no as the point of comparison.

The first test under the Ninth Circuit is the false statement must be unrelated to pursuit of a claim to a privilege or a claim against the government.²²⁹ The Court of Military Appeals indicated agreement with this proposition in *Prater* "some circuits hold that this defense does not exist where the false statement is made with respect to a previously submitted claim against the Government."²³⁰ The court cited a Ninth Circuit opinion, *United States v. Olsow*.²³¹ *Prater* also cited a contrary Fourth Circuit opinion, *Cogdell*. *Cogdell*, discussed earlier, terminates pursuit of claim for exculpatory no purposes when the check is cashed.²³² Under these circumstances a false statement made during the investigation is not related to pursuit of the claim in the opinion of the Fourth Circuit Court of Appeals.²³³ *Cogdell* also distinguished their holding from the Ninth Circuit's in *Olsow*. The Fourth Circuit Court of Appeals remarked that in *Olsow* the check had not been received.²³⁴ Even the Ninth Circuit has in other cases adopted conflicting positions on this particular issue.²³⁵ *Prater* is indicative of the Court of Military Appeals adopting a broad general definition of pursuit of a claim as a test for exculpatory no. As an exception the court listed "[t]he challenged questions were asked by military police in regards to earlier submitted military dependency claims."²³⁶ Thus, a fair reading is that any false statement

relating to a claim at any point in time will fail the test. This position is consistent with the majority of jurisdictions in recognizing the exculpatory no defense. *Barr* provides the best rationale in support of this proposition.

The policy underlying the judicial creation of the exculpatory no doctrine, that of limiting the government's ability to coerce individuals suspected of wrong-doing into self-incrimination during the course of government investigations, certainly would not be advanced through protecting persons from prosecution under § 1001 who, like *Barr*, make false statements in connection with their quest for government employment.²³⁷

Nonetheless, a contrary argument limited the pursuit of a claim definition along *Cogdell* lines can be made on reading *Prater*. *Prater* had an on-going claim concerning dependent benefits. The Court of Military Appeals left this possibility among others open by indicating that in a contested case additional evidence may establish the availability of the defense. In an earlier case, *United States v. Thomas*,²³⁸ the Court of Military Appeals decided a false statement involving separate rations in a manner consistent with the *Cogdell* argument. *Thomas* was suspected of making a false claim for separate rations based on residing with his dependents. He was questioned by military police and advised of his rights under Article 31. His false statement to the military police was the basis of a charge under Article 107. There the court reversed the conviction. The rationale was that

the false statement related only to the investigation and was not related to the claim for separate rations. Therefore, the false statement was not official under the *Aronson-Osborn* rationale. The *Cogdell* argument concerning pursuit of a claim is persuasive only if you favor the exculpatory no defense. As indicated earlier, the underlying rationale for this inquiry makes little sense. False statements are separate from false claims. Nonetheless, it can be satisfactorily concluded based on the case law that a military criteria for application of the exculpatory no doctrine is that the false statement not relate to receipt of a government claim, benefit, or privilege or seek a government claim, benefit or privilege.

The second criteria is that the statement must have been in response to inquiries initiated by a federal agency or department. The military cases have recognized this requirement. In fact, military cases may indicate a much more stringent requirement which will be discussed below. This second criteria is generally consistent with the holdings in *Collier* and *Kupchik*. A basic reading of these cases is that the exception is not available for an accused who volunteered information. The military version of the second requirement would be to the effect a false statement must have been in response to questioning initiated by a person in the authorized execution of duty.²³⁹

The third criteria, the false statement must not impair the

basic functions entrusted by law to the agency, is premised on statutory construction and a restricted reading of statement in § 1001. This goes back to the *Stark* rationale, a false statement to an investigator does not pervert the normal functioning of an investigative agency, and therefore, Congress did not intend it to be covered.²⁴⁰ Conceptually, what this really amounts to is a disguised materiality requirement. As discussed earlier, a violation of section 1001 requires that the statement be material, "a tendency to influence or capable of influencing the decisionmaking body to which it is addressed."²⁴¹ Rather than examining the factual nature of the statement, the court was in effect ruling as a matter of law an accused false statements to an investigator were immaterial. Materiality is not a requirement for violation of Article 107. However, *Aronson-Osborn* adopted the *Stark* rationale. *Aronson* stated "the only possible effect a statement received from a suspect or an accused can have is to stimulate the agency to carry out its function, namely to discover the person or persons who have committed the offense."²⁴² *Osborn* held that the statement, however false, is hardly calculated to pervert the function of the investigating agency. *Rodgers* rejected this position in regard to § 1001.²⁴³ The Court of Military Appeals in light of *Rodgers* rejected this notion of strict interpretation of Article 107 in *Jackson*.²⁴⁴ "Statements to military criminal investigators can now be considered official for purposes of Article 107."²⁴⁵ The cases support that the Court of Military Appeals has rejected the

necessity of considering the impairment of the basic function of the agency caused by the false statement as part of the analysis.

Unfortunately, the inquiry about an analagous military criteria for the third test of the Ninth Circuit is not completed by rejecting the basis for the requirement using the *Rodgers, Jackson, Prater* analysis. There is a corollary proposition of exculpatory no which follows from the question of whether the false statement impairs the basic functions entrusted by law to the agency. This is an issue of limits on the false response. A condition described by *Prater* is "appellant's response was much more than a simple 'no.'" ²⁴⁶ The Court of Military Appeals adds to the confusion by indicating in the same case that "other courts hold that it does not extend beyond mere negative responses to questions by a criminal investigator." ²⁴⁷ The military appeals court is not alone in failing to accurately delimit the extent of the response under the umbrella of the exculpatory no doctrine in precise terms. Part of this confusion comes from *Davey's* discussion that "no" is not a statement, and therefore, "no" was not included under § 1001. ²⁴⁸ The Second Circuit's position is any statement beyond a simple "no" does not fall within the exception. ²⁴⁹ In an unpublished opinion a panel of the Air Force Court of Military Review interpreted *Prater* to indicate the Court of Military Appeals adoption of the more stringent standard of the Second Circuit Court of Appeals. ²⁵⁰ However, panels of the Army Court of Military Review have read

Prater to consider exculpatory no coverage for "mere negative responses to questions by a criminal investigator."²⁵¹ This position is consistent with the old interpretation of the Fifth Circuit before abandoning the exculpatory no exception. That circuit's rationale was "only positive statements would pervert government functions."²⁵² However, the Fifth Circuit gave a generous reading to what constituted a mere negative answer. In *United States v. Bush*,²⁵³ the defendant provided a false two page affidavit.²⁵⁴ The Fifth Circuit found this false statement included within the exculpatory no exception.²⁵⁵ The Eleventh Circuit recognizes "generally negative and exculpatory response" within the ambit of the exculpatory no exception.²⁵⁶ That circuit, however, precludes the defense for "affirmative representation of facts peculiarly within the knowledge of the suspect not otherwise obtainable by the investigator."²⁵⁷ On the other hand, the Ninth Circuit does not limit the false statement in any manner beyond the aforementioned five part criteria. Although the Fifth Circuit now rejects exculpatory no, their interpretation of a statement under § 1001 discussed in *Rodriguez-Rios* makes the most sense. "[W]e consider that as a matter of common sense and plain meaning, the word 'no' is indeed a statement."²⁵⁸ Following this rationale, a false statement is a false statement. Otherwise, the question really becomes the degree of falsity of the statement. What the federal courts have developed around the various interpretations of a statement is a distinction without a difference. An inquiry about the nature of

the statement is no longer a meaningful one. A basic premise of the exculpatory no doctrine, discussed earlier, is that a false statement from an accused does not pervert the normal functioning of the agency or department under § 1001. Arguably, accepting this theory obviates the need to set parameters for the statement. One type of false statement by an accused will have no greater impact than another. However, this characterization is reasoned to make a statement not a statement, and therefore, not a perversion of the agency function.²⁵⁹ If the false declaration is recognized as a statement the function of the agency may possibly be influenced. This legal gobbledygook and circuitous logic has no continuing relevance in light of *Rodgers*. The opinion in *Rodgers* cast serious doubt the result of this inquiry is still legally significant. The holding implies that application of the plain meaning of any matter would include any false statement, even to an investigative agency. The degree of falsity or extent of the statement are not relevant. This continuing question in military law is a result of adopting the exculpatory no doctrine à la carte without analysis of the underlying rationale. Nonetheless, until the Court of Military Appeals issues a contrary opinion, the rule in the military is that the false statement must not go "beyond a mere denial." Recognizing that *Prater* may create some ambiguity, the opinions in *Siever* and *Davenport* would indicate this is the correct standard as adopted by the Army Court of Military Review in *Hudson* and *Sanchez*. Therefore, the third military criteria is

that the false statement must not extend beyond a mere denial.

Criteria four is that the false statement must have been made in the context of an investigation rather than a routine exercise of administrative responsibility. When the Sixth Circuit rejected the exculpatory no doctrine, the Court of Appeals determined this fourth criteria was preempted by the Supreme Court opinion in *Rodgers*. The holding in *Rodgers* obviates drawing any distinction between investigative or other government agencies under § 1001. This issue comes from *Stark's* interpretation of jurisdiction and statement under section 1001. An investigative agency lacked sufficient power to act to meet the requirement of the statute.²⁶⁰ Also, as discussed above a false statement to an investigative agency by suspect did not adversely impact the agency function. The Court of Military Appeals has disregarded this position in *Jackson* and *Prater* and adopted by analogy the broad reading of *Rodgers* in regard to Article 107.²⁶¹ This does away with the need to make any distinction between an investigative or administrative agency. However, a close examination of *Collier* and *Kupchik* indicates the distinction between an investigation and an administrative inquiry may have continued significance in military law. These cases contain language of peculiar pertinence to the military. *Collier* distinguished *Aronson-Osborn* in that the appellant was not a *suspect*. *Kupchik* found the appellant's statement was not the result of *interrogation*. The italicized words have special

significance in a military law context. Interrogation denotes formal questioning in which an incriminating response is sought.²⁶² Suspect designation in the military indicates an official law enforcement investigation.²⁶³ Consequently, one reading of *Collier* and *Kupchik* would require as a criteria for consideration of the exculpatory no exception an interrogation of a suspect during the course of an official law enforcement investigation. This requirement would be consistent with the purpose behind the exception of protecting individuals in an investigative context from any type of compelled self-incrimination. A reasonable reading of the military cases is that less formal questioning does not make the exception available. On the other hand, a contrary argument can be made. In *Kupchik* an investigation was in progress. However, the false information was volunteered. So the language concerning the absence of an interrogation is surplusage. In fact, neither of the decisions answers the specific question as presented here. Those cases only addressed the distinct question of whether voluntary statements were included within the coverage of the exception. Further, Judge Everett in his dissent in *Siever* indicated his opinion of the applicability of the exculpatory no defense to the investigation although no formal questioning occurred. The federal courts have on the whole restricted the availability of the exception to the investigative context as reflected by the Ninth Circuit test. The federal circuits have loosely interpreted what constitutes an investigation. The

former Fifth Circuit position was that questions by customs officials during border crossing was sufficient to make the defense available.²⁶⁴ The Eight Circuit Court of Appeals in *Taylor* described the defense as available when the "inquiring government agent acts as a police investigator and not when the agent's question constitute a routine exercise of administrative responsibility."²⁶⁵ *Taylor* held that when questioning leads to possible criminal charges and the questioner recognizes a duty to report the suspected violation the the exculpatory no exception is available. Present case law does not provide a clear answer to whether the exculpatory no defense applies in the absence of an investigation or interrogation in the military. Military courts could answer this question in the affirmative as a means to restrict the reach of the defense. Accordingly, the courts could require as a criteria for consideration of the defense in the military that the questioning be in the context of an investigation, either formal or informal, and beyond routine administrative activity. The requirement may even include that the declarant be a suspect or that the investigation be for purposes of law enforcement. This requirement would otherwise do away with the exculpatory no defense in combination with the requirement for the absence of Article 31 rights to be discussed later. However, it is unlikely the military courts would reach this conclusion. Any exculpatory no requirement for an investigative vice administrative context would be contrary to the *Rodgers* and *Jackson* decisions. Rather than engage in such

circuitous logic, the Court of Military Appeals would more likely simply abandon recognition of the exculpatory no defense. If military law continues to recognize the exception, any requirement other than an informal inquiry would be mutually exclusive with the criteria regarding Article 31 warnings.

The final Ninth Circuit criteria is that a truthful answer would have incriminated the declarant. This requirement has been generally recognized by the majority of the federal circuit courts.²⁶⁶ The Court of Military Appeals has not explicitly adopted this requirement. However, acceptance of the criteria appears implicit in the *Jackson* decision. The court did not discuss the exculpatory no exception to her false statement. Her response about the location of the suspect did not incriminate her. The lack of discussion by the court evidences the the defense is not available in this situation. Thus, the military criteria also includes the requirement a truthful response must be incriminating.

There are additional requirements indicated by the cases which military law demands before the exculpatory no defense may be available. One such requirement is a result of military service. The declarant's charged to remain silent or speak truthfully when there is an independent duty or obligation.²⁶⁷ This proposition is contained in the *Manual For Courts-Martial* explanation of Article 107.

If a suspect or accused does have an independent duty or obligation to speak, as in the case of a custodian who is required to account for property, a statement made by that person during an interrogation into the matter is official. While the person could remain silent (Article 31(b)), if the person chooses to speak, the person must do so truthfully.²⁶⁸ This reflects the *Aronson-Osborn* cases. The independent duty or obligation announced by those cases still remains alive. Further, *Davenport* indicates this obligation is not limited to a custodian or someone individually assigned a responsibility. *Davenport* had a duty to identify himself and establish his status as a member of the military. An unanswered question is how far this general military obligation to account may extend. Still, the case law supports the proposition in military law an independent duty or obligation to speak truthfully precludes application of the exculpatory no defense.

Another requirement of military law for application of the defense is the most important. The declarant cannot have been advised of rights pursuant to Article 31, UCMJ in order to raise the exception.²⁶⁹ "Finally, where warnings under Article 31 are given to the criminal suspect, as in the present case, his duty to respond truthfully to criminal investigators, if he responds at all."²⁷⁰ In support of this position, that rights warnings makes the defense unavailable, *Prater* referenced *Tabor* and *King*. *Tabor* recognized a lack of *Miranda* rights as "additional factor

justifying the doctrine."²⁷¹ *Tabor* does not provide much insight into this premise. The Eleventh Circuit Court of Appeals merely noted without elaboration that the defendant was a suspect and not warned of her rights. The court did not elaborate on the significance of this fact. Among circuits which recognize the exculpatory no doctrine, a defendant being advised of their right to remain silent has had no significance on application of the defense.²⁷² Many of these cases have applied the exception regardless of the defendant being warned prior to the statement. However, for the Seventh Circuit in *King* a *Miranda* warning precluded the availability of the exculpatory no exception.²⁷³ The Second Circuit has also indicated a knowledge of the nature of the questioning removes the availability of the exception.²⁷⁴ Cases have addressed rights advice primarily from the standpoint of notice of the officiality of the questioning. Reconciling the federal cases and the Court of Military Appeals decision in *Prater* concerning rights advice leads to possible confusion. *Prater* stated the advice "is now sufficient to impute officiality to his statements for purposes of Article 107."²⁷⁵ The Army Court of Military Review took a different meaning from the aforementioned statement. *Sanchez* found reading Article 31, UCMJ rights established accused knowledge of officiality.²⁷⁶ This is consistent with the federal cases, but really adds nothing to the military court's consideration of the exception. *Sanchez* implicitly recognizes this in acknowledging that the accused knowledge is not an element of the offense.²⁷⁷ An accused

knowledge of officiality can be easily misread. Unlike the federal courts, the military courts have not squarely ruled that knowledge of officiality is sufficient to defeat the exculpatory no defense. If the military court adopted the same position of the federal courts, that knowledge of officiality makes the defense unavailable, the exculpatory no defense would be virtually eliminated in military law.

Article 31 rights advice also serves other purposes. The rights warning informs the individual of the safe harbor of remaining silent and provides an opportunity for reflection.²⁷⁸ Also, the advice also places the individual on notice that a false statement may be punishable when advised that any response can be used against them. The proposed Senate revision of section 1001 included such a provision.²⁷⁹ Advice pursuant to Article 31 serves all these purposes. As a consequence though, adoption of this criteria by the military severely restricts the continued availability of the exculpatory no defense.

In summary the case law supports that the test for the exculpatory no exception in the military is as follows. A false statement alleged in violation of Article 107, UCMJ would be viewed against this six part criteria:

- (1) the false statement must not relate to receipt of the proceeds, a benefit, or a privilege conferred by a claim or request from the government or seeking a claim,

benefit, or privilege from the government;

- (2) the false statement must have been in response to questioning by a person in the authorized execution of duty;
- (3) the false statement must not extend beyond a mere negative response;
- (4) a truthful response would have incriminated the declarant; and
- (5) the declarant must be without an independent duty or obligation to speak;
- (6) the declarant must not have been advised of their rights under Article 31, UCMJ.

Admittedly, the standard presented involves some conjecture. The Court of Military Appeals has not explicitly articulated the criterion for an exculpatory no defense. The reported cases fail to reflect reversal of a conviction on review because of the exception other than for an inadequate providency inquiry.

Therefore, this test presented is inferentially determined from analysis of the cases. Providing Article 31 advice precludes reliance on this defense. This criteria alone almost effectively eliminates the exculpatory no exception in military law.

Obviously, not the most straight forward way of doing away with the defense, but not inconsistent with the military courts reluctance to recognize this defense.

C. Scope of the Exculpatory No Doctrine in Military Law

The following discussion is concerned with when, if ever, the exculpatory no doctrine may be available in the military within the previously described parameters. The Army Court of Review in *Sanchez* took a significant step toward "clarifying the place where the legal line is to be drawn for today's military attorneys"²⁸⁰ for application of this defense in military law. Moreover, the practical result of *Sanchez* may be a declaration that military law only recognizes, if at all, the smallest possible legal loophole where the exculpatory no exception provides a license to lie. This is because the exculpatory no defense is only available now in a situation where the declarant was not advised of rights under Article 31.

The pertinent provision of Article 31(b), UCMJ for purposes here provides:

No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense without first informing him of the nature of the accusation and advising him that the does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.²⁸¹

Interrogation includes any formal or informal questioning

designed to elicit an incriminating response or an incriminating response is a reasonable consequence of the questioning.²⁸² The Court of Military Appeals has limited application of Article 31 to situations where the questioner is acting in an official law-enforcement investigation or disciplinary inquiry.²⁸³ Secondly, advice pursuant to Article 31 is required when the questioner believes or reasonably should have considered the person a suspect.²⁸⁴ As discussed herein, Article 31 advice precludes the availability of the exculpatory no defense. This leaves only three possible scenarios where the exculpatory no defense may be available. One situation would involve questioning by a person not subject to the UCMJ.²⁸⁵ Another possibility would be questioning by a person subject to the Code, but not acting in an official law enforcement capacity.²⁸⁶ Lastly, the case of of individual questioned before being indentified as a suspect.²⁸⁷ All three hypothethicals would involve the same basic exculpatory no analysis.

*United States v. Loukas*²⁸⁸ presents a factual situation significantly on point for consideration of the unanswered questions about the scope of exculpatory no in the military. Loukas was a loadmaster on a C-130 aircraft flying a drug interdiction mission. He arrived at the aircraft two hours late. Four hours later, while in flight, Loukas was

observed hallucinating. The crew chief asked if he had taken drugs. Loukas responded that he had not. In a more insistent manner, the crew chief asked the appellant what he had taken. Loukas then admitted using cocaine. He had not been advised of his rights under Article 31 prior to the responses. The Court of Military Appeals held that Article 31 rights advice was not required in *Loukas*. The court held the questioning was not for purposes of an official law-enforcement investigation or a disciplinary inquiry. A slight change of these facts presents the other scenarios. If the crew chief had not suspected drug use, he may have merely asked Loukas what was wrong, but ended up with the same result. A civilian nurse may have conducted a similar inquiry with Loukas. In none of these cases would Article 31 warnings have been required. Yet, Loukas' first response was a false statement. This presents a *prima facie* case of a violation of Article 107. The issue is whether the exculpatory no exception applies.

Comparing this situation to the military test for exculpatory no set out above reveals the following. Loukas' false statement does not relate to a claim, and therefore, would meet the first requirement of the test. The second criterion is also met. The false statement was in response to questioning by a person in the authorized execution of duty. The false statement did not extend beyond a mere negative

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would seem to make the statement outside of the obligation to speak. Comparison with the cases involving drugs and the "duty to report" may provide some additional light on this issue. In these cases the Court of Military Appeals has held that failure to report drug abuse which would incriminate the accuse does not constitute dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892.²⁹³ By analogy the duty to account may not extend to incriminating responses of the nature of Loukas' prior drug use. Also, Judge Everett in *Sievers* indicated that the exculpatory no exception applied in a similar situation involving an incriminating response without Article 31 rights. It is a debatable point whether Loukas would meet the fifth criteria to raise the exception. However, the case law appears to support this situation meeting the criteria in regard to lacking an obligation to account.

Prior military cases do not lead to a clear conclusion regarding the situations described and the exculpatory no defense. Resort to the federal cases still leaves the issue unresolved because of the contrary precedents. Resolving this question is inextricably entwined with whether the exception should be recognized at all. This issue shall be discussed shortly.

D. Continued Viability of Exculpatory No Doctrine in Military Justice

It is clear for a typical law enforcement investigation the exculpatory no doctrine no longer exists in military law. At first glance, it would appear the exculpatory no loophole is now down to the eye of the needle because of the impact of the requirement for the absence of Article 31 rights. Actually, the opposite may be the case. The Court of Military Appeals decision in *Loukas* opens up an area of false statements that for a significant period of time has been either outside the reach of prosecution or viewed as such. The *Manual For Courts-Martial, United States (1951)* sought to include these statements regardless of Article 31.

In a prosecution for an offense in which the making of a false statement is an element (for example, perjury or making a false official statement) the fact that the accused had not been warned of his right against self-incrimination before he made the statement is not a ground for excluding evidence that the statement was made by him, even though, under the circumstances, such a preliminary warning may have been required by Article 31b or some other provision of law.²⁹⁴

The Court of Military Appeals ruled this provision invalid in *United States v. Price*,²⁹⁵ because of Article 31 requirements. Certain Article 31 impediments were removed by *Loukas*. His false statement was certainly ignored. However, statements which are

now admissible on the substantive offense are now subject to prosecution under Article 107 if false. In fact, the day to day interaction of service-members with other service personnel and their superiors is where the question of the truth or falsity of communication may be most important. Military case law does not clearly indicate how the exculpatory no exception applies in the new gray area before the appropriate level of suspicion or officiality for Article 31 rights.

In *Harrison* the Army Court of Military Review requested the Court of Military Appeals reconsider the exculpatory no doctrine.

Because of the high ethical standards required of those in the military, we believe that the exculpatory no defense is an inappropriate exception to offenses charged under Article 107, UCMJ (false official statement). We earnestly encourage the United States Court of Military Appeals to clarify its implication in *United States v. Davenport*, 9 M.J. at 370, that the exculpatory no doctrine may serve as a defense to prosecutions under Article 107, UCMJ.²⁹⁶

Harrison goes on at great length to discuss that truthfulness is a *sine qua non* of service in the military, and therefore, the exculpatory no doctrine is antagonistic to that purpose.²⁹⁷ The Air Force Court of Military Review was of a similar opinion. "[T]he Court should reassess the rationale of *United States v. Aronson* and the subsequent decisions based thereon at the earliest possible opportunity."²⁹⁸ The military review courts are

justified in calling for the Court of Military Appeals to discard the exculpatory no exception.

The admixture of premises of federal courts accepting this defense and those rejecting the exception has resulted in a polyglot without a definitive legal purpose in military law regarding the exculpatory no doctrine. Part of the reason for this outcome are the underlying flaws of an ill-conceived doctrine. The exculpatory no doctrine is not justified by the legal reasons offered by those federal courts which recognize this defense. It is an exclusionary rule of sorts which is not designed to deter improper government conduct. Government agencies are allowed to question citizens about matters within their area of responsibility. The Court of Military Appeals engrafted this doctrine to military law following the precedent of the federal courts. It is now time to recognize the shift away from the acceptance of this flawed exception. The Court of Military Appeals should follow the lead of the Fifth and Sixth Circuit Courts of Appeals and reject continued recognition of the exculpatory no doctrine.

Article 107, UCMJ contains no reference to an exculpatory no exception. Only a deviation from the plain meaning of Article 107 provides a basis for recognizing the exculpatory no doctrine. In all the federal decisions, judicial interpretation of the statute has been the only established basis for recognizing the

exception. This premise must rely on drawing an analogy to the federal courts interpretation of 18 U.S.C. § 1001. However, the Supreme Court, most recently in *Rodgers*, has continually rejected attempts to restrict the plain meaning of section 1001. The clear implication of *Rodgers* is that statutory constructions which seek to restrict the plain meaning of § 1001 are unwarranted. The Court of Military Appeals adopted this position in regard to Article 107 in *Jackson*. This significantly undermines recognition of the exculpatory no exception, which is merely a judicially created exception to the statute. Consequently, the notion of restricting Article 107 by judicial interpretation to allow for the exculpatory no exception is "to open the court to attack on the ground that its interpretation of the law is nothing more than judicial legislation."²⁹⁹

Even if an exculpatory no exception should exist in relation to § 1001, this does not necessarily dictate that a similar exception must exist for Article 107. The rationale supporting a restricted interpretation of section 1001 is even less persuasive when compared to the provisions of the Uniform Code of Military Justice. A parallelism does not exist between the two provisions under all circumstances. There are numerous reasons to reject the analogy between § 1001 and Article 107 in relation to the exculpatory no doctrine.

Federal courts were troubled by the fact section 1001

provided a greater punishment, a large fine, than was provided for under the federal perjury statute. These same courts, notably *Levin*, *Davey*, and *Cheevor*, were also concerned about the absence of an oath as required for a perjury conviction. The Supreme Court rejected this argument in *Rodgers* as a matter left to the determination of Congress. These factors are not a matter of consideration for military law. The maximum punishment provided for false official statement in violation of Article 107 is exactly the same as the maximum punishment for perjury in violation of Article 131, 10 U.S.C. § 931. If an oath is administered, the accused, under military law, would be subject to punishment for false swearing in violation of Article 134.³⁰⁰ Yet, again another difference between the two statutes and the concepts surrounding the exculpatory no exception.

Federal courts adopting exculpatory no expressed concern about § 1001 being overbroad and addressing any and every statement to a government official. On one hand, Article 107 only punishes for false *official* statements. The military article has an appropriate limitation. But, as the Army Court of Military Review pointed out in *Harrison*, this type of absolute truthfulness is exactly what is expected of military personnel based on the needs of the military.³⁰¹ Truthfulness in all official activities is a requirement for military members to maintain the efficiency and effectiveness of the military service.

Courts have sought to link the exception to the Fifth Amendment privilege against self-incrimination. None of the cases have clearly stated a rationale in support of this proposition. The Fifth Amendment is not a talismanic incantation which the accused can rely upon to escape punishment for lying. "[I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question the Government should not have asked."³⁰² A citizen has a right to refuse to answer questions, but not a right to lie. The exculpatory no doctrine should not provide such a right under the guise of the Fifth Amendment. Whatever the relationship between § 1001 and Article 107, there is a clear relationship between the latter and Article 31, UCMJ. Congress promulgated the Code provisions specifically to govern the military services. The Court of Military Appeals has interpreted Article 31 as effectuating Fifth Amendment protections against self-incrimination for service-members.³⁰³ Recognition of exculpatory no significantly expands the traditional protection against self-incrimination afforded under Article 31. As Judge Latimer noted in his dissent in *Osborne*, the protection afforded by Article 31 is limited. "He must rely on his privilege and remain silent, but if he speaks he must tell the truth."³⁰⁴ Exculpatory no excuses a lie. When Article 31 rights are given that principal should control. Decisions in *Prater* and *Sanchez* indicate that exculpatory no does not override Article 31. The exception

should not control and cause a different result when Article 31 rights are not provided. The Army Court of Military Review in *Collier* was of the same opinion. "[T]here is no good reason to give a member of the military who is not an accused or suspect a license to lie when making a statement which others may reasonably be expected to act upon."³⁰⁵ It strains logic that Congress could have intended the Code to function in any other fashion. The premise of Article 31 should control as to the privilege against self-incrimination in the military. This is the proposition that the a suspect has a right to remain silent, but not a right to lie. Even in the absence of Article 31 advice, the fundamental principal should remain the same. The respondent must answer truthfully or remain silent. The Court of Military Appeals should reject any application of exculpatory no to false responses even those without benefit of Article 31 when the advice is not required prior to the questioning.

V. Conclusion

The amorphous exculpatory no doctrine remains ever changing and uncertain among the federal circuit courts. Military law has recognized this exception because of the federal courts. This is a position which should be reexamined by the Court of Military Appeals in light of the Fifth and Sixth Circuit Court of Appeals rejection of the doctrine. Those courts offer a persuasive argument why this exception should not be recognized.

This doctrine has recently started to take some recognizable form in the military law sufficient to determine the scope of the exception. Fortunately, the direction of the military courts has been to severely limit any application of this defense.

Earlier theories no longer justify continued recognition of the archaic formulation of the exculpatory no doctrine. This exception produces the bizarre result of an accused committing a criminal act and escaping prosecution even though the government has not acting in an improper or unlawful manner. This is at odds with the purpose of military law, "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment."³⁰⁶ Justice is that "guilt shall not escape or innocence suffer."³⁰⁷ Further, it is a necessity for a properly functioning military that members furnish truthful information.³⁰⁸ The exculpatory no exception promotes neither of these functions. This defense allows the the guilty to evade punishment for a false statement without promoting any beneficial societal purpose. The exception does not operate to promote good order and discipline or efficiency and effectiveness in the military by condoning lying. There is no reason for military law to continue to recognize this exception because of the acceptance of the doctrine in the federal courts. Those decisions adopting exculpatory no are inconsistent with Supreme Court decisions, the requirements of the Uniform Code of Military Justice, and military case law.

Decriminalizing conduct in the military is a matter to be left to the Congress and not judicial interpretation of the plain meaning of the Code. Despite recognition of the exculpatory no doctrine, military courts have not applied it to preclude criminal responsibility. The military courts have publicized the need to consider the exculpatory no. Unfortunately, the courts provided inadequate guidance in implementing that direction. Subsequent decisions have clarified the matter. Close examination of the cases indicates that any remaining concern about exculpatory no is extremely narrow in scope. Application of the exception may possibly arise in a case charging a false statement outside of a criminal investigation. Ordinary analysis for a Article 107 violation should suffice in most cases to dismiss any exculpatory no concerns. Still, the better course would be for the Court of Military Appeals to reject this defense when the opportunity presents itself.

Asserting that exculpatory no is basically at an end for consideration as a defense to a charge under Article 107 does not terminate the need to make further comment. The Sixth Circuit Court of Appeals noted in *Steele* that Congress relied on the discretion of prosecutors to limit the potential application of section 1001.³⁰⁹ Military law also needs to rely on the discretion of those exercising the prosecution function in relation to Article 107. The power to charge does not require every possible offense should be charged. Recently, the

Assistant Attorney General of the United States commented on the responsibility of prosecutors in regard to pretrial discovery. Those comments are apropos to this discussion. "From power arise more obligations. Frequently, prosecutors do not receive much guidance."³¹⁰ There is little guidance provided to military prosecutors in the charging decision.³¹¹ The Court of Military Appeals decision in *United States v. Teter*,³¹² removed one of the last remaining brakes on charging criminal violations in the military. There are some considerations with charging false statements arising from a criminal investigation worth noting. Although not controlling on the legal issue, as a practical matter, false statements to investigators by an accused have less likelihood of perverting the authorized government function. Typically, the false statements often assist the investigation. Certainly, the impact of the offense is usually reduced in those circumstances. Another consideration is how false statement during the course of an investigation ends up at trial. A natural inclination is to charge a false statement resulting from an investigation of another substantive offense after the accused subsequently confesses. On the other hand, charges of false statement, in contested cases, are ususally not charged to avoid prematurely putting an accused exculpatory statement before the fact-finder. The accused who eventually recants his false statement may typically face a greater maximum punishment than one who sticks to the lie.

There are limited reasons for separately charging a

violation of Article 107 involving a false statement to an investigator when the underlying offense is charged. These false statements should be charged if contingency of proof problems exist. A reason to charge the Article 107 violation may be when particular aggravating circumstances arise from a false statement to an investigator. Also, if the false statement is part of an ongoing attempt to continue to defraud the government, this would be justification for a separate charge. This is not an exhaustive list. The suggestion here is that the power to charge this offense should be exercised with discretion. I am not advocating a free ride for the accused, but a charging decision based on the interest of fairness and judicial economy. The false statement connected to the underlying offense should be considered as an aggravating factor on sentencing. "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."³¹³ Ordinarily, an uncharged offense would be considered uncharged misconduct and inadmissible for sentencing under the rules. However, the Court of Military Appeals in *United States v. Wingart*,³¹⁴ specifically indicated that false statements concerning an offense are admissible on sentencing as aggravation evidence. "It may follow the offense of which the accused has been convicted --e.g., a false official statement concealing an earlier theft of government property."³¹⁵ The prosecution need only offer the appropriate proof and request an appropriate sentencing instruction. A proposed instruction

patterned after the mendacity instruction in *United States v. Warren*³¹⁶ would appear appropriate.³¹⁷

Rejection of exculpatory no defense in military law will promote judicial economy and efficiency by removing the need to consider an archaic and ill-advised exception to the clear rule of law. The continued recognition of this doctrine is inconsistent with the law as it has evolved in the military and the federal circuits. Rejection of the defense will avoid the morass of the federal courts in attempting to determine the scope of this exception. The exercise of appropriate prosecutorial discretion should be sufficient to prevent any overbroad application of Article 107, UCMJ under the circumstances.

ENDNOTES

¹*United States v. Garsson*, 291 F. 646 (D.C.N.Y. 1923).

²*United States v. Payne*, 750 F.2d 844 (11th Cir. 1985).

³*United States v. Barenio-Burgos*, 739 F. Supp. 772, 787 (E.D.N.Y. 1990); *United States v. Cogdell*, 814 F.2d 179, 182 (4th Cir. 1988).

⁴*United States v. Rodriguez-Rios*, 14 F.3d 1040, 1994 WL 38664, 10 n.7 (5th Cir. 1994).

⁵S. REP. NO. 96-553, 96th Cong., 2d Session 377-86 (1980).

⁶S. 1722, 96th Cong., 2d Sess. (1980) (Senate Judiciary Committee voted 12 to 1 in favor, bill approved by the Senate) (making a false statement to a law enforcement officer a crime, affirmative defense of recantation, reduced penalties to two years). See also 124 CONG. REC. S1437 (daily ed. January 30, 1978) (statement of Sen. Allen & Sen. Kennedy).

⁷Criminal Code Reform (Federal), 15 Major Legislation Congress MLC-090 (Dec 1980) (noting criminal code reform bills introduced in 93d through 96th Congress no bill passed by more than one House).

⁸*United States v. Cervone*, 907 F.2d 332, 342 (2d Cir. 1990), cert. denied, 498 U.S. 1028, 111 S.Ct. 680, 112 L.Ed.2d 672(1991); *Cogdell*, 844 F.2d at 182-83; *United States v. Medina De Perez*, 799 F.2d 540 (9th Cir. 1986); *United States v. Bush*, 503 F.2d 813 (5th Cir. 1974).

⁹*United States v. Chevoor*, 526 F.2d 178, 182-84 (1st Cir. 1975),

cert. denied, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed. 2d 176 (1976); *Perez*, 799 F.2d at 543; *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962).

¹⁰*United States v. Steele*, 993 F.2d 1313 (6th Cir. 1991).

¹¹*Paternostro*, 311 F.2d at 201; *United States v. Lambert*, 501 F.2d 943, 946 nn.2A & 4 (5th Cir. 1974); *Payne*, 750 F.2d at 861; *United States v. Anderrez*, 661 F.2d 404, 409 (5th Cir. 1981); *United States v. Palzer*, 745 F.2d 1350, 1354 (11th Cir. 1984).

¹²*United States v. Rodriguez-Rios*, 14 F.3d 1040, 1994 WL 38664 (5th Cir. 1994).

¹³*United States v. Steele*, 993 F.2d 1313 (6th Cir. 1991).

¹⁴Statement by the President After Receipt of the Report of the National Commission on Reform of Federal Criminal Laws, 7 WEEKLY COMP. PRES. DOC. 68 (Jan. 16, 1971).

¹⁵*United States v. Hutchins*, 5 U.S.C.M.A. 422, 18 C.M.R. 46 (C.M.A. 1955) (finding general analogy between language Art. 107 and § 1001); *United States v. Aronson*, 8 U.S.C.M.A. 525, 25 C.M.R. 29 (C.M.A. 1957) (holding purpose of Art. 107 and § 1001 the same); *United States v. Jackson*, 26 M. J. 377, 378 (C.M.A. 1988) (noting close relationship between Art. 107 and § 1001).

¹⁶29 M. J. 72 (C.M.A. 1989).

¹⁷*Id.* at 74.

¹⁸*United States v. Sanchez*, 39 M. J. 518, 1993 WL 534996 (A.C.M.R. 1993).

¹⁹37 M. J. 992 (A.C.M.R. 1993).

²⁰*Id.* at 994.

²¹*United States v. Goldsmith*, 29 M. J. 979 (A.F.C.M.R. 1990) ("We have sought--with only minimal success--to find some plausible theory which will make all the cases fit a logical, consistent pattern. Our efforts evaporate after a few moments' reflection like some legal Brigadoon.")

²²*United States v. Prater*, 28 M.J. 818 (A.C.M.R. 1989); *United States v. Prater*, ACMR 8800576 (A.C.M.R. 15 Nov. 1989), *unpub. vacated by unpub. order*, 14 Dec 1989; *United States v. Prater*, 30 M.J. 785 (A.C.M.R. 1990), *aff'd*, 32 M. J. 432 (C.M.A. 1991).

²³*Prater*, 30 M. J. at 789.

²⁴*Id.*

²⁵*United States v. Prater*, 32 M.J. 433 (C.M.A. 1991).

²⁶39 M. J. 518, 1993 WL 534996 (A.C.M.R. 1993).

²⁷*Id.* at *1.

²⁸*Id.*

²⁹*United States v. Rutland Hospital Inc.*, 320 F. Supp. 583 (D. Vt. 1970).

³⁰18 U.S.C. § 152 (Concealment of assets, false oaths and claims, bribery); 18 U.S.C. § 287 (False, fictitious or fraudulent claims); 18 U.S.C. § 288 (False claims for postal losses); 18 U.S. C. § 289 (False claims for pensions); 18 U.S.C. § 542 (Entry of goods by means of false statements); 18 U.S.C. § 550 (False claim for refund of duties); 18 U.S.C. § 651 (Disbursing officer falsely certifying full payment); 18 U.S.C. § 911 (False personation citizen of the U.S.); 18 U.S.C. § 912 (False personation officer or employee of U.S.); 18 U.S. C. § 913 (False

impersonator making arrest or search); 18 U.S.C. § 914 (False personation creditor of U.S.); 18 U.S.C. § 916 (False personation 4-H Club member or agent); 18 U.S.C. § 917 (False personation Red Cross member or agent); 18 U.S.C. § 923 (False entry firearms record); 18 U.S.C. § 954 (False statements influencing foreign government); 18 U.S.C. § 1001 (False statement or entries); 18 U.S.C. § 1002 (Possession of false papers to defraud U.S.); 18 U.S.C. § 1003 (False demands against U.S.); 18 U.S.C. § 1005 (False bank entries, reports and transactions); 18 U.S.C. 1006 (False federal credit institution entries, reports and transactions); 18 U.S.C. § 1007 (False statement Federal Deposit Insurance Corporation transactions); 18 U.S.C. § 1008 (False statement Federal Saving and Loan Insurance Corporation transactions); 18 U.S.C. 1009 (False rumor regarding Federal Savings and Loan Insurance Corporation); 18 U.S.C. 1010 (False statement Department of Housing and Urban Development and Federal Housing Administration transactions); 18 U.S.C. § 1011 (False statement Federal land bank mortgage transactions); 18 U.S.C. § 1012 (False entry Department of Housing and Urban Development transactions); 18 U.S.C. § 1013 (False pretense Farm loan bonds and credit bank debentures); 18 U.S.C. § 1014 (False statement loan and credit applications generally; renewals and discounts; crop insurance); 18 U.S.C. § 1016 (False statement naturalization, citizenship or alien registry); 18 U.S.C. § 1061 (False acknowledgement or appearance or oath); 18 U.S.C. § 1017 (False use government seals and instruments); 18 U.S.C. § 1018

(False official certificates or writings); 18 U.S.C. § 1019
(False statement certificates by consular officers); 18 U.S.C. §
1020 (False statement highway projects); 18 U.S.C. § 1021 (False
certification title records); 18 U.S.C. § 1024 (False pretenses
on high seas and other waters); 18 U.S.C. § 1026 (False statement
compromise, adjustment, or cancellation of farm indebtedness); 18
U.S.C. § 1027 (False statements and concealment of facts in
relation to documents required by the Employee Retirement Income
Security Act of 1974); 18 U.S.C. 1028 (Fraud and related activity
in connection with identification documents); 18 U.S.C. § 1526
(Fraud and misuse of visas, permits, and other entry documents);
18 U.S.C. § 1712 (Falsification of postal returns); 18 U.S.C. §
1722 (False evidence to secure second-class postal rate); 18
U.S.C. § 1731 (Vehicles falsely labeled); 18 U.S.C. 1919 (False
statement to obtain unemployment compensation); 18 U.S.C. § 1920
(False statement to obtain Federal employees compensation); 18
U.S.C. § 1922 (False or withheld report concerning Federal
employees' compensation); 18 U.S.C. § 2072 (False crop reports);
18 U.S.C. 2073 (False entries and reports of moneys or
securities); 18 U.S.C. § 2074 (False weather reports).

³¹*United States v. Barr*, 963 F.2d 641, 645 (3d Cir.), cert.
denied, ___ U.S. ___, 113 S.Ct. 811, 121 L.Ed.2d 684 (1992);
United States v. Herring, 916 F.2d 1543, 1546 11th Cir. 1990,
cert. denied, ___ U.S. ___, 111 S.Ct. 2248, 114 L.Ed.2d 488 (1991);
United States v. Lawson 809 F.2d 1514 (11th Cir. 1987); *United*
States v. Lange, 528 F.2d 1280 (5th Cir. 1978); *United States v.*

Chandler, 752 F.2d 1148, 1150 (6th Cir. 1985); *Steele*, 993 F.2d at 1318-19 (finding five elements to false statement offense: a statement, falsity, materiality, specific intent, and agency jurisdiction); *United States v. Silva*, 715 F.2d 43, 49 (2d Cir. 1983); *United States v. Capo*, 791 F.2d 1054, 1069 (2d Cir. 1986); *United States v. Adler*, 380 F.2d 917, 920 (2d Cir.), cert. denied, 389 U.S. 1006, 88 S.Ct. 561, 19 L.Ed.2d 602 (1967) (finding four elements to false statement: a statement, knowledge that it was false, statement knowingly and willfully, in jurisdiction of the United States).

³²*United States v. Rodgers*, 466 U.S. 475, 480-81, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984).

³³*United States v. Beacon Brass Co.*, 344 U.S. 43, 46, 73 S.Ct. 77, 97 L.Ed. 61(1952)(noting no distinction between oral and written statements).

³⁴*Adler*, 380 F.2d at 922.

³⁵*United States v. Marzani*, 168 F.2d 133 (App.D.C.), aff'd, 335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431 (1948)(upheld on four to four split decision).

³⁶*United States v. Yermian*, 468 U.S. 63, 74, 104 S.Ct. 2936, 82 L.Ed.2d 53, 62 (1984).

³⁷*Yermian*, 468 U.S. at 73; *United States v. Bakhitar*, 913 F.2d 1053, 1060 (2d Cir. 1990), cert. denied, 499 U.S. 924, 111 S.Ct. 1319, 113 L.Ed.2d 252 (1991); *United States v. Gibson*, 881 F.2d 318, 323 (6th Cir. 1989); *United States v. Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985); *United States v. Green*, 745 F.2d 1205,

1209 (9th Cir. 1984), *cert denied*, 474 U.S. 925, 106 S.Ct. 259, 88 L.Ed. 2d 266 (1985). *Cf. United States v. Egenberg*, 441 F.2d 441 (2d Cir.), *cert. denied*, 404 U.S. 994, 92 S.Ct. 530, 30 L.Ed.2d 546 (1971)(holding reckless disregard sufficient scienter).

³⁸*Yermian*, 468 U.S. at 68; *Herring*, 916 F.2d at 1546 (11th Cir. 1990).

³⁹*Gonzales v. United States*, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878, 81 S.Ct. 1028, 6 L.Ed.2d 190 (1961); *Robles v. United States*, 279 F.2d 401 (9th Cir. 1960), *cert. denied*, 365 U.S. 836, 81 S.Ct. 750, 5 L.Ed.2d 745 (1961); *United States v. Larocca*, 245 F.2d 196 (3d Cir. 1957); *Rolland v. United States*, 200 F.2d 678 (5th Cir.), *cert. denied*, 345 U.S. 375, 73 S.Ct. 950, 97 L.Ed. 1383 (1953). *Contra United States v. Silver*, 235 F.2d 375 (2d Cir.), *cert. denied*, 352 U.S. 880, 77 S.Ct. 102, 1 L.Ed.2d 80 (1956); *United States v. Marchisio*, 344 F.2d 653, 666 (2d Cir. 1965)(holding materiality not required).

⁴⁰*Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 1541, 99 L.Ed.2d 839 (1988); *Steele*, 933 F.2d at 1319; *Green*, 745 F.2d at 1208; *United States v. Duncan*, 693 F.2d 971, 975 (9th Cir. 1982), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2436, 77 L.Ed.2d 1321 (1983); *United States v. Van Horn*, 789 F.2d 1492, 1510 (11th Cir. 1986).

⁴¹*Capo*, 791 F.2d. at 1069.

⁴²*Fisher v. United States*, 254 F.2d 302, 303 (9th Cir.), *cert.*

denied, 358 U.S. 895, 79 S.Ct. 157, 3 L.Ed.2d 122 (1958); *United States v. Killian*, 246 F.2d 77, 82 (7th Cir. 1957).

⁴³*United States v. Bramblett*, 348 U.S. 503, 504-07 75 S.Ct. 504, 99 L.Ed. 594 (1955); *United States v. Gilliland*, 312 U.S. 86, 90-95, 61 S.Ct. 518, 83 L.Ed. 598 (1941); *Rodgers*, 466 U.S. at 477-78; *Perez*, 799 F.2d at 542-43; *Rodriguez-Rios*, 1994 WL 38664 at *5-6; *Bush*, 503 F.2d at 814-815; *United States v. McCue*, 301 F.2d 452, 454-55 (2d Cir.), cert. denied, 370 U.S. 939, 82 S.Ct. 1586, 8 L.Ed.2d 808 (1962); *United States v. Stark* 131 F.Supp. 190, 199-201 (D.M. 1955); *United States v. Fitzgibbon*, 619 F.2d 874, 877-78 (10th Cir. 1980); *United States v. Tabor*, 788 F.2d 714, 716-17 (11th Cir. 1986); *United States v. Levin*, 133 F.Supp. 88, 89 (D.Colo. 1953).

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Tabor*, 788 F.2d at 717; *Stark*, 131 F. Supp at 199.

⁴⁷*Gilliland*, 312 U.S. at 603-04; *Perez*, 799 F.2d at 542; *Stark*, 131 F.Supp. at 199.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰Art. 83, UCMJ (fraudulent enlistment, appointment, or separation); Art. 107, UCMJ (false official statement); Art. 115, UCMJ (malingering by feigning illness, physical disablement, mental lapse, or derangement); Art. 121 (larceny or wrongful appropriation by fraud or false pretense); Art. 123, UCMJ (forgery); Art. 131, UCMJ (perjury); Art. 132, UCMJ (frauds

against the U.S.); Art. 134, UCMJ (false or unauthorized pass, false swearing, false pretenses obtaining services, false swearing, perjury subornation, public record altering, wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button).

⁵¹*MANUAL FOR COURTS-MARTIAL, United States*, pt. IV, ¶ 31b, (1984), [hereinafter *MCM*].

⁵²*Id.* at pt. IV, ¶ 31c(1).

⁵³*Id.* at pt. IV ¶ 31c(3).

⁵⁴*Id.* at pt. IV ¶ 31c(5).

⁵⁵ *Hutchins*, 18 C.M.R. at 51.

⁵⁶Section 1001 evolved from Article of War 60. See also

Hutchins, 18 C.M.R. at 50 ("The first part of Article 107, which deals with false documents, undoubtedly has its roots in Articles of War 56 and 57, 10 U.S.C. §§ 1528 and 1529, and Article 8 (14) of the Articles for the Government of the Navy, 34 U.S.C. § 1200. (citation omitted) These antecedent statutes prohibit the making or signing of a false muster, or the making of a false return of a specified kind. Plainly, the present Article of the Code is much broader in scope. It not only enumerates, as did the predecessor statutes, specified type of reports, but it delineates as an offense the making of any other false official statement."); *Goldsmith*, 29 M. J. 979 (Article 107 consolidates Articles of War 56(false musters) and 57(false returns) and nothing indicates based in any way upon 18 U.S.C. § 1001.).

⁵⁷*United States v. Jackson*, 26 M.J. 377, 378 (C.M.A. 1988).

⁵⁸*Aronson*, , 25 C.M.R. at 32; *Hutchins*, 18 C.M.R. at 51; *United States v. Collier*, 23 U.S.C.M.A. 173, 48 CMR 789, 790 (C.M.A. 1974); *United States v. Ragins*, 11 M.J. 42, 44 (C.M.A. 1981).

⁵⁹*Jackson*, 26 M. J. at 379.

⁶⁰*Hutchins*, 18 C.M.R. at 51.

⁶¹*Collier*, 48 C.M.R. at 791; *Jackson*, 26 M.J. at 378 n.3; *Prater*, 30 M. J. at 789; *Prater*, 32 M. J. at 437.

⁶²133 F. Supp. 88.

⁶³*Id.* at 93.

⁶⁴*Id.* (18 U.S.C. § 1001 provides for 5 years and a \$10,000 fine, 18 U.S.C. § 621 provided for 5 years and a \$2,000 fine).

⁶⁵131 F. Supp. 190.

⁶⁶*Paternostro*, 311 F.2d at 302;. *Barr*, 963 F.2d at 645;. *Cogdell*, 844 F.2d at 182; *United States v. Taylor*, 907 F.2d 801, 803 (8th Cir. 1990); *Tabor*, 788 F.2d at 805.

⁶⁷*Paternostro*, 311 F.2d at 302.

⁶⁸*Stark*, 155 F. Supp. at 193.

⁶⁹155 F. Supp. 175 (S.D.N.Y. 1957).

⁷⁰*Id.* at 177.

⁷¹*Id.*

⁷²301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939, 82 S.Ct. 1586, 8 L.Ed.2d 808 (1962).

⁷³citing *Gilliland*, 312 U.S. at 93 61 S.Ct. 518, 85 L.Ed. 598 (1941); *Beacon Brass Co.*, 344 U.S. at 46; *Bramblett*, 348 U.S. at 504.

⁷⁴*McCue*, 301 F.2d at 455.

⁷⁵*Paternostro*, 311 F.2d at 298 (holding mere negative responses to inculpatory questions by government investigators not prohibited by § 1001).

⁷⁶*Perez*, 799 F.2d at 545-46.

⁷⁷*Barr*, 963 F.2d at 646 (3rd Cir. 1992); *Steele*, 933 F.2d at 1320; *Taylor*, 907 F.2d at 805; *Cervone*, 907 F.2d at 342 (2d Cir. 1990); *Codgell*, 844 F.2d at 183.

⁷⁸526 F.2d 178 (1975).

⁷⁹*Id.* at 182 (citing J. Wigmore, EVIDENCE § 2251 at 316 (McNaughton rev. 1961)).

⁸⁰*Id.* at 182.

⁸¹*Id.* at 182-183.

⁸²*United States v. Distefano*, 741 F. Supp 49, 50 n.2 (E.D.N.Y. 1990); *Cervone*, 907 F.2d at 343; *Bareno-Burgos*, 739 F. Supp. at 787 n.10; *Perez*, 799 F.2d at 546.

⁸³*McCue*, 301 F.2d 452.

⁸⁴*Id.* at 455.

⁸⁵*Distefano*, 741 F. Supp. at 49; *Bareno-Burgos*, 739 F. Supp. at 788.

⁸⁶*Distefano*, 741 F. Supp. at 49; *United States v. Capo*, 791 F.2d at 1069 (2d Cir. 1986), , 817 F.2d 947 (2d Cir. 1987); *Cervone*, 907 F.2d at 342.

⁸⁷*Bakhtiari*, 913 F.2d at 1062; *Capo*, 791 F.2d at 1069; *Distefano*, 741 F. Supp. at 50; *Cervone*, 907 F.2d at 343; *United States v. Grotke*, 702 F.2d 49, 52-53 (2d Cir. 1983); *Adler*, 380 F.2d at 922.

⁸⁸*McCue*, 301 F.2d at 455 (Here the appellants voluntarily appeared before three representatives of the Treasury under circumstances in which they were well aware of the nature and purpose of the examination. They were accompanied by counsel and they were questioned under oath.); *Cervone*, 907 F.2d at 343 (holding exculpatory no not applicable because interviewee well aware of the nature and purpose of the examination); *Distefano*, 741 F. Supp. at 50 n.2.

⁸⁹*McCue*, 301 F.2d at 454-455.

⁹⁰963 F.2d 641 (3d Cir. 1992).

⁹¹*Id.* at 646.

⁹²*Id.* at 647.

⁹³844 F.2d 179 (4th Cir. 1988).

⁹⁴*Id.* at 184.

⁹⁵*Id.* at 183.

⁹⁶*Id.* at 183.

⁹⁷*Paternostro*, 311 F.2d 298.

⁹⁸*Barr*, 963 F.2d at 646; *Cogdell*, 844 F.2d at 182; *Tabor*, 788 F.2d at 716-19; *Taylor*, 907 F.2d at 804.

⁹⁹*United States v. Krause*, 507 F.2d 113, 117 (5th Cir. 1975).

¹⁰⁰*United States v. Rodriguez-Rios*, 991 F.2d 167 (5th Cir. 1993), *rev'd*, 14 F.3d 1040, 1994 WL 38664 (1994).

¹⁰¹14 F.3d 1040, 1994 WL 38664.

¹⁰²*Rodriguez-Rios*, 1994 WL 38664 at *4.

¹⁰³*United States v. Steele*, 896 F. 2d 998 (1990), *rev'd*, 933 F.2d 1313 (1990). *See also* Sandra L. Turner *WOULD I LIE TO YOU? THE SIXTH*

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¹⁰⁴Id.

¹⁰⁵*United States v. Steele*, 933 F.2d 1313.

¹⁰⁶*United States v. Ospina-Herrera*, 1990 WL 43265 *3 (N.D. ILL.
1990) (unpub opinion).

¹⁰⁷493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct.
3183, 41 L.Ed 2d 1146 (1974).

¹⁰⁸613 F.2d 670 (7th Cir. 1980).

¹⁰⁹374 F.2d 363(8th Cir. 1967).

¹¹⁰706 F.2d 854 (8th Cir. 1983), *rev'd*, 466 U.S. 475, 104 S.Ct.
1942, 80 L.Ed.2d 492 (1984).

¹¹¹*United States v. Rodgers*, 466 U.S. 475, 104 S.Ct. 1942, 80
L.Ed.2d 492 (1984).

¹¹²907 F.2d 801 (8th Cir. 1990).

¹¹³799 F.2d 540 (9th Cir. 1986).

¹¹⁴619 F.2d 874 (1980).

¹¹⁵788 F.2d 714 (11th Cir. 1986).

¹¹⁶Id. at 717.

¹¹⁷*United States v. North*, 708 F.Supp. 364, 369 (D.D.C. 1988);
United States v. White, 887 F.2d 267, 273-74 (D.C. Cir. 1989);
United States v. Clarridge, 811 F. Supp. 699 (D.D.C. 1992);
United States v. Dale, 782 F. Supp. 615, 618 (D.D.C.), *cert.*
denied, 114 S.Ct. 650, 126 L.Ed.2d 607 (1991).

¹¹⁸*Dale*, 782 F. Supp. at 618.

¹¹⁹*United States v. Steele*, 896 F.2d at 1001.

¹²⁰*Rodriguez-Rios*, 1994 WL 38664 at *3.

¹²¹*United States v. Poutre*, 646 F.2d 685, 686 (1st Cir. 1980) (emphasis added) (referring to S.1722 supra note 6).

¹²²*McCue*, 301 F.2d 452; *Bakhtiari*, 913 F.2d 1053 *Capo*, 791 F.2d 1054; *Distefano*, 741 F. Supp. 49; *Cervone*, 907 F.2d 332 ; *Grotke*, 702 F.2d 49; *Adler*, 380 F.2d 917.

¹²³*Barr*, 963 F.2d 641.

¹²⁴*Cogdell*, 844 F.2d 179.

¹²⁵*Rodriguez-Rios*, 14 F.3d 1040, 1994 WL 38664.

¹²⁶*Steele*, 933 F.2d 1313.

¹²⁷ *Ospina-Herrera*, 1990 WL 43265 at *3.

¹²⁸*Taylor*, 907 F.2d 801.

¹²⁹*Perez*, 799 F.2d 540.

¹³⁰*Fitzgibbon*, 619 F.2d 874.

¹³¹*Tabor*, 788 F.2d 714.

¹³²*Rodriguez-Rios*, 1994 WL 38664 at *10 n.7.

¹³³ 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941).

¹³⁴*Id.* at 93("The rule of ejusdem generis is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. The rule of 'ejusdem generis' is applied as and aide in ascertaining the intention of the Legislature not subvert it when ascertained.").

¹³⁵*Id.*

¹³⁶348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955).

¹³⁷*Id.* at 510.

¹³⁸*Id.* at 507.

¹³⁹466 U.S. 475, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984).

¹⁴⁰*Id.* at 408.

¹⁴¹*Id.* at 482.

¹⁴²*Perez*, 799 F.2d at 542-43.

¹⁴³*Id.* at 543.

¹⁴⁴*Stark*, 131 F.Supp. 190; *Levin*, 133 F. Supp. 88; *Davey*, 155 F. Supp. 175; *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967).

¹⁴⁵*Stark*, 131 F. Supp. 190; *Davey*, 155 F. Supp. 175; *Paternostro* 311 F.2d 298; *Cogdell*, 844 F.2d 179.

¹⁴⁶*Levin*, 133 F. Supp. at 91(emphasis added).

¹⁴⁷*Stark*, 131 F. Supp. at 207.

¹⁴⁸*Friedman*, 374 F.2d at 367.

¹⁴⁹*Id.*

¹⁵⁰*Levin*, 133 F. Supp. at 90.

¹⁵¹*Stark*, 131 F. Supp. at 205, *Davey*, 155 F. Supp. at 178, *Chevoor*, 526 F.2d at 182.

¹⁵²*Davey*, 155 F. Supp. at 179 (indicating false statement apt to work against the maker); *Cogdell*, 844 F. 2d at 184(noting trained agent cannot be suprised a suspect fails to admit guilt); *Perez*, 799 F.2d at 546(stating a thorough agent will continue vigorous investigation of all leads until personally satisfied); *Taylor*, 907 F.2d at 806.

¹⁵³*Levin*, 133 F. Supp. at 90, *Davey*, 155 F. Supp. at 177; *Cheevor*, 526 F.2d at 182; *Taylor*, 907 F.2d at 804; *United States v. Bedore*, 455 F.2d 1109 at 1110 (9th Cir. 1972); *Friedman* 374 F.2d at 366.

¹⁵⁴*Perez*, 799 F.2d at 544; *Stark*, 131 F. Supp. at 207 (stating sweeping generality of the language of section 1001 requires caution in applying it); *Friedman*, 374 F.2d at 366 (noting any casual conversation with a government official could result in a violation).

¹⁵⁵*Steele*, 933 F.2d at 1320.

¹⁵⁶*Stark*, 131 F. Supp. at 207.

¹⁵⁷*Cogdell*, 844 F.2d at 183 (holding statute not intended to compel persons suspected of crimes to assist criminal investigators in establishing their guilt).

¹⁵⁸*Anderez*, 661 F.2d at 409; *Lambert*, 501 F.2d at 946, n.2A & 4; *Bush*, 503 F.2d at 818.

¹⁵⁹*Taylor*, 907 F.2d at 803.

¹⁶⁰*Cogdell*, 844 F.2d at 182; *Taylor*, 907 F.2d at 803.

¹⁶¹*Bareno-Burgos*, 739 F. Supp. at 787-788; *Distefano*, 741 F. Supp. at 50.

¹⁶²*Steele*, 933 F.2d at 1318; *Rodriguez Rios*, 1994 WL 38664 at *10 n.7.

¹⁶³*Id.* at 1321 (stating fourth criteria for exculpatory no does not take into account guidance of *Rodgers*).

¹⁶⁴*Rodgers*, 466 U.S. at 482.

¹⁶⁵*Id.*

¹⁶⁶*Id.* at 484.

¹⁶⁷*Rodriguez-Rios*, 1994 WL 38664 at *3.

¹⁶⁸*Id.* at *4.

¹⁶⁹*Rodriguez-Rios*, 1994 WL 38664 at *7; *Steele*, 933 F.2d at 1320.

¹⁷⁰*Steele*, 933 F.2d at 1320 n.6.

¹⁷¹396 U.S. 64, 72, 90 S.Ct. 355, 360, 24 L.Ed.2d 264 (1969).

¹⁷²*Bryson v. United States*, 396 U.S. 64, 72, 90 S.Ct. 355, 360, 24 L. Ed.2d 264 (1969); *Steele*, 933 F.2d at 1320; *Rodgriguez-Rios*, 1994 WL 38664 at *8.

¹⁷³384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966).

¹⁷⁴*Id.* at 479.

¹⁷⁵*Id.* at 478.

¹⁷⁶*Id.* at 477.

¹⁷⁷*Id.*

¹⁷⁸*Id.* at 478.

¹⁷⁹*Stark*, 131 F. Supp. 190; *Perez*, 799 F.2d 540; *Cogdell*, 844 F.2d 179.

¹⁸⁰*MANUAL FOR COURTS-MARTIAL, United States*, ¶ 186 (rev. ed. 1969); *United States v. Kupchik*, 6 M. J. 766, 768 (A.C.M.R. 1978).

¹⁸¹25 C.M.R. 29.

¹⁸²*Id.* at 32-33.

¹⁸³*Id.*

¹⁸⁴*Id.* at 33.

¹⁸⁵*See* J. Wigmore, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2259 (McNaughton Rev. 1961) (custodian

impliedly waives privilege against self-incrimination to authorized inspection of public records).

¹⁸⁶*Aronson*, 25 C.M.R. at 34.

¹⁸⁷9 U.S.C.M.A. 455, 26 C.M.R. 235 (C.M.A. 1958).

¹⁸⁸*Id.* at 237.

¹⁸⁹*MCM*, *supra* note 51, pt. IV ¶ 31c(6).

¹⁹⁰Article 36, UCMJ, 10 U.S.C. § 836 (providing President may prescribe rules for pretrial, trial, and post-trial procedures, including modes of proof).

¹⁹¹48 C.M.R. 112 (A.C.M.R. 1973), *aff d*, 23 U.S.C.M.A. 173, 48 C.M.R. 789 (C.M.A. 1974).

¹⁹²*Friedman*, 374 F.2d 363.

¹⁹³*Adler*, 380 F.2d 917.

¹⁹⁴*See Lambert*, 501 F.2d 943 (5th Cir. 1974) (en banc) (undecided at time of *Collier* decision).

¹⁹⁵*Collier*, 48 C.M.R. at 115.

¹⁹⁶*United States v. Collier*, 23 U.S.C.M.A. 173, 48 C.M.R. 789 (C.M.A. 1974).

¹⁹⁷6 M.J. 766 (A.C.M.R. 1978).

¹⁹⁸*See United States v. Johnson*, 530 F.2d 52 (5th Cir. 1976); *Bedore*, 455 F.2d 1109; *McCue* 301 F.2d 452; *Perez*, 799 F.2d 540.

¹⁹⁹9 M. J. 364 (C.M.A. 1980).

²⁰⁰*Id.* at 370.

²⁰¹20 M.J. 710 (A.C.M.R. 1985).

²⁰²*Id.* at 711.

²⁰³*Id.* at 712.

²⁰⁴24 M.J. 815 (A.C.M.R. 1987).

²⁰⁵24 M.J. 304 (C.M.A. 1987).

²⁰⁶*See United States v. Hajecate*, 683 F.2d 894 (5th Cir. 1982) (holding exculpatory no not a defense to fraudulent tax returns under 26 U.S.C. § 7206); *United States v. McCright*, 821 F.2d 226 (5th Cir. 1987) (finding exculpatory no not applicable to prosecution for false bank form); *United States v. \$18,350.00 In U.S. Currency*, 758 F.2d 553, (11th Cir. 1985)(holding exculpatory no not a defense to false customs form). *Contra Payne*, 750 F.2d 844 (11th Cir. 1985)(holding exculpatory no defense to false statement to federal land bank under 18 U.S.C. § 1006).

²⁰⁷26 M. J. 377 (C.M.A. 1988).

²⁰⁸*Id.* at 379.

²⁰⁹*Distefano*, 741 F. Supp at 50 n.2; *Cervone*, 907 F.2d at 343; *Bareno-Burgos*, 739 F. Supp. at 787 n.10; *Perez*, 799 F.2d at 546; *Payne*, 750 F.2d at 863.

²¹⁰29 M. J. 72 (C.M.A. 1989).

²¹¹*Id.* at 73.

²¹²*Id.*

²¹³*Id.* at 75.

²¹⁴*United States v. Prater*, 28 M. J. 818 (A.C.M.R. 1989), *vacated by unpub. order*, 5 Sept. 1989.

²¹⁵*United States v. Prater*, ACMR 8800576 (A.C.M.R. 15 Nov. 1989), *unpub. vacated by unpub. order*, 14 Dec. 1989).

²¹⁶*United States v. Prater*, 30 M. J. 785 (A.C.M.R. 1990), *aff'd*, 32 M. J. 432 (C.M. A. 1990).

- ²¹⁷*Prater*, 30 M. J. at 791 (Giuntini, J. dissenting).
- ²¹⁸*Id.* at 437.
- ²¹⁹*Id.* at 438.
- ²²⁰*Jackson*, 26 M. J. at 379
- ²²¹*Sievers*, 29 M.J. at 75.
- ²²²*Davenport*, 9 M. J. at 369.
- ²²³34 M.J. 135 (C.M.A. 1992).
- ²²⁴*Id.* at 138.
- ²²⁵*Osborn*, 26 C.M.R. at 238.
- ²²⁶39 M. J. 518, 1993 WL 534996.
- ²²⁷*Id.* at *2.
- ²²⁸*Prater*, 32 M. J. at 437.
- ²²⁹*Perez*, 799 F.2d at 545-546.
- ²³⁰*Prater*, 32 M. J. at 437.
- ²³¹836 F.2d 439 (9th. Cir. 1987) (holding false statement to Secret Service agent investigating fraudulent claim did relate to claim against the government).
- ²³²*Cogdell*, 844 F.2d at 184.
- ²³³*Id.*
- ²³⁴*Id.* at 184 n.5.
- ²³⁵*United States v. Rose*, 540 F.2d 1358 (9th Cir. 1978) (holding declarant claiming privilege of entry not entitled to exculpatory no defense). *Contra Perez*, 799 F.2d at 545 n.8 (finding not all statements of declarant at the border related to the privilege of entry).
- ²³⁶*Prater*, 32 M. J. at 437.

²³⁷*Barr*, 963 F.2d at 646.

²³⁸10 U.S.C.M.A. 54, 27 C.M.R. 128 (C.M.A. 1958).

²³⁹See *MCM*, *supra* note 51, pt. IV, ¶ 31c(2) (officiality requires a person in the execution of official duties).

²⁴⁰*Stark*, 131 F. Supp. at 205

²⁴¹*Kungys*, 485 U.S. at 770; *Steele*, 933 F.2d at 1319; *Green*, 745 F.2d at 1208; *Duncan*, 693 F.2d at 975; *Van Horn*, 789 F.2d at 1510.

²⁴²*Aronson*, 25 C.M.R. at 34.

²⁴³*Rodgers*, 466 U.S. at 482.

²⁴⁴*Jackson*, 26 M. J. at 379.

²⁴⁵*Prater*, 32 M. J. at 438.

²⁴⁶*Id.* at 437.

²⁴⁷*Id.*

²⁴⁸*Davey*, 155 F. Supp. at 177. See also *Paternostro*, 311 F.2d at 302-303.

²⁴⁹*Bakhtiari*, 913 F.2d at 1062; *Capo*, 791 F.2d at 1069; *Distefano*, 741 F. Supp. at 50; *Cervone*, 907 F.2d at 343; *Grotke*, 702 F.2d at 52-53; *Adler*, 380 F.2d at 922.

²⁵⁰*United States v. Kennedy*, 1992 WL 165801 (A.F.C.M.R. 1990), *unpub.*, ("[T]he doctrine only protects the no.").

²⁵¹*United States v. Hudson*, 37 M. J. 992, 993 (A.C.M.R. 1993); *Sanchez*, 1993 WL 534996 at *1.

²⁵²*Paternostro*, 311 F.2d at 309.

²⁵³503 F.2d 813.

- ²⁵⁴*Id.* at 816-819 (Roney, J. dissenting indicating affidavit contained affirmative statements of false facts).
- ²⁵⁵*Id.* at 819.
- ²⁵⁶*Tabor*, 788 F.2d at 718.
- ²⁵⁷*Van Horn*, 789 F.2d at 1510.
- ²⁵⁸*Rodriguez-Rios*, 1994 WL 38664 at *4.
- ²⁵⁹*Capo*, 791 F.2d at 1069.
- ²⁶⁰*Stark*, 131 F. Supp. at 204.
- ²⁶¹*Jackson*, 26 M. J. at 379; *Prater*, 32 M. J. at 438.
- ²⁶²*MCM*, supra note 51 Military Rule of Evidence 305 [hereinafter Mil. R. Evid.].
- ²⁶³*United States v. Loukas*, 29 M. J. 385 (C. M. A. 1990).
- ²⁶⁴*United States v. London*, 550 F.2d 206 (5th Cir. 1977).
- ²⁶⁵*Taylor*, 907 F.2d at 806. See also *Perez*, 799 F.2d at 545; *Cogdell*, 844 F.2d at 184.
- ²⁶⁶*Perez*, 799 F.2d at 546; *Distefano*, 741 F. Supp. at 50 n.2; *Cervone*, 907 F.2d at 343; *Barr*, 963 F.2d at 646; *Taylor*, 907 F.2d at 804; *Cogdell*, 844 F.2d at 183. *Contra Cheevor*, 526 F.2d 178.
- ²⁶⁷*Aronson*, 25 C.M.R. at 33.
- ²⁶⁸*MCM*, supra note 50, pt. IV, ¶ 31c(6)(b).
- ²⁶⁹*Prater*, 32 M. J. at 437.
- ²⁷⁰*Id.* at 438.
- ²⁷¹*Tabor*, 788 F.2d at 718; *Cogdell*, 844 F.2d at 182.
- ²⁷²*Stark*, 131 F. Supp. at 193; *Perez*, 799 F.2d at 541; *Cogdell*, 844 F.2d at 180.
- ²⁷³*King*, 613 F.2d at 675.

²⁷⁴*McCue* 301 F.2d at 455; *Cervone*, 907 F.2d at 343; *Distefano*, 741 F. Supp. at 50 n.2.

²⁷⁵*Prater*, 32 M. J. at 438.

²⁷⁶*Sanchez*, 1993 WL 534996 at *2.

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹S. REP. NO. 96-553, *supra* note 5 at 381.

²⁸⁰*Goldsmith*, 29 M. J. 979 (A.F.C.M.R. 1990) (noting Court of Military Appeals decision in *Jackson* clarifies legal line for viewing 18 U.S.C. § 1001 in liberal fashion).

²⁸¹Article 31(b), UCMJ, 10 U.S.C. § 831. *See also MCM, supra* note 50, Mil. R. Evid. 305(c).

²⁸²*MCM, supra* note 51, Mil. R. Evid. 305(b)(2).

²⁸³*Loukas*, 29 M. J. 385 (holding Art. 31 not required where questioning crew chief not acting in law enforcement capacity); *United States v. Good*, 32 M.J. 105 (C.M.A 1991).

²⁸⁴*United States v. Morris*, 13 M. J. 297 (C.M.A. 1982); *United States v. Leiffer*, 13 M. J. 337 (C.M.A. 1982).

²⁸⁵*See, e. g., Goldsmith*, 29 M. J. 979 (false official statement to civilian cashier working at the officers club).

²⁸⁶*See, e. g., Loukas*, 29 M. J. 385.

²⁸⁷*See, e. g., United States v. Blocker*, 30 M. J. 1152 (A.C.M.R. 1990), *aff d*, 33 M. J. 349 (C.M.A. 1991).

²⁸⁸29 M. J. 385 (C.M.A. 1990).

²⁸⁹37 M. J. 422, 425 (C.M.A. 1993)

²⁹⁰*Id.*

²⁹¹*Id.*

²⁹²Had Loukas continued to deny drug use and been referred to a medical facility for a fitness for duty examination, service regulations would have precluded the use of the results for disciplinary purposes.

²⁹³*United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986); *United States v. Dupree*, 24 M.J. 319 (C.M.A. 1987); *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991).

²⁹⁴*Manual For Courts-Martial, United States*, ¶ 140a (1951). See also Kenneth M. Abagis, *The False Official Statement: A Comparative Study of 18 U.S.C. 1001 and Article 107, Uniform Code of Military Justice* 9 (Apr. 1961) (unpublished thesis, on file with The Judge Advocate General's School U.S. Army Charlottesville, Va.).

²⁹⁵7 U.S.C.M.A. 590, 23 C.M.R. 54 (C.M.A. 1957) (holding UCMJ controls over Manual, statement in violation of Art. 31 inadmissible).

²⁹⁶*Harrison*, 20 M. J. at 712 n.2.

²⁹⁷*Id.* at 712.

²⁹⁸*Goldsmith*, 29 M. J. at 983.

²⁹⁹*United States v. Postle*, 20 M. J. 632 (N.M.C.M.R. 1985).

³⁰⁰*Goldsmith*, 29 M. M. at 983 ("[C]riminal investigators would swear all persons who they questioned so that any false statements made under oath could be alleged as violations of Article 134, thereby finessing the difficulties inherent in Aronson.").

³⁰¹*Harrison*, 20 M. J. at 712; *Collier*, 48 C.M.R. at 115. In fact all service-members operate under an oath from the point of entry into the service. Officers swear to bear true faith and allegiance and to faithfully fulfill the duties of their office. Enlisted members swear true faith and allegiance and to obey laws, regulations, and the Uniform Code of Military Justice.

³⁰²*Bryson*, 396 U.S. at 71.

³⁰³*United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

³⁰⁴*Osborne*, 26 C.M.R. at 238 (Latimer, J. dissenting).

³⁰⁵*Collier*, 48 C.M.R. at 115.

³⁰⁶*MCM*, *supra* note 51, pt. I, ¶ 3.

³⁰⁷*Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

³⁰⁸*See Osborn*, 26 CMR at 238 (Lattimer, J. dissenting); *Harrison*, 20 M. J. at 712.

³⁰⁹*Steele*, 933 F.2d at 1320.

³¹⁰Jo Ann Harris, The Twenty-third Kenneth J. Hodson Lecture In Criminal Law at The Judge Advocate General s School, United States Army (Mar. 24, 1994).

³¹¹*MCM*, *supra* note 51, Rule For Courts-Martial 307(c)(4) discussion [hereinafter R.C.M.] ("What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.").

³¹²37 M. J. 370 (C.M.A. 1993) (holding court concerned only with statutory elements for multiplicity not pleading and proof).

³¹³*MCM*, *supra* note 51, R.C.M. 1001(b)(4).

³¹⁴27 M. J. 128 (C.M.A. 1988).

³¹⁵*Id.* at 135.

³¹⁶13 M. J. 278 (C.M.A. 1982)

³¹⁷The evidence presented (and the argument of trial counsel) have raised the question of whether the accused gave a false statement (while under oath) to officials investigating the alleged charges. No person including the accused, has a right to seek to impede or influence the due administration of justice by a false statement. You are advised that you may consider this issue only within certain constraints. First, (notwithstanding any argument by trial counsel), this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie in the statement (under oath). Second, such lies must have been, in your view, willful and material before they can be considered in your deliberations. Finally, you may consider this factor only insofar as you conclude that it, along with all the circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false statement itself. See *Warren*, 13 M.J. 316; *Wingart*, 27 M. J. 128.