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A CRIME FOR ALL SEASONS: 18 U.S.C. § 1001 AND COUNTERTERRORISM

Jeff Breinholt

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A CRIME FOR ALL SEASONS: 18 U.S.C. § 1001 AND COUNTERTERRORISM

Jeff Breinholt¹

TABLE OF CONTENTS

INTRODUCTION.....	604
I. THE HISTORY OF 18 U.S.C. § 1001.....	605
A. <i>The Early Cases</i>	608
B. <i>9/11 Hits</i>	609
C. <i>9/11 Hoaxes</i>	611
1. Frank Barresi.....	611
2. Pamfilo Dacua.....	612
3. Samina Faisal.....	613
4. Dan Weathers.....	613
5. Essan Mohammed Almohandis.....	614
D. <i>Post-9/11: Al-Qaida and Beyond</i>	614
1. Yassin Muhiddin Aref.....	614
2. Adham Hassoun.....	615
3. Soliman Bihieri.....	615
4. Zeljko Boskic.....	616
5. Veselin Vidacak.....	616
6. Fawaz Damrah.....	616
7. Mohamed Kamal Elzahabi.....	617
8. <i>Beyond Al-Qaida</i>	618
E. <i>Recent § 1001 Terrorism Opinions</i>	622
1. Hamza Naj Ahmed.....	622
2. Mohamed Elshinawy.....	622
III. DEFENSES TO TERRORISM-RELATED 1001 CASES.....	623
A. <i>The Demise of the “Exculpatory No” Defense</i>	623
B. <i>Recantation</i>	624
1. James Joseph Pickett.....	625
2. Jeffrey Levenderis.....	626
3. Gerald Sasso.....	627
C. <i>What About The Unbelievable Lie?</i>	628
D. <i>The Ambiguous Question (and the Impossible Answer)</i> ..	629

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E. Courts Scrutinize the Terrorism Sentencing

<i>Enhancement</i>	632
CONCLUSION	638

INTRODUCTION

In the history of American law enforcement's response to September 11, 2001, one of the key tools that emerged was the so-called "material support" statute, 18 U.S.C. § 2339B, which was enacted in 1996.² Meanwhile, another development was less heralded but perhaps as significant: the growing use of 18 U.S.C. § 1001 in terrorism cases. Section 1001 makes it a crime to lie to federal agents.³ Although it carries neither the breadth nor sting of § 2339B, it has been extremely useful for U.S. counterterrorism professionals who expect to uncover the truth from the public so they can thwart prospective terrorist plots. If people lie to the FBI when it is conducting its terrorism investigations—even when they simply issue a blanket denial that turns out to be false—those people can be charged with a felony.

This article describes the terrorism-related cases that have used the § 1001 tool since 9/11, and the emerging jurisprudence that is signaled by them. It describes court opinions that illustrate how § 1001 has been used in the history of counterterrorism enforcement (before, during and after 9/11), both to uncover terrorist plots and to redress terrorism-related hoaxes. These cases include ones where § 1001 was used as a sole charge, as well as ones in which the § 1001 charges were embedded in larger terrorism indictments. As shown in this article, § 1001 might be extremely beneficial to counterterrorism agents, especially with the demise of the "exculpatory no" defense⁴ and the fact that even obviously false (and easily dismissible) false statements are actionable under § 1001. Using it in terrorism cases, however, is not completely without its limits, as ambiguous or imprecise questions during terrorism interviews—which can raise the "literal truth" defense—can foil a § 1001 prosecution. Moreover, even though Congress has made those § 1001 violations "involv[ing] international or domestic terrorism" into a crime with an eight-year

2. 18 U.S.C. § 2339B; see Jeffrey Breinholt, *The Revolution of Substantive Criminal Counterterrorism Law: "Material Support" and its Philosophical Underpinnings*, in *THE LAW OF COUNTERTERRORISM* 91 (Lynne K. Zusman ed., 2011).

3. 18 U.S.C. § 1001 (2006).

4. See *Brogan v. United States*, 522 U.S. 398, 400–05 (1998) (holding that "exculpatory no" defense does not apply to actions under § 1001).

(as opposed to five-year) maximum sentence, courts seem to have not been shy about scrutinizing this enhancement when sought by prosecutors.⁵

I. THE HISTORY OF 18 U.S.C. § 1001

Section 1001, which was enacted in the Civil War era, was largely designed to deal with the problem of citizens filing false claims for compensation with the federal government.⁶ Over time, § 1001 grew in use, especially during the 1930s, when a predecessor provision punished false statements only when made “for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States.”⁷ In 1934, Congress deleted the requirement of a specific purpose and enlarged the class of punishable false statements to include false statements made “in any matter within the jurisdiction of any department or agency of the United States. . . .”⁸ In 1948, the predecessor statute—codified at 18 U.S.C. § 35—was renumbered § 1001.⁹

As recently as 1968, at least one scholar expressed skepticism with the trend of using § 1001 to prosecute people who lie to the FBI in the course of criminal inquiries.¹⁰ This development, the author argued, put criminal suspects in too difficult of a bind, and got away from the original intent of § 1001—to punish false affirmative claimants seeking money.¹¹

The Supreme Court finally resolved the issue in 1984, when it decided *United States v. Rodgers*.¹² There, the Eighth Circuit had affirmed the district court’s decision to grant a motion to dismiss the indictment of a defendant who lied to the FBI and Secret Service by telling them (falsely) that his estranged wife had been kidnapped and that she was involved in threats on the President.¹³ The Eight Circuit reasoned that the term “jurisdiction” within § 1001 included the “power to make monetary awards, grant governmental privileges, or

5. 18 U.S.C. § 1001.

6. See Brogan, 522 U.S. at 412 (1998) (Ginsburg, J., concurring) (discussing the history of § 1001).

7. *Id.* (quoting Act of Oct. 23, 1918, ch. 194, § 35, 40 Stat. 1015–16).

8. *Id.* at 413 (quoting Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996).

9. Act of June 25, 1948, ch. 645, 62 Stat. 749.

10. Note, *Obscene Harpies and Foul Buzzards? The FBI’s Use of Section 1001 in Criminal Investigations*, 78 Yale L.J. 156, 156–157 (1968).

11. *Id.*

12. *United States v. Rodgers*, 466 U.S. 475 (1984).

13. *Id.* at 476–77.

promulgate binding administrative and regulative determinations,' while excluding 'the mere authority to conduct an investigation in a given area without the power to dispose of the problems or compel action.'"¹⁴ "The [Eighth Circuit] concluded that false statements made to the FBI were not covered by § 1001 because the FBI 'had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry.'"¹⁵

The Supreme Court, in an opinion by Justice Rehnquist, disagreed, writing:

There is no doubt that there exists a "statutory basis" for the authority of the FBI and the Secret Service over the investigations sparked by respondent Rodgers' false reports. The FBI is authorized "to detect and prosecute crimes against the United States," including kidnaping. 28 U.S.C. § 533(1). And the Secret Service is authorized "to protect the person of the President." 18 U.S.C. § 3056. It is a perversion of these authorized functions to turn either agency into a Missing Person's Bureau for domestic squabbles. The knowing filing of a false crime report, leading to an investigation and possible prosecution, can also have grave consequences for the individuals accused of crime. There is, therefore, a "valid legislative interest in protecting the integrity of [such] official inquiries," an interest clearly embraced in, and furthered by, the broad language of § 1001.¹⁶

Twenty years later, in December 2004, Congress doubled-down on *Rodgers*, amending § 1001 to create a new "super 1001" violation with an eight-year (as opposed to five-year) maximum penalty when the false statement involves "international or domestic terrorism."¹⁷ In 2006, it opened § 1001 up even further, providing for an eight-year maximum for people convicted of lying in the context not only of terrorism but child sex abuse and sex trafficking inquiries.¹⁸ The current § 1001 provides:

14. *Id.* at 478 (quoting *Friedman v. United States*, 374 F.2d 363, 367 (8th Cir. 1967)).

15. *Id.* (quoting *Friedman*, 374 F.2d at 368).

16. *Id.* at 482 (citation omitted).

17. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6703(a), 118 Stat. 3638, 3766.

18. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §141(c), 120 Stat 587, 603.

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

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

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

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

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

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

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

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

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.¹⁹

19. 18 U.S.C. § 1001 (2006).

II. HISTORY OF § 1001 IN TERRORISM CASES

A. *The Early Cases*

From when 9/11 occurred until September 17, 2003, the § 1001 offense was a five-year felony.²⁰ That did not prevent it from being used by counterterrorism prosecutors, even if just as throw-in for strategic reasons, in actions and events that predated 9/11. For example, in a case that arose before 9/11 but was decided afterward, Ahmed Ressam was stopped in late 1999 trying to enter the U.S. from Vancouver, Canada.²¹ He falsely gave his name as “Benni Norris.”²² An alert customs agent’s opening of Ressam’s trunk yielded a compartment full of explosives, (we now know Ressam was on his way to bomb the Los Angeles International Airport.)²³ Prosecutors charged him with a § 1001 violation based on the false name, along with a host of terrorism offenses.²⁴ He was eventually convicted on all counts.²⁵

It turns out the § 1001 charge in *Ressam*, was key to another charge—the 18 U.S.C. § 844(h), which provided for a ten-year minimum mandatory for people who carry an explosive during the commission of any felony.²⁶ The U.S. Supreme Court ultimately ruled that this § 1001 and § 844(h) combination in the *Ressam* indictment was fair game.²⁷

Arguably, prosecutors took somewhat of a § 1001 flyer with New York attorney Lynn Stewart, indicted along with her cohorts in a plot to help incarcerated terrorist Sheik Omar Abdel Rahman smuggle secret messages out of prison to his followers in Egypt on behalf of his terrorist organization.²⁸ In addition to the terrorism support charges, they charged Stewart individually with § 1001, based on an agreement she signed with the Bureau of Prisons in which she promised to follow the prison’s Special Administrative Measures

20. As noted above, the eight-year maximum for terrorism-related § 1001 violation was not enacted until December 2004. *See supra* note 16.

21. *United States v. Ressam*, 679 F.3d 1069, 1073 (9th Cir. 2012).

22. *Id.*

23. *Id.*

24. *Id.* at 1071 n.1.

25. *Id.* at 1071.

26. 18 U.S.C. § 844(h)(2) (2012).

27. *See United States v. Ressam*, 553 U.S. 272, 274–777 (2008) (finding that § 844(h)(2) applied because Ressam was carrying explosives when he made the false statements to customs agents).

28. *United States v. Sattar*, 272 F. Supp. 2d 348, 354 (S.D.N.Y. 2003). Stewart and her cohorts were indicted in 2002 for conduct that occurred in 2000.

(SAMs).²⁹ As the court noted, she clearly broke the agreement, within days of making the promise, when she started helping her client smuggle messages out of the prison.³⁰ Did that broken agreement make her original promise that she would keep the agreement “false and fraudulent,” for § 1001 purposes?

According to the district court, which entertained a motion to dismiss based on this issue, a false promise in these circumstances could indeed be a false statement for § 1001 purposes.³¹ As the court stated:

Stewart signed the May Affirmation on May 16, 2000. The Indictment alleges that only a few days later, on May 19 or 20, 2000, Stewart visited Sheikh Abdel Rahman in prison and violated the SAMs when she allowed Sheikh Abdel Rahman to dictate letters to Yousry about Sheikh Abdel Rahman's decision to withdraw his support for the cease-fire. The Government alleges that Stewart then submitted the May Affirmation to the Government on or about May 26, 2000 and thereafter communicated Sheikh Abdel Rahman's message to the media that he was renouncing his support for the cease-fire. The Government contends both that Stewart violated § 1001 at the time of the May Affirmation's making because she did not intend to abide by the terms of the agreement, and that she had clearly violated the agreement by the time she submitted the May Affirmation to the Government on May 26, 2000 following her visit to Sheikh Abdel Rahman.³²

The Second Circuit, after the defendants were convicted, agreed: “In light of her repeated and flagrant violation of the SAMs, a reasonable factfinder could conclude that Stewart's representations that she intended to and would abide by the SAMs were knowingly false when made.”³³

B. 9/11 Hits

The days and weeks after 9/11 were heady times for FBI counterterrorism agents. No one knew if a next wave of attacks would

29. *Id.* at 369–70.

30. *Id.* at 376.

31. *Id.* at 375–78.

32. *Id.* at 376 (citations omitted).

33. *United States v. Stewart*, 590 F.3d 93, 99 (2d Cir. 2009).

be forthcoming. The U.S. was on a high state of alert, and § 1001 came into play. More than anything else, the goal was intelligence collection and prevention. Section 1001 was beneficial to both.

Faisal Al Salmi attended flight school with Hani Hanjour, one of the 9/11 hijackers. He was potentially a valuable intelligence asset. When FBI approached him for information, he falsely denied knowing Hanjour.³⁴ He was arrested and charged with a single § 1001 count, on which he was convicted.³⁵ The Ninth Circuit found the evidence for the conviction sufficient.³⁶

Osama Awadallah was Al Salmi's roommate and he, too, was a potential source of valuable intelligence.³⁷ He was charged with perjury, 18 U.S.C. § 1621, but only because prosecutors in New York decided to put him in front of the grand jury after he failed a polygraph.³⁸ He had been asked whether he had personal knowledge of the 9/11 attacks and was acquainted with some of the dead hijackers, and he said no.³⁹ According to the court—which found that Awadallah was not the victim of a perjury trap—he could well have been charged with § 1001.⁴⁰ However, the court ultimately suppressed the search material that could be used to prove his lie.⁴¹ The Second Circuit reversed the suppression.⁴² Awadallah was eventually acquitted.⁴³

When Wael Abdel Rahman Kishk arrived in the U.S. at JFK International Airport after 9/11, he was questioned about his plans.⁴⁴ He insisted he came into the country with plans to study business administration, rather than the truth that he planned to take flight

34. *United States v. Al Salmi*, No. 02-10143, 2003 WL 117996, at *1 (9th Cir. Jan. 13, 2003).

35. *Id.*

36. *Id.*

37. *See United States v. Awadallah*, 202 F. Supp. 2d 82 (S.D.N.Y. 2002).

38. *Id.* at 85.

39. *Id.* at 94, 108.

40. *Id.* at 108 n.41.

41. *Id.* at 107.

42. *United States v. Awadallah*, 349 F.3d 42, 45 (2d Cir. 2003).

43. Ray Rivera & Matthew Sweeney, *Acquaintance of 2 Hijackers Is Acquitted*, N.Y. TIMES, Nov. 18, 2006, <http://www.nytimes.com/2006/11/18/nyregion/18immigrant.html>.

44. *United States v. Kishk*, No. 02-1157, 2003 WL 1868479, at *1 (2d Cir. Apr. 11, 2003).

lessons.⁴⁵ He ultimately recanted, but was still charged with a § 1001 violation.⁴⁶ His conviction was affirmed on appeal.⁴⁷

Shortly after 9/11, in one of the first salvo in efforts against terrorist financing, U.S. Treasury officials designated a charity known as the Benevolence International Foundation (BIF) as al-Qaida-affiliated, and shut it down.⁴⁸ Enaam Arnaout was its executive director.⁴⁹ In the civil case challenging that action, Arnaout's lawyers filed an affidavit in which they said that Arnaout had not been involved in political violence in any way, shape or form.⁵⁰ Prosecutors charged him with a § 1001 violation, based on the theory that this statement about his non-violence was false.⁵¹ Arnaout was eventually indicted for running an Al Qaeda-affiliated charity that defrauded its donors about its programs, in a case that did not include § 1001 charges.⁵² He ultimately pled guilty to racketeering.⁵³

C. 9/11 Hoaxes

What about hoaxes? Is it acceptable to make bad jokes to FBI counterterrorism agents, who are often desperately running things to ground in the name of keeping the American people safe from political violence? Is a § 1001 violation too much for this type of mischief? After all, hoaxes result in wasted counterterrorism resources to run these claims to ground:

1. Frank Barresi

On September 12, 2001, Frank Barresi telephoned the [FBI] and suggested that the manager of the Brooklyn store where his girlfriend worked might have been involved in the [9/11] terrorist attacks. Barresi said that on September 7, the

45. *Id.*

46. *Id.* The question of whether recantation of a false statement is a defense to a §1001 charge is discussed *infra*.

47. *Id.* at 2.

48. *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 936–37 (N.D. Ill. 2002).

49. *Id.* at 937.

50. *Id.*

51. *See United States v. Arnaout*, 231 F. Supp. 2d 754, 755 (N.D. Ill. 2002) (stating that the government charged Arnaout with violations of § 1001(a)(2) and (3) for making false declarations in the civil case).

52. *United States v. Arnaout*, 431 F.3d 994, 997 (7th Cir. 2005).

53. *Id.* at 997–98.

manager, who he said was Middle Eastern, had thrown something at Barresi's girlfriend and that when Barresi had gone to the store to confront him, the manager had said "I can't wait for you Americans to die."⁵⁴

Although he soon recanted, Barresi was charged and convicted of a § 1001 charge.⁵⁵

[In another case,] shortly after the events of [9/11], [Brian] Seifert contacted the FBI and informed agents that an unknown male of Middle Eastern descent had entered his computer data recovery business and engaged him to recover data from a disk. Seifert claimed that, upon examining the disk, he had found a file that generated an image of an American flag which, when decrypted, revealed Arabic text urging terrorists to drive fuel trucks into schools, churches, synagogues and shopping malls. Seifert gave a copy of the recovered file to the FBI. However, after analyzing the file and investigating Seifert's statement, the FBI quickly began to doubt Seifert's story and the existence of the Middle Eastern man. When pressed, Seifert changed his story and claimed that a Caucasian man he met at a restaurant had given him the disk. The FBI also doubted this version of events. In fact, after its initial investigation, the FBI had concluded that Seifert was the true author of the text. Accordingly, the government charged Seifert with two counts of making false statements to a federal agency.⁵⁶

He ultimately pleaded guilty.⁵⁷

2. Pamfilo Dacua

On November 19, 2003, Dacua informed the FBI that he had been approached by an individual, Ahmed, who sought his assistance in smuggling VX, a nerve agent, into the United States. In reality, no such plot existed. Dacua fabricated the story in the hopes of obtaining a place in the witness protection program for his "assistance" in revealing the alleged VX plot.

54. *United States v. Barresi*, 316 F.3d 69, 71 (2d Cir. 2002).

55. *Id.* at 71 (appeal of sentence); *see also United States v. Barresi*, 361 F.3d 666 (2d Cir. 2004) (appeal of resentencing).

56. *United States v. Seifert*, No. 03-843, 1, at *1 (7th Cir. Mar. 5, 2004).

57. *Id.*

Dacua used the name of a real person, lending some credibility to his story. To further his scheme, Dacua set up “meetings” with the fictitious Ahmed and another invented person, Didi, a drug source allegedly provided by Ahmed. The FBI prepped Dacua for each meeting, outfitted him with a body recorder, and conducted surveillance, but to no avail. Neither Ahmed nor Didi showed up. Dacua also recruited friends to play the parts of Didi and Ahmed in several scripted recordings, made for the benefit of the agents he hoped to deceive.

In late December 2003, the FBI confronted Dacua and advised him of their doubts about the veracity of his story. Dacua continued to lie to the FBI, inventing further facts in support of his scheme. But later, when the authorities confronted Dacua again, he confessed to having fabricated the story for his own interests.⁵⁸

He was charged and convicted of several § 1001 counts.⁵⁹

3. Samina Faisal

Samina Faisal in February 2005 used a telephone at JFK International Airport to convey false information concerning a bomb and of making false statements to a law enforcement officer, and then falsely told the FBI that she heard two men talking about it, which she claimed compelled her to make the 911 call.⁶⁰ She was convicted on a § 1001 charge.⁶¹

4. Dan Weathers

Dan Weathers wrote a letter to the FBI falsely describing the location of explosive materials in Athens, Georgia, to be used by a

58. United States v. Dacua, No. 05–2517, 2006 WL 1438744, at *1 (3d Cir. May 24, 2006).

59. *Id.*

60. United States v. Faisal, No. 07–1009-cr, 2008 WL 2369657, at *1 (2d Cir. June 10, 2008).

61. *Id.* at *1–2.

group of individuals to bomb the R.G. Stephens Federal Building located in Athens.⁶² He was convicted of violating § 1001.⁶³

5. Essan Mohammed Almohandis

[Almohandis]. . . , a citizen of Saudi Arabia, was arrested at Logan International Airport, Boston after he arrived on a Lufthansa flight from Riyadh, Saudi Arabia via Frankfurt on January 3, 2004. He was arrested before he was admitted to the United States when border agents discovered three “devices” in his backpack which the government claim[ed] [were] “incendiary” or “explosive” devices. [Almohandis] was charged in a complaint with possessing the devices on the aircraft as well as a . . . [§1001 violation for telling] government agents that the devices were artist's pens or crayons.⁶⁴

He eventually was acquitted.⁶⁵

D. Post-9/11: Al-Qaida and Beyond

As the 9/11 events receded, the FBI started to focus on terrorism generally. There were still al-Qaida cases, but they were joined with an interest in other terrorist groups.

1. Yassin Muhiddin Aref

In upstate New York, Yassin Muhiddin Aref was convicted of an al-Qaida procurement conspiracy after an FBI undercover sting operation.⁶⁶ One of the charges was § 1001, based on Aref's false statement that he was not acquainted with Mullah Krekar of the Islamic Movement of Kurdistan.⁶⁷ Aref claimed on appeal

62. United States v. Weathers, No. 05-12451, 2006 WL 133661, at *1 (11th Cir. Jan. 4, 2006).

63. *Id.*

64. United States v. Almohandis, 307 F. Supp. 2d 253, 254 (D. Mass. 2004).

65. *Saudi Engineer, Acquitted of Smuggling Explosives, Tells His Ordeal*, GULF NEWS, Mar. 9, 2004, <http://gulfnews.com/news/uae/general/saudi-engineer-acquitted-of-smuggling-explosives-tells-his-ordeal-1.315846>.

66. United States v. Aref, No. 04-CR-402, 2007 WL 603508, at *1-2 (N.D.N.Y. Feb. 22, 2007).

67. *Id.* at *4.

(unsuccessfully) that the question he answered was “fundamentally ambiguous.”⁶⁸

2. Adham Hassoun

Adham Hassoun was Jose Padilla’s recruiter. After Padilla was released from military custody where he was being held on suspicions of a dirty-bomb plot, they were both convicted in Miami on material support charges.⁶⁹ The case against Hassoun, however, included several § 1001 charges for false statements he made to the FBI and DHS.⁷⁰ Hassoun’s statements indicated that “he neither encouraged nor assisted an individual named Mohamed Youssef regarding travel to any foreign country,” when, according to the indictment, Hassoun did indeed “encourag[e] and assis[t] Youssef regarding travel to a foreign country.”⁷¹ Hassoun’s statements also indicated that “he was not aware of Mohammed Youssef visiting a foreign country other than Egypt,” when, according to the indictment, Hassoun “knew that Youssef had traveled to a foreign country other than Egypt.”⁷² During the proceedings, Hassoun unsuccessfully claimed that law enforcement questions—which referred to “violent jihad”—were fundamentally ambiguous and imprecise.⁷³

3. Soliman Bihieri

Soliman Bihieri, after being convicted of naturalization fraud, was charged in Virginia with violating § 1001.⁷⁴ At an interview at Washington Dulles International Airport, he “falsely told the agents that he did not have a business relationship with, nor had he handled money for, either Mousa Abu Marzook or Sami Al-Arian, both of whom were affiliated with [Palestinian] terrorist organizations” (Hamas and

68. *United States v. Aref*, No. 07-0981-cr, 2008 WL 2663348, at *2 (2d Cir. July 2, 200).

69. *United States v. Hassoun*, 477 F. Supp. 2d 1210, 1212–13 (S.D. Fla. 2007). Contrary to popular belief, Padilla and Hassoun were not convicted of their support to al-Qaida. Rather, they were charged and convicted under §2339A, which does not require a connection to a designated foreign terrorist organization. See 18 U.S.C. § 2339A (2009) (the material support statute under which Padilla and Hassoun were convicted).

70. *Hassoun*, 477 F. Supp. 2d at 1214–15.

71. *Id.* at 1217 (quoting the indictment).

72. *Id.*

73. *Id.* at 1217–19.

74. See *United States v. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2005).

the Palestinian Islamic Jihad, respectively).⁷⁵ Bihieri eventually pleaded guilty to passport fraud.⁷⁶

4. Zeljko Boskic

Zeljko Boskic was convicted of possessing a green card procurement by false statements relating to his refugee status.⁷⁷ The investigation, which involved FBI Joint Terrorism Task Force agents, involved false denials about his membership in a Republika Srpska detachment that was involved in war crimes.⁷⁸ Similarly, Rasim Causevic was convicted of § 1001 charges for not telling U.S. immigration officials that he was wanted in Bosnia-Herzegovina on a wartime murder charge.⁷⁹

5. Veselin Vidacak

Veselin Vidacak suffered a similar fate. On his U.S. refugee application form, he failed to report any military service.⁸⁰ In fact, he was a member of a unit July 1995 Srebrenica massacre, “wherein elements of the VRS, primarily from the Zvornik and Bratunac Brigades, over-ran a United Nations safe-area and executed thousands of Bosnian Muslims.”⁸¹ Vidacak eventually admitted the lie, and was charged and convicted under § 1001.⁸²

6. Fawaz Damrah

Fawaz Damrah’s downfall did not involve § 1001, but his case is instructive on the dynamics of false statement prosecutions. A prominent religious leader in Ohio, Damrah was naturalized as a U.S. citizen in 1994.⁸³ On his naturalization application, he was asked a

75. *Id.* at 591–92.

76. *Id.* at 592.

77. *United States v. Boskic*, 545 F.3d 69, 75 (1st Cir. 2008).

78. *Id.* at 71–72.

79. *U.S. v. Causevic*, 636 F.3d 998, 1000–01 (8th Cir. 2011).

80. *United States v. Vidacak*, 553 F.3d 344, 346 (4th Cir. 2009).

81. *Id.* at 347.

82. *Id.* at 346–47; *see also* *United States v. Sakoc*, 115 F. Supp. 3d 475, 479–80 (D. Vt. 2015) (naturalization fraud conviction for lying about his war crimes in the Balkans); *United States v. Ngombwa*, No. 14-CR-123-LRR, 2016 WL 111434, at *1–2 (N.D. Iowa Jan. 10, 2016) (section 1001 charge for failing to describe involvement in Rwandan genocide in refugee application).

83. *United States v. Damrah*, 412 F.3d 618, 620 (6th Cir. 2005).

yes/no question, "Have you at any time, anywhere, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion?"⁸⁴ He checked "no" and signed the application.⁸⁵ His written denial was followed up with oral denials in an interview with U.S. immigration officials.⁸⁶ Unfortunately for Damrah, he had been caught on videotape in 1991 at an event sponsored by a Palestinian terrorist group, beseeching followers to violently attack Jews, whom he described as "the sons of monkeys and pigs."⁸⁷ The video was played for the jury. Damrah was convicted of naturalization fraud, 18 U.S.C. 1425.⁸⁸ He was ordered denaturalized and deported.⁸⁹

7. Mohamed Kamal Elzahabi

Mohamed Kamal Elzahabi was charged in Minnesota with two counts of providing false material statements in violation of § 1001(a)(2).⁹⁰

Elzahabi was interviewed by the [FBI] over the course of 17 days in April and May 2004 in connection with an investigation of [his] alleged links to suspected terrorists. . . . Count 1 allege[d] that Elzahabi falsely stated that he was unaware of the contents of packages shipped to a business he operated in New York, and that he merely held those packages for pickup by another individual. Count 1 allege[d] that, in truth, Elzahabi knew the packages contained radios and telecommunications devices and he helped repackage and ship the packages to Pakistan.

Count 2 allege[d] that Elzahabi falsely stated that he did not assist another individual, Ri'ad Hijazi, in obtaining a Massachusetts driver's license by allowing Hijazi to use his address as his own and by transporting him to the examination facility. Hijazi was arrested in connection with

84. *Id.* at 621 (quoting INS Form N-400).

85. *Id.*

86. *Id.*

87. *United States v. Damrah*, 334 F. Supp. 2d 967, 969, 969 n.3 (N.D. Ohio 2004).

88. *Damrah*, 412 F.3d at 622.

89. Tony Dejak, *Ohio Imam Convicted of Lying About Terrorism Ties*, USA TODAY (June 17, 2004, 4:48 PM), http://usatoday30.usatoday.com/news/nation/2004-06-17-imam-convicted_x.htm.

90 *United States v. Elzahabi*, Crim. No. 04-282 (JRT/FLN), 2007 WL 2084133, at *1 (D. Minn. July 16, 2007).

an Al-Qaeda plot to blow up various tourist destinations in Jordan, and [was being] detained in a Jordanian prison.⁹¹

Elzashabi was eventually convicted of false immigration documents and deported.⁹²

8. Beyond Al-Qaida

As investigators and prosecutors moved beyond al-Qaida in the years after 9/11, two hotly-contested § 1001 cases found their way into the courts. They involved Sabri Benkahla in Virginia and Hamed Hayat in California.

a. Sabri Benkahla

Sabri Benkahla was part of a group of men associated with northern Virginia's Dar al-Arqam Islamic Center indicted for jihad training and for traveling to Pakistan, India and Afghanistan to fight on behalf of a terrorist organization known as Lashkar-e-Taiba (LeT).⁹³ Eleven were indicted, including Benkahla, although the case against him was eventually severed out and he was tried alone:⁹⁴

[Benkahla] had taken a trip to England in the summer of 1999, and, from there, had bought a ticket to Pakistan, where he traveled with a man called "Abdullah." According to the government, in August 1999 he crossed from Pakistan into Afghanistan and there attended a [LeT] jihadist training camp, where he fired an AK-47 and a rocket-propelled grenade launcher—conduct charged (since attending a [LeT] jihadist training camp was not necessarily illegal at the time) as supplying services to the Taliban and using a firearm in furtherance of a crime of violence. Benkahla was arrested in Saudi Arabia in 2003. . . . Ultimately, having waived his right to a jury trial, Benkahla appeared before the U.S. District Court for the Eastern District of Virginia for a bench trial in March 2004.

91. *Id.*

92. *United States v. Elzahabi*, 517 F. Supp. 2d 1121, 1125 (D. Minn. 2007) (finding sufficient evidence to uphold Elzahabi's conviction of supplying false immigration documents).

93. *United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008).

94. *Id.* at 303.

It was clear . . . [to the court] that Benkahla was drawn to violent jihad, had traveled to Pakistan in August 1999, and had cultivated relationships with various individuals connected to terrorist organizations and jihadist training. In its decision, the trial court indicated that it thought he had attended a jihadist camp somewhere, either in Pakistan or Afghanistan, and fired an AK-47 and rocket-propelled grenade launcher while there. The court stated that “[i]f the standard of proof for the government were by a preponderance of the evidence, I would be able to find this defendant guilty.” But the nature of the charges required that the camp be located in Afghanistan and that Benkahla have provided some meaningful form of support to the Taliban while there. In the court's judgment, there simply was not enough evidence on those points to convict beyond a reasonable doubt.

Within a few weeks of his March 2004 acquittal, Benkahla was subpoenaed. The government had been unable to prove that he had attended a jihadist training camp in Afghanistan, but [according to the court] it was by no means convinced that he had [not] attended a jihadist training camp at all. Indeed, it was still investigating such camps, the individuals who facilitated training at them, and several militants associated with Dar al-Arqam. Specifically, the government had convened two grand juries to investigate violations of 18 U.S.C. §§ 2339A and 2339B, which concern the provision of material support to terrorists and terrorist organizations. Thus over the next few months, the government compelled Benkahla to testify before each of the grand juries and to meet with the FBI several times in ancillary proceedings, with immunity from criminal prosecution for truthful testimony.

The questions throughout the proceedings focused anew on whether Benkahla had attended a jihadist training camp during that August 1999 trip. But they no longer centered on the camp's location, and the government took the approach of asking about the camp in the disjunctive (as in “Did you participate in any training . . . during your trip to Pakistan *or* Afghanistan in the summer of 1999?”). The questions also concerned the individuals with whom Benkahla had communicated in the course of exploring violent jihad and planning the 1999 trip abroad. For his part, Benkahla consistently denied attending any such camp anywhere, or knowing anything substantial about the individuals.

[I]n 2006, the grand jury indicted Benkahla for making false material declarations to the two grand juries, 18 U.S.C. § 1623 (2000), obstructing justice on account of the false declarations, 18 U.S.C. § 1503 (2000), and making false material statements to the FBI under §1001(a) (2000). Specifically, Benkahla stood accused of a set of false denials: that he had participated in a jihadist training camp somewhere in August 1999; that he had handled weapons while there and observed others doing the same; and that he knew about the various people he had communicated with about training for jihad. . . . After a day-and-a-half of deliberations, the jury convicted Benkahla on all counts. . . .⁹⁵

b. Hamed Hayat

Hamed Hayat's troubles in California started in October 2001, when FBI agents in Oregon interviewed Naseem Khan, a 28-year-old Pakistani immigrant, in connection with a money laundering investigation. Khan told the agents that he had regularly observed Ayman al Zawahiri, Osama bin Laden's second-in-command, at a mosque in Lodi, California, in 1999. Khan later told the agents that he had also seen two other individuals on the FBI's most-wanted list in Lodi during the same period.

The FBI then hired Khan as a confidential informant and asked him to return to Lodi to gather additional information on a suspected terrorist cell. He began his work as an informant in Lodi in December 2001.

Approximately eight months later, in August 2002, Khan met Hayat, who was nineteen years old at the time and living in his parents' garage.

Over the course of several recorded conversation, Hayat spoke approvingly of Islamic fundamentalist groups such as Jaish-e-Mohammed and indicated his respect for their leaders. He also professed to know and to admire Pakistanis who had engaged in "jihad." Some of these people Hayat knew because they had studied in a madrassah, or religious school, in Pakistan run by his grandfather, which Hayat had also attended. Hayat told Khan that his grandfather was a prominent cleric and that after 9/11, Pakistani President Musharraf had sent him and others to Afghanistan to persuade the Taliban to hand over Osama bin Laden. Hayat claimed that he wanted to go to Pakistan "for training."

95. *United States v. Benkahla*, 530 F.3d 300, 304–05 (4th Cir. 2008)

Hayat explained to Khan how to send money to Sipah-e-Sahaba (SSP), a Pakistani organization that Pakistan declared a terrorist organization in 2002. During a conversation with Khan, Hayat expressed admiration for members of SSP who die as “martyrs.” he boasted that he gave more money to SSP than any other member of his Pakistani madrassah, and stated that he gave money to SSP because his money was more likely to be used to acquire “weapons, books and everything” than if he gave to other groups, which wasted money. . . . Hayat also reported that when someone told him that he could go to jail for giving SSP money, he replied, “Fuck you. Who cares, man, who goes to jail, man? . . . Fuck, look what's America doing. . . .”

Hayat's direct interactions with American law enforcement began when he attempted to reenter the United States in May 2005. On May 30, 2005, Hayat's return flight to San Francisco was diverted to Japan because Hayat's name appeared on the federal government's “No Fly” list. Hayat was interviewed in Japan by the FBI, who questioned Hayat about his two-year stay in Pakistan, including whether Hayat had joined a terrorist organization or attended a terrorist training camp. Hayat denied joining a terrorist group or attending a training camp while in Pakistan.

A few days later, the FBI interviewed Hayat at his parents' home in Lodi. After again explaining the reason for his family's trip to Pakistan—because of his mother's health—and his activities while in Pakistan, Hayat again denied having attended a terrorist training camp and stated that “he would never be involved with anything related to terrorism, and didn't know why anybody would say otherwise.” After eliciting this response, the FBI asked Hayat to come to the FBI office in Sacramento for further questioning.

Hayat ultimately admitted that he had attended a camp for a few days during an earlier stay in Pakistan in 2000, where he “observed and heard weapons training,” and also in 2003, when he himself received “pistol training” at a camp. He confirmed that he had attended a camp to train for jihad and said he was trained to use a pistol and rifle and taught how to kill American troops.

The FBI arrested Hayat at the end of this set of interviews. On January 26, 2006, the government obtained an indictment against Hayat, charging him with one count of violating 18 U.S.C. § 2339A and three counts of violating.⁹⁶

The jury ultimately convicted Hamed Hayat, although it acquitted his father of a § 1001 charge based on his allegedly false denials about

96. *United States v. Hayat*, 710 F.3d 875, 880–83 (9th Cir. 2013) (emphasis on English portions of Hayat's quotes omitted).

the younger Hayat's travels.⁹⁷ Hamed Hayat filed several motions for new trial, and has continued to seek habeas review of his conviction as recently as the last few months.⁹⁸

E. Recent § 1001 Terrorism Opinions

The FBI's reliance on § 1001 in terrorism cases has continued into the last couple of years, except the focus has shifted to ISIS and al-Shabaab.

1. Hamza Naj Ahmed

Hamza Naj Ahmed was charged in Minnesota for falsely telling agents that he was going alone on vacation to Madrid, when in fact he was traveling with others to Turkey.⁹⁹ In addition to the § 1001 charge, Ahmed was charged with attempting to provide material support to ISIS.¹⁰⁰ Also, in Minnesota, Hawo Mohamed Hassan was convicted of making a false statement, after she denied that she knew anyone who sent money to Al Shabaab for violent jihad.¹⁰¹

2. Mohamed Elshinawy

"Mohamed Elshinawy, a United States citizen of Egyptian descent, was arrested in Maryland on December 11, 2015, and indicted about a month later, on January 13, 2016. . . . On July 17, 2015, Elshinaway allegedly made several false statements to agents of the FBI."¹⁰²

For example, [he] told agents of the FBI that he only received a total of \$4,000 from an overseas ISI[S] operative. During a second interview with FBI agents on July 20, 2016, [he]

97. *Id.* at 881 n.3, 884 ("Umer Hayat pled guilty to making a single false statement to the FBI and U.S. Customs and Border Protection—falsely denying that he was carrying more than \$10,000 while on a flight from the United States to Pakistan. [He] was sentenced to time served, approximately 11 months.").

98. *United States v. Hayat*, Nos. 2:05-cr-0240-GEB-CMK, 2:14-cv-1073-GEB-CMK, 2016 WL 6658963, at *1 (E.D. Cal. Nov. 10, 2016) (moving for summary judgement to vacate, set aside, or correct Hayat's criminal conviction).

99. *United States v. Ahmed*, 107 F. Supp. 3d 1002, 1004–05 (D. Minn. 2015).

100. *Id.*

101. *United States v. Ali*, 799 F.3d 1008, 1016 (8th Cir. 2015).

102. *United States v. Elshinaway*, No. ELH-16-0009, 2016 WL 7324633, at *1, 3 (D. Md. Dec. 16, 2016).

amended his earlier statement and claimed that he had received no more than \$5,200 from an ISI[S] operative.

In fact, he allegedly had received over \$8,000.¹⁰³ Elshinawy's indictment included both material support and § 1001 charges.¹⁰⁴ His case suggests that § 1001 continues to be a valuable counterterrorism tool over fifteen years after 9/11.¹⁰⁵

III. DEFENSES TO TERRORISM-RELATED 1001 CASES

If § 1001 is so effective, are there any cautionary tales? What are the available defenses to people who find themselves charged with a false statement during a terrorism investigation?

A. *The Demise of the "Exculpatory No" Defense*

Many of the cases detailed above involve simply negative answers to FBI questions, like answering "no" to the question of whether you have ever attended a jihad training camp. Of course, when the FBI asks the question, they are looking for clues to prevent a terrorist attack. They are looking to gain intelligence to fill out a mosaic picture. They are looking for possible informants. All of these may justify the quick-hit yes-or-no question. Still, there is an American tradition of excusing mere false denials—"exculpatory no's"—from the coverage of § 1001.

As of 1998, the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all had adopted the "exculpatory no" defense.¹⁰⁶

103. *Id.* at *3.

104. *Id.* at *1.

105. For judicial opinions in cases in which § 1001 charges were embedded in larger terrorism indictments, see *United States v. Fries*, 781 F.3d 1137 (9th Cir. 2015); *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014); *United States v. Hir*, 517 F.3d 1081 (9th Cir. 2008); *United States v. Jabarah*, No. 08-0672-cr, 2008 WL 4222032 (2d Cir. Sept. 16, 2008); *United States v. Tounisi*, No. 13 CR 328, 2013 WL 5835770 (N.D. Ill. Oct. 30, 2013); *United States v. El-Hindi*, No. 3:06CR719, 2009 WL 1373270 (N.D. Ohio May 15, 2009); *United States v. Sabir*, No. S4 05 Cr. 673(LAP), 2007 WL 1373184 (S.D.N.Y. May 10, 2007); *U.S. v. Warsame*, 488 F. Supp. 2d 846 (D. Minn. 2007); and *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004).

106. See *Moser v. United States*, 18 F.3d 469, 473–74 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717–19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880–81 (10th Cir. 1980); *United States v. Chevoor*,

Only the Fifth Circuit had formally rejected it.¹⁰⁷ The recognition of “exculpatory no” defense was based on a number of factors, but they generally boiled down to fairness and the view that the Fifth Amendment privilege against self-incrimination gives someone the right to simply deny wrongdoing, when asked directly by criminal investigators.¹⁰⁸

In 1998, the Supreme Court officially did away with the “exculpatory no” defense in false statement prosecutions, reasoning that the defense not supported by § 1001’s plain language.¹⁰⁹ “By its terms, 18 U.S.C. § 1001 covers ‘any’ false statement—that is, a false statement ‘of whatever kind,’ [including the use of] the word ‘no’ in response to a question[,] . . .” and to recognize the “exculpatory no” defense would be to give people the “privilege to lie” to investigators.¹¹⁰ With the demise of the “exculpatory no” defense, are there any other defenses available to people who are charged with § 1001 for lying in a terrorism investigation?

B. Recantation

What about people who eventually recant their misrepresentations to the FBI? Should that be mitigating? Should the availability of mitigation be determined by how long the subject they let the lie stand (a few minutes versus a few weeks)?

The answer to these questions—at least in the terrorism context—should be informed by the dynamics of counterterrorism efforts. For example, as FBI agent Harry Sweeney testified at Hamed Hayat’s trial:

One of the FBI’s functions includes investigation of terrorist threats. . . . [W]hen the FBI learns of a terrorist threat, its immediate goals are to assess the scope of the threat, identify the individuals involved, and if possible, stop the threat before it reaches fruition. . . . [T]he FBI attempts to discern the nature of the terrorist threat, including whether it is a

526 F.2d 178, 183–84 (1st Cir. 1975). The Supreme Court abrogated these decisions in *United States v. Brogan*, 522 U.S. 398 (1998), which is discussed *infra*.

107. See *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1045 (5th Cir. 1994) (en banc) (rejecting the “exculpatory no” defense).

108. Nathan Edwards, Note, *Brogan v. United States: A Critical Response to the Supreme Court’s Analysis of 18 U.S.C.A. § 1001*, 31 MCGEORGE L. REV. 147, 151–52 (1999).

109. *Brogan v. United States*, 522 U.S. 398, 408 (1998).

110. *Id.* at 400, 404 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

domestic threat that jeopardizes the safety of United States residents. . . . [It is vital to] ac[t] quickly once a terrorist threat materializes in order to avert potential harm.¹¹¹

For this reason, recantation has not been recognized as a defense in terrorism-related § 1001 prosecutions, no matter how quickly it occurs after the false statement. Even when the recantation was virtually instantaneous with the lie, § 1001 charges can be pursued. Three real cases—involving James Joseph Pickett (D.C.), Jeffrey Levenderis (Ohio), and Gerard Sasso (Massachusetts)—illustrate this point.

1. James Joseph Pickett

Pickett, a Capitol Police officer, from his desk at the height of the Anthrax scare, left a handwritten note and a small pile of white powder.¹¹² “The note read, ‘PLEASE INHALE YES THIS COULD BE? CALL YOUR DOCTOR FOR FLU – SYMPTOMS. THIS IS A CAPITOL POLICE TRAINING EXERCIZE [sic]! I HOPE YOU PASS!’”¹¹³

After some delay, [Pickett admitted] that “it was a joke” and that the powder “was Equal.” Although the powder was never tested, the government has never contended that it was actually Anthrax or anything other than the dietary sugar substitute [Pickett] suggested. [The Capitol Police] conducted some further investigation and reported the incident to the Criminal Investigation Division of the Capitol Police.¹¹⁴

“The grand jury . . . charge[d] Pickett with making false statements in violation of 18 U.S.C. § 1001 and obstructing and interfering with the Capitol Police in violation of 40 U.S.C. § 212a-2(d).”¹¹⁵ He was eventually convicted of the § 1001 charge.¹¹⁶ “The District Court entered a judgment on February 11, 2003, sentencing [Pickett] to two

111. *United States v. Hayat*, No. 2:05-CR-0240-GEB, 2006 WL 1686491, at *2 (E.D. Cal. June 19, 2006).

112. *United States v. Pickett*, 353 F.3d 62, 63–64 (D.C. Cir. 2004).

113. *Id.* at 64.

114. *Id.*

115. *Id.*

116. *Id.*

years probation, 200 hours of community service, and a \$100 special assessment.”¹¹⁷

2. Jeffrey Levenderis

[In Ohio], Jeff Levenderis obtained a handful of castor beans [in 2000]. Using a “recipe” he found on the Internet, he ground the beans into a fine powder, which he further distilled in an acetone solution. The end result was a “high-grade” form of ricin: a deadly toxin capable of killing every cell it comes in contact with. Levenderis divided the finished product into three pill bottles, which he stored in a coffee can in his freezer.

¹¹⁸

Levenderis fell ill and was admitted into a nursing home.¹¹⁹ He asked his friend to check his house for the ricin, and the friend called the fire department.¹²⁰ The FBI soon visited Levenderis, who initially claimed that the substance was ant poison.¹²¹ After consulting with an attorney, Levenderis admitted that the substance was high-grade Ricin.¹²²

[He] stated that he thought about using the ricin as part of an elaborate suicide plan in which he would light his house on fire, hang bottles of ricin in each doorway, and put signs up indicating the bottles contained ricin in order to prevent firefighters from entering the home and putting out the fire. He also mentioned using it as a way to threaten his cousin, with whom he was feuding, from coming to his house. In addition, the FBI learned that [Levenderis] also intended to poison his step-father, with whom he had disputes over inheritance and financial matters, by putting ricin in a bowl of soup.

Meanwhile, an FBI HAZMAT team extracted the coffee can from the freezer and, after conducting various tests, determined that it contained 35.9 grams of ricin, enough to kill over 250 people.

117. *Id.*

118. *United States v. Levenderis*, 806 F.3d 390, 392 (6th Cir. 2015).

119. *Id.*

120. *Id.*

121. *Id.* at 393.

122. *Id.*

A federal grand jury indicted [Levenderis] on four counts: (1) knowingly developing, producing, stockpiling, retaining, and possessing a biological toxin and delivery system (ricin) for use as a weapon, 18 U.S.C. § 175(a); (2) knowingly possessing a biological toxin and delivery system (ricin) that was not in its naturally occurring form and was of a type and quantity that, under the circumstances, was not reasonably justified by a peaceful purpose, 18 U.S.C. § 175(b); and (3) and (4) willfully and knowingly making a materially false, fictitious, and fraudulent statement to the FBI during the January 24 and 27, 2011, interviews that the substance found was ant poison, not ricin, 18 U.S.C. § 1001(a)(2).¹²³

Levenderis was convicted, notwithstanding the shortness of his lie.¹²⁴

3. Gerald Sasso

“On the night of December 8, 2007, two members of the Massachusetts State Police . . . flew a helicopter escort of a liquefied natural gas tanker as it traversed Boston Harbor en route to a facility in Everett, Massachusetts.”¹²⁵ Around 9:00 p.m., they were hit with a laser pointer from the ground.¹²⁶ “The troopers determined that the laser beam was emanating from the third floor of a triple-decker house on the Medford–Somerville border. They radioed this information to police officers on the ground,” who visited Gerard Sasso’s apartment and knocked on his door.¹²⁷ Sasso answered and invited the officers to look around his apartment, which they did.¹²⁸ He initially denied any involvement with the helicopter incident.¹²⁹ But when the officers located several lasers, Sasso eventually said “I did it. It was me.”¹³⁰ On June 18, 2008, Sasso was arrested. He eventually was convicted under § 1001, notwithstanding that his lie did not last long.¹³¹ Clearly, even quick recantation did not absolve these defendants of § 1001 liability.

123. *Id.*

124. *Id.* at 394.

125. *United States v. Sasso*, 695 F.3d 25, 27–28 (1st Cir. 2012).

126. *Id.* at 28.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 28–29.

C. *What About The Unbelievable Lie?*

What if the agents know beforehand or instantaneously that the statement is false? When they know the truth before the falsehood is uttered, is that still actionable under §1001?

In 2004, [Tarek Mehanna], an American citizen, was 21 years old and living with his parents in Sudbury, Massachusetts. On February 1, he flew from Boston to the United Arab Emirates with his associates, Kareem Abuzahra and Ahmad Abousamra. Abuzahra returned to the United States soon thereafter but [Mehanna] and Abousamra continued on to Yemen in search of a terrorist training camp. They remained there for a week but were unable to locate a camp. Mehanna then returned home, while Abousamra eventually reached Iraq. [Upon returning home, Mehanna caught the attention of the FBI.]¹³²

[In December 2006, Mehanna] told the agents that he had last heard from [Daniel] Maldonado two weeks earlier and that Maldonado was living in Egypt, working as a website steward. These statements were unquestionably false: [Mehanna] had spoken to Maldonado within the week and knew that Maldonado was in Somalia and training for jihad. [Mehanna was indicted under § 1001.]¹³³

At trial, Mehanna seized on the materiality element, claiming that “when the agents questioned him, they knew full well where Maldonado was and what he was doing. They also knew that he had spoken with Maldonado by telephone within a matter of days.”¹³⁴

Building on this foundation, [Mehanna] argue[d] that the agents were asking him questions to which they already knew the answers for the sole purpose of catching him in a lie. Thus, his argument runs, his false statements [could] not be material because the agents knew that his statements were false ab initio and, therefore, were not misled by them.¹³⁵

According to the First Circuit:

132. United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013).

133. *Id.* at 54.

134. *Id.*

135. *Id.*

[T]he statement need not actually have influenced the governmental function. It is enough that the “statement could have provoked governmental action.” Thus, the proper inquiry is not whether the tendency to influence bears upon a particular aspect of the actual investigation but, rather, whether it would bear upon the investigation in the abstract or in the normal course.¹³⁶

Under this formulation, the knowledge of the interrogator is irrelevant to the materiality of the defendant's false statements. With this in mind, courts have rejected variations of the metaphysical proposition advanced by [Mehanna] with a regularity bordering on the monotonous.¹³⁷

In the case at hand, it is clear beyond hope of contradiction that the defendant's false statements about Maldonado had a natural tendency to influence an FBI investigation into terrorism. After all, Maldonado was hip-deep in terrorism-related antics. During the critical interview, the defendant was plainly attempting to obscure both Maldonado's participation in terrorist endeavors and the telephone call in which he and Maldonado had discussed jihad and terrorist training. The misinformation imparted by the defendant thus had a natural propensity to influence an FBI investigation into terrorist activity.

To cinch matters, the defendant's mendacity was undertaken for the purpose of misdirecting the ongoing FBI investigation (or so the jury could have found). This is an important datum: where a defendant's statements are intended to misdirect government investigators, they may satisfy the materiality requirement of section 1001 even if they stand no chance of accomplishing their objective. This principle makes eminently good sense: it would stand reason on its head to excuse a defendant's deliberate prevarication merely because his interrogators were a step ahead of him.¹³⁸

D. The Ambiguous Question (and the Impossible Answer)

The foregoing analysis suggests that the § 1001 tool is very powerful, and might be considered efficacious for counterterrorism

136. *Id.* (quoting *United States v. Seabagala*, 256 F.3d 59, 65 (1st Cir. 2001)).

137. *Id.* (citation omitted).

138. *U.S. v. Mehanna*, 735 F.3d 32, 55 (1st Cir. 2013) (citation omitted).

agents. It does not require the defendant to be under oath when the false statement is made, which makes it distinct from perjury. However, the false statement charge is not without limits. The false statement must be material to a proceeding, and it cannot be subject to differing interpretations.

Consider the following scenario: FBI counterterrorism agents have been focusing on a group of individuals within the U.S. who are apparently planning to plant explosives at a local shopping mall. Agents decide to pay a visit to one of the subject at his home. He is not in custody when they ask him the following question:

“Are you a terrorist?”

“No,” he answers.

Let’s say that the agents have intelligence that he is involved in the plot. Can they arrest him now on a bare-bones § 1001 charge, in the name of disruption?

It is highly doubtful, because the single question was ambiguous. It could be that the subject is involved in a violent plot, but he sincerely believes that what he and his cohorts are planning does not meet the definition of “terrorism.” If he answers no, he might be telling the technical truth. The agents would be better advised to come up with better questions, because of the ambiguity of this particular query. The dangers of the imprecise question or the ambiguous answer are not merely hypothetical. Consider the case of upstate New York grocery store owner Mohamed Subeh.

On May 3, 2002, Subeh rushed to the Rochester Airport in an attempt to prevent his brother from leaving on a trip to the Middle East.¹³⁹ “[P]rior to leaving, [the brother] had written a letter indicating that he would be traveling to Israel for the purpose of becoming a suicide bomber.”¹⁴⁰ When Subeh could not get past airport security, he was questioned by law enforcement, and insisted that he did not want his brother to leave because it would jeopardize his immigration status.¹⁴¹ They asked Subeh whether his brother was on his way “to do something harmful,” and Subeh responded that “he did not know.”¹⁴² After some additional FBI questioning, Subeh was charged under § 1001.¹⁴³

139. *United States v. Subeh*, No. 04-CR-6077T, 2006 WL 1875407, at *2 (W.D.N.Y. July 5, 2006).

140. *Id.*

141. *Id.*

142. *Id.* at *3.

143. *Id.*

Count Three of the Indictment charge[d] that . . . in response to a question as to whether a man whose identity is known to the Grand Jury was interested in becoming a suicide bomber, the defendant, MOHAMED SUBEH, told a Special Agent of the Federal Bureau of Investigation and a member of the Joint Terrorism Task Force sponsored by the Federal Bureau of Investigation that he could not answer that question one way or another; when in point of fact, and as the defendant then and there well knew, the man whose identity is known to the Grand Jury was interested in becoming a suicide bomber in the country of Israel on behalf of the foreign terrorist organization Al-Aqsa Martyr's Brigade.¹⁴⁴

Subeh moved to dismiss the count.¹⁴⁵ These charges, and the imprecision of the question and answer, proved too much. As the court noted:

Subeh was asked whether or not Dorgham had any interest in becoming a suicide bomber. That question is directed to Dorgham's state of mind, not Subeh's. Accordingly, Subeh's opinions or beliefs about Dorgham's intentions are immaterial, as such opinions and beliefs would reveal Subeh's state of mind, not Dorgham's. Because Dorgham's state of mind is at issue, and not Subeh's, evidence that Subeh had seen the martyrdom letter and himself believed that Dorgham intended to become a suicide bomber is irrelevant to the question of whether Dorgham himself held an interest in becoming a suicide bomber. While the letter certainly suggests that Dorgham had intentions of becoming a suicide bomber, Subeh could only speculate as to what his brother's true intentions were, and because Subeh was not asked by investigators about his own opinion, but was instead asked about Dorgham's intentions, his statement that he could not answer a question about his brother's state of mind was not false, and indeed, was true. . . . [T]his court simply and carefully holds that a person who states that he cannot answer a question that is directed to another person's state of mind cannot be subjected to imprisonment for failing to speculate as to what the person's

144. *Id.*

145. *Id.*

state of mind may be. I therefore grant defendant's motion to dismiss count three of the Indictment.¹⁴⁶

There was some consolation for prosecutors: in a later decision, the court refused to dismiss counts 1 and 2—both § 1001 counts—in which Subeh allegedly lied when he gave specific reasons why his brother was leaving the U.S. and why Subeh did not want him to go (that his brother was homesick, and that Subeh did not want him to jeopardize his U.S. immigration status, respectively).¹⁴⁷ Subeh eventually pleaded guilty to one § 1001 count and was given probation and a \$250 fine.¹⁴⁸

E. Courts Scrutinize the Terrorism Sentencing Enhancement

In December 2004, § 1001 was amended to provide for an eight-year maximum if the misrepresentations “involve terrorism.”¹⁴⁹ This is one aspect of terrorism-related § 1001 indictments the courts have not been reluctant to push back on.

On January 13, 2010, a grand jury [in Arizona] indicted . . . Elton Simpson for knowingly and willfully making a materially false statement to the [FBI]. The indictment also charged that the statement involved international and domestic terrorism[,] [subjecting Simpson to the enhancement]. The indictment specified that on or about January 7, 2010, [Simpson] falsely stated to . . . the FBI that he had not discussed traveling to Somalia, when in fact he had discussed with others traveling to Somalia for the purpose of engaging in violent jihad.¹⁵⁰

According to the testimony presented at trial, . . . Elton Simpson [was] an American Muslim. In 2006, the FBI in Phoenix began a criminal investigation of Mr. Simpson,

146. *Id.* at *4, 7.

147. *United States v. Subeh*, No. 04-CR-6077 CJS, 2006 WL 3407891, at *2–4 (W.D.N.Y. Nov. 27, 2006).

148. *Brother of Would-Be Palestinian Homicide Bomber Gets \$250 Fine, Probation for Lying to FBI*, FOX NEWS (May 1, 2007), <http://www.foxnews.com/story/2007/05/01/brother-would-be-palestinian-homicide-bomber-gets-250-fine-probation-for-lying.html>.

149. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, § 6703(a), 118 Stat. 3638, 3766.

150. *United States v. Simpson*, No. CR 10–055–PHX–MHM, 2011 WL 905375, at *1 (D. Ariz. Mar. 15, 2011).

because of his association with an individual whom the FBI believed was attempting to set up a terrorist cell in Arizona. The FBI was investigating whether [Simpson], and certain of his associates, might travel to foreign countries to engage in violent jihad. The investigation was part of the FBI's mission to deter and disrupt terrorist acts involving American citizens as authorized by executive order.¹⁵¹

In May 2005, the FBI engaged an informant, Mr. Daba [sic] Deng, who was from Kenya and who knew Mr. Simpson from the mosque he attended. In the fall of 2006, Mr. Deng was asked by the FBI to become friends with Mr. Simpson and get to know him better by presenting himself as an individual who was new to Islam and who sought to learn more from Mr. Simpson. Mr. Deng began to meet with Mr. Simpson three to four times per week and recorded their conversations. Mr. Deng was paid for his work as an informant.¹⁵²

During the trial, the Government played some of the taped conversations between the informant, Dabla Deng, and [Simpson]. One of these recordings was from July 31, 2007, more than two years before his indictment. In that recording, Mr. Simpson told Mr. Deng that Allah loves an individual who is "out there fighting [non-Muslims]" and making difficult sacrifices such as living in caves, sleeping on rocks rather than sleeping in comfortable beds and with his wife, children and nice cars. Mr. Simpson said that the reward is high because "If you get shot, or you get killed, it's [heaven] straight away." Mr. Simpson then said "[Heaven] that's what we here for . . . so why not take that route?"¹⁵³

At this point Mr. Deng asked:

Deng: What route though? You mean here in America, we can get the reward too, or do you have to be outside?

Simpson: . . . right now, I'm talking about going out, you know what I mean? . . . Because the brothers in like Palestine, and stuff they need help.¹⁵⁴

Mr. Simpson then mentioned Palestine, Iraq and Somalia and stated that if "a brother" in Palestine has his house bombed, you should feel like that bomb landed on your house. "You should feel for your Muslim brother no matter where he is."

151. *Id.*

152. *Id.*

153. *Id.* (alteration in original).

154. *Id.* at *2 (alteration in original).

Mr. Simpson then stated that “they trying to bring democracy over there man, they're trying to make them live by man-made laws, not by Allah's laws. That's why they get fought. You try to make us become slaves to man? No we slave to Allah, we going to fight you to the death.” Mr. Simpson then mentioned Palestine, Afghanistan and Iraq and stated “Some people they don't believe that they should be over there fighting. That's the problem. That's like a disease in the heart, man . . . [I]t's a small group of brothers who can see and understand why . . . Some brothers don't have the same understanding.”¹⁵⁵

In another recording from May 29, 2009, Mr. Simpson told Mr. Deng “it's time to go to Somalia, brother . . . we know plenty of brothers from Somalia.” Mr. Simpson and Mr. Deng then discussed their possible contacts in Africa. Mr. Simpson then said “It's time. I'm tellin' you man. We gonna make it to the battlefield . . . it's time to roll.” Mr. Simpson and Mr. Deng then discussed “jihad”. In that conversation, Mr. Simpson explained why Muslims are fighting, the following way: “People fighting and killing your kids, and dropping bombs on people that have nothing to do with nothing. You got to fight back you can't be just sitting down . . . smiling at each other. . . .” The two then discussed a video of a beheading.¹⁵⁶ Then on June 16, 2009, six months before he was indicted, Mr. Simpson mentioned to Mr. Deng “Getting up out of here”. Mr. Simpson said he was tired of living under non-Muslims. Mr. Simpson also said that non-Muslims are fighting against Allah and that his money and taxes are going towards their weapons. Later in the same conversation, Mr. Simpson discusses having sent someone a link to a video about the permissibility of doing martyrdom operations. He says that someone in the video talks “about how they gonna use the car with the bombs on it.” Mr. Simpson then discussed a lecture, by (presumably former President) Bush about the Caliphate—which Mr. Simpson described as a system based on Shariah law for all Muslims—and Shariah government. According to Mr. Simpson, President Bush said that the Caliphate was evil. Mr. Simpson said that Muslims had the Caliphate over 80 years ago, but that the non-Muslims destroyed that. He also explained “that's what the Muslims are trying to do right now. They're trying to bring that back.” Mr. Simpson also said that

155. *Id.* (alteration in original).

156. *Id.* (alteration in original).

President Bush said “you're either with us or you're with the terrorists . . . Bush is either saying you're with us or you're with the Muslims. That's what that means. The . . . true Muslims.”¹⁵⁷

Then on October 23, 2009, about two months before he was indicted, Mr. Simpson told Mr. Deng:

Me and Yahya was talking about . . . me going to South Africa and then uh, I make my way up to, uh Somalia, and uh he said ... “what if you go to Somalia and you waiting on a brother come pick you up and what if it was me?”¹⁵⁸

Mr. Simpson then said that Somalia is eight countries away from South Africa and that this was a lot of traveling, suggesting that even if he had the intention to go there, it was far. Then on November 7, 2009 Mr. Simpson, speaking to Mr. Deng and a group of others stated:

Deng: You never know if one day he's going to be a scholar, . . . you never know if he is going to be mujahid,

Simpson: Yeah, that's the whole point. School is just a front. School is just a front and if I am given the opportunity to bounce

Later in the same conversation, another person says “we got to come up with what we gonna say. In case they stop us.” Mr. Simpson respond[ed]: “I already know. It's so much simpler than what it seems.” He goes on to say “You say . . . I'm just trying, trying to travel, trying to see the world. ‘Cause, you got to be, kind of like, relaxed.” Then, later he indicated he would say “How come all you . . . asking all these questions and not anybody else in the airport. Why did you all pick me?”¹⁵⁹

When it looked like Simpson was about to leave the US, FBI went to his house.¹⁶⁰

[After some unsuccessful back and forth,] Agent Hebert finally asked [Simpson] in a yes or no fashion whether he had discussed with anyone traveling to Somalia from South Africa. [Simpson] responded no. Agent Hebert also asked [Simpson] if

157. *Id.* (alteration in original).

158. *Id.* at *3 (alteration in original).

159. *Id.* (alteration in original).

160. *Id.*

he wanted to participate in violent jihad, and . . . Simpson said no.¹⁶¹

Hebert knew that Mr. Simpson was not telling the truth when Mr. Simpson said he had not discussed traveling to Somalia with anyone. Agent Hebert testified that until Mr. Simpson made his false statement, the FBI was not sure whether they needed to be concerned about Mr. Simpson's travel plans. Because [Simpson] was being deceptive about the possibility of traveling to Somalia, however, the FBI became concerned that [he] in fact did intend to go [sic] Somalia to engage in violent jihad. As a result, the agents attempted to prevent or disrupt [Simpson]'s travels. The FBI tried, unsuccessfully, to place Mr. Simpson on the no-fly list. Concerned that Mr. Simpson's associates would be inspired by him and attempt to follow in his footsteps, FBI also prepared to begin interviewing them in the same manner they interviewed Mr. Simpson. The FBI's next step would have been to tell the South African government about Mr. Simpson, but before this happened, the FBI arrested Simpson and brought him up on [the § 1001] charges.¹⁶²

The court had no trouble convicting Simpson under § 1001 following his bench trial.¹⁶³ Inexplicably, despite all this evidence of Simpson's terrorist proclivities, it ruled that the terrorism enhancement had not been established.¹⁶⁴ Instead, the court claimed "there [was] no controlling law concerning what the [prosecution] must prove to establish that a false statement "involves" international terrorism to trigger the sentence enhancement."¹⁶⁵ "The problem, [according to the court], [was] that the [prosecution] ha[d] not

161. *Id.* at *4.

162. *Id.*

163. *Id.* at *6.

164. *Id.* at *7.

165. *Id.* at *6. This was probably true. In my research, I was not able to find any other case besides *Simpson* on this particular legal issue. Some cases do refer to how the defendant was charged with the § 1001 terrorism enhancement (presumably by express reference in the indictment), but offer no elaboration on the issue of what the prosecution must prove. See *United States v. Shehadeh*, 940 F. Supp. 2d 66 (E.D.N.Y. 2012) (where the defendant allegedly made false statements about traveling to Pakistan to join a terrorist organization); *United States v. Tounisi*, No. 13 CR 328, 2013 WL 5835770 (N.D. Ill. Oct. 30, 2013) (where the defendant was charged with providing material support to a designated terrorist organization and making false statements to federal officers).

established with the requisite level of proof, that [Simpson]’s potential travel to Somalia (and his false statement about his discussions regarding his travels) was sufficiently “related” to international terrorism.¹⁶⁶

The court did allow that there was no question that Simpson made a statement to the FBI, while the FBI was investigating him about possible involvement in international terrorism.¹⁶⁷ However, it viewed that as not enough. Rather, the court claimed that the prosecution, “at best,” only proved that Simpson, “who harbors sympathy and admiration for ‘fighting’ non-Muslims abroad and establishing Shariah law, made a false statement about discussing traveling to Somalia” and this was not sufficient.¹⁶⁸ The court concluded its opinion with these remarks:

The possibility that the Defendant did in fact intend to go to Somalia to engage in violent jihad exists, as the Defendant never presented any alternative reason for going there. However, that is not the Defendant’s burden and as stated, the Government has not established beyond a reasonable doubt that the Defendant had such intentions. As it is, the Government only established that Mr. Simpson discussed traveling to Somalia and later lied about discussing traveling to Somalia. The Government also established that Mr. Simpson expressed sympathy and admiration for individuals who fight non Muslims—possibly even those who engage in violent jihad in other countries including Somalia—that he would like to see Shariah law established, and that he believed that fighting non-Muslims would lead to heaven. However obnoxious, troubling or repugnant these beliefs and statements may be, this Court cannot find that sufficient evidence exists to enhance the Defendant’s sentence.¹⁶⁹

It seemed that Elton Simpson had dodged a judicial bullet this time. However, his luck did not last long: a few years later, he and a friend traveled to Garland, Texas with plans to shoot up a public event

166. *Id.* at *7.

167. *Simpson*, 2011 WL 905375, at *5–7.

168. *Id.* at *8.

169. *Id.*

there.¹⁷⁰ After they arrived and started shooting, they were both killed by law enforcement authorities.¹⁷¹

CONCLUSION

Having now reviewed the modern use of § 1001 in terrorism investigation and the available defenses, what can we conclude about the viability of the crime in counterterrorism? For the FBI in counterterrorism, information—intelligence—is fundamental. When agents approach someone who may have relevant intelligence, they are looking to fill out more of the mosaic so they can disrupt political violence before it occurs. As we have seen, many of the questions whose false answers give rise to § 1001 charges involve the interviewees' travel and attendance at overseas jihad training camps, and known terrorists with which the interviewees might be acquainted. Demonstrable lies are often the first sign of trouble, indicating that the interviewee has something to hide. To prove the lie in court, agents and prosecutors can generally suffer less declassification of intelligence than would be required to prove a larger terrorism conspiracy. That makes § 1001 valuable.

We are a long way past the day when academics complained that § 1001 was being used to redress lies to the FBI in criminal investigations. Congress has seen to it that lies in terrorism cases are a firm part of the § 1001 offense. Thanks to the Supreme Court, the “exculpatory no” defense is no longer viable, and even immediate recantation does not negate the original misrepresentation. Courts might continue to scrutinize terrorism-related § 1001 for the imprecise question and the terrorism enhancement, as they did in *Subeh* and *Simpson*, respectively. However, this will not stop § 1001 from being a valuable tool in law enforcement's counterterrorism arsenal in the future.

170. Holly Yan, *Texas attack: What we know about Elton Simpson and Nadir Soofi*, CNN (May 5, 2015, 1:34 PM), <http://www.cnn.com/2015/05/05/us/texas-shooting-gunmen/>.

171. *Id.*