# SUPREME COURT OF THE UNITED STATES

No. 94–172

JOHN BRUCE HUBBARD, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 15, 1995]

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join Parts I-III and VI of JUSTICE STEVENS' opinion. *United States* v. *Bramblett*, 348 U. S. 503 (1955), should be overruled.

The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of "an arbitrary discretion in the courts" is restrained, The Federalist No. 78, p. 471 (C. Rossiter ed. 1961). Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).

The reason here, as far as I am concerned, is the demonstration, over time, that *Bramblett* has unacceptable consequences, which can be judicially avoided (absent overruling) only by limiting *Bramblett* in a manner that is irrational or by importing exceptions with no basis in law. Unlike JUSTICE STEVENS, I do not regard the courts of appeals' attempts to limit *Bramblett* as an "`intervening development of the law,'" *ante*, at 18 (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989)) that puts us to a choice between two conflicting lines of authority. Such "intervening developments" by lower courts that we do not agree with are ordinarily disposed of by reversal. See, *e.g.*, *McNally* v. *United States*, 483 U. S. 350 (1987). Instead, the significance I find in the fact that so many

Courts of Appeals have strained so mightily to discern an exception that the statute does not contain, see *ante*, at 3, n. 2 (collecting cases), is that it demonstrates how great a potential for mischief federal judges have discovered in the mistaken reading of 18 U. S. C. §1001, a potential we did not fully appreciate when *Bramblett* was decided. To be sure, since §1001's prohibition of concealment is violated only when there exists a duty to disclose, see, *e.g.*, *United States* v. *Kingston*, 971 F. 2d 481, 489 (CA10 1992); *United States* v. *Richeson*, 825 F. 2d 17, 20 (CA4 1987); *United States* v. *Irwin*, 654 F. 2d 671, 678–679 (CA10 1981), cert. denied, 455 U. S. 1016 (1982), it does not actually prohibit any legitimate trial tactic. There remains, however, a serious concern that the *threat* of criminal prosecution under the capacious provisions of §1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of §1001 prosecution.

One could avoid the problem by accepting the Courts of Appeals' invention of a “judicial function” exception, but there is simply no basis in the text of the statute for that. Similarly unprincipled would be rejecting *Bramblett*'s *dictum* that §1001 applies to the courts, while adhering to *Bramblett*'s holding that §1001 applies to Congress. This would construct a bizarre regime in which “department” means the Executive and Legislative Branches, but not the Judicial, thereby contradicting not only the statute's intent (as *Bramblett* does), but, in addition, all conceivable interpretations of the English language. Neither of these solutions furthers the goal of avoiding “an arbitrary discretion in the courts”; they seem to me much more arbitrary than simply overruling a wrongly decided case.

The other goal of *stare decisis*, preserving justifiable expectations, is not much at risk here. Those whose reliance on *Bramblett* induced them to tell the truth to Congress or the courts, instead of lying, have no claim on our solicitude. Some convictions obtained under *Bramblett* may have to be overturned, and in a few instances wrongdoers may go free who could have been prosecuted and convicted under a different statute if *Bramblett* had not been assumed to be the law. I count that a small price to pay for the uprooting of this weed.