

Checking in on Bank Fraud

July 1, 2014

In *Loughrin v. United States*, U.S. Supreme Court, No. 13-316, the Supremes approved the application of the federal bank fraud statute to a relatively unsophisticated check cashing scheme, leading to the collective hand-wringing by a host of internet commentators who decried the federalization of state crimes and runaway prices at Whole Foods. The defendant in the underlying case was a pillar of the community named Kevin Loughrin, who stole and altered checks so that he could buy merchandise at his local Target stores, leading to six federal bank fraud charges. According to the case record, Loughrin intended to buy merchandise with the checks and return them for cash refunds. Let's face it, this was not the world's most enterprising criminal.

What was enterprising, however, was Loughrin's argument that he intended to target Target and *not* a federally-insured financial institution. According to Loughrin, a conviction for bank fraud required that prosecutors prove intent to defraud the banks on which the checks were drawn. Otherwise, suggested Loughrin, the federal bank fraud statute would extend to ordinary, unsophisticated frauds that simply involve payment by check – an area that was typically left to prosecution by the states.

Setting aside the debate between the breadth and scope of federal criminal laws (sorry, breathless internet commentators!), I'd instead like to talk about how bank fraud may not be bank fraud even though it's bank fraud. Make sense? No? Hmm. Let me try again.

The Supremes cleared up that bank fraud applies to things like Loughrin's moronic basic check cashing scheme because of the use of checks, right? And this helps with the definition of *what* bank fraud actually *is* and what conduct bank fraud actually *covers*. But while the crime of bank fraud has become a little more clear, there is still absolutely no straightforward way of figuring out whether your local U.S. Attorney's Office will actually prosecute the case or not.

"What?" you say indignantly. "But crime has been committed! Criminals must be punished! Heads must roll!" Oh, I agree. And you would be hard pressed to find people who do not agree (criminals have terrible lobbyists). But charging decisions are left entirely to the discretion of local U.S. Attorney's offices, which must balance Department of Justice priorities with local priorities, office staff, and agency resources. So while a bank fraud of \$30,000 in Billings, Montana may capture federal attention, the same fraud in Los Angeles, California, is likely going to be declined by federal prosecutors. The problem becomes more acute when the arbitrary lines bisect the same bustling metropolis, like what happens between the Northern and Eastern District of Texas or between the Southern and Eastern Districts of New York. It is entirely possible, for example, that federal prosecution in the Dallas area depends on where a criminal decides to exit Highway 75.

Does that sound arbitrary? If so, it's because it *is*. But it's the system that we have. And because of that system, bank fraud may not be bank fraud . . . even though it's bank fraud.