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PERSPECTIVE

Justices resist unchecked growth of federal criminal law

By Daniel B. Levin and Victoria A. Degtyareva

The number and scope of federal crimes has vastly expanded over the past few decades, but the U.S. Supreme Court has resisted the unchecked growth of federal criminal law. Last week, the Supreme Court issued an important decision limiting the reach of the federal bank fraud statute. While the court affirmed the petitioner's bank fraud conviction in *Loughrin v. United States*, 2014 DJDAR 7996 (June 23, 2014), it agreed with the defense that the federal bank fraud statute should not be construed "as a plenary ban on fraud, contingent only on use of a check," and imposed a significant limit on the use of federal law to prosecute garden-variety fraud.

The decision came from an appeal by Kevin Loughrin, who used six forged checks to steal just over $1,000 from a Target store in Salt Lake City. Loughrin posed as a Mormon missionary to steal checks from mailboxes, which he altered and used to purchase merchandise from Target. Loughrin then immediately returned the merchandise to Target for a cash refund. The government charged Loughrin with six counts of federal bank fraud under 18 U.S.C. Section 1344(2) and two counts of aggravated identity theft under 18 U.S.C. Section 1028A. He was convicted and sentenced to three years in prison.

On appeal, Loughrin argued that his conviction should be overturned because there was no evidence that he intended to defraud a bank. He only intended to defraud Target and did not care whether Target ever submitted the forged checks to a financial institution. Loughrin contended that interpreting the bank fraud statute to cover any fraudulent scheme to obtain funds from a bank, even when the defendant has no intent to defraud a bank, would improperly extend the statute to cover any commonplace fraud that happened to involve a check.

In a unanimous opinion written by Justice Elena Kagan, the Supreme Court held that a conviction under Section 1344(2) does not require the government to prove that a defendant intended to defraud a bank. The court noted that the first clause of the bank fraud statute, Section 1344(1), explicitly prohibits schemes intended to defraud a financial institution. Loughrin, however, was prosecuted under the second clause, Section 1344(2), which prohibits schemes to obtain money or property that is owned or controlled by a financial institution by means of false representations, but does not require that a defendant intend to defraud a bank.

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Although the court affirmed Loughrin's conviction, it nevertheless placed an important limit on the scope of the federal bank fraud statute. Under Section 1344(2), a defendant must scheme to obtain money from a bank "by means of" a misrepresentation. This requirement, the court held, is only satisfied where "the defendant's false statement is the mechanism naturally inducing a bank … to part with money in its control." In cases like Loughrin's, the false statement — the altered check — is the means by which the defendant obtains money from a bank and, therefore, these cases properly fall within the scope of federal bank fraud. However, in cases where no false statement will ever be transmitted to a bank — such as where a defendant passes off a knock-off as a Louis Vuitton handbag and the victim pays with a check — the misrepresentation is not the means of obtaining the bank's money and Section 1344(2) would not apply. In other words, the court required that the defendant's misrepresentation have "some real connection" to the bank.

In adopting this narrow construction, the court noted that interpreting federal bank fraud to cover petty offenses in which the bank's involvement is "wholly fortuitous" would contravene basic principles of federalism absent a clear indication that Congress intended to extend federal criminal law into areas traditionally handled by the states. This decision came just weeks after the court ruled in *Bond v. United States*, 2014 DJDAR (June 2, 2014), that a federal statute prohibiting the use of chemical weapons could not be used to prosecute a simple assault resulting in a minor chemical burn on the victim's thumb. The court's renewed concern about the unwarranted expansion of federal criminal law is a welcome development.

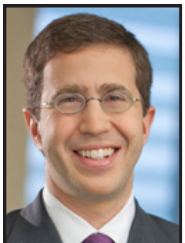
In the past few decades, there has been a major trend toward the federalization of criminal law. According to a 2010 study by the Heritage Foundation and the National Association of Criminal Defense Lawyers, the number of criminal offenses in the U.S. Code has increased from 3,000 in the early 1980s to over 4,450 by 2008. Similarly, the number of defendants prosecuted in federal courts has grown from 67,000 in 1996 to 102,931 in 2011.

While much of this expansion is the result of legislation explicitly federalizing criminal conduct that had previously been within the exclusive province of state courts, prosecutors and courts have also applied federal statutes to purely local crimes even in the absence of any clear congressional statement.

Significant problems arise when the same conduct may be prosecuted in either state or federal court. Federal and state law often provide considerably different procedural protections to defendants, including in the use of grand juries, the standards for the approval of search warrants, the burdens of proof to justify wiretaps, and the restrictions on discovery of the government's case. And, as *Loughrin* illustrates, federal mandatory minimum sentences and the use of federal convictions as predicate acts for additional federal charges often drive federal sentences to be far more severe than their state-law counterparts. Consequently, when state and federal criminal laws overlap, similarly situated defendants may receive substantially different treatment depending only on where they are prosecuted.

The creation of two redundant legal systems also negatively impacts the overall administration of criminal justice. Turning federal courts into a venue for the prosecution of minor local crimes burdens the relatively limited resources of the federal criminal system, which was historically intended to cover only a small subset of crimes that affect uniquely federal interests. Overlapping jurisdiction creates counterproductive competition between state and federal authorities, leads to the ineffective duplication of investigative, prosecutorial, and judicial resources, and undermines the states' role in prosecuting crime by creating the perception that state prosecutors and courts are inadequate.

The court's narrow reading of the federal bank fraud statute will impose a meaningful limit on the over-federalization of criminal law that may help to alleviate some of these concerns. There will likely be disagreement by lower courts on the precise contours of the court's limitation. As the court noted, whether a particular fraud satisfies the "by means of" requirement is a context-specific inquiry. But the decision ensures that not every petty fraud accomplished through the receipt of a check will be subject to federal prosecution.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