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The Federal Bank Fraud Statute: A Plain Interpretation

Joseph Callister

After the Supreme Court's decision in *Williams v United States*, the federal government was forced to stop prosecuting individuals who defrauded federal financial institutions via check kiting and other similar schemes. To fill this prosecutorial void, Congress passed the Federal Bank Fraud Act ("the Act") as part of the Comprehensive Crime Control Act. The Act's purpose is to protect the federal government's interest as an insurer of financial institutions by criminalizing offenses including check kiting, check forging, the use of stolen checks, credit card fraud, the diversion of bank funds by bank employees, and making false statements on loan applications. Since its passage, the

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1 B.A. 2003, Brigham Young University; J.D. Candidate 2006, University of Chicago.
3 A check kite is a bank check drawn on insufficient funds at another bank in order to take advantage of the floating overdraft period. See id at 281–82 (explaining defendant's check kiting scheme). See also Mark J. MacDougall, *Judicial Dilution and the Bank Fraud Statute*, 111 Banking L J 173, 176 (1994) (discussing Williams' check kiting scheme).
bank fraud statute has been a popular tool of prosecutors seeking to punish criminals for various attacks on federally-insured financial institutions.\textsuperscript{6}

The federal government's broad use of the statute, coupled with ambiguities in its language, has created confusion about the scope and elements of the criminalized conduct, leaving the circuits split over the precise meaning of the Act. In particular, the courts disagree about whether the two subsections of the Act should be read conjunctively or disjunctively, and about whether specific intent to defraud and victimize a financial institution is required to sustain a conviction under the statute.\textsuperscript{7}

The bank fraud statute potentially reaches three different situations: (1) where the defendant's scheme is directed at victimizing the financial institution; (2) where the financial institution is indirectly put at risk of potential or actual loss as the result of the defendant's scheme to defraud someone else; and (3) where the financial institution is not put at risk of loss, but funds or other property in custody of the bank are obtained through the defendant's scheme. The circuits agree that situation (1) is clearly covered by the statute, but disagree on whether situations (2) and (3) are covered as well.\textsuperscript{8} A plain reading of the broad language of the statute\textsuperscript{9} (particularly the second clause) suggests that all three situations fall within the scope of the Act, but some courts have limited the scope of the statute to situation (1) on the

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\textsuperscript{6} Consider Steven M. Biskupic, \textit{Fine Tuning the Bank Fraud Statute: A Prosecutor's Perspective}, 82 Marq L Rev 381 (1999) (discussing prosecutors' broad range of uses for the federal bank fraud statute).

\textsuperscript{7} Compare \textit{United States v McNeil}, 320 F3d 1034, 1037–40 (9th Cir 2003) (holding that the statute should be read disjunctively and requiring only that the bank is in some way involved in the defendant's overall scheme), with \textit{United States v Thomas}, 315 F3d 190, 195–201 (3d Cir 2002) (reading the statute conjunctively and requiring specific intent to defraud and victimize the financial institution).

\textsuperscript{8} Compare \textit{Thomas}, 315 F3d at 195–201 (requiring specific intent to victimize the financial institution), with \textit{McNeil}, 320 F3d at 1037–40 (requiring only that the bank is in some way involved in the defendant's overall scheme and not requiring any proof of an actual or potential loss) and \textit{United States v Everett}, 270 F3d 986, 991 (6th Cir 2001) (requiring that the bank be put at "some risk of loss . . . although the perpetrator may intend to defraud someone other than the bank").

\textsuperscript{9} The statute punishes perpetrators who "knowingly execut[e], or attempt[t] to execute, a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody of control of, a financial institution, by means of false or fraudulent pretenses, representations or promises." 18 USC § 1344 (2000).
theory that the clearly expressed purpose of the statute requires this limitation.\textsuperscript{10}

In construing the statute, the circuits have looked to the legislative history accompanying the Act for guidance. Those circuits that support a more restrictive interpretation find in this history evidence that Congress intended the statute to require a finding of specific intent to victimize the financial institution.\textsuperscript{11} In contrast, those courts that advance a permissive reading draw support from the judicial construction of the mail and wire fraud statutes,\textsuperscript{12} which served as the model for the bank fraud statute.\textsuperscript{13}

This Comment addresses the split over the interpretation of the scope and intent requirements of the Act. Part I reviews recent circuit court decisions, identifying the three principal interpretations of the statute and their implications. It also examines the abundant legislative record accompanying the passage of the Act and draws comparisons to the wire and mail fraud statutes. Part II analyzes the reasoning of the circuit decisions, the legislative history of the Act, the mail and wire fraud statute case law, and various policy concerns, ultimately concluding that there is no reason to depart from the plain language of the Act. Accordingly, the Comment concludes that the statute should be read disjunctively, without a requirement of specific intent to victimize the financial institution.

I. THE FEDERAL BANK FRAUD STATUTE IN THE COURTS

A. The Federal Bank Fraud Statute

As it currently reads, the federal bank fraud statute provides:

\textsuperscript{10} See Thomas, 315 F3d at 196, 197–98 ("[T]he legislative history strongly suggest[s] that . . . [a] defendant must have deliberately target[ed] his or her scheme at the banking institution."); United States v Davis, 989 F2d 244, 246–47 (7th Cir 1993) ("[T]he purpose of [the bank fraud statute] is not to protect people who write checks to con artists but to protect the federal government's interest as an insurer of financial institutions.").

\textsuperscript{11} See, for example, Thomas, 315 F3d at 196–98 (basing holding that statute requires specific intent to defraud and victimize financial institution on legislative history).

\textsuperscript{12} Crime Control Act, 18 USC §§ 1341, 1343 (2000).

\textsuperscript{13} Compare McNeil, 320 F3d at 1038 (concluding that legislative history of the mail and wire statute does not support a limiting interpretation), with Thomas, 315 F3d at 198 (reasoning that the legislative history of the mail and wire statute requires a conjunctive interpretation).
Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.14

The federal appellate courts agree that the statute creates three elements of the crime: (a) knowingly; (b) executing or attempting to execute a scheme or artifice; (c) to defraud, or, through false or fraudulent representations, obtain the money of, a financial institution.15 In addition to these elements, the Supreme Court recently clarified that “materiality of falsehood” is an additional element of both mail and bank fraud under the respective statutes.16

The courts are split, however, on whether the two subsections of the statute should be read disjunctively or conjunctively.17 In other words, does the intent requirement of subsection (1) of the statute carry over to subsection (2) of the statute? Is it necessary that the financial institution was the primary victim of the scheme, or is it only necessary that the funds or property of the bank were involved in some way? These questions all turn on the issue of whether subsection (2) creates an independent offense under the statute, or whether it merely broadens the scope of subsection (1).

B. Whether §§ 1344(1) and (2) Create Two Separate Offenses

The issue of whether to read the bank fraud statute conjunctively or disjunctively seems, at first glance, to be unambiguous. After all, the language of the statute itself expressly uses the word “or” to connect subsections (1) and (2). A straightforward

14 18 USC § 1344.
15 See Thomas, 315 F3d at 195; McNeil, 320 F3d at 1037.
17 Compare Thomas, 315 F3d at 197–201 (holding that the bank fraud statute should be read conjunctively), with McNeil, 320 F3d at 1037 (holding that the bank fraud statute should be read disjunctively).
interpretation of the statute would thus allow for prosecution of schemes specifically directed at a bank or any scheme where the money, funds, or property of a bank is obtained.

Despite the apparent clarity of the plain language, one circuit has strongly advocated a conjunctive reading of the statute. In *United States v Thomas*, the Third Circuit, departing from the other circuit holdings, claimed that the legislative history and policy concerns mandated a more restrictive reading of the Act. The issue dividing the circuits is whether the Act requires the defendant to specifically defraud the bank, or whether any fraud involving the bank suffices.

This issue arises in cases where the defendant does not specifically target the bank as the victim of his fraud but funds are obtained from the bank as part of the scheme. Such a situation existed in *Thomas*, where the defendant, a home healthcare aide for an elderly woman, induced the woman to sign over checks worth more than $100,000. The victim later accompanied the defendant to the bank when the defendant cashed the checks, repeatedly giving her approval for the transactions to bank officials. Consequently, the bank did not suffer from the scheme, but it was involved in transferring funds from the victim to the perpetrator.

For these acts, the defendant was convicted of bank fraud under § 1344, but the Third Circuit reversed the conviction. On appeal, the government argued that subsections (1) and (2) create two independent offenses, with (1) involving specific intent to defraud a financial institution, and (2) covering any scheme where the bank is involved in transferring property after false and fraudulent misrepresentations. The court rejected this argument, reasoning,

[A] disjunctive reading of the two sections, as proposed by the Government, gives the statute a breadth of scope that extends well beyond what Congress intended the statute

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18 315 F3d 190 (3d Cir 2002).
19 Id at 197–201 (holding that the legislative history mandates that a defendant have specific intent to defraud the bank). But see *McNeil*, 320 F3d at 1037 (holding that the bank fraud statute should be read disjunctively); *United States v Crisci*, 273 F3d 235, 239–40 (2d Cir 2001) (reading the bank fraud statute according to the plain language).
20 315 F3d at 194.
21 Id.
22 Id at 206 (reversing the conviction because the defendant did not have specific intent to defraud the bank).
23 Id at 195.
to regulate. Subsection (2), unlike (1), provides only the most tenuous nexus between the scheme or artifice and the institution of banking, which Congress sought foremost to protect.24

In support of this interpretation, the court turned to the congressional history of the statute, noting that “Congress enacted the statute for the purpose of protecting financial institutions from the perpetration of fraud upon them, leaving to states the traditional prosecution of crimes of larceny, embezzlement and fraudulent conversions.”25 The court concluded that subsection (2) “does not set forth an independent basis of liability.”26

Most of the other circuits have disagreed with the Third Circuit’s reading of the statute, and instead have held that the plain language of the Act mandates a disjunctive reading.27 Under a disjunctive interpretation, subsections (1) and (2) outline two different ways of committing bank fraud. For example, in United States v McNeil28 the Ninth Circuit recognized that the scope of the two subsections differs greatly, but concluded that the second subsection is a catch-all that criminalizes all “schemes to obtain money or property in the custody or control of a bank by deceptive means.”29 The Second Circuit similarly rested its holding on the plain language of the statute, stating that “[b]ecause the two subsections of Section 1344 are written in the disjunctive,” the section must be interpreted as defining two different ways of committing bank fraud.30 Whether to read the statute conjunctively, as in Thomas,31 or disjunctively, following the other circuits,32 touches on a more fundamental issue: the intent requirement under the Act.

24 Thomas, 315 F3d at 196.
25 Id.
26 Id at 198.
27 For example, McNeil, 320 F3d at 1037; Crisci, 273 F3d at 239; United States v Colton, 231 F3d 890, 897 (4th Cir 2000); United States v Mueller, 74 F3d 1152, 1159 (11th Cir 1996).
28 320 F3d 1034 (9th Cir 2003).
29 Id at 1037.
30 Crisci, 273 F3d at 239. See also Colton, 231 F3d at 897 (accepting a disjunctive reading of the statute); Mueller, 74 F3d at 1159 (11th Cir 1996) (stating that § 1344 covers two distinct types of bank fraud).
31 315 F3d at 196.
32 McNeil, 320 F3d at 1037; Crisci, 273 F3d at 239; Colton, 231 F3d at 897; Mueller, 74 F3d at 1159.
C. The Intent Requirement under the Statute

Questions of intent usually arise in situations involving subsection (2), where the defendant has not specifically targeted the financial institution as his victim. In such situations, the courts are again split over how to interpret and apply the statute. Three principal views have emerged: (1) that intent to defraud and victimize the financial institution is required;\(^3\) (2) that intent to defraud, but not necessarily victimize, the financial institution is required;\(^3\) and (3) that intent to defraud someone is required, but not necessarily the financial institution, so long as the financial institution is involved in the transfer of property.\(^3\)

1. Intent to defraud and victimize the financial institution.

The narrowest view is that the statute requires specific intent to defraud and victimize the financial institution. According to this view, the subsection (1) requirement of intent to defraud a financial institution “applies to any indictment pled under the statute.”\(^3\) This restrictive position follows naturally from a conjunctive reading of the statute, and is grounded in an analysis of the legislative history.\(^3\)

The Third Circuit, which alone advocates a conjunctive interpretation of the statute, noted that Congress “enacted the bank fraud statute to fill the gaps existing in federal jurisdiction over ‘frauds in which the victims are financial institutions that are federally created, controlled, or insured.’”\(^3\) The court similarly quotes the House Report to show that the statute is primarily concerned with “fraudulent schemes where banks are victims.”\(^3\) From these statements, the court concluded that the “legislature wanted the intent requirements of subsection (1) to apply to any indictment under the statute, and that, in order to prove bank fraud, a bank must be more than a mere incidental player. A defendant must have deliberately targeted his or her scheme at the banking institution.”\(^4\) Accordingly, the court con-

\(^{33}\) See Thomas, 315 F3d at 196.
\(^{34}\) See, for example, McNeil, 320 F3d at 1037.
\(^{35}\) See Everett, 270 F3d at 990–91.
\(^{36}\) Thomas, 315 F3d at 196.
\(^{37}\) See id at 197–98 (discussing legislative history).
\(^{38}\) Id at 197, citing S Rep No 98-225 at 377 (cited in note 5).
\(^{40}\) Thomas, 315 F3d at 198.
cluded that "the sine qua non of a bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank."41

The Second Circuit similarly42 held that fraudulent schemes merely involving a bank are not crimes under the statute unless there is a specific intent to victimize the bank.43 Under that reading, the statute requires that "the defendant engage in . . . a pattern or course of conduct designed to deceive a federally chartered or insured financial institution into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss."44 In a Seventh Circuit case reversing a bank fraud conviction, Judge Posner also endorsed this position, noting that the purpose of the statute is "not to protect people who write checks to con artists but to protect the federal government's interest as an insurer of financial institutions."45

In addition to drawing on the congressional record of the bank fraud statute, courts have looked to the judicial construction of the similarly-structured mail fraud statute46 for guidance. For example, in interpreting the mail fraud statute in McNally v United States,47 the Supreme Court held that the second subsection serves to broaden the scope of the first clause, not to establish an independent ground of criminal liability.48 The Third Circuit inferred that because the "correct syntactical construction of the mail fraud statute sheds light on the appropriate construction of the bank fraud statute[,] . . . subsection (2) does not set forth an independent basis of liability," and specific intent to defraud the bank is required.49

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41 Id at 197.
42 In requiring specific intent to defraud a bank, the Second and Seventh Circuits, like the Third Circuit, essentially argue for a conjunctive reading. The interpretation is distinguished because the Third Circuit explicitly advocates a conjunctive reading in opposition to the plain language, whereas the Second and Seventh Circuits attempt to read a specific intent requirement into each subsection of the Act.
43 See United States v Blackmon, 839 F2d 900, 905–06 (2d Cir 1998); United States v Rodriguez, 140 F3d 163, 167 (2d Cir 1998).
44 Rodriguez, 140 F3d at 167 (emphasis in original), quoting United States v Stavroulakis, 952 F2d 686, 694 (2d Cir 1992).
45 Davis, 989 F2d at 247. See also United States v Laljie, 184 F3d 180, 191 (2d Cir 1999) (reversing bank fraud conviction because the bank was merely deceived, not put at risk of loss).
46 18 USC § 1341.
48 Id at 358–59.
49 Thomas, 315 F3d at 198.
2. Intent to defraud, but not necessarily victimize, the financial institution.

The First and Ninth Circuits have held that although there must be intent to defraud the financial institution, the federal bank fraud statute does not require intent to victimize the institution.\textsuperscript{50} In a Ninth Circuit identity theft case, the defendant requested a tax refund in another’s name and obtained the funds by using the other person’s personal information to set up a bank account.\textsuperscript{51} The court upheld the bank fraud conviction, holding that “bank fraud charges may lie even if the bank is not the immediate or sole victim of the defendant’s conduct,” so long as the scheme is directed at deceiving the financial institution.\textsuperscript{52} The court in \textit{McNeil} explicitly disagreed with the Seventh Circuit’s use of the congressional record in \textit{United States v Davis}\textsuperscript{53} to support the opposite contention, arguing that “Congress . . . is free to define federal crimes more broadly than the core harms it seeks to remedy.”\textsuperscript{54} The court also noted that the most restrictive comments in the congressional record concern a different draft of the statute than was enacted.\textsuperscript{55}

The First Circuit similarly held that the intent necessary to sustain a conviction for bank fraud under the Act is intent to defraud, but not necessarily victimize, the bank.\textsuperscript{56} The court stated that “[t]he particular means of deception chosen are not essential to the intent element, which can therefore be defined as an intent to deceive a bank in order to obtain from it money or other property. Nothing in the language of § 1344(2) indicates that ‘intent to harm’ is required.”\textsuperscript{57} In concluding that intent to defraud but not harm was required, the First Circuit cited the mail fraud statute construction for support, in opposition to the \textit{Thomas} court’s use of the mail fraud statute.\textsuperscript{58}

\textsuperscript{50} \textit{McNeil}, 320 F3d at 1037; \textit{United States v Kenrick}, 221 F3d 19, 26–29 (1st Cir 2000).
\textsuperscript{51} \textit{McNeil}, 320 F3d at 1036.
\textsuperscript{52} Id at 1037.
\textsuperscript{53} 989 F2d 244 (7th Cir 1993).
\textsuperscript{54} \textit{McNeil}, 320 F3d at 1038.
\textsuperscript{55} Id.
\textsuperscript{56} \textit{Kenrick}, 221 F3d at 26–29.
\textsuperscript{57} Id at 27.
\textsuperscript{58} Compare id at 27–28, citing \textit{Neder}, 527 US at 21, 23 (discussing a decision in which the Supreme Court, in interpreting the bank, mail and wire fraud statutes, “followed the ‘well-established rule of construction’ that ‘Congress intends to incorporate the well-settled meaning of the common-law terms it uses.’”), with \textit{Thomas}, 315 F3d at 198 (discussing a decision in which the Court held that “Congress intended the second de-
While most circuits have required proof of intent to defraud the financial institution, with or without intent to victimize the institution, they have not agreed on what counts as such proof. The Second Circuit required a showing of intent to victimize the institution "by exposing it to actual or potential loss." The Tenth Circuit held that the "government does not have to prove the bank suffered any monetary loss, only that the bank was put at potential risk." Many circuits hold that direct financial loss as a result of the scheme is not required if the bank could face civil liability for the losses.

3. Intent to defraud someone, but not necessarily the financial institution.

The Sixth Circuit has, seemingly, adopted the most expansive reading of the statute, requiring only intent to defraud someone where the funds of a financial institution are involved. The United States v Everett court held that the plain meaning of the statute leads to a disjunctive interpretation, with no specific intent to defraud the bank required. Thus, the Government must show only that the defendant, "in the course of committing fraud on someone[,] causes a federally insured bank to transfer funds under its possession and control." Such "minimal involvement of the bank" is required under the statute's language because, "in such situations, the federally insured bank will almost always be placed at some risk of loss." As in other circuit court opinions, the Sixth Circuit used the construction of the mail and wire fraud statutes to support its interpretation.

In reality, the line between the second and third interpretations of the statute is thin. Indeed, it is difficult to imagine a situation where a person defrauds another out of property through the medium of a financial institution without knowing that the institution is involved at some level. The distinguishing characteristic is therefore whether the defendant possessed specific intent to defraud and victimize the bank, or just to defraud it at someone else's expense. The third view thus collapses into the second, and the critical question remains whether subsection (2) of the Act creates an independent offense—whether specific intent to defraud and victimize is required.

II. AN ARGUMENT FOR PLAIN INTERPRETATION

The statute should be read broadly, with subsections (1) and (2) creating two different ways of committing bank fraud. The plain language of the statute clearly uses the disjunctive to link subsection (1) and (2), thus indicating that each clause was to create an independent way of committing the offense. Nothing in the legislative history or the mail fraud statute case law creates a legitimate reason for contravening the clear meaning of the text.

A. The Plain Language of the Act Creates a Strong Presumption in Favor of a Disjunctive Reading

Statutory interpretation begins with the plain language of the text. The Supreme Court has stated, "[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." In this case, the statute expressly uses the disjunctive "or" to connect subsections (1) and (2). Thus, § 1344 seems to articulate two independent ways of committing bank fraud.

all that is necessary] makes the bank fraud statute more harmonious with the mail and wire fraud statutes, which require only that the mail or wire communication be used to facilitate the fraud.

69 18 USC § 1344.
70 See, for example, McNeil, 320 F3d at 1037 (stating that the first subsection "criminalizes schemes to defraud financial institutions" while the second subsection "is broader in that it criminalizes schemes to obtain money or property in the custody or control of a bank by deceptive means."); Crisci, 273 F3d at 239 (distinguishing first and second sub-
The plain language is not the end of the matter, however, as the Supreme Court has also held that courts may look past the plain language in construing a statute where: (1) the plain language creates inconsistencies within the statute; (2) the plain language is contrary to clearly expressed legislative intent; or (3) the application of the plain language would lead to absurd results.\textsuperscript{71} While the Court has carved out these three exceptions to straightforward textual interpretation, it is important to stress that there is a strong presumption in favor of starting and ending with the plain language. Indeed, the plain language will be regarded as "conclusive" if one of the exceptions is not clearly established.\textsuperscript{72}

In this case, the plain language does not create inconsistencies within the statute. Read literally, the first subsection punishes schemes directed at defrauding financial institutions, and the second subsection more expansively punishes schemes involving the transfer of bank property.\textsuperscript{73} There is no logical or practical contradiction in the plain language. Moreover, application of the plain language would not lead to absurd results. More schemes will be prosecuted under a disjunctive reading than a conjunctive reading, and while this may be undesirable for some parties, it is hardly absurd. Consequently, the first and third exceptions of the Supreme Court's test\textsuperscript{74} are clearly not relevant.

Accordingly, analysis of the statute should be focused on whether the plain reading—the disjunctive reading—is contrary to a clearly-expressed legislative intent. Because the presumption lies in favor of the plain reading, arguments challenging this position only have to be rebutted; affirmative arguments, though they may be persuasive, are not necessary.\textsuperscript{75}

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\textsuperscript{72} Turkette, 452 US at 580.

\textsuperscript{73} See 18 USC § 1344. The first subsection of the statute makes it a crime "to defraud a financial institution" while the second subsection states "to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody of control of, a financial institution, by means of false or fraudulent pretenses, representations or promises." Id.

\textsuperscript{74} See Turkette, 452 US at 580; Trans Alaska Pipeline Rate Cases, 436 US at 643.

\textsuperscript{75} See, for example, Bread Action Committee v Federal Election Commission, 455 US 577, 580–85 (1982) (holding that the plain language controls statutory construction absent "clear evidence" of a "clearly expressed" congressional intent to the contrary and also holding that challengers to the plain language bear the burden of proving by clear evidence that the legislative history mandates departing from the plain language). See also Richards, 369 US at 9–10 (finding appellant’s argument insufficiently persuasive to over-
B. The Legislative History Should Not Trump the Plain Language

The legislative record for the bank fraud statute does not reveal a clearly-expressed purpose contrary to the plain language of the statute. While the Senate and House Reports both affirm that the purpose of the Act is to protect federally-insured financial institutions, the record consistently speaks in broad terms of the scope and powers granted under the Act. 76

1. Arguments in favor of a conjunctive reading.

The Third and Seventh Circuits 77 both used statements from the congressional record to support a conjunctive interpretation of the text, in opposition to the plain language. For example, in Thomas, the Third Circuit argued that although “[t]he use of the disjunctive ‘or’ connecting the two subsections seems to indicate that the two connected subsections of the statute are to be given independent [effect],” such a reading contradicts the clearly-expressed legislative intent. 78 The Senate committee stated that the purpose of the statute was to fight “frauds in which the victims are financial institutions that are federally created, controlled, or insured.” 79 The House similarly noted that the statute is primarily concerned with “fraudulent schemes where bank[s] are victims.” 80 The Third Circuit opined that:

A disjunctive reading of the two sections . . . gives the statute a breadth of scope that extends well beyond what Congress intended the statute to regulate. Subsection (2), unlike (1), provides only the most tenuous nexus between

76 See S Rep No 98-225 at 377 (cited in note 5) (“[S]erious gaps now exist in the federal jurisdiction over frauds against banks . . . and the legislation in this part would assure a basis for federal prosecution of those who victimize these banks through fraudulent schemes.”); HR Rep No 98-901 at 2-3 (cited in note 38) (discussing gaps in ability to prosecute bank fraud).

77 While the Seventh Circuit does not directly refer to the legislative record, use of such history is inferred in the court’s citation of the purpose of the statute. See Davis, 989 F2d at 246-47.

78 315 F3d at 196.

79 S Rep No 98-225 at 377 (cited in note 5).

the scheme or artifice and the institution of banking, which Congress sought foremost to protect.\textsuperscript{81}

While the Third Circuit is correct that subsection (2) is more indirectly related to protecting banking than subsection (1), the relationship between subsection (2) and financial institutions is sound—subsection (2) clearly speaks of the transfer of funds or other property from financial institutions.\textsuperscript{82}

Presumably drawing on the same House and Senate statements,\textsuperscript{83} the Seventh Circuit also advocated a narrow reading of the text, arguing that the intentions of Congress in passing the act were limited to protecting the "federal government's interest as an insurer of financial institutions."\textsuperscript{84} Writing for the Court, Judge Posner stated that a defendant who used a bank to cash a fraudulently obtained tax refund had not committed bank fraud under the statute.\textsuperscript{85} Similarly, in requiring a showing of specific intent to defraud and victimize the financial institution, the Second Circuit agreed with the Third and Seventh Circuits on this point.\textsuperscript{86}

The central issue is whether these statements from the congressional record are sufficient to override the plain—disjunctive—language of the statute. The legislative statements reveal that the disjunctive-conjunctive issue and the intent requirement issue are really one and the same.\textsuperscript{87} If the statute is read disjunctively, then subsection (2) creates an independent basis of liability, with no requirement of specific intent to victimize the bank. On the other hand, if the statute is read conjunctively, as \textit{Thomas} recommends,\textsuperscript{88} then the specific intent requirement of subsection (1) can be applied to subsection (2), mandating proof of intent to defraud and victimize the bank.\textsuperscript{89}

\textsuperscript{81} \textit{Thomas}, 315 F3d at 196.
\textsuperscript{82} 18 USC § 1344.
\textsuperscript{83} See note 74.
\textsuperscript{84} \textit{Davis}, 989 F2d at 247.
\textsuperscript{85} Id at 246-47.
\textsuperscript{86} See \textit{Blackmon}, 839 F2d at 905-06 (drawing on legislative history); \textit{Rodriguez}, 140 F3d at 169 (reversing defendant's conviction because the bank was a holder in due course of the fraudulently obtained checks and therefore faced no liability).
\textsuperscript{87} See S Rep No 98-225 at 377 (cited in note 5); HR Rep No 98-901 at 2 (cited in note 39).
\textsuperscript{88} See \textit{Thomas}, 315 F3d at 199.
\textsuperscript{89} The Second and Seventh Circuit decisions seem to directly depend on the resolution of this question.
2. The legislative history supports a disjunctive reading.

While the House and Senate reports both establish that the purpose of the bank fraud statute is to deter and criminalize schemes aimed at harming federally insured banks, they also speak very generally of the scope and powers granted under the Act. For example, the Senate commented that "serious gaps now exist in the federal jurisdiction over frauds against banks ... and the legislation in this part would assure a basis for federal prosecution of those who victimize these banks through fraudulent schemes." Speaking of the Act as a bridge to cover gaps in federal power indicates a desire to grant broad and general powers. Restricting the scope of the Act to cover only those perpetrators possessing specific intent to defraud and victimize financial institutions, when the second subsection of the statute clearly does not require such intent, does not harmonize with the Senate's stated intention to cover holes in federal prosecutors' ability to fight all manner of financial frauds.

Similarly, the Senate report underscores the broad nature of the Act by repeatedly using the word "general" to describe the statute's scope, and by indicating that the Act is meant to curtail a "wide range of fraudulent activity." The Senate report also noted that the bank fraud statute is "modeled on the present wire and mail fraud statutes," which "have been construed by the courts to reach a wide range of fraudulent activity." By speaking approvingly of the broad construction of the mail fraud statute, the Senate report implied that the bank fraud statute should operate in a similarly broad fashion.

3. A prior draft of the Act does not support a conjunctive interpretation.

A few courts have sought to support a conjunctive interpretation of the statute through references to the Judiciary Committee's comment on an earlier draft of the Act. The text of this

\[\text{References:} 90, 91, 92, 93, 94\]
draft more exactly copied the language of the mail and wire fraud statutes, making it a crime to "intend to devise a scheme to defraud a financial institution . . . and engaging in conduct in furtherance of the scheme." Commenting on this version of the Act, the Judiciary Committee noted:

The new section would prohibit devising a scheme to defraud a financial institution, or to obtain property of such an institution, and engaging in conduct in furtherance of such a scheme. The section thus parallels the language of the current mail fraud and wire fraud statute . . . and is intended to incorporate case law interpretations of those sections. The Committee, however, is concerned by the history of expansive interpretations of that language by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions.96

The Ninth Circuit observed that this statement could be used to advocate limiting the scope of the bank fraud statute, in opposition to the mail and wire fraud statutes.97 One could argue that in rejecting this version of the Act and using alternative language, Congress signaled its desire to avoid creating another expansive criminal statute.

This argument can be rebutted on two grounds. First, the Ninth Circuit observed that this comment refers to an earlier version of the Act that was not adopted, and thus these concerns do not necessarily apply to the current statute.98 More importantly, the text of the final bank fraud statute demonstrates that despite the Judiciary Committee's concerns with modeling the bank fraud statute after the mail and wire fraud statutes,99 Congress did just that. The changes in language between the earlier draft and the final Act do not cut the link between the bank and mail fraud statutes.100 Instead, the changes emphasize what the statute is punishing. The earlier draft of the Act made it a crime

subsequent discussion in Part II-B-2.

95 HR Rep No 98-901 at 11 (cited in note 39).
96 Id at 4.
97 McNeil, 320 F3d at 1038.
98 Id at 1038–39.
100 Compare id at 11 with 18 USC § 1344.
to "intend to devise a scheme to defraud a financial institution . . . and to engage in conduct in furtherance of the scheme." The final version of the Act instead focuses on the "scheme itself," rather than various conduct done in furtherance of the scheme. Whatever the significance of the earlier draft, the change to the final language does not signify Congress's unequivocal purpose to limit the scope of the Act to those schemes done with intent to defraud and victimize a bank.

The final text of the Act still criminalizes any scheme involving a financial institution, and therefore does not plainly require specific intent to victimize the financial institution. The earlier draft of the Act, and the Committee's comments about it, do not contain evidence that the statute should be read conjunctively, in opposition to the plain language.

4. Summary.

The legislative history does not contradict the plain language and require a conjunctive reading. The Senate and House reports both emphasize that the focus of the crime is on the harm done to the financial institution, not the mental state of the defendant. The Senate report repeatedly mentions that the Act is meant to protect against crimes committed involving "federally insured and controlled financial institutions." The House and Senate reports neither mention the statute in terms of the blameworthiness of the defendant's actions, nor clarify the intent requirement beyond what the text sets forth. This focus on harm done to federally-supported financial institutions demonstrates that Congress was not concerned with specific intent by potential defendants; it was concerned with protecting banks from fraudulent schemes. Consequently, the courts should not impose a stricter intent requirement than the text demands.

While both the Senate and the House reports do mention that the purpose of the Act is to protect federally insured finan-

102 McNeil, 320 F.3d at 1038-39.
103 S Rep No 98-225 at 377-79 (cited in note 5) ("[T]he legislation in this part would assure a basis for federal prosecution of those who victimize these banks through fraudulent schemes"); HR Rep No 98-901 at 2-3 (cited in note 39) ("Federal banks and financial institutions are protected against theft and false statements; this protection, however, is incomplete.").
105 Id; HR Rep No 98-901 at 2-3 (cited in note 39).
cial institutions, this purpose is not in opposition with the plain language of the text. Indeed, if anything, the legislative history supports a broad construction of the Act, in accordance with the plain meaning of the text. When utilizing the congressional record for interpretive purposes, there is a strong presumption in favor of construing the statute according to its plain text. The plain language will be abandoned only if it is contrary to clearly expressed legislative intent. The congressional record contains no such evidence.

As the Ninth Circuit astutely summarized:

Congress, within its constitutional limits, is free to define federal crimes more broadly than the core harms it seeks to remedy. In attempting to prevent losses to federally insured institutions—and the damage such losses cause to the federal fisc—Congress reasonably could have determined that it was appropriate to criminalize schemes to obtain money or property from a bank whether or not such schemes expose a bank to actual or potential loss, as the plain language of the statute suggests.

The statute should be interpreted disjunctively, allowing for the prosecution of schemes lacking specific intent to victimize the financial institution. If the legislature is worried that the broad language of the statute is being abused by over-aggressive prosecutors, then it has the prerogative to amend the statute to limit the intent requirement.

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106 S Rep No 98-225 at 377 (cited in note 5) (stating that legislation would allow the federal government to prosecute people for defrauding federal banks); HR Rep No 98-901 at 2–3 (cited in note 39) (describing gaps in federal ability to prosecute various types of fraud against banks).

107 See Turkette, 452 US at 580 (stating that the plain language of the statute is generally controlling); Trans Alaska Pipeline Rate Cases, 436 US at 643 (stating that the plain language is usually determinative).

108 Id.


110 McNeil, 320 F3d at 1038.

111 The idea that the judiciary should defer to the clearly expressed words of the legislature, in the absence of a constitutional problem, is widely held. See, for example, Sturges v Crowninshield, 17 US 122, 191–206 (1819) (holding that until Congress chooses to amend federal law to establish uniform bankruptcy laws, state law controls); In re Thompson, 894 F2d 1227, 1231 (10th Cir 1990) (Baldock concurring in judgment only) (stating that courts should not “assume a legislative role” based on the demands of equity; they should instead wait for Congress to amend problematic statutes); United States v Steele, 896 F2d 998, 1008 (6th Cir 1990), vacd and reheard as 933 F2d 1313 (Ryan dissenting) (asserting that even if “there is an appealing argument that for policy reasons
C. The Judicial Construction of the Mail Fraud Statute Supports a Broad Interpretation of the Act

In addition to the congressional record, most circuit courts evaluating the bank fraud statute have drawn an analogy with the mail and wire fraud statutes.\(^{112}\) The statutes are similar in their initial construction and phraseology, and the mail fraud statute served as the model for the bank fraud statute.\(^{113}\) The mail fraud statute reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.\(^{114}\)

The language and structure of the bank fraud statute closely parallels the mail fraud statute: both criminalize those who devise “scheme[s]” to “obtain money or property.”\(^{115}\) While the bank fraud statute targets fraudulent schemes directed at particular victims (financial institutions), the mail fraud statute focuses on fraudulent schemes utilizing a particular medium of exchange (the mails).\(^{116}\)

Because of the textual and structural similarities between the two statutes, courts have routinely looked to case law involv-
ing the mail fraud statute when constructing the bank fraud statute. Consequently, an analysis of the judicial construction of the mail fraud statute can provide aid in determining how to interpret the bank fraud statute.

Courts have uniformly interpreted the mail fraud statute broadly and expansively. Indeed, courts and scholars often express concern at the broad, almost limitless, reach of the statute. The Supreme Court has held that the phrase "any scheme or artifice to defraud" should be interpreted broadly to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." Commenting on this expansive construction, the Seventh Circuit noted, "The language of the mail-fraud statute is very broad, and concern has repeatedly been expressed that it not be given too vague and encompassing a scope by judicial interpretation." The Second Circuit similarly commented, "[W]e are asked to construe two seemingly limitless provisions, the mail and wire fraud statutes."

Despite the courts' consistently broad interpretation of the mail fraud statute, a few circuits have attempted to find support for a more limited interpretation of the bank fraud statute in the mail fraud statute case law. For example, the Third Circuit noted that the Supreme Court held that the second clause of the mail fraud statute only served to broaden the first clause. The second clause outlawed any scheme to obtain money by "false or fraudulent promises," whereas the first clause more narrowly

117 See, for example, Monostra, 125 F3d at 186–87 (discussing McNally, 483 US at 50, which interpreted the mail and wire fraud statutes); Thomas, 315 F3d at 198 (same).

118 See, for example, Emery v American General Finance, Inc, 71 F3d 1343, 1346 (7th Cir 1995) ("The language of the mail-fraud statute is very broad."); United States v Dial, 757 F2d 163, 170 (7th Cir 1985) ("Courts have been more concerned with making sure that no fraud escapes punishment than with drawing a bright line between fraudulent, and merely sharp, business practices."); United States v McNeive, 536 F2d 1245, 1252 (8th Cir 1976) ("[O]ur acceptance of the Government's theory in this case would have far-reaching ramifications as to the already pervasive mail fraud statute.").

119 See, for example, Emery, 71 F3d at 1343, 1346 (7th Cir 1995) (noting the frequently expressed concern that the mail fraud statute is vulnerable to overbroad interpretation); John C. Coffee, Jr., From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 Am Crim L Rev 117 (1981) (discussing the increasing use of the mail and wire fraud statutes to impose criminal liability for breach of fiduciary duties).


121 Emery, 71 F3d at 1346.


123 See Thomas, 315 F3d at 198; Everett, 270 F3d at 991.

124 Thomas, 315 F3d at 198, citing McNally, 483 US at 351.
criminalized those who devise fraudulent schemes. Because of
the similarities between the two statutes, the Third Circuit held
that subsection (2) of the bank fraud statute should be construed
as merely broadening the scope of subsection (1) and not as set-
ting forth an independent offense.

While the Third Circuit is correct that the second subsection
broadens the scope of subsection (1), this is not all subsection (2)
does. Indeed, the language of subsection (2), following the dis-
junctive 'or,' indicates that the second clause broadens the reach
of the statute by creating an independent offense—in addition to
the more narrow offense of subsection (1). The first subsection
deals with schemes specifically defrauding financial institutions,
and the second subsection more expansively covers any scheme
involving the transfer of property from financial institutions.

In fact, case law for the mail fraud statute unequivocally
supports a broad interpretation of the bank fraud statute. The
Sixth Circuit recognized this fact when adopting a disjunctive,
plain language view of the statute: “This interpretation makes
the bank fraud statute more harmonious with the mail and wire
fraud statutes, which require only that the mail or wire commu-
ication be used to facilitate the fraud.” The mail and wire
fraud case law does not provide enough support for rejecting a
plain language interpretation. In fact, an analogy with the mail
and wire fraud statute merely strengthens the disjunctive posi-
tion—if the mail fraud statute was interpreted broadly, then, by
analogy, the bank fraud statute should also be interpreted
broadly.

D. Policy Concerns with a Plain Language Interpretation of the
Statute

When interpreting the bank fraud statute, the circuit courts
have appealed for support to various policy arguments in addi-
tion to the text, legislative history, and mail fraud statute case
law. None of these arguments presents a compelling reason to
reject the plain language for a conjunctive reading of the Act.

125 18 USC § 1341.
126 See id at 197–98, citing McNally, 483 US at 351.
127 See 18 USC § 1341.
128 See, for example, Emery, 71 F3d at 1346 (“The language of the mail-fraud [sic]
statute is very broad.”); Dial, 757 F2d at 170 (“Courts have been more concerned with
making sure that no fraud escapes punishment than with drawing a bright line between
fraudulent, and merely sharp, business practices.”).
129 Everett, 270 F3d at 991.
1. Preserving the federal-state criminal law balance.

One concern with reading the bank fraud statute too broadly is the danger of infringing on state criminal laws. If the statute is construed according to the plain language, allowing for the prosecution of any fraudulent scheme involving bank funds (even when the bank is merely an intermediary between the perpetrator and the victim), then the powers given to federal prosecutors may conflict with relevant state statutes.\(^{130}\) However, the Supreme Court declared that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."\(^{131}\)

The court in *Thomas* noticed this tension, cautioning that "Congress enacted the [bank fraud] statute for the purpose of protecting financial institutions from the perpetration of fraud on them, leaving to states the traditional prosecution of crimes of larceny, embezzlement and fraudulent conversions."\(^{132}\) The court further held that a broad interpretation of the statute "offends the balance of federal and state jurisdiction and our principles of comity by imposing federal law where the federal interest is remote and attenuated."\(^{133}\)

Although *Thomas* articulates an important concern, its reasoning is flawed. First, the Supreme Court held that the federal-state balance is not to be changed by federal law "unless Congress conveys its purpose clearly."\(^{134}\) In this case, Congress has conveyed its purpose clearly: the Act serves to protect financial institutions from fraudulent schemes. The broader the scope of the statute, the more it coheres with Congress's stated purpose of protecting federally insured financial institutions.\(^{135}\) Indeed, limiting the government's ability to prosecute under the Act by imposing the strict specific-intent requirements from subsection (1) on subsection (2) undermines congressional intent.

While the Supreme Court is sensitive to preserving traditional state criminal jurisdiction, federal criminal laws are al-

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132 *Thomas*, 315 F3d at 196.
133 Id at 199.
134 *Bass*, 404 US at 349 (emphasis added).
135 Compare 18 USC § 1344 with S Rep No 98-225 at 377 (cited in note 5).
lowed to encroach on that jurisdiction when there is a clearly expressed and rational purpose for doing so.\textsuperscript{136} Congress's desire to protect federally-supported financial institutions through aggressive prosecution of bank fraud allows for intrusion on general state laws outlawing embezzlement, larceny, and so forth. This is especially true in light of Congress's willingness to grant federal prosecutors nearly unchecked power in the form of RICO,\textsuperscript{137} numerous conspiracy laws,\textsuperscript{138} and the closely-related mail and wire fraud statutes.\textsuperscript{139}

Increasing federal power over what were traditionally state crimes on the basis of the bank fraud statute should not influence a more narrow judicial interpretation in light of the major expansions of federal power granted under these more extensive federal statutes. Due to competence concerns, jurisdictional gaps, and other policy factors, Congress has consistently moved in the direction of increasing federal prosecutorial power, even at the expense of state power. Consequently, the courts should construe the bank fraud statute according to its plain language, even if it has the effect of decreasing state prosecution of various financial fraud crimes. Whether or not courts are concerned by these infringements on state power, they should defer to the plain language, especially given the consistent trend towards increased federal prosecutorial power.

Moreover, any infringement on state criminal jurisdiction could be tempered in two ways. First, while the bank fraud statute may grant federal prosecutors powers that encroach on state criminal laws, these prosecutors can exercise their discretion and not bring cases in federal courts that are better left to the state courts. The increased power to prosecute under the bank fraud statute is not a mandate, but a tool federal prosecutors can use at their discretion. It is likely that workload and limited resources will limit federal prosecution to larger cases, systematically limiting encroachment on state prosecutions to those cases where the expertise and resources of federal prosecutors are desired. The states likely will still be serving the role of prosecuting spot fraud and other minor crimes against financial institutions.

Second, even if there clearly is a case where the bank fraud statute is allowing federal prosecutors to intrude on the states' jurisdiction, the courts should construe the statute according to its plain language, even if it has the effect of decreasing state prosecution of various financial fraud crimes. Whether or not courts are concerned by these infringements on state power, they should defer to the plain language, especially given the consistent trend towards increased federal prosecutorial power.

\textsuperscript{136} Bass, 404 US at 349–50.
\textsuperscript{138} See, for example, Federal Conspiracy Act, 18 USC § 371 (2000).
\textsuperscript{139} 18 USC § 1341.
domain, the courts can then analyze whether the statute's scope has reached too far on a case-by-case basis.\textsuperscript{140}

2. The banks will help deter schemes involving their funds.

Another possible concern with interpreting the statute broadly is that such an interpretation might discourage efficient deterrence of financial schemes involving bank property. Many cases discuss the fact that banks often face civil liability when money is taken from them through some fraudulent scheme.\textsuperscript{141} This civil liability is often used as proof that the bank suffered an actual or potential loss in connection with some fraudulent plan.\textsuperscript{142} But, more importantly, civil liability could affect bank fraud deterrence by affecting financial institutions' own diligence in watching for fraudulent schemes involving their property.

For example, if the statute is read narrowly, banks might retain an incentive to protect their customers' funds from fraudulent schemes. In many of these cases, banks were involved in fund transfers between a customer and the defendant. If such situations did not potentially give rise to a federal bank fraud prosecution, then banks might fear that more fraudulent schemes would remain undetected. A greater number of undetected schemes could result in increased civil liability, and thus banks might step up internal policing of suspicious behavior. Conversely, if the statute was read to allow for the prosecution of any scheme involving bank property, then banks might hope that federal law enforcement would uncover many such thefts, reducing their civil-liability incentive to provide internal policing.\textsuperscript{143}

These concerns that reading the statute broadly may create disincentives for banks and federal law enforcement to uncover bank frauds should not affect judicial construction of the statute for three reasons. First, there is no empirical evidence demonstrating: (1) that banks and law enforcement will decrease their policing of financial institution fraud in the face of a narrower

\textsuperscript{140} Though, it would be difficult for the courts to articulate and consistently apply a theory to guide their case by case analysis.

\textsuperscript{141} See, for example, \textit{McNeil}, 320 F3d at 1038.

\textsuperscript{142} See, for example, \textit{McCauley}, 253 F3d at 820 (holding that the government need only prove a risk of civil liability to support a conviction of bank fraud); \textit{Davis}, 989 F2d at 246–47 (stating that because the bank would not face civil liability, it was not put at risk of loss and thus there was no bank fraud under the statute).

\textsuperscript{143} The problem may be that internal policing is more effective, because it occurs closer to the action, and/or that internal policing is less costly for taxpayers. Either way, it is very difficult to prove either of these propositions true.
statute, or (2) that there is a direct relationship between the intensity of criminal prosecution under the bank fraud statute and the degree of civil liability faced by banks from fraudulent schemes. It is possible that those individuals uncovering bank frauds (whether private bank employees or law enforcement investigators) are not even aware of the particular interpretation of the statute in the jurisdiction in which they work. In the absence of clear evidence that construing the statute broadly will result in a substantial decrease in financial fraud policing, there is no reason to depart from the plain language, disjunctive interpretation. Second, even if there were clear evidence proving that banks and law enforcement would increase policing in the face of a narrower statute, this evidence should only lead to legislative, not judicial, amendment of the statute. Finally, it is possible that financial institutions are the parties that most often discover fraudulent schemes targeting their property. Given the constant concern of civil liability, banks are not likely to proportion the intensity of their policing according to the particular judicial interpretation of the federal bank fraud statute.

CONCLUSION

After analyzing the relevant case law, legislative history, and policy concerns, this Comment advocates a broad reading of the bank fraud statute, in accordance with the plain language. In this case, the bank fraud statute uses the disjunctive “or” to connect the two subsections, thus creating two independent clauses, each outlining a different way of committing bank fraud. This lack of ambiguity in the plain language creates a strong, though rebuttable, presumption in favor of reading the statute broadly.

144 See In re Thompson, 894 F2d at 1231 (Baldock concurring) (stating that courts should not “assume a legislative role” based on the demands of equity; they should instead wait for Congress to amend problematic statutes); Sturges, 17 US at 191–208 (holding that until Congress chooses to amend federal law to establish uniform bankruptcy laws, state law controls); Steele, 896 F2d at 1008 (Ryan dissenting) (asserting that even if “there is an appealing argument that for policy reasons Congress should amend” a federal statute, “this is the responsibility of Congress, not the courts”).

145 Especially considering the fact that in addition to the federal statute there exist state statutes, such as 720 ILCS 5/16H-15 (“Misappropriation of financial institution property”) and KS ST § 9-2012 (criminalizing fraud by bank employees), that criminalize most fraudulent schemes directed at financial institutions in addition to the federal statute.

146 See note 108.
While several circuit courts appeal to the legislative history of the Act when concluding that Congress only intended to criminalize schemes in which financial institutions are the direct and intended victims of the fraud, the legislative record does not support this conclusion. Congress intended the Act to combat the flood of financial frauds being directed at federal institutions, and the legislative history reveals that Congress intended the scope of the statute to be broad. Consequently, the congressional purpose does not contradict the plain language of the Act. Furthermore, Congress modeled the bank fraud statute after the mail and wire fraud statutes, and Congress was aware that these statutes had received a broad judicial construction. Congress remains free to amend the statute in order to curtail its scope, but until this happens there is no reason to depart from the plain language.

Potential policy concerns with a broad interpretation of the Act do not present a sufficient reason to favor a narrower interpretation. While there does exist a potential conflict between federal and state criminal jurisdictions, Congress has not unlawfully infringed on traditional state criminal law jurisdiction by seeking to broadly protect federally-insured financial institutions. Finally, any concern over deterring financial institutions from policing potential frauds is really an empty concern given the desire of such institutions to escape any and all liabilities for inappropriate transfers of property. The federal bank fraud statute should therefore be construed to allow for the prosecution of defendants who lack specific intent to victimize a bank.

147 See Thomas, 315 F3d at 196 (stating that legislative history establishes that bank fraud statute should only apply when a bank is the intended victim); Blackmon, 839 F2d at 905–06 (2d Cir 1998) (arguing that legislative history requires bank to be victimized); Rodrigues, 140 F3d at 167–69 (reversing conviction because defendant did not “engag[e] in a deceptive course of conduct as to the bank”).

148 See S Rep No 98-225 at 379 (cited in note 5) (stating that the statute’s purpose is to “assure the integrity of the Federal banking system”).

149 18 USC §§ 1341, 1343.

150 Emery, 71 F3d at 1346 (“The language of the mail-fraud statute is very broad.”).

151 See Sturges, 17 US at 191–208 (holding that until Congress chooses to amend federal law to establish uniform bankruptcy laws, state law controls).