

The Bank Fraud Act: A Risk of Loss Requirement?

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On October 12, 1984, Congress enacted 18 USC § 1344,¹ the Bank Fraud Act, as part of the Comprehensive Crime Control Act of 1984, in order to protect what the government found was a “strong federal interest in . . . the financial integrity of [federal banking] institutions.”² The statute was enacted to address what Congress saw as increasingly complex frauds aimed at the nation’s financial institutions.³ The Bank Fraud Act criminalized schemes to defraud or obtain moneys under false or fraudulent pretenses from federally insured financial institutions.⁴ The Act “took a broad[] view of criminal conduct and focused on the overall deceptive activity aimed at [] financial institution[s],”⁵ giving prosecutors a powerful weapon to combat the problem of bank fraud.⁶

Aggressive prosecutorial use of the Bank Fraud Act has produced a substantial body of case law as courts have struggled to define the elements required for a conviction under § 1344.⁷ In particular, courts have disagreed about the criminal intent required to sustain a conviction under § 1344. Specifically, the circuits are divided on whether the Bank Fraud Act requires the government to prove the defendant possessed the criminal intent to victimize the institution by exposing it to a risk of civil liability or financial loss. This Comment

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¹ Comprehensive Crime Control Act of 1984 Part G—Bank Fraud, Pub L No 98-473, 98 Stat 2147 (1984), codified at 18 USC § 1344 (2000).

² Comprehensive Crime Control Act of 1983, S Rep No 98-225, 98th Cong, 2d Sess 377 (1983), reprinted in 1984 USCCAN 3182, 3517. See also Steven M. Biskupic, *Fine Tuning the Bank Fraud Statute: A Prosecutor’s Perspective*, 82 Marq L Rev 381, 382 (1999) (noting that § 1344 was enacted in response to the vulnerability of insured financial institutions to certain criminal “schemes”).

³ Biskupic, 82 Marq L Rev at 382 (cited in note 2).

⁴ 18 USC § 1344.

⁵ Biskupic, 82 Marq L Rev at 383 (cited in note 2).

⁶ See *id* at 381 (“[T]he Statute’s broadness and flexibility have made it the lead charge for prosecutors indicting hundreds of white-collar crimes that affect financial institutions each year.”). See also Amitabh Agarwal, Adam Gusman, and James Pyle, *Financial Institutions Fraud*, 40 Am Crim L Rev 637, 654 (2003) (“Because of the financial institution failures of the 1980s, the federal government has established a comprehensive network of mechanisms to check insider fraud.”).

⁷ See Barry Tarlow, *RICO Report*, 25-MAY Champion 50, 60 (May 2001) (discussing whether intent to harm is a required element for an offense under § 1344(1) or § 1344(2) offense).

argues that this “risk of loss” requirement should not be considered a necessary precondition for a conviction of bank fraud.

Part I of this Comment provides the statutory and case law background of the current circuit split. Part II analyzes the competing approaches to the risk of loss requirement in an attempt to determine which method is preferable. This analysis reveals that a new approach is required. Part II suggests such an approach. By comparing the parallel language of the mail and wire fraud statutes to the bank fraud statute, Part II argues that courts should not require a risk of loss requirement in interpreting § 1344. Part II also examines whether this understanding of the bank fraud statute comports with congressional intent and purpose. Finally, this Part addresses objections to an expansive reading of the Bank Fraud Act. These criticisms include the fear that an expansive approach to bank fraud will federalize crimes best handled by state and local authorities. This Comment argues that such criticisms may be overstated and, despite potential drawbacks, the absence of a risk of loss requirement adequately balances concerns of federalism by giving prosecutors the flexibility necessary to protect the nation’s financial institutions.

I. THE STATUTORY AND CASE LAW BACKGROUND

A. The Comprehensive Crime Control Act of 1984

The Bank Fraud Act was passed in its current form as part of the Comprehensive Crime Control Act of 1984.⁸ Congress passed the bank fraud statute partly in response to the Supreme Court’s 1982 decision in *Williams v United States*.⁹ In *Williams*, the Supreme Court held that persons who engage in fraudulent schemes, such as check-kiting,¹⁰ could not be prosecuted under 18 USC § 1014, the federal

⁸ Comprehensive Crime Control Act of 1984 Part G—Bank Fraud, 98 Stat 2147.

⁹ 458 US 279 (1982) (holding that depositing checks not supported by sufficient funds does not constitute a “false statement or report” under 18 USC § 1014). See also *United States v Doherty*, 969 F2d 425, 429 (7th Cir 1992) (“The legislative materials surrounding the passage of section (1) . . . clearly evince Congress’ [sic] desire to enact a federal check kiting statute in the wake of *Williams*.”); S Rep No 98-225 at 377–78 (cited in note 2) (explaining that the “various gaps in existing statutes” caused by *Williams*, inter alia, “create a plain need for enactment of the general bank fraud statute set forth in this part”).

¹⁰ Check-kiting is the drawing of checks on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Due to the delay created by the collection of funds by one bank from the other, an artificial balance is created. A simple version of this pattern might involve depositing a worthless check drawn on a Chicago account in a Los Angeles bank. The Los Angeles account in turn is used to draw a check that is then deposited in the Chicago bank. The kiter may deposit several items in this way within a short period of time to give the appearance of substantial balances, when in fact both accounts may be empty or contain very small amounts. When one of the banks

provision that criminalized false statements to financial institutions. The Court reasoned that a person's presentation of a check to a bank did not constitute a false representation that sufficient funds existed in the account to cover the check.¹¹ As a result of *Williams*, the Justice Department had to drop a substantial number of white-collar prosecutions that were based on check-kiting charges.¹²

As *Williams* weakened federal law, federal authorities began witnessing increasingly complex frauds aimed at the nation's financial institutions, which the authorities were ill-equipped to handle.¹³ Federal statutes did address specific crimes against banks and other financial institutions.¹⁴ Most of the time, however, these statutes fell short. Many federal statutes did not proscribe overall deceptive activity aimed at financial institutions,¹⁵ and instead allowed the government to pursue prosecutions only in situations where they were able to prove an element of another federal crime.¹⁶

permits a withdrawal of cash, the kite has succeeded. See Biskupic, 82 Marq L Rev at 382 n 4 (cited in note 2).

¹¹ See *Williams*, 458 US at 284 (“[T]echnically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as ‘true’ or ‘false.’”).

¹² S Rep No 98-225 at 378 (cited in note 2) (“As a result of [*Williams*], the Committee has been advised by the Justice Department that it has been necessary to cease prosecution of numerous pending check-kiting cases.”).

¹³ Biskupic, 82 Marq L Rev at 382 (cited in note 2). See also S Rep No 98-225 at 379 (cited in note 2) (“[T]he scope of the present Federal statutes is not sufficient to assure effective prosecution of the range of fraudulent crimes commonly committed today against federally controlled or insured financial institutions.”). Federal jurisdiction over crimes committed against federally controlled and insured financial institutions was recognized by Congress only in its passage of laws against embezzlement, robbery, larceny, and burglary. See *id.* at 377.

¹⁴ Biskupic, 82 Marq L Rev at 382–83 (cited in note 2) (noting that federal law did address crimes such as “false certification of a check, false bank entries, and false statements on a loan application.”).

¹⁵ *Id.* at 382 (“Prior to the enactment of 18 U.S.C. 1344, statutes prohibiting crimes against financial institutions focused on particular and distinct acts—usually an affirmative false statement.”).

¹⁶ For example, crimes such as false certification of a check, false bank entries, and false statements on a loan application were not prosecutable unless the defendant made an affirmatively false statement or actual theft of property took place. See Financial Bribery and Fraud Amendments Act of 1984, HR Rep No 98-901, 98th Cong, 2d Sess 2 (1984) (“Federal banks and financial institutions are protected against theft and false statements; this protection, however is incomplete. It does not extend to fraudulent schemes where banks are victims unless the specific elements of false statement or theft crimes are met.”). Congress was worried that the general bank theft statute did not apply to cases of false pretenses in which there was not a taking and carrying away of property. See S Rep No 98-225 at 378 (cited in note 2) (noting a recent case where the general bank theft statute “[did] not apply to a case of false pretenses in which there is not a taking and carrying away’ of the property.”). See also *Bell v United States*, 462 US 356, 361 (1983) (holding that the general bank theft statute, 18 USC § 2113 (2000), is not limited to common law larceny and does reach certain offenses involving the obtaining of property from banks by false pretenses, but “does not apply to a case of false pretenses in which there is not a taking and carrying away” of the property). It is worth noting that state prosecution was available for many of the crimes directed against financial institutions, including check-kiting. How-

The existing gaps in federal law, as well as the lack of a unitary provision aimed at the problem of bank fraud, forced Congress to develop a better approach to combat crimes against federally insured financial institutions.¹⁷ The Bank Fraud Act was drafted with those needs in mind.¹⁸

At stake was what Congress termed the “financial integrity” of the nation’s federally insured banking institutions.¹⁹ White collar schemes such as check-kiting were costing the United States hundreds of millions of dollars a year.²⁰ Additionally, the threat of bank fraud was no longer a state or local matter: “Financial transactions [were] becoming increasingly integrated and complex as . . . financial instruments [were] securitized and traded on the national and global markets.”²¹

But even beyond these monetary losses, Congress was also concerned about general instances of fraud where a bank was victimized,²² regardless of the resulting loss to the institution.²³ The financial integrity and vitality of the banking system depended upon the ability of the federal government to prosecute any type of fraud directed at federally backed financial institutions.

ever, Congress had a strong federal interest in protecting financial institutions which were organized or operating under federal law and whose deposits were federally insured. See S Rep No 98-225 at 377 (cited in note 2). See also *Federal Response to Criminal Misconduct By Bank Officers, Directors, and Insiders*, Hearings before the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, 98th Cong, 1st Sess 168 (1983) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Division) (describing the “limited” application of current federal statutes).

¹⁷ See S Rep No 98-225 at 378 (cited in note 2).

¹⁸ See text accompanying note 5.

¹⁹ S Rep No 98-225 at III (cited in note 2).

²⁰ In fiscal year 1982 alone, “loss[es] to financial institutions on account of fraud and embezzlement exceeded \$440 million, almost ten times the \$46.8 million lost through bank robberies.” 98th Cong, 1st Sess 168 (1983) (statement of John C. Keeney) (cited in note 16). As the Department of Justice official noted, federal criminal cases arising out of recent bank failures in New York and California had an “enormous impact on the nation’s banking system.” *Id.* More troubling were the more frequent but “less-publicized violations involving [] smaller monetary losses. . . . [In fiscal year 1982 alone,] federal prosecutor[s] secured [over 2,000] convictions for banking violations” — 320 involving “cases where the monetary amount [] exceeded \$100,000.” *Id.*

²¹ *United States v Brandon*, 17 F3d 409, 427 (1st Cir 1994) (affirming defendants’ convictions for bank fraud and conspiracy to commit bank fraud for various fraudulent misrepresentations made to obtain loan financing).

²² 98th Cong, 1st Sess 174 (1983) (statement of John C. Keeney) (cited in note 16) (“Enactment of [the bank fraud statute] would greatly assist our efforts to prosecute offenders who victimize the banking system.”).

²³ HR Rep 98-901 at 2 (cited in note 16) (citing insider trading as an example of an act that should be prosecutable even if there is no resulting loss to the institution).

The Bank Fraud Act was modeled after the mail and wire fraud statutes, which courts had broadly construed to tackle a wide variety of criminal enterprises.²⁴ The Bank Fraud Act currently provides that:

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.²⁵

Facially, the statute provides two alternate means of tackling bank fraud. The two prongs of § 1344 operate independently; prosecutors may bring a charge of bank fraud under either section.²⁶ Each section serves a different purpose—section (1) “focuses on the conduct as it affects the financial institution,” while section (2) “emphasizes the conduct of the defendant.”²⁷

B. The Circuit Split

Despite its narrow beginnings as a reaction to the Court’s decision in *Williams*, the Bank Fraud Act now reaches a wide variety of fraudulent schemes beyond those initially considered.²⁸ The expansive use of the statute has produced a troubling four-sided circuit split. The question courts have grappled with is whether under both § 1344(1)

²⁴ S Rep No 98-225 at 378 (cited in note 2).

²⁵ 18 USC § 1344.

²⁶ Most jurisdictions treat sections (1) and (2) independently. See, for example, *United States v Dennis*, 237 F3d 1295, 1303 (11th Cir 2001) (“A conviction can be sustained under either [§ 1344(1) or § 1344(2)] when the indictment . . . charge[s] both clauses.”); *United States v Ponec*, 163 F3d 486, 488 (8th Cir 1998) (finding that the plain meaning of § 1344 indicates that Congress set out two separate ways in which bank fraud could be committed under the statute). But see *United States v Thomas*, 315 F3d 190, 196–98 (3d Cir 2002) (concluding that section (2) does not set forth an independent basis of liability but rather “underscores the breadth” of section (1)). In order to sustain a conviction under § 1344, the government must show that the defendant: (1) acted knowingly; (2) to execute or attempt to execute; (3) a scheme or artifice to either (a) defraud, or (b) obtain moneys of a financial institution by false or fraudulent pretenses a financial institutions 18 USC § 1344. Most courts have not held that the risk of loss requirement goes to the *elements* of the crime but rather have held that a showing of a risk of loss is necessary to prove the specific intent of the crime. See Part I.B. But see *United States v Jacobs*, 117 F3d 82, 91 (2d Cir 1997) (finding that an actual or potential risk of loss is one of the required *elements* for conviction of bank fraud).

²⁷ *United States v Sapp*, 53 F3d 1100, 1103 (10th Cir 1995).

²⁸ Biskupic, 82 Marq L Rev at 382–83 (cited in note 2). See also Agarwal, Gusman, and Pyle, 40 Am Crim L Rev at 640–41 (cited in note 6) (finding instances where the bank fraud statute has been used to target check forging, false statements and non-disclosures on loan applications, stolen checks, student loan fraud, automobile title fraud, credit card fraud, and false statements intended to induce check cashing, among others).

and §1344(2), prosecutors must show that the defendant exposed a bank to a “risk of loss” in order to establish the requisite specific intent for bank fraud. That is to say, did the defendant expose the bank to an actual or potential risk of financial loss or civil liability?²⁹ Courts have taken four positions in response to this question. First, some circuits find a risk of loss requirement necessary under section (1) of § 1344 but not section (2).³⁰ Second, some circuits come to the exact opposite conclusion; they find a risk of loss requirement under section (2) but not section (1).³¹ Third, a number of circuits have found that neither section (1) nor section (2) requires the government to show the bank was exposed to an actual or potential risk of financial loss or civil liability.³² Finally, one circuit requires that the government establish a risk of loss showing under both section (1) and section (2).³³

To simplify the discussion, this Comment has grouped this multifaceted debate into two different approaches. The risk of loss approach (“loss approach”) refers to those situations where circuit courts have required that the prosecution show a risk of loss for conviction under either section (1) or (2) of § 1344.³⁴ The totality of the circumstances approach (“totality approach”) refers to those situations where circuit courts have held that a risk of loss requirement is not required to sustain a conviction under either subsection of § 1344. This approach suggests that courts should look to the totality of the defendant’s actions to determine if he or she acted with the requisite intent to commit bank fraud. This Comment will argue that the totality approach is the proper way in which courts should interpret the Bank Fraud Act.

²⁹ This is the definition of “risk of loss” accepted by most jurisdictions. See, for example, *United States v Briggs*, 965 F2d 10, 12–13 (5th Cir 1992) (defining risk of loss as a bank’s exposure to civil liability). Some courts have gone so far as to argue a risk of loss may refer to economic loss faced by a lack of funds that would hamper a bank’s normal lending operations, though this is not a definition accepted by most jurisdictions. See, for example, *United States v Everett*, 270 F3d 986, 990–91 (6th Cir 2001) (stating that risk of loss is not required, but, if it were, it would “almost inevitably” be present anytime the bank had even incidental involvement in the fraud scheme, even if the bank was not the victim).

³⁰ See Part I.B.1.a.

³¹ See Part I.B.1.b.

³² See Part I.B.2.

³³ See *United States v McCauley*, 253 F3d 815, 819–20 (5th Cir 2001) (employing separate and different analyses for § 1344(1) and § 1344(2) and requiring the government to show the bank was faced with a risk of loss under both sections).

³⁴ Due to concerns of brevity, the Fifth Circuit’s position in *McCauley* is not discussed separately. However, the question of whether a risk of loss is required under section (1) and section (2) is adequately addressed. See Parts I.B.1.a–b.

1. The loss approach.

a) *A risk of loss is required under § 1344(1)*. Six circuits have held that a conviction under § 1344(1) requires a risk of loss showing. For example, in *United States v Stavroulakis*,³⁵ the Second Circuit took an in-depth look at the Bank Fraud Act and whether a risk of loss requirement was necessary for section (1). Stavroulakis was convicted of, among other things, selling stolen checks to an undercover federal agent.³⁶ The Second Circuit affirmed his conviction, holding that, for a conviction under the “scheme to defraud” language of section (1), the prosecution needed to prove that the defendant acted in a deceitful manner toward the financial institution, “with the intent to victimize the institution by exposing it to an actual or potential loss.”³⁷ Other circuits have followed suit.³⁸ In *United States v Lemons*,³⁹ the Fifth Circuit upheld a conviction under § 1344(1) against a defendant who was convicted of depositing checks with forged endorsements. The court held that had the endorsement been challenged, the bank that accepted the check would be at risk of financial loss.⁴⁰ In addition, a bank could incur civil liability for distributing customer funds to an unauthorized party.⁴¹ In either situation, the bank could be exposed to a risk of loss, a necessary precondition for a bank fraud conviction.⁴²

b) *A risk of loss is required under § 1344(2)*. The risk of loss requirement has been adopted for convictions under § 1344(2) as well. In *United States v Davis*,⁴³ the defendant, Davis, obtained a refund check from the Internal Revenue Service (IRS) by allegedly submitting a false federal income tax return in the name of another individual.⁴⁴ Davis opened a bank account in order to deposit the fraudulently obtained funds, and was subsequently convicted of bank fraud

³⁵ 952 F2d 686 (2d Cir 1992).

³⁶ *Id* at 693.

³⁷ *Id* at 694.

³⁸ See, for example, *United States v Wilkinson*, 137 F3d 214, 232 (4th Cir 1998) (Hamilton concurring) (explaining that to convict under § 1344(1), the government must prove that the financial institution was placed at risk of an actual or potential loss). See also *Thomas*, 315 F3d at 201 (holding that “mere deceptive conduct” is not enough); *Sapp*, 53 F3d at 1102 (finding a risk of loss showing is required for a conviction under section (1) but not section (2)); *Brandon*, 17 F3d at 426 (requiring a risk of loss finding under § 1344(1)).

³⁹ 941 F2d 309 (5th Cir 1991).

⁴⁰ *Id* at 316.

⁴¹ *Id*.

⁴² *Id* at 316 n 3 (approving of the jury instructions used by the district court, which stated that “the Government must prove beyond a reasonable doubt, that the defendant’s scheme and artifice, if any, placed one or both of the banks at a risk of loss and that neither of the two banks knowingly accepted such a risk”).

⁴³ 989 F2d 244 (7th Cir 1993).

⁴⁴ *Id* at 246.

under § 1344(2).⁴⁵ The Seventh Circuit reversed the conviction.⁴⁶ Although Davis may have made false representations to the bank in order to withdraw the funds from the account, “[t]here was no way in which the fraud could have endangered the [financial institution].”⁴⁷ After a thorough examination of the Uniform Commercial Code and an Illinois state revenue statute,⁴⁸ The court concluded that the bank was not exposed to a risk of civil liability or loss.⁴⁹ The purpose of the Bank Fraud Act, the court reasoned, was “not to protect people who write checks to con artists but to protect the federal government’s interest as an insurer of financial institutions.”⁵⁰ In this case, the real target of the fraud was the IRS, not the bank,⁵¹ and thus the defendant could not possess the criminal intent required to bring about a conviction under § 1344(2).

Several other circuit courts have also considered the risk of loss question under § 1344(2) and have come to the same conclusion.⁵² In *United States v Briggs*,⁵³ the Fifth Circuit adopted a risk of loss requirement to sustain a conviction under § 1344(2)⁵⁴ where the defendant perpetrated a scheme to illegally transfer more than \$5 million.⁵⁵ The court affirmed her conviction. By succumbing to her fraudulent scheme, the bank faced a heightened threat of civil liability, a necessary harm for a conviction under § 1344(2).⁵⁶

2. The totality approach.

The totality approach takes the opposite view of both § 1344(1) and § 1344(2). The Sixth, Ninth, and Eleventh Circuits have all held

⁴⁵ *Id.*

⁴⁶ *Id.* at 247.

⁴⁷ *Id.*

⁴⁸ *Id.* The court cites UCC §§ 3-305(b), 3-306 (ALI 2002), and Ill Rev Stat ch 26, ¶¶ 3-305(b), 306, as well as *Northwestern National Insurance Co v Maggio*, 976 F2d 320 (7th Cir 1992), to illustrate the point that the bank would not have been held civilly liable since it was a holder in due course of the IRS’s check and thus “took free of any defenses that the IRS might have had to a suit by the payee (Williams).” *Davis*, 989 F2d at 247.

⁴⁹ *Davis*, 989 F2d at 247.

⁵⁰ *Id.* at 246–47.

⁵¹ *Id.* at 247 (“He may well have committed fraud against the [IRS] But only in the most literal, hypertechnical sense could he be said to have schemed to defraud the bank of money or other property belonging to it.”).

⁵² See *United States v Ponec*, 163 F3d 486, 488 (8th Cir 1998) (“Paragraph (2) of the statute refers to a scheme to obtain monies or other property of a financial institution. . . . [S]ome loss to the institution, or at least an attempt to cause a loss, appears to be required.”).

⁵³ 965 F2d 10 (5th Cir 1992).

⁵⁴ *Id.* at 12–13.

⁵⁵ *Id.* at 11.

⁵⁶ *Id.* at 12–13 (“Although the record does not disclose whether the banks were ever threatened with a civil action . . . [the defendant’s] conduct clearly put those institutions at risk.”).

that a risk of loss requirement is not necessary for conviction under either section (1) or section (2). The Sixth Circuit used the totality approach to analyze § 1344(1) in *United States v Hoglund*.⁵⁷ The defendant was an attorney convicted of settling his clients' cases without their permission and forging their signatures on settlement checks for his deposit.⁵⁸ The court held that a risk of loss requirement was not necessary to sustain a conviction under § 1344(1) but was merely one way of establishing intent to defraud.⁵⁹ The Ninth and Eleventh Circuits have also endorsed this view.⁶⁰

What is therefore required to establish specific intent under § 1344(1)? The Ninth Circuit found that intent to defraud can be established by looking at the structure of the financial transaction.⁶¹ Other jurisdictions that also have refused to find a risk of loss requirement under § 1344(1) have held that the specific intent to defraud a bank can be established by circumstantial evidence such as the defendant's actions or the scheme itself.⁶²

Courts have also used the totality approach in analyzing § 1344(2). In *United States v McNeil*,⁶³ the defendant was convicted of bank fraud for engaging in identity theft in order to file fraudulent tax returns and then depositing the fraudulent returns at a national bank.⁶⁴ In affirming the conviction, the Ninth Circuit conducted a thorough examination of the text and legislative history of § 1344 and sharply disagreed with the Seventh Circuit's analysis of § (2).⁶⁵ Examination of state commercial law in order to determine liability was unworkable, the Ninth Circuit reasoned, since it was too difficult for courts to make "liability . . . turn on the correct application of state commercial law and possible subsequent state-court adjudication."⁶⁶ Instead of looking for a potential risk of loss, the court held that the specific intent needed to establish a bank fraud conviction could be shown by examining the scheme itself. McNeil misrepresented himself to the bank by

⁵⁷ 178 F3d 410 (6th Cir 1999).

⁵⁸ *Id* at 412.

⁵⁹ *Id* at 413.

⁶⁰ See *United States v De La Mata*, 266 F3d 1275, 1298 (11th Cir 2001) ("[W]e believe that 'risk of loss' is merely one way of establishing intent to defraud in bank fraud cases."); *United States v Wolfswinkel*, 44 F3d 782, 786 (9th Cir 1995) (finding the bank was exposed to a risk of loss but such a requirement has never been necessary to sustain a conviction under § 1344(1)).

⁶¹ *United States v Molinaro*, 11 F3d 853, 857 (9th Cir 1993).

⁶² See, for example, *United States v Lamarre*, 248 F3d 642, 649 (7th Cir 2001).

⁶³ 320 F3d 1034 (9th Cir 2003).

⁶⁴ *Id* at 1036 (upholding a § 1344(2) conviction for opening a bank account in the name of another person, submitting a false tax form for that person, and receiving a direct deposit refund from the IRS into the fraudulent bank account).

⁶⁵ *Id* at 1037.

⁶⁶ *Id* at 1038.

opening and depositing moneys under a false name.⁶⁷ His actions were enough to establish the criminal intent element of fraud, even though the bank turned out to be an incidental player in McNeil's overall scheme to defraud the IRS.⁶⁸ The specific intent required under § 1344(2) could be established by looking at the totality of the circumstances.⁶⁹ The overall scheme to defraud satisfied the specific intent requirement under § 1344(2).⁷⁰

II. INTERPRETATIVE GUIDANCE: HOW STRUCTURAL SIMILARITIES WITH THE MAIL AND WIRE FRAUD ACTS HELP TO INTERPRET § 1344

In trying to determine if a risk of loss requirement exists under § 1344, courts have traditionally looked to the statute's text to establish its plain meaning. The absence of explicit language requiring a risk of loss seems to suggest such a requirement is unnecessary. Textual arguments for and against a risk of loss requirement have left courts divided and the issue unresolved. This Comment suggests a different approach to determine the proper interpretation of the Bank Fraud Act.

Congress modeled the Bank Fraud Act after the wire and mail fraud acts.⁷¹ Though many courts have acknowledged the obvious similarities between the statutes,⁷² they have consistently ignored the wire and mail fraud statutes in their analyses of the Bank Fraud Act, in particular the risk of loss requirement. This Part argues that the simi-

⁶⁷ Id at 1039–40.

⁶⁸ Id at 1040.

⁶⁹ Id. See also *United States v Mason*, 902 F2d 1434, 1443 (9th Cir 1990) (“Intent to defraud may be established by circumstantial evidence.”).

⁷⁰ Again, other courts have followed suit. See *Sapp*, 53 F3d at 1102 (finding that a risk of loss requirement was unnecessary for § 1344(2) since “clause (1) focuses on the [defendant’s] conduct as it affects the financial institution, while clause (2) emphasizes the conduct of the defendant.”) See also *United States v Everett*, 270 F3d 986, 991 (6th Cir 2001) (holding that a risk of loss or civil liability is not necessary for a conviction under § 1344(2)). In *Everett*, the defendant issued checks payable in her name and then deposited the funds in her personal bank account. Id at 988. While finding that a risk of loss requirement was not necessary, the court also noted that even if such a showing was needed under § 1344(2), it could easily be satisfied since “causing a bank to transfer funds pursuant to a fraudulent scheme reduces the funds the bank has available for its loans . . . inevitably [causing] it some loss.” Id at 990–91. Thus, the Sixth Circuit suggests that even if a risk of loss is required, any type of bank fraud will, at the very least, affect the victim bank’s level of deposits and thus trigger a “loss.” Compare *Davis*, 989 F2d at 246–47 (finding no liability in a similar situation where the defendant tricked a third party into endorsing the IRS refund check).

⁷¹ See S Rep No 98-225 at 378 (cited in note 2).

⁷² See *United States v Mason*, 902 F2d 1434, 1441 (9th Cir 1990) (“[T]he bank fraud statute directly tracks or is parallel to the mail and wire fraud statutes.”). See also *United States v Blackmon*, 839 F2d 900, 906 (2d Cir 1988) (noting that “the House Judiciary Committee, in considering the proposed bank fraud statute, was particularly concerned about the case law development of federal jurisdiction under the mail fraud . . . and wire fraud . . . statutes”).

larities between the statutes shed new light on how courts should interpret both § 1344(1) and § 1344(2).

First, this Part notes the problems created by the current textual analysis of § 1344. The statute's lack of clarity has left courts divided on how best to analyze the text, as neither the totality approach nor the loss approach offers any clear answers. Second, this Part seeks to demonstrate why the mail and wire fraud acts should guide the interpretation of the Bank Fraud Act. Because Congress felt that the Bank Fraud Act should be interpreted in the same manner as the mail and wire fraud acts, the historical underpinnings of the statutes and their modern-day interpretations are important in understanding the Bank Fraud Act's intended meaning. Third, this Part will use the interpretative guidance provided by the mail and wire fraud acts to analyze whether the Bank Fraud Act has a risk of loss requirement. Ultimately, the similarities between the statutes provide a broad base of support for the totality approach: the Bank Fraud Act does not require the government to prove the victim bank was exposed to a risk of loss or civil liability. Finally, this Part will interpret the totality approach in light of the legislative intent and purposes behind the statute, addressing, in the end, whether the suggested method is a compelling alternative to the loss approach.

A. Textual Approaches to § 1344

To determine if § 1344 has a risk of loss requirement, the first step is to look at the text of the Bank Fraud Act. On its face, § 1344(1) does not include a risk of loss requirement. Instead, it employs the term "scheme . . . to defraud,"⁷³ a phrase that courts have found vague and imprecise.⁷⁴ The ambiguity of the "scheme to defraud" language has made the risk of loss inquiry difficult for courts. How do courts show that the defendant had the specific intent "to defraud?" Do courts need to show the bank was exposed to a risk of loss by a defendant's actions or can a prosecutor just show that the defendant engaged in deceptive activity toward the bank? Unfortunately, the text does not offer a clear answer to these questions.

The totality approach focuses on the defendant's deceptive conduct toward the bank. Under this approach, courts look to whether the defendant acted willfully against the bank with the specific intent

⁷³ 18 USC § 1344.

⁷⁴ *United States v Goldblatt*, 813 F2d 619, 624 (3d Cir 1987) (noting the imprecise nature of the term "scheme to defraud," and relying more on "whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community").

to deceive or cheat the institution, usually to financially benefit himself or cause financial loss to another. This approach seems to be a sensible way to read the "scheme to defraud" language of § 1344(1) and has been adopted by the Seventh Circuit.⁷⁵ According to the Seventh Circuit's reading of § 1344(1), the defendant need not expose the bank to a risk of loss or civil liability, but must act with the specific intent to cheat the bank for his or her own personal gain.⁷⁶ Often the "gain" the defendant receives is the use of the bank's services to further his or her scheme. Crimes such as money laundering fit nicely under this interpretation; the bank would not necessarily be exposed to a risk of loss but the defendant would still have acted with the specific intent necessary to commit fraud upon the financial institution. Although prosecutors could show the bank faced a risk of loss to establish this level of intent,⁷⁷ it could also be established by circumstantial evidence and inferences drawn from the scheme itself, which is what the totality approach advocates.⁷⁸

The totality approach to § 1344(1) has not been universally accepted. Some courts have argued that in light of the fact that section (1) "focuses on the conduct as it affects the financial institution" while section (2) "emphasizes the conduct of the defendant,"⁷⁹ a bank is only "defrauded" under section (1) if it faces a risk of loss or civil liability. The Second Circuit in *Stavroulakis* argued that § 1344(1)'s "scheme to defraud" clause "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."⁸⁰

This reading of section (1) does not seem to fit with the plain meaning of the statute, especially when one looks to the entire statute. Section (2) of the Bank Fraud Act proscribes schemes "to obtain any of the moneys" owned or under control of the bank. Thus, it seems more likely that under section (1), only a specific intent to defraud is needed, not an actual loss or even a potential risk of loss. Instead, as the *Hoglund* court noted, a risk of loss may be used to help establish the specific intent to defraud, but it is not a *sine qua non*.⁸¹ Despite these persuasive arguments, advocates of the loss approach are not convinced: unless the bank is exposed to a risk of loss, it has not been

⁷⁵ *United States v Moede*, 48 F3d 238, 241 (7th Cir 1995).

⁷⁶ See *United States v Lamarre*, 248 F3d 642, 649 (7th Cir 2001).

⁷⁷ See *Hoglund*, 178 F3d at 413.

⁷⁸ *Lamarre*, 248 F3d at 649.

⁷⁹ *United States v Sapp*, 53 F3d 1100, 1103 (10th Cir 1995).

⁸⁰ 952 F2d at 694.

⁸¹ 178 F3d at 413.

defrauded. Proponents of this approach continue to press prosecutors to show a risk of loss in order to sustain a conviction under § 1344(1).

What about § 1344(2)? Does the text of the Bank Fraud Act offer a clear answer to whether a risk of loss showing is required under section (2)? Like section (1) of § 1344, section (2) does not mention a risk of loss requirement. Instead, the statute criminalizes any attempt or “scheme . . . to obtain any of the moneys . . . owned by, or under the custody or control of a financial institution.”⁸² The absence of any explicit language requiring a risk of loss again seems to suggest that such a requirement is unnecessary.

Advocates of the loss approach disagree and read the “obtain any of the moneys” language in § 1344(2) as a requirement that the bank be faced with a real risk of having its funds stolen. Otherwise, they argue, use of the federal statute would federalize crimes that are typically prosecuted at the local level, such as the writing of bad checks. Such a result, though unintended, may not be troublesome. Though no court has read the bank fraud statute as a federal law against bad checks,⁸³ it is distinctly possible Congress wanted to give prosecutors a jurisdictional hook to reach crimes that were becoming increasingly federal in nature. In either case, advocates of the loss approach argue that courts should still develop a limiting principle so as not to allow federal prosecution of crimes where banks are not truly victimized, a result, they argue, that would extend beyond congressional intent.⁸⁴

In response, proponents of the totality approach argue that a risk of loss requirement is especially unwarranted because the statute criminalizes “attempts” at bank fraud. A risk of loss requirement could create a paradox where attempted bank frauds are prosecuted, but actual bank frauds that do not endanger the bank are not. It seems

⁸² 18 USC § 1344(2).

⁸³ See *United States v Orr*, 932 F2d 330, 332 (4th Cir 1991) (finding that Congress did not intend the bank fraud statute to cover ordinary state law offenses, where the fraud victim was not a federally insured bank).

⁸⁴ Indeed, in *McNeil* the defendant was convicted not of exposing the bank to any form of risk of loss, but instead of defrauding the IRS. By all accounts, it seems as though the bank was an incidental player in the scheme. Even if, as the Ninth Circuit held, *McNeil* violated the bank fraud statute by misrepresenting himself as the John Doe when opening the bank account, it does not follow that this would be a legitimate reason for prosecuting him for bank fraud when other state remedies might exist such as identity theft law. *McNeil*, 320 F3d at 1037 (“[B]ank fraud charges may lie even if the bank is not the immediate or sole victim of the defendant’s conduct.”). See also *Sapp*, 53 F3d at 1102 (“[V]ictimizing a bank is . . . ‘not necessary under § 1344(2).’”), quoting *United States v Young*, 952 F2d 1252, 1256 n 4 (10th Cir 1991). But see *United States v Thomas*, 315 F3d 190, 198 (3d Cir 2002) (“Thus, to take money in the custody of a bank is not a crime under the statute unless there is a concomitant intent to victimize the bank.”). In addition, according to the Senate Report on the Comprehensive Crime Control Act of 1984, the legislation was enacted to assure “a basis for Federal prosecution of those who victimize these banks through fraudulent schemes.” See S Rep No 98-225 at 377 (cited in note 2).

unreasonable to require prosecutors to show that banks were exposed to a risk of loss, when often they can only ascertain a risk of loss after an attempt is executed. A risk of loss requirement for a scheme in its infancy could invalidate legitimate prosecutions.

Such concerns may be overstated. Attempts can still expose banks to a potential risk of loss. A risk of loss requirement may strike a better balance, criminalizing only those attempts that are serious enough to expose the bank to a risk of financial liability. These types of attempts are more dangerous since they are more likely to threaten the financial integrity of the banking system.

Both sides of this debate have offered persuasive arguments for and against a risk of loss requirement. Unfortunately, a purely textual approach does not clearly resolve the risk of loss issue. To determine whether a risk of loss should be required under § 1344, this Comment suggests looking at an alternative mode of interpretation.

B. Statutory Analogs: Section 1344 and the Mail and Wire Fraud Acts

The legislative history of the Bank Fraud Act explicitly states that the statute was modeled after the mail and wire fraud statutes.⁸⁵ Indeed, Congress intended the courts to interpret the Bank Fraud Act in the same manner as the mail and wire fraud acts,⁸⁶ and specifically “endors[ed] the current interpretations of [those statutes].”⁸⁷ Therefore, a proper next step in interpreting the Bank Fraud Act is to look to how courts have interpreted the mail and wire fraud statutes. The risk of loss debate currently lacks guidance from these acts. Though many courts have acknowledged the obvious similarities between these statutes, these courts generally do not give sufficient weight to these similarities, particularly when deciding whether the bank fraud statute requires a risk of loss.⁸⁸

⁸⁵ See S Rep No 98-225 at 378 (cited in note 2).

⁸⁶ HR Rep No 98-901 at 4 (cited in note 16) (“The section thus parallels the language of the current mail fraud and wire fraud statute (‘scheme to defraud’), and is intended to incorporate case law interpretations of those sections.”).

⁸⁷ *Id.* Although the scope of the statutes is currently greater than that intended by Congress, it did not anticipate any further expansion of both statutes. It is worth noting that the totality approach had been used by courts prior to the passage of the Bank Fraud Act and thus would not necessarily be considered an expansive reading. See *United States v Bohonus*, 628 F2d 1167 (9th Cir 1980) (holding that the specific intent to defraud can be found by examining the scheme itself); *United States v Vasilios*, 598 F2d 387, 392 (5th Cir 1979) (upholding a finding of specific intent by examining the defendant’s scheme to defraud where he made false representations); *United States v Bush*, 522 F2d 641, 648–49 (7th Cir 1975) (finding an intent to defraud by examining the course of the defendant’s conduct).

⁸⁸ *Mason*, 902 F2d at 1441 (noting that the Bank Fraud Act “directly tracks or is parallel to the mail and wire fraud statutes”). The court in *Mason* also noted that “the legislative history expresses the congressional intent that the bank fraud statute receive the same broad scope as

Like the Bank Fraud Act, both the mail and wire fraud statutes proscribe the conduct of executing or attempting to execute a scheme or artifice to take the property of another “by means of false or fraudulent pretenses, representations, or promises.”⁸⁹ The Mail Fraud Act provides:

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* . . . 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 . . . shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.⁹⁰

The statutory language of the Wire Fraud Act, itself modeled after the Mail Fraud Act, is very similar, and punishes:

any *scheme or artifice to defraud*, or for *obtaining money* or property by means of *false or fraudulent pretenses, representations, or promises*, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce.⁹¹

The Bank Fraud Act includes parallel language to that used by the other two statutes and makes it a crime to execute or attempt 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*.⁹²

Comparing the language of these statutes can shed light on the congressional intent behind the Bank Fraud Act. First, Congress’s choice of words was purposeful. This language is a strong indication that Congress envisioned that the bank fraud statute would be interpreted in the same vein as the mail and wire fraud acts; otherwise they would have used different statutory terms. Similarity of language be-

the mail and wire fraud statutes.” Id. In reading this language, courts that have adopted the loss approach may not be necessarily ignoring congressional intent, but instead understand this language to mean only that the bank fraud act be used to tackle a wide variety of fraudulent schemes.

⁸⁹ See Mail Fraud Act, 18 USC § 1341 (2000); Wire Fraud Act, 18 USC § 1343 (2000).

⁹⁰ 18 USC § 1341 (emphasis added).

⁹¹ 18 USC § 1343 (emphasis added).

⁹² 18 USC § 1344.

tween statutes is a strong indication that the statutes should be interpreted *pari passu*.⁹³ This presumption is especially strong if the words are part of the same body of law, such as the federal criminal code.⁹⁴

The statutory enactment history, encompassed in the House and Senate Reports, also provides courts with guidance from Congress on how to interpret the wire and mail fraud statutes. The House Committee noted that they “intended to incorporate case law interpretations” of the wire and mail fraud acts through the language of the Bank Fraud Act.⁹⁵ Although Congress recognized the expansive interpretations used by the courts in construing the wire and mail fraud statutes,⁹⁶ it still “modeled [the bank fraud statute] on the present wire and mail fraud statutes which [are] construed by the courts to reach a wide range of fraudulent activity.”⁹⁷

How do the courts view the mail and wire fraud statutes? The mail and wire fraud statutes are powerful prosecutorial tools. Prosecutors refer to the statutes as the Colt 45 of federal law enforcement.⁹⁸ Originally enacted to protect people from schemes to deprive them of their money or property,⁹⁹ the courts have found an increasingly wide

⁹³ See *Northcross v Memphis Board of Education*, 412 US 427, 428 (1973) (holding that two attorney-fee provisions in federal statutes should be interpreted similarly due to their similar language, especially if they share a common purpose). See also *West Virginia University Hospitals, Inc v Casey*, 499 US 83, 87–101 (1991) (interpreting a statute authorizing prevailing parties to recover attorney’s fees by examining the text of many other statutes); *Community for Creative Non-Violence v Reid*, 490 US 730, 739–40 (1989) (holding that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms”). This is not an absolute rule and readily yields to other indicia of congressional intent. See *Atlantic Cleaners & Dyers, Inc v United States*, 286 US 427, 433 (1932). Here, the totality approach, which is supported by the use of mail and wire fraud acts, is in line with congressional intent. See Part II.D.1.

⁹⁴ See *Lorillard v Pons*, 434 US 575 (1978) (holding that a familial relationship between statutes provides a strong indication that newer statutes should be interpreted consistently with older statutes upon which they were modeled). See also William N. Eskridge, et al, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1049 (American Casebook 3d ed 2001) (“Reasoning from statutes in *pari materia* (similar statutes) generally has greater force when the statutes are all in the same jurisdiction.”).

⁹⁵ HR Rep No 98-901 at 4 (cited in note 16).

⁹⁶ *Id.*

⁹⁷ S Rep No 98-225 at 378 (cited in note 2).

⁹⁸ As one former prosecutor noted:

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law “darling,” but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.

Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne L Rev 771, 771 (1980) (internal citations omitted).

⁹⁹ The mail fraud statute was initially enacted in 1872 as a measure to protect the postal service against “frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and

range of activities punishable by the statutes. The statutes cover the full range of consumer frauds, stock frauds, land frauds, insurance frauds, and commodity frauds, as well as crimes such as blackmail, counterfeiting, election fraud, bribery, money laundering and racketeering.¹⁰⁰ Over time, courts have come to view both statutes as stop-gap provisions that provide a “first line of defense” against innovative frauds, that is, until Congress enacts more specific legislation.¹⁰¹

Congress endorsed this liberal interpretation of the Bank Fraud Act.¹⁰² Although Congress may not have anticipated any further expansive interpretations of the mail and wire fraud acts, it did not seek to cabin the reach of the Bank Fraud Act in any appreciable way. It is clear that Congress crafted the language of the Bank Fraud Act in the hope that the statute would receive the same broad construction as the mail and wire fraud statutes and reach a wide range of fraudulent activity.

C. Use of the Mail and Wire Fraud Statutes Provides Support for the Totality Approach

Elemental analysis of the wire and mail fraud statutes seems to indicate that the statutes generally apply in any instance where the mails, or wires, are used in furtherance of a scheme to defraud.¹⁰³ Courts have traditionally followed the common law definition of fraud and read into the statute an additional element requiring the defendant to have the specific intent to defraud.¹⁰⁴ Showing the existence of a scheme “reasonably calculated to deceive persons of ordinary prudence and comprehension” satisfies the requirement of specific intent under either statute.¹⁰⁵ This intention can readily be shown by examin-

rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country.” *McNally v United States*, 483 US 350, 356 (1987), quoting Rep. John F. Farnsworth, in Cong Globe, 41st Cong, 3d Sess, 35 (1870).

¹⁰⁰ Nirav Shah, *Mail and Wire Fraud*, 40 Am Crim L Rev 825, 826 (2003).

¹⁰¹ *United States v Maze*, 414 US 395, 405–06 (1974) (Burger dissenting).

¹⁰² See notes 154–55 and accompanying text.

¹⁰³ Since the mail and wire fraud statutes share the same language in relevant parts, the same analysis applies to each. See 18 USC §§ 1341, 1343; *Carpenter v United States*, 484 US 19, 25 n 6 (1987). See also *United States v Welch*, 327 F3d 1081, 1104 (10th Cir 2003) (“The elements of federal mail fraud as defined in 18 U.S.C. § 1341 are (1) a scheme or artifice to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises, (2) an intent to defraud, and (3) use of the mails to execute the scheme.”).

¹⁰⁴ See *United States v Dinome*, 86 F3d 277, 284 (2d Cir 1996) (upholding jury instructions emphasizing that the statute requires proof of intent to defraud); *United States v Green*, 745 F2d 1205, 1207 (9th Cir 1984) (“The government satisfies the requirement of proof of specific intent under section 1341 if it proves the existence of a scheme which was ‘reasonably calculated to deceive persons of ordinary prudence and comprehension,’ and this intention is shown by examining the scheme itself.”).

¹⁰⁵ *Green*, 745 F2d at 1207.

ing the scheme itself.¹⁰⁶ Conversely, a defendant charged under either statute may use circumstantial evidence to show that he did not have the requisite intent.¹⁰⁷ Additionally, in a charge involving mail or wire fraud, the government need not prove the success of the scheme or loss to the defrauded person.¹⁰⁸ This is consistent with the purpose of both statutes, which seek to prevent the use of the mails or wires in any situation “where it is closely entwined with fraudulent activity.”¹⁰⁹

Consistent with courts’ applications of the wire and mail fraud statutes, a more reasonable construction of the Bank Fraud Act would look at the totality of the defendant’s actions, rather than a risk of loss, to determine if the defendant had the specific intent necessary to commit the crime of bank fraud.¹¹⁰ This totality approach, which would examine the scheme itself, would best comport with modern interpretations of the mail and wire fraud statutes.

The mail and wire fraud statutes seem to support an interpretation of § 1344(1) that does not require a risk of loss. The mail and wire fraud’s “intent to defraud” language has already been interpreted in a way that supports the minority approach. That is, the government satisfies the specific intent requirement under § 1344(1) as long as it proves the existence of a scheme that is “reasonably calculated to deceive persons of ordinary prudence and comprehension.”¹¹¹ According to interpretations of the mail and wire fraud statutes, the fraudulent nature of the “scheme or artifice to defraud” should be measured by a

¹⁰⁶ *Id.* See also *United States v Berndt*, 86 F3d 803, 809 (8th Cir 1996) (“Intent is an essential element of the crime of mail fraud, . . . but the jury may properly infer that intent from circumstantial evidence.”); *United States v Copple*, 24 F3d 535, 545 (3d Cir 1994) (“Proving specific intent in mail fraud cases is difficult, and, as a result, a liberal policy has developed to allow the government to introduce evidence that even peripherally bears on the question of intent.”); *United States v Ham*, 998 F2d 1247, 1254 (4th Cir 1993) (“Fraudulent intent may be inferred from the totality of the circumstances and need not be proven by direct evidence.”).

¹⁰⁷ See *Copple*, 24 F3d at 545 n 16 (noting that defendants can “introduce testimony of collateral transactions that tend to negate the requisite intent”). In addition, it should be noted that the *McNeil* court quoted language used by the Ninth Circuit in *Green. McNeil*, 320 F3d at 1039. The *McNeil* court implicitly used the parallel language of the mail and wire fraud statutes to assist its interpretation of the bank fraud statute. *Id.*

¹⁰⁸ *United States v Pollack*, 534 F2d 964, 971 (DC Cir 1976).

¹⁰⁹ *United States v Halbert*, 640 F2d 1000, 1009 (9th Cir 1981).

¹¹⁰ In *McNeil*, the Ninth Circuit found that risk of loss was not necessary to prove specific intent since a court could infer the specific intent needed for a fraud conviction by looking at the whole scheme itself. 320 F3d at 1039–40.

¹¹¹ See text accompanying note 105. Additionally, the requisite level of intent can be shown by examining the scheme itself. See *McNeil*, 320 F3d at 1039. See also *United States v Saks*, 964 F2d 1514, 1518 (5th Cir 1992) (holding that the requisite intent to defraud under the mail and wire fraud statutes is established if the defendant acted knowingly and with specific intent to deceive).

nontechnical standard, giving courts ample leeway in criminalizing conduct that threatens federal interests.¹¹²

In regards to section (2), the totality approach once again gains support through the parallel language of the mail and wire fraud statutes. The language the Ninth Circuit used in *McNeil* tracks very closely the language other circuits use when interpreting the wire and mail fraud statutes.¹¹³ For example, the *McNeil* court held that prosecutors need only show that the defendants had engaged in a scheme reasonably calculated to deceive or cheat a reasonable person in order to warrant a § 1344(2) conviction.¹¹⁴ The court suggested the requisite intent can be shown by examining the circumstances surrounding the scheme itself.¹¹⁵ This is similar to the language used in *United States v Flynn*,¹¹⁶ where the Eighth Circuit held that the specific intent in wire fraud “can be inferred from the facts and circumstances surrounding a defendant’s actions.”¹¹⁷

Critics may question the use of interpretative guidance of the mail and wire fraud statutes since a risk of civil liability or financial loss is specific to the crime of bank fraud. Many mail and wire fraud prosecutions do not involve banks. Thus, opponents of this approach may argue that using the parallel language of the mail and wire fraud statutes is inapposite since the courts interpreting those statutes have not and could not directly speak to the issue of a risk of loss requirement.¹¹⁸

The fact that courts have not directly spoken to the risk of loss requirement within the context of the mail and wire fraud statutes

¹¹² *United States v Louderman*, 576 F2d 1383, 1388 (9th Cir 1978) (noting that nontechnical standards guide a court’s determination of the character of a particular representation under § 1343).

¹¹³ See *Dinuome*, 86 F3d at 281, 283–85 (holding that no actual harm need be proven to show an illegal attempt to defraud under § 1341 and § 1343 and that a jury could examine the whole scheme to determine whether fraudulent intent exists); *Green*, 745 F2d at 1207–08 (holding that an intent to deceive can be shown by examining the scheme itself).

¹¹⁴ *McNeil*, 320 F3d at 1039, citing *Mason*, 902 F2d at 1443. In *McNeil*, the court affirmed a conviction for filing a false income tax return and depositing the refund in a bank. The bank did not face any type of a loss or liability, but the court held that the defendant had misrepresented himself as the John Doe on the check by opening the account and depositing the check in that name. *McNeil*, 320 F3d at 1039.

¹¹⁵ *Id.*

¹¹⁶ 196 F3d 927 (8th Cir 1999).

¹¹⁷ *Id.* at 929.

¹¹⁸ Opponents may also point to the fact that some jurisdictions hold that specific intent can only be established by proving the defendant contemplated actual harm against the victim. See *United States v Starr*, 816 F2d 94, 98 (2d Cir 1987) (“Only a showing of intended harm will satisfy the element of fraudulent intent.”). If analogized to the bank fraud act, this could lend support to the view that a risk of loss is required. However, as interpretations of the mail and wire fraud statutes have shown, circumstantial evidence can be used to show this contemplated harm. A risk of loss may be one way of showing this harm, but is not a necessary precondition.

should not stop courts from using the interpretative guidance offered by these statutes.¹¹⁹ When interpreting the bank fraud statute, courts need to ask how they should determine the specific intent required under § 1344. The mail and wire fraud statutes indicate that such intent can be inferred by looking at the circumstantial evidence surrounding the scheme. A victim's actual or potential losses through wire fraud may be relevant in determining intent,¹²⁰ but are not a necessary precondition.¹²¹ Similarly, though a risk of loss showing may help prove the specific intent of a defendant on trial for bank fraud, it should not be a requirement for conviction.

D. How Should We Interpret the Congressional Intent and Purpose Behind the Statute?

The textual similarities between the mail and wire fraud statutes and the Bank Fraud Act would seem to resolve the risk of loss debate in favor of the totality approach. However, since the text is not explicit in its recommendations, it is useful to ask whether the totality approach makes sense in light of the legislative history and the purposes behind the statute. This section addresses two separate questions. First, what was Congress's intent as it pertains to the risk of loss requirement? Second, does the totality approach comport with Congress's purpose in enacting the statute? Specifically, does the totality approach, which is a more expansive interpretation of the Bank Fraud Act, federalize state and local crimes and make the statute's reach effectively limitless?

1. Congressional intent: an examination of the legislative history surrounding the enactment of the Bank Fraud Act.

Supporters on both sides of the Bank Fraud Act debate have used the Act's legislative history to solidify their positions.¹²² An ex-

¹¹⁹ The interpretations of specific intent under the mail and wire fraud acts should be used to guide courts when they analyze the Bank Fraud Act. See *Greenwood Trust Co v Massachusetts*, 971 F2d 818, 827 (1st Cir 1992) (“[I]t is . . . a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way.”). See also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 537 (1947) (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”).

¹²⁰ *United States v DeSantis*, 134 F3d 760, 768 (6th Cir 1998) (holding that the government may introduce evidence of investor loss as proof of a defendant's specific intent to defraud).

¹²¹ *United States v Christopher*, 142 F3d 46, 52–53 (1st Cir 1998) (finding that the person deceived does not have to be same person deprived of money or property by fraud).

¹²² By legislative history, this Comment refers to the House and Senate Committee Reports accompanying the Comprehensive Crime Control Act of 1984. As a rule of thumb, this is the

amination of the House and Senate Committee Reports provides useful insight into Congress's motivations and goals when it enacted § 1344. Two issues are of critical importance to the current debate.

First, as noted throughout the legislative history, Congress enacted the Bank Fraud Act to provide an effective vehicle for the prosecution of frauds in which the victims are federally insured financial institutions.¹²³ Congress sought to design a system that would protect the financial integrity of the federal banking system and ensure federal prosecution of those who victimize banks through fraudulent schemes.¹²⁴ This included the criminalization of acts that may threaten the integrity of the federal banking system but do not place the victim banks at a risk of loss or civil liability.¹²⁵

As a background matter, courts have disagreed about which crimes actually threaten the financial integrity of banking institutions. In *Davis*, the Seventh Circuit conceded that the defendant fraudulently misrepresented himself to the bank when opening a bank account.¹²⁶ Technically, therefore, the bank was "defrauded."¹²⁷ However, because the real victim of fraud was the IRS, the crime did not fall within the scope of § 1344(2). Since the bank had taken the IRS refund as a holder in due course, the bank was not placed at risk for any liability.¹²⁸ The statute's purpose, the court noted, was not necessarily to protect individual victims of fraud but to protect the federal government and its interest as an insurer of the nation's financial institutions.¹²⁹

However, not all crimes that threaten the nation's financial institutions produce a risk of loss. The legislative history contains numer-

most accurate type of legislative history since it speaks most closely to congressional intent. Indeed, instead of reading the entire bill, Senators, Congressmen, and their staffers often just read the committee reports in order to understand the legislation for which they are voting. James Landis, *A Note on "Statutory Interpretation,"* 43 Harv L Rev 886, 888-89 (1930) ("Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent [when other members vote for a bill] becomes in reality a concurrence in the expressed views of another.") (internal citations omitted). See also Harry Willmer Jones, *Extrinsic Aids in the Federal Courts*, 25 Iowa L Rev 737, 748-49 (1940) (noting the important role of "committee specialization" in the legislative process). Further down on the hierarchy of legislative material are the statements of individual legislators. Using this type of legislative history is not recommended since it opens the door for enterprising judges to pick and choose floor testimony in order to bolster their arguments. *Id.* at 750-51.

¹²³ S Rep No 98-225 at 377 (cited in note 2) (noting the need for "[f]ederal jurisdiction over crimes committed against federally insured . . . financial institutions").

¹²⁴ *Id.*

¹²⁵ The legislative history specifically refers to insider trading in circumstances where there is no loss to the financial institution. See note 133 and accompanying text.

¹²⁶ 989 F2d at 246.

¹²⁷ *Id.*

¹²⁸ *Id.* at 245-47.

¹²⁹ *Id.* at 247.

ous references to crimes that are to be reached under the statute but that do not necessarily cause financial institutions to face a risk of loss or liability.¹³⁰ Prior to § 1344's enactment, Congress recognized various gaps in the federal law concerning crimes against banks.¹³¹ In fact, both the House and the Senate noted various fraudulent schemes they wished to combat with the enactment of the bank fraud statute.¹³² Many of these schemes were for crimes that did not expose financial institutions to a risk of loss.

For example, the House Report found that insider trading was not prosecutable in many instances unless "there [was a resulting] loss to the institution."¹³³ In addition, the Senate Judiciary Committee noted a need for a general bank fraud statute to combat crimes of common law larceny where "there is not a 'taking and carrying' away of [property]."¹³⁴ Money laundering may not actually expose a bank to a risk of loss, but may still victimize banks and be in step with congressional intent to go after crimes regardless of the resulting loss to the institution. These statements support the argument that Congress wanted to enact a statute to cover situations where an institution did not incur an actual or a potential risk of loss. The evidence suggests Congress wanted § 1344 to be broad and multifaceted, so as to tackle various types of fraud against financial institutions.

Second, the financial integrity and vitality of the banking system depends on the ability of the federal government to prosecute any type of fraud directed at federally backed financial institutions. The Ninth Circuit implicitly recognized this principle in *McNeil*. Even though the IRS may have been the main victim of the defendant's scheme, the use of a federally insured bank as a conduit of crime threatened the integrity of the national banking system.¹³⁵

¹³⁰ This is an issue that has not been examined by any of the circuit courts.

¹³¹ See HR Rep No 98-901 at 2 (cited in note 16).

¹³² Id. See also S Rep No 98-225 at 377 (cited in note 2).

¹³³ HR Rep No 98-901 at 2 (cited in note 16).

¹³⁴ S Rep No 98-225 at 378 (cited in note 2).

¹³⁵ See *McNeil*, 320 F2d at 1037 ("Even though *McNeil*'s ultimate goal was to obtain funds from the IRS, bank fraud charges may lie even if the bank is not the immediate or sole victim of the defendant's conduct."). Again, in *United States v Everett*, 270 F3d 986 (6th Cir 2001), the Sixth Circuit has taken a more nuanced approach as to which crimes threaten the integrity of financial institutions. Id. at 991. Although in agreement that a risk of loss requirement is not necessary for a § 1344(2) conviction, the court found that in the event such a rule was required, a bank conviction could be sustained under § 1344(2) in all instances where a bank was defrauded into transferring moneys under its control. Id. This is because any scheme that causes a bank to transfer funds would necessarily make those funds unavailable for use in everyday banking operations, such as securing loans. Thus, financially and economically, any fraud upon a bank would "almost inevitably [cause] it some loss." See id.

2. The totality approach and its consistency with the Act's purpose.

The totality approach faces the same criticism that courts have leveled against the mail and wire fraud statutes. Such criticism centers on concerns of federalism due to the statutes' far-reaching effects and their apparent lack of limitation.¹³⁶ Many of these concerns, though valid, overstate the problem. Congress intended that the fraud statutes be given a liberal construction in order to effectively deal with crimes that have a federal impact.

a) *Does an expansive interpretation of the bank fraud statute make the statute's reach limitless?* The original purpose of the mail fraud statute was to protect the mail from being used as a vehicle for counterfeiters, illegal schemes, and forgeries.¹³⁷ Since its enactment the scope of the statute has increased dramatically. Prosecutors have used the Mail Fraud Act to protect a company's confidential business information,¹³⁸ as well as a citizen's right to a fair and honest government.¹³⁹ The concern is that "[a] limitless reading of the mail fraud statute could result in a kind of federal criminal common law, that is, a situation where a person could be convicted of a crime against the United States despite the conduct not violating an express statutory provision."¹⁴⁰

Such is the fear with the bank fraud statute. Absent a risk of loss requirement, courts may have difficulty limiting the reach of the statute to insure prosecution of crimes that only directly impact the integrity of the country's financial institutions. For example, in *McNeil*, the Ninth Circuit upheld the defendant's bank fraud conviction even though his crime involved more of a fraud against the government than against the bank.¹⁴¹ In fact, the court noted that bank fraud charges may lie even when a bank is not the immediate or intended victim of a defendant's conduct.¹⁴² The bank in *McNeil* was only an

¹³⁶ See Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 BC L Rev 435, 437 (1995) (arguing that the statute has become the primary provision to extend federal jurisdiction to crimes traditionally prosecuted at the state and local level); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U Cin L Rev 1, 3 (1998) (noting the evolution of the Mail Fraud Act from "initially protect[ing] money or property rights to . . . protect[ing] rights in honest services and intangible property").

¹³⁷ Brian C. Behrens, Comment, *18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 SLU Pub L Rev 489, 490, 492-93 (1993).

¹³⁸ See, for example, *Carpenter v United States*, 484 US 19, 25 (1987).

¹³⁹ See 18 USC § 1346 (2000).

¹⁴⁰ *United States v Brown*, 79 F3d 1550, 1556-57 (11th Cir 1996). For another view on the far reach of the mail and wire fraud statutes, see note 98.

¹⁴¹ *McNeil*, 320 F3d at 1037 ("[T]he bank was not merely an unwitting instrumentality of a scheme to defraud the IRS, it was also a victim.").

¹⁴² *Id.*

incidental player in the scheme. In this case it is difficult to see, absent a risk of loss requirement, what limits the federal government's use of the Bank Fraud Act for a wide variety of crimes for which it was not originally intended.

Although valid, these concerns are overblown and may not be in line with the purposes behind the act. In interpreting the mail fraud statute, courts have found that the use of the mails need not be indispensable to the success of a scheme to defraud, but can merely be an incidental step to the fraud.¹⁴³ The same reasoning should hold true for the Bank Fraud Act.

In addition, due to the increasingly complex nature of crimes against financial institutions and the ever-changing face of technology, an expansive interpretation would give prosecutors flexibility to attack crimes against financial institutions. The mail and wire fraud statutes are often used as a "first line of defense," or "stop-gap" device, permitting the prosecution of newly invented frauds until Congress enacts legislation to cope with the new crime.¹⁴⁴ Congress noted the statute's potential as a stop-gap defense when it was passed; Congress was facing new types of fraudulent schemes that it was unable to handle effectively.¹⁴⁵ The Bank Fraud Act provided a valuable "jurisdictional hook" for federal prosecutors to deal with new types of crimes.¹⁴⁶ Additionally, federal prosecutors always have an option not to prosecute; thus, if they find that the new fraudulent activity does not sufficiently implicate federal interests, they may decide to expend their resources elsewhere and leave the resolution of the issue to state and local authorities.

b) Does an expansive interpretation of the bank fraud statute federalize state and local crimes? A corollary to the concern of the statute's limitless reach is the argument that the federal government should not prosecute crimes that are easily reachable under state law. The Second Circuit took this position in *United States v Blackmon*.¹⁴⁷ In *Blackmon*, the defendant faced charges under the bank fraud statute.

¹⁴³ *United States v Brocksmith*, 991 F2d 1363, 1367 (7th Cir 1993). See also *Pereira v United States*, 347 US 1 (1954) (holding that the mail fraud statute was violated when a defendant defrauded a victim and attempted to cash a check drawn from an out-of-state bank, causing the mails to be used as part of the bank's check-clearing procedures).

¹⁴⁴ *United States v Czubinski*, 106 F3d 1069, 1079 (1st Cir 1997) (concluding that mail and wire fraud statutes "can address new forms of serious crime that fail to fall within more specific legislation"). See also Shah, 40 Am Crim L Rev at 826 (cited in note 100).

¹⁴⁵ Shah, 40 Am Crim L Rev at 827 (cited in note 100).

¹⁴⁶ Compare *United States v Sawyer*, 85 F3d 713, 723 n 5 (1st Cir 1996) (referring to the mailing element of the statute as a "hook" to secure federal jurisdiction).

¹⁴⁷ 839 F2d 900, 905 (2d Cir 1988) ("Congress did not intend the bank fraud statute to cover ordinary state law offenses.").

ute for his involvement in a “pigeon drop scheme.”¹⁴⁸ Though the defendants asked the victims to withdraw money from their accounts, and in effect removed property under the control of the bank, the bank was not victimized by the scheme.¹⁴⁹ The federal interest in the integrity of the banking system was not at risk.¹⁵⁰ Instead, the court noted that expansive use of the bank fraud statute may implicate federalism concerns because state law already criminalized the scheme.¹⁵¹ The court offered the example of the Travel Act,¹⁵² and stated that the expansive application of that statute “to activity ‘traditionally subject to state regulation . . . would alter sensitive federal-state relationships’ and ‘could overextend limited federal police resources.’”¹⁵³ The fear is that federal prosecutors will use the bank fraud statute in the same expansive way as they have the mail and wire fraud statutes, as a cheap tool to gain federal jurisdiction over crimes that are more properly handled at the state level.

Again, though valid, these concerns are exaggerated. Congress specifically endorsed the expansive use of the wire and mail fraud statutes and crafted the bank fraud statute in hopes that it would receive the same expansive interpretation.¹⁵⁴ At the time of the bank fraud statute’s enactment, the mail and wire fraud acts already had a very expansive reach. Had Congress been concerned about federalism or prosecutorial overreach, it could have limited the statute’s reach during its enactment. Congress must have known that the use of parallel language would mean the statutes would have the same broad reach.¹⁵⁵

¹⁴⁸ *Id.* at 902. A pigeon drop scheme is a “street confidence game.” In *Blackmon*, the game involved persuading wealthy elderly women that they had “found” cash earmarked for Iran or the PLO, and then convincing the women to withdraw their *own* money from banks in an amount equivalent to their “share” of the found cash, convert that money into foreign currency, and give the foreign currency to the appellants for high-return foreign investment. The victims, of course, never saw either their share of the found money or their own money again.

Id. at 902–03. See *United States v Jones*, 648 F Supp 225, 226–28 (SD NY 1986), for a more colorful account of the details.

¹⁴⁹ *Blackmon*, 839 F2d at 903. Compare *United States v Lankford*, 573 F2d 1051, 1053–54 (8th Cir 1978) (finding that, when property is deposited in a bank, the bank owes its depositors a duty of care regarding certain potential risks in order to protect those using its services).

¹⁵⁰ *Blackmon*, 839 F2d at 906.

¹⁵¹ *Id.*

¹⁵² 18 USC § 1952 (2000).

¹⁵³ *Blackmon*, 839 F2d at 906, quoting *Rewis v United States*, 401 US 808, 812 (1971). Consider Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv J L & Pub Pol 117, 124–27 (1987) (discussing the use of federal police resources and duplicative law enforcement when federal officers take over state investigations).

¹⁵⁴ HR Rep No 98-901 at 4 (cited in note 16).

¹⁵⁵ Consider *id.* (suggesting that Congress knew and understood that a broad interpretation of the Act’s language would result).

All evidence points to the fact that Congress did not want the courts to cabin the reach of the Bank Fraud Act, but instead wanted to keep its reach in accordance with modern day interpretations of the mail and wire fraud statutes.

Additionally, as the First Circuit noted in *United States v Brandon*,¹⁵⁶ “[f]inancial transactions are becoming increasingly integrated and complex as more and more financial instruments are securitized and traded on national and global markets,” and that, “[c]onsequently, the effects of fraudulent actions against one institution are increasingly likely to spill over and detrimentally affect others.”¹⁵⁷ This position does not advocate the federalization of criminal transactions previously covered only by state law, it simply “recogniz[es] that those criminal transactions are becoming more federal in nature.”¹⁵⁸

Rather than federalizing state and local crimes, the concern should be that the loss approach would lead to judges peering into the realm of state and local law, increasing the likelihood of judicial error. For example, the *McNeil* court noted the difficulty judges would have in determining whether the bank would be held civilly liable for falling victim to fraud or misrepresentations.¹⁵⁹ It would most likely not be in line with congressional purposes for federal bank fraud liability to “turn on the correct application of state commercial law and possible subsequent state-court adjudication.”¹⁶⁰ Indeed, the *Davis* court looked to the Illinois state revenue code and the Uniform Commercial Code to determine if the bank would face a risk of civil liability.¹⁶¹ This seems an unreasonable exercise for judges to undertake, and could mean white collar criminal prosecutions would shift in response to the changing tunes of state commercial banking law. Reliance on state laws could make prosecuting these crimes very difficult since prosecutors would have to know various state commercial law provisions. It may also be burdensome for defendants since they would not have proper notice of each state’s bank fraud laws. Though courts often look at state laws when deciding important questions of federal law, the totality approach advocated by the Sixth and Ninth Circuits would simplify the process and could reduce judicial error.

Congress rejected a similar rationale when it enacted the Bank Fraud Act. Congress wanted to avoid situations where a federal interest was vindicated on the basis of whether the fraudulent activity in

¹⁵⁶ 17 F3d 409 (1st Cir 1994).

¹⁵⁷ *Id.* at 427.

¹⁵⁸ *Id.*

¹⁵⁹ 320 F3d at 1038.

¹⁶⁰ *See id.*

¹⁶¹ 989 F2d at 246–47.

question is a violation of some other bank statute; thus, the bank fraud statute was enacted to provide for a more unitary approach to tackling bank fraud.¹⁶²

CONCLUSION

In the years to come the federal government will face increasingly complex financial crimes directed at financial institutions. These crimes will not be simply local in nature, but will be increasingly national and global in scale, affecting our entire economic system. Prosecutors must have the power and the flexibility to protect the nation's banking system. This Comment shows how the absence of a risk of loss requirement in the Bank Fraud Act will address that need.

Neither the statutory language nor legislative history provide an adequate resolution to the problem courts face in their interpretation of the bank fraud statute. Though noted by circuit courts as the model for the Bank Fraud Act, the mail and wire fraud statutes have not been a model of interpretation. However, by looking at the analogous mail and wire fraud statutes, this Comment lends credence to the totality approach adopted by the Sixth and Ninth Circuits. The analysis makes it clear that § 1344 does not, and should not, require the government to prove the victim bank was exposed to a risk of loss or civil liability. Such an approach will give prosecutors the needed flexibility necessary to aggressively protect the financial integrity of the federal banking system.

¹⁶² S Rep No 98-225 at 377 (cited in note 2).

