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PERSPECTIVE

Bank fraud case shows the importance of charging decisions

By Michael M. Farhang

This week, the U.S. Supreme Court will take up *Shaw v. United States*, another in a line of cases testing the outer limits to which prosecutors may stretch federal criminal statutes to penalize fraud schemes. Recent Supreme Court decisions have raised the question of whether the government has "overcriminalized" certain conduct by extending the application of certain oft-used criminal statutes into questionable areas, including the honest services fraud statute (*Skilling v. United States*) and the bribery statute (*McDonnell v. United States*). Another case also before the Supreme Court this term, *Salman v. United States*, will give the court occasion to address whether the government has also overreached in its use of the federal insider trading laws to target certain types of nonpecuniary gains. Charging decisions thus present an area where the government should be alert to proceeding with great caution to avoid unnecessarily precipitating judicial rebukes.

On Tuesday, Supreme Court hears oral argument in *Shaw*, a criminal appeal from the Central District of California raising a related, and equally important question: whether the government is fully availing itself of the tools Congress has put at its disposal to fight new evolving varieties of fraud like identity theft. With media reports of large-scale data breaches emerging constantly, the losses caused by identity theft in the U.S. are only increasing and affecting larger numbers of Americans each year. The Supreme Court's consideration of *Shaw* highlights in sharp detail how crucial charging decisions can be, and why the government should strive to seek the sharpest tools at its disposal to combat growing problems like identity theft.

Although the conduct at issue in *Shaw* was at its essence a garden-variety type of identity theft — an account takeover — targeting an individual as victim, the Department of Justice relied instead on the generic bank fraud statute, 18 U.S.C. Section 1344(1), a law enacted more than 30 years ago to penalize fraudulent activities like check-kiting specifically directed at banks. *Shaw* raises the question of what measure of latitude the government enjoys when it, in the words of petitioner Shaw, tries to "force a square peg into a round hole" in charging decisions and fails to use other, better-suited tools at its disposal.

In *Shaw*, the defendant was convicted for a scheme in which he used a victim's identity to siphon approximately $300,000 from his bank accounts. The defendant did so by illegally obtaining mail belonging to the victim, a U.S. businessman living overseas. Using information in the victim's bank account statements to impersonate him, the defendant directed the transfer of funds from the victim's bank account to an online payment account the defendant controlled with a money services business, and then ultimately to other accounts at a different bank. The defendant used both the victim's identity and the identity of a relative in order to effectuate the fraud.

Shaw involved a twist commonly seen in account takeover schemes — banks and other financial institutions are typically themselves deceived by the perpetrators but the true purpose of the deception is to access the assets of an individual victim, the person whose identity is stolen. In *Shaw*, when the victim's son discovered and reported the scheme, the victim's bank was able to close the compromised account and reverse some of the unauthorized transfers, which had been processed through the banking industry's Automated Clearing House (ACH) network. In the end, the victim's bank suffered no pecuniary loss as a result of the scheme, as the money services business was required to reimburse the bank for the reversed transfers and the victim himself — not the victim's bank — sustained the loss from the rest of the non-reversible transfers made as part of defendant's scheme.

The government's charging approach appears to have unnecessarily complicated things. Instead of bringing an indictment under 18 U.S.C. Section 1344(2), which criminalizes the use of false or fraudulent representations to obtain funds "owned by, or *under the custody or control of*" a banking institution, the government instead chose to charge the defendant with a violation of Section 1344(1), the bank fraud statute's companion offense, which criminalizes more generally schemes "*to defraud a financial institution*." By doing so, the government opened up an inevitable post-conviction challenge that the indicted charge did not actually penalize his conduct because the intent and nature of his fraud scheme was not to steal funds of the bank itself, thereby causing a loss to the bank, but instead to steal funds belonging to the victim.

Such a challenge could not have come as a surprise to the government. Although the 9th U.S. Circuit Court of Appeals (along with the 6th and 8th Circuits) have endorsed the government's position that Section 1344(1) can encompass schemes designed only to *deceive* a bank (and not also to cause it to suffer pecuniary loss), this is a minority position and Shaw's petition for certiorari points out that nine other circuits have decided to the contrary. As a result of the ambiguity created by the different interpretations of the circuits, the briefs of the petitioner and the government conflict in their interpretations of the statute's meaning, delving into such arcane questions as the legal meaning of the term "property," whether banks hold title to funds held in the name of accountholders, and even the common law history of the tort of fraud.

The New York Times

Jeffrey Skilling, former CEO of Enron, in 2006

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Amid this complicated discussion, neither Shaw nor the government notes the more glaring question: Why didn't the government simply avail itself of the more specific federal identity- theft-related charges designed for the type of account takeover scheme at issue? The government could potentially have employed other more specific statutes that appear better suited to address Shaw's conduct, including the general federal identity theft statute, 18 U.S.C. Section 1028, the aggravated identity theft statute, 18 U.S.C. Section 1028A, and the access device fraud statute, 18 U.S.C. Section 1029. Interestingly, the National Association of Criminal Defense Lawyers points out in is amicus brief supporting reversal that defendant's conduct could also have been effectively addressed by prosecution under a number of California state criminal statutes, including identity theft statutes. The NACDL criticizes the federalization of a crime that was essentially directed at harming a real live person rather than a federally-insured financial institution.

In petitioner's words, the government "having chosen the more difficult path of [Section 1344(1)] ... asks the Court to reject the statute's plain meaning and lessen the burden it thereby took on." It can hardly be disputed that the government made its own task substantially more onerous by choosing Section 1344(1) rather than a range of other, apparently better, options available to it. Having made a charging decision in the first instance that in hindsight now appears risky given the clear circuit split, the government is now stuck with having to defend it all the way through oral argument before the Supreme Court.

No doubt the government is confident that it will prevail in its arguments, and the federal prosecutors of the Central District are some of the nation's best. But a different charging approach — including resort to the powerful tools Congress and the states have put at the government's disposal to deal with identity theft — could have eliminated the government's burden of having to wade into this area entirely.

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