



Economic Crisis is not Capitalism's Fault

By Daniel J. Popeo, Examiner Contributor
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These days, it seems honest American commerce is suddenly the designated punching bag for every politician looking for an applause line. The fact is, for at least the past eight years, job-creating companies have already been shackled, drawn and quartered, and declared guilty of capitalism.

How can a government be so proficient at harassing honest businesses when it is so inept at catching obvious fraudsters or even executing everyday policies? Our veterans get substandard medical care.

Our porous border enforcement invites in millions of illegal immigrants. And with the involvement of 19 different government entities, there still is no 9/11 memorial at Ground Zero.

Yet, that same government, with help from their accomplices in the plaintiffs' bar and professional activists, are misdirecting their criminal enforcement at honest businesses and placing entire sectors of our economy in a constant state of legal and regulatory anxiety.

With such intense risk and uncertainty, it's no surprise that entrepreneurs like Home Depot co-founder Bernie Marcus say "I couldn't have started the company in the current legal environment."

Our government certainly has a role to play in making sure that the free market works effectively and that participants in it are not abusing the system. In order to effectively fulfill that role, however, government must utilize great discretion in how it wields its awesome power, especially when it comes to its criminal enforcement activities.

Federal enforcement officials have at their disposal literally thousands of laws and fine-print regulations, and courts have given prosecutors a very wide berth as to how rules are interpreted and applied.

Regretfully, prosecutors all too often have not used this discretion wisely. Honest conduct by any business employee that at most constitutes a minor civil or administrative infraction can and has become a criminal act at the whim of an unelected prosecutor or regulator.

Perverse professional and political incentives exist for these officials to reach out far beyond a rational interpretation of the facts and the law before them, which often result in exotic new legal theories and create "new" crimes.

Such overzealous use of already vague laws and aggressive enforcement tactics have undermined businesses' and individuals' civil liberties. Legitimate charges or not, targeted companies have been told that "cooperation", such as waiving the attorney-client privilege or not paying employees' legal fees, may earn them more lenient treatment. Prosecutors don't seem bothered that these tactics discourage pro-active corporate compliance and could violate employees' constitutional right to counsel.

Who truly benefits from the unpredictable, and too often abusive, use of government's awesome power to criminalize? Confronted with draconian sentences and destruction of their reputations, most targets settle, and government collects millions in fines.

Those who support such government conduct are like townspeople in the old movies who cheer on the "populist" bank robbers. It doesn't dawn on them until after the robbers have left town that it's their own money that was taken.

When government goes too far, it drives up consumer costs for everyday goods and services, and chills innovation and job creation. It forces businesses to look for opportunities overseas, where other countries' regulatory and legal systems are more conducive to investment and commerce. Needless criminalization also undermines our faith in government's ability to impartially apply the rule of law.

Such concerns have inspired groups as diverse as the Washington Legal Foundation, the ACLU, the National Association of Criminal Defense Lawyers, and the ABA to take action. There have been some recent promising developments in the federal courts and at the Justice Department, and influential law makers are now paying more attention to federal prosecutors' coercive tactics.

Unfortunately, a deeply ingrained culture of criminalization now pervades regulation of commerce, one which discourages concentrated, efficient use of enforcement resources, while distracting government's attention from pressing priorities.

What, for instance, were federal corporate watchdogs doing before the executives of government-sponsored enterprises Fannie Mae and Freddie Mac executives handed taxpayers a multi-billion dollar mortgage tab to pay off?

If intentional violations of existing federal laws and regulations are found when examining Fannie and Freddie's actions, criminal charges must certainly be considered and brought where appropriate.

The same goes for others whose fraudulent actions exacerbated our financial crisis. But government must not expand the punishment of such bad apples into an overarching criminal indictment of all business conduct. To do so would trivialize the very concept of what is a "crime", while suffocating our already faltering economy of its oxygen – honest commerce.

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