



# Quin-Essential Cases: Business Failure is no Crime

By [Quin Hillyer](#)

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Unbridled greed may be a sin, but not all sins are criminal. Likewise, not all attempts to make money are fairly characterized as greed. Nor is greed – as opposed to incompetence or even sheer bad luck – the cause of every financial failure.

Similarly, it is not necessarily a sign of criminality for a failing businessman to want the benefit of counsel, and to want his conversations with his attorney to be confidential.

Finally, the attempt to criminalize failed business practices retroactively, in a time of economic instability, could easily add to the instability and hamper any recovery.

Such were the themes at a recent forum at the Heritage Foundation called “Avoiding a Rush to Judgment: Overcriminalization and the Subprime Meltdown.” They are themes that President-elect Barack Obama, his allies on Capitol Hill, and his incoming Justice Department nominees ought to understand – and act on accordingly.

As it is, House Oversight and Government Reform Committee Chairman Henry Waxman of California is deep into hearings, with more scheduled for Nov. 13, seeking corporate scapegoats for policy mistakes more fairly blamed on Congress itself. These hearings could easily devolve into a case of “misdirection-by-investigation.” Especially so soon after the Wall Street crisis, they are probably not a good idea.

The Heritage panelists’ advice for both Congress and prosecutors was to tread carefully.

“Can we attach criminality, for example, to bad risk assessment?” asked William R. McLucas, former director of enforcement for the Securities and Exchange Commission. “Can we attach criminal responsibility for excessive leverage? For a failure to have adequately foreseen your risk models?”

McLucas suggested that those mistakes do not rise to the level of criminality.

Former U.S. Attorney General Dick Thornburgh agreed. While stressing that there is indeed a role for

prosecuting outright fraud, Thornburgh added: “We should be sure that we’re reserving criminal sanctions for the most egregious types of events, because the consequences of a reckless prosecution, that is pressing beyond where the evidence would take you, has been demonstrated in any number of cases, ruined careers and ruined reputations. Sometimes we lose sight of that in the hurly-burly that comes with the aftermath of something as dramatic as what’s occurred this year in our financial and credit markets.”

In a paper released at the Heritage event by the National Association of Criminal Defense Lawyers, Nadal’s Stephanie Martz and Tiffany Joslyn wrote that “when a person is prosecuted and convicted, even though he or she acted without intent to do anything wrong or violate any law, the criminal law loses its moral force. &hellip; The civil law and administrative remedies are available to redress inadvertent violations of the law and good-faith mistakes of judgment.”

What’s worse is that Congress still has not acted to curb the strong-arm tactics, favored by federal prosecutors in recent years, of pressuring corporate defendants to waive their right to attorney-client privilege. The House passed a bill to rein in these prosecutorial tactics, but Senate Judiciary Committee Chairman Patrick Leahy of Vermont has kept the bill bottled up in his chamber.

McLucas brought up the “privilege” issue at the Heritage event, and both Heritage and the **Washington Legal Foundation** have released reports excoriating the practice.

Whatever the cause, Bill Beach, director of Heritage’s Center for Data Analysis, warned against prosecutors who are too eager to be “frog-walking businessmen down Wall Street.”

Again, though, it is not just the businessmen who suffer from the attempt to criminalize business failures. The deleterious effects flow out to the broader economy. Commenting after the forum about such overcriminalization, Beach said: “The price is a higher cost of doing business in the United States.”

In a “Web Memo” released the same day by Heritage’s Brian Walsh and Ryan O’Donnell, the two analysts wrote that “Congress’ insistence on uncovering ‘villains’ behind the subprime disaster all but ensures future economic crises.”

Nobody wants purveyors of fraud to get off the hook. And nobody should excuse the sorts of greed that harm a host of innocent victims. But if the rush to criminalize business failures causes some of the same systemic economic problems as the original mistakes, the needless harm will be exacerbated – and the prosecutors and congressional bullies will be to blame.

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