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OPINION

DON'T OVERSTATE CRIMES

FINANCIAL CRISIS

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THE RECENT announcement that the FBI was beginning a wide-ranging investigation into the failures of various financial institutions was just one more moment of déjà vu from the savings and loan crisis of the 1980s. Indeed, the announcement came almost 25 years from the establishment of the U.S. Department of Justice's Savings and Loan Task Force, which was created to ferret out and prosecute those responsible for what was then being called "the greatest financial scandal since the Depression."

There has no doubt been wrongdoing by individuals and institutions that has contributed to the latest financial crisis. And any effort to address the ongoing meltdown of investment banks, insurance companies and other institutions must include thorough scrutiny of this conduct, adequate investigation resources and vigorous prosecution of those who crossed the line. However, there were lessons learned in the criminal prosecutions during the S&L crisis that should not be lost in any new effort.

To begin with, public officials have a tendency to overstate the criminal wrongdoing as a cause of the crisis, in part to deflect blame for their own lack of proper oversight. Assigning blame correctly would have Congress (and the various regulatory agencies) accepting a large share for legislating for looser credit, deregulation of financial institutions, euphoric belief that financial institutions could police themselves and a wishful attitude that housing prices would constantly rise. It is a lot easier to explain to angry Americans how it was only the greedy and corrupt wrongdoers on Wall

Street who were to blame, but this easier excuse leads to less than a proper assessment of the problem and its solution.

In fact, in 1993, the National Commission on Financial Institution Reform, Recovery and Enforcement issued its report to the president and Congress on the "Origins and Causes of the S&L Debacle." The eight-person blue ribbon, bipartisan panel that produced the S&L report included industry experts, public officials and academics and reviewed thousands of documents and heard from dozens of witnesses. Their conclusion is worth remembering. They stated: "fraud was not the cause of the S&L debacle." Indeed, they estimated that for all the bluster, fraud was responsible for 10% of S&L losses. This is not to make light of that fraud; it is just important to keep perspective before we charge ahead with criminal cases and ignore other causes.

To deal with the S&L wrongdoing, the Justice Department created its S&L task force. This was a good model then, and it should be done again now. Without a centralized effort, the 95 individual U.S. attorneys could end up having different interpretations of where the line from aggressive lending to criminal behavior occurred, different ideas of what charges might apply and different ways to pursue those charges. In addition to ensuring consistency and fairness, a centralized effort will be necessary for the government to succeed in complicated financial cases. Any case now taking on issues like mortgage-backed securities and derivative credit products would make the S&L issues seem as easy as A, B, C. This complexity will require a cadre of experienced investigators and attorneys getting the benefit of each successive case that can only occur in a task force model.

No new laws are needed

Furthermore, no new laws are needed to address today's wrongdoing. In the S&L era, members of Congress were pushing each other out of the way to draft laws with new severe penalties and new weapons for law enforcement. Again, this was a makeup effort by legislators to look tough on financial wrongdoing when they had avoided the issue for a decade while the problem grew. The results were S&L laws that had different statutes of limitations, penalties and grand jury rules than for the same or worse wrongdoing committed in other business settings. The current laws on wire and mail fraud, securities fraud and banking fraud are more than enough to address any real crimes that have been committed.

Finally, in prior cases, prosecutors learned the hard way that bigger cases with more charges and multiple defendants were not better. When they bit off more than they could chew, prosecutors not only were able to bring fewer cases, but lost a number of those cases because juries were bogged down with mind-numbing figures, truckloads of documents or incomprehensible expert testimony. Keeping it simpler was a learned approach that should not be forgotten now.

So, the demise of so many financial institutions should and will spawn criminal investigations and cases. But members of Congress, government regulators, prosecutors and the media should not blow the criminal component of the financial crisis out of proportion. Doing so provides a way to shift blame to unsympathetic scapegoats, but does not get at the real problems or ensure that we will finally learn the lessons to avoid the next "greatest financial scandal since the Depression." ■

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