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## FedEx: Not Just Delivering Packages, But Beating Arrogant Federal Prosecutors

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The U.S. Department of Justice has put little if any effort into investigating the IRS over its targeting of conservative groups (even single individuals, such as Professor Mary Grabar, for daring to oppose Common Core), but it has the resources for far-fetched prosecutions of business officials for alleged criminal activity.

One such case recently crashed after almost two years of legal skirmishing in federal district court. The crime the feds were going after was an imaginary conspiracy between FedEx officials and online pharmacies to ship sleep aids, sedatives, painkillers and other medications to customers who didn't have valid prescriptions. Somehow, FedEx was supposed to know which packages were illegal.

Of all the lunacy brought about by the war on drugs, it's hard to top that.

For one thing, the company had repeatedly told federal officials that they would stop dealing with any shippers known to be sending illegal drugs. All they needed was a list of such shippers, but the government refused that offer of cooperation. One might therefore conclude that going after a high-profile corporate defendant for a gigantic fine (\$1.6 billion) was of more interest to the prosecutors than stopping some illicit shipments.

Another glaring problem with the prosecution's case was that it is clearly barred by federal statute. Congress, apparently suspecting that overly ambitious prosecutors would aim for scalps by going after big national carriers, wrote an exemption for common carriers into the Controlled Substance Act. Carriers like FedEx are allowed to transport the substances covered by the CSA as long as they do so "in the usual course of business."

Nothing suggested that FedEx had somehow deviated from its usual business in taking and delivering packages that happened to contain illegal medications, but the prosecutors devised a new interpretation of the law under which the exemption only applies to shipments of medications that were dispensed "within lawful channels." Nice try, but Congress *did not write that into the law* and prosecutors don't have the authority to amend statutes to suit their convenience.

And there was still one more grave legal problem in the case, namely that the government was engaged in a prosecution tantamount to an *ex post facto* law. The Supreme Court ruled in *U.S. v. Lanier* (1997) that “due process bars courts from applying a novel construction to a criminal statute to conditions that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.”

Cory Andrews of Washington Legal Foundation explains the connection: “In FedEx’s case, even if the government’s newfound, elastic construction of the common carrier exemption were deemed valid for future prosecutions, due process precludes retroactively applying such a novel construction in a case where it would operate to expand the scope of previous conduct subject to prosecution.”

On June 17, the government moved to dismiss its case, no doubt reading the words and demeanor of Judge Charles Breyer (brother of Supreme Court Justice Stephen Breyer) who was clearly skeptical about it. He promptly granted the motion to dismiss, declaring that FedEx was “factually innocent” and that the decision to finally drop the case was “consistent with the government’s overarching obligation to seek justice, even at the expense of some embarrassment.” (You can read the Reuters story on the case here.)

Moreover, the judge had harsh words for the Justice Department: “The government should take a hard look at how they made the tremendously poor decision to file these charges.”

Unfortunately, harsh words from a federal judge don’t have any impact on zealous, trophy-hunting prosecutors. What the country badly needs is a way of penalizing overly aggressive prosecutors, but that rarely happens. I know of only one instance where it did, namely the disbarment of district attorney Mike Nifong for his role in the Duke lacrosse case.

Cato Institute legal scholar Walter Olson observes about the case, “Many in the field of white-collar legal defense have warned large corporations, particularly those with businesses built upon relationships of public trust, to cut a deal with the federal government rather than try to withstand the full force it can bring to bear in a prosecution. But FedEx, for one, has shown that it is still possible to defy the authorities and win.”

Olson is right. With this case as evidence that there’s still life in the rule of law, maybe other firms will fight rather than quit.

A fascinating tidbit of information is that when the government launched a similar case against UPS back in 2013, UPS decided to settle, paying out a mere \$40 million to make the case go away. When the feds threaten prosecution, many companies quiver in fear and will do almost anything to avoid trial. That leads to huge amounts paid out, but also accepting government decrees as to how they will operate in the future.

In this piece, Manhattan Institute legal scholars James Copland and Rafael Mangual explain the consequences: “Without trial, the Department of Justice collects billions annually through these agreements – more than \$6 billion in 2015. But these hefty levies are the least-unusual parts of these arrangements. Instead, under the terms of a deferred- or non-prosecution agreement,

companies make concessions to the government that include dramatic changes to business practices. In its 2013 non-prosecution agreement, UPS agreed to hire a new corporate officer as well as an 'independent auditor' who reported to the government. In some cases, companies have been strong-armed into firing senior officers and directors. Regularly, they agree to new training programs, to modifying sales practices, and to adjustments in employee compensation."

Copland and Mangal refer to this ugly development as "the shadow regulatory state." It's the Justice Department's equivalent of the way many regulatory agencies abuse the Administrative Procedure Act to exert control that they were not given in legislation but want to have anyway.

Why has the U.S. economy gone so sluggish? Part of the reason is that companies have to spend so much defending against overreaching prosecutors and waste potentially productive funds on useless stuff to placate the busybodies in Washington.

The great economist Ludwig von Mises warned about the dangers of, as he entitled one of his books, *Omnipotent Government*. We are well on our way there, but at least FedEx and Judge Breyer have delayed that day.