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Can the Feds Prosecute Foreigners if Their Actions Are Legal Where They Are?

I am in Switzerland this week interacting with and lecturing to students and faculty at the University of Zurich. The subject of our work is the U.S. Constitution and its protections of personal liberty.

In most countries, government has begrudgingly granted snippets of personal liberty to keep those who are demanding it at bay. Throughout history, kings and other tyrants have, from time to time, given in to pressures from folks to recognize their natural rights. These instances of "power granting liberty," as the practice has come to be known, usually have come about to avoid further bloodshed.

In the United States and in Switzerland, however, the opposite took place. In both countries, sovereign states came together to establish a central government peacefully. This model is known as "liberty granting power." Indeed, the Swiss Constitution is modeled on our own, whereby free and independent states delegated some of their sovereignty to a new, limited central government.

Today, however, the two countries are embroiled in a below-the-radar dispute over whether U.S. federal courts can try Swiss nationals who have diligently followed Swiss law and who have never been in the U.S.

Here is the back story.

When Thomas Jefferson wrote the Declaration of Independence, he included a section he would later refer to as the indictment of British King George III. It characterized the "long train of abuses and usurpations" designed by the king to "harass our people, and eat out their substance." This was harsh language, even by today's standards.

One of those abuses and usurpations was "for transporting us beyond Seas to be tried for pretended offenses." He was referring to the British practice of charging colonists -- who had never been to Great Britain -- in London for behavior that was lawful in the Colonies but somehow allegedly ran afoul of English law.

The typical charge was speaking out and inducing others to oppose the king and Parliament or refusing to pay their unlawful taxes. These so-called crimes were often generally characterized as treason against the Crown.

This British practice of dragging American colonists before British judges and British juries was so offensive to the colonists that the Framers sought to prevent it from happening here by crafting two prophylactic clauses in the Constitution itself. One clause defined treason as only levying war against the United States or giving aid and comfort to our enemies. The other clause required that people be tried in the state where such crimes were alleged to have been committed.

The Constitution recognizes that American people and property can be harmed by foreigners in foreign countries, and the common law at the time required that if there was no harm, there was no crime.

These first principles -- crime is harm and people should be tried in the place where they are accused of committing a crime -- have been bedrocks of Anglo-American jurisprudence for hundreds of years.

The reason for trying a criminal case in the place where the action took place is to comply with the constitutional requirements of due process. The form of due process requires the pre-existence of the statute allegedly violated, notice of the violation, a trial before a neutral judge and jurors, and the right to appeal the trial's outcome, but the essence of due process is fairness.

Fairness at trial means that the defendant has the constitutionally required tools available to him, not the least of which are witnesses and tangible things to aid in his defense. The Framers knew this would be nearly impossible to achieve in a foreign land before a foreign court.

This understanding subsisted until the Reagan administration, when the government began seizing foreigners abroad and bringing them to the U.S. for trial. Though these seizures were repellent, the crimes -- violence against individuals or large-scale distribution of dangerous drugs -- were crimes everywhere, and the harm caused by them was palpable.

Until now.

Now Swiss bankers who have followed and respected Swiss banking laws -- which honor the privacy of customers, no matter who they are -- and who have never caused harm to American people or property are on trial in the U.S.

The charges? Violating U.S. banking laws by failing to report suspicious transactions to U.S. banking regulators. And for those "pretended offenses," these bankers have been transported "beyond Seas" for trial.

The Department of Justice is unable to point to any harm caused by these so-called offenses, but federal judges, just as they did in the Reagan era, are

accepting the DOJ argument of universal jurisdiction -- that somehow American federal courts can try anyone, no matter where a person is said to have committed a crime, as long as the defendant is physically in the courtroom.

But this violates the Declaration of Independence and Constitution's first principles, and it subjects American bankers and government officials to the same pretended universal jurisdiction of foreign courts. Indeed, a court in Spain has indicted former President George W. Bush and former Defense Secretary Donald Rumsfeld for alleged war crimes committed in Afghanistan.

Why should Bush and Rumsfeld answer to Spain for events that allegedly occurred in Afghanistan? Why should Swiss bankers answer to the U.S. when they didn't violate Swiss law?

This is all about power and the fiction of universal jurisdiction -- a fiction the Framers thought they had buried. It needs to be buried again.

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