
Is Cooperation the Answer?

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It has been said that the price of freedom is eternal vigilance. That is especially true in the age of a world economy and global policemen.

Over the last decade, the U.S. and several EU nations have agreed to mutual assistance treaties for the purpose of assisting each others' law enforcement efforts. These treaties generally provide that the law enforcement agencies of the signatory countries will work together in the investigation of crime, including gathering evidence, interviewing suspects and apprehending criminals. That assistance may include joint interrogations and searches, for example, in England by a combined force of FBI agents and Scotland Yard detectives. It could also involve sharing Web-tapping software, like the FBI's recently disclosed "Carnivore" program, as well as the products of one agency's Web-tapping activities. Whatever may be said about the wisdom of allowing FBI agents to interview English subjects in their homes and offices in order to assist a criminal prosecution in the U.S., the system, as originally conceived, involved governments of equal stature agreeing to enforce prohibitions that they all generally shared, against tax fraud, terrorism, and organized crime. As this trend has gained momentum, however, "mutual assistance" has also become a standard for economic and political transparency in the new global marketplace, and agreeing to be part of the mutual assistance network has become the price of admission to

international funding for many poor nations.

On June 23, the Financial Action Task Force (FATF), "an intergovernmental body designed to combat money laundering which is connected to the OECD", announced a "blacklist" of "non-cooperative countries" in the field of money laundering investigations. At the same time, the FATF said that it was "ready to help. . . establish effective anti-money-laundering systems" in the blacklisted countries but "would consider unspecified counter measures "if the countries failed to take action". Within a week, Panama, one of the countries on the blacklist, announced that it would allow its Financial Intelligence Unit to cooperate with law enforcement agencies in other countries. In another week, it was reported that the Group of Seven finance ministers, meeting in Tokyo, would "call[] on regulators to send official advisory notes to private sector banks warning. . . of the risks of dealing with countries that do not take sufficient measures against money laundering and other financial crimes" and that they would "consider suggestions that the International Monetary Fund take countries" regulatory regimes into consideration when deciding whether to extend loans". By the end of August, Liechtenstein had announced that it would amend its laws to "speed help to foreign authorities in money laundering investigations".

On September 1, the World Bank was reported to be talking with other world agencies about establishing a unified world blacklist on corruption and "reconsider[ing] lending levels for countries that do not have a convincing anticorruption reform program in place and do not collaborate with external efforts to help promote such programs". Three weeks later, the OECD and EU, as "part of unprecedented international action aimed at bringing tax dodgers to account and improving the exchange of information between tax authorities", published a list of "35 tax havens that faced economic sanctions

unless they took remedial action" and "an outline agreement. . .on a system of information exchange to ensure the taxation of non-resident savings in the 15 member states". On October 27, it was reported that Luxembourg's parliament had enacted a statute allowing its criminal investigatory authorities to assist U.S. law enforcement agents in investigations of violations of U.S. laws including tax fraud, and that for some time, the IRS has been forcing "banks in Luxembourg and other European countries" to act on its behalf and gather taxes from U.S. taxpayers" by certifying cooperating banks as "qualified intermediaries" which could then have an easier relationship with U.S. financial institutions. To date, "banks in Luxembourg, Ireland, Switzerland, Germany, the UK, Sweden, Belgium, France, the Netherlands and Jersey have taken" up the IRS' offer. On October 28, EU finance and home affairs ministers agreed to several measures to combat money-laundering, including access to bank and tax records as part of a "draft convention for mutual assistance in criminal matters". The British government also gave Bermuda, the Cayman Islands, the British Virgin Islands and three other Caribbean territories "until January 15 to draw up proposals for improving anti-money laundering procedures and increasing cooperation with regulators in other countries". In November, the OECD announced that a country would be removed from the FATF blacklist only if it had "mechanisms to allow exchange of information with OECD revenue authorities on all tax matters (civil and criminal)". It therefore appears that the original idea of mutual assistance between the U.S. and European government law enforcement agencies has been transformed into a requirement that the poorer nations of the world use their police powers to aid investigations by the richer countries. It may be asked whether any person can feel entirely safe under such a regime.

No reasonable law-abiding citizen can object to governments bonding together to fight money laundering, political corruption and tax evasion.

Everyone can agree in principle that cooperation between government agencies with similar interests should be encouraged. But like many good ideas, this one contains the seeds of unintended and harmful results.

For one thing, where in all this requirement of "mutual assistance" is a re-affirmation of the rights of the individual or of minority groups to be protected from the excesses of government" As an American, I know what my rights are when faced with the power of my government; I'm less sure when looking across the table at a detective from Scotland Yard; and I have no idea when facing a colonel from the Panamanian Financial Intelligence Unit. Worse, I probably won't be face to face with the Panamanian; he will only need to use web-surfing software developed by the FBI to check my e-mail without the bother of first obtaining a judicial warrant. How is it possible that the leaders of the world's democracies have enthusiastically put in place an international system of law enforcement that works in secret, subject to the control of no over-riding judicial authority, without even considering attaching to it a guarantee of fundamental human rights?

We might take some comfort from a knowledge of how difficult it is for law enforcement agencies truly to "cooperate" with each other. I have seen how at least the U.S. government's investigative agencies "cooperate" with their counterparts in America. It is a cliché in the U.S. that federal government law enforcement agencies define "cooperation" as another agency giving them information and a "lack of cooperation" as other agencies asking for something in return. Human nature being what it is, I suspect that a similar story could be told in many other countries.

But the threat here is not that the FBI or Scotland Yard will not provide information to the secret police in Indonesia or the tax police in a Caribbean state; the threat is that those poorer nations will obtain and turn over to the FBI and Scotland Yard any information they can get their hands on, by any

means they choose, in order to qualify for international trade and financial assistance. That prospect, I suggest, is very real indeed, and I question whether this is an activity that the citizens of the richest countries really want their governments to undertake? There are certainly some improper reasons to maintain secret bank accounts or to conduct one's affairs differently in one country than in another. But I suspect that there are at least as many legitimate reasons for doing so as illegitimate. Why shouldn't a person who has paid his taxes and made his money by legal means be able to put it where no one else can count it? What is wrong with a person acting differently, but within the law, in one country than in another? Why shouldn't different countries, even within the Western world, be free to allow certain activities which others declare criminal? The Anglo-American legal system long ago rejected the notion that a man with nothing to hide has no reason not to answer any questions the government wants to put to him. Are we all really better off when we are subject to intensive scrutiny and questioning by the law enforcement agents of every country around the globe?

We should also ask where the principle of "cooperation" will end. At this point, the U.S., EU, OECD and Group of Seven insist only on "cooperation" in pursuing money launderers, tax cheats and corrupt politicians. We are asked to assume that, in each case, the targeted conduct violates the criminal laws of both the country requesting cooperation and, at least in principle (e.g., tax cheating), the laws of the country from which "cooperation" is sought. But what if this principle becomes more generalized and "mutual assistance" begins to be required for investigations of activities that are not crimes in the country from which cooperation is sought? Is it in our interest to allow our law enforcement agencies to investigate conduct that we, in our own home countries, do not regard as criminal? Certainly in the case of war crimes, it seems to be a settled principle that whether the law of the place

where the event occurred prohibits the activities or not is immaterial since the laws of humanity condemn the actions charged. Accordingly, the alleged war criminal may be investigated, arrested and charged wherever he or she can be found. But what about bribing foreign officials to obtain contracts or failing to disclose such bribes as bribes on a company's public financial reports. These are violations of the laws of the United States but not of all other countries, even in Europe. Should all the police forces of the world be compelled to "cooperate" with U.S. agencies in investigating these types of activities which are legal where they occur but illegal in the U.S.?

This is not an idle question. In two recent cases -- one involving an Italian company and another a German utility -- the SEC took the view that actions by those companies which took place within their home countries and were legal where they occurred nevertheless violated U.S. securities laws because the companies' stock was traded on the New York Stock Exchange as well as on the companies' home country exchanges. Presumably, the SEC's investigations of these transgressions would require "cooperation" by the Italian and German governments, but should they?

There is evidence that the U.S. approach is spreading. On June 23, the Swiss government announced that it was charging Russian citizens for being involved in kickbacks to win construction contracts from the Kremlin and that documents seized in raids on Swiss offices of Russian companies would be sent to Russian prosecutors. On September 27, it was revealed that the British FSA fined Nomura International and two of that company's former executives for trades designed to manipulate the Australian stock market. The Australian authorities had uncovered the practice but apparently had no authority to levy sanctions, and the British government stepped in to make up for the "deficiency" in Australian law.

Rather than witnessing the dawn of a bright new era of transparency and accountability in world finance and government, we may be seeing the beginning of a world wide regime that diminishes privacy and eliminates the rights of people to decide for themselves what standards they will live by. And all this change is being carried out by the quiet negotiation of treaties, the insidious pressure of financial need, and the righteous insistence of Western investigative agencies, now free to roam the globe seeking "cooperation" to gather information about anyone from any source.

All this emphasizes that there is no more important time for citizens to be vigilant in the protection of their freedoms than when government gets carried away with a "good idea".

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