Transatlantic Flight Fights:

Multi-level governance, actor entrepreneurship and international anti-terrorism cooperation

Abraham Newman

Assistant Professor, Georgetown University School of Foreign Service

aln24@georgetown.edu

Abstract:

Anti-terrorism cooperation has sparked a series of transatlantic conflicts. Many popular accounts look to differing policy preferences between US and European capitals to explain these disagreements. This article, by contrast, contends that these disputes are often rooted in internal European institutions that present opportunity structures for non-traditional actors to influence international debates. The case of airline passenger name records offers a natural experiment to examine the actor entrepreneurship hypothesis.

Since the terrorist attacks in the United States, Spain and the United Kingdom, internal security and police cooperation has taken on an increasingly international component (Bensahel 2003; Keohane 2008). And this international effort has included a number of heated transatlantic disputes (e.g. information surveillance, biometric passports, extreme rendition), which have pitted security concerns against civil liberties, most notably privacy (Aldrich 2004). A set of transnational civil liberties has emerged whereby citizens are held simultaneously accountable to domestic security operations in multiple jurisdictions. This has important economic consequences for businesses such as airlines or telecommunications, which operate in the transatlantic space, and at the same time creates new challenges for individuals as they attempt to protect their basic rights. In addition, the failure to resolve these disputes threatens future transatlantic cooperation on anti-terrorism (Archick 2006; Dalgaard-Nielsen and Hamilton 2006).

Much of the popular narrative in this area of regulation, especially since the unilateralist invasion of Iraq by the United States, focuses on US coercive pressure. According to this narrative, public disputes over anti-terrorism cooperation have resulted largely as a product of divergent preferences on the two sides of the Atlantic, with the US calling for greater security and the European Union members pushing for a measured response that privileges law enforcement and human rights protection (Stevenson 2003; Monar 2007). This is based in part on the US reaction to the terrorist attacks of 2001 and different cultural traditions in the two regions. The passage of a number of measures in Europe to expand surveillance and cooperate with the US reflects the power that the US wields in the international system (Occhipinti 2003; Klosek 2006; Rees 2006). More

generically, these explanations reinforce an image of world politics whereby the Venutian Europeans face the Martian Americans and must back down (Kagan 2002).

While there are no doubt hints of truth to the image of the bullying American, it does not fit entirely with the historical record. First, there is no reason why the EU could not have resisted the US and constructed rival standards as they have in privacy matters focused on purely economic concerns (Shaffer 2000; Newman 2008b). Second, many of the proposals that were forwarded by the US had circulated in European capitals long before the transatlantic disputes, tempering a claim that such initiatives were uniquely American (e.g. Commission of the European Union 2004).

In contrast to those that argue that the recent bout of conflict and now cooperation resulted from divergent interests overwhelmed by systemic power, this article looks to internal European institutions to explain this pattern of transatlantic relations. The multi-level governance system in Europe opens opportunities for non-traditional actors to influence regional politics (Zito 2001; Börzel and Hosli 2003). This is particularly true in areas that are highly communitarized, where actors from numerous levels endowed with distinct power resources are integrated into the policy-making process (Perkmann 2007; Newman 2008). In short, the conflicts were less between US and European capitals but between sub-state actors in Europe (especially national data privacy authorities) and their capitals, which spilled over into the transatlantic relationship because of the nature of European governance.

To investigate this claim, I examine the most visible conflict to have emerged – the sharing of airline passenger records. In 2001, the US required that all foreign airlines landing in the US provide the Customs Bureau with detailed passenger data prior to landing or suffer considerable fines. This led to a heated five-year negotiation between the US and the EU,

which cycled from intense conflict to an agreement that reflects many of the original US demands. This dispute was particularly important because it signaled to US policy-makers the potential limits of anti-terrorism cooperation with Europe (Archick 2006). And within Europe it furthered public dissatisfaction with the global war on terror (Klosek 2006).

Methodologically, the case of passenger name records (PNR) is particularly helpful in identifying the role of internal European institutions for the transatlantic relationship as it contains a natural experiment in which the negotiation is run twice under two different institutional processes (Dunning 2007). During the early phase of the conflict, the negotiation was conducted by the European Commission under the auspices of the first pillar. An agreement was reached in 2004. A European Court of Justice decision in 2006, however, struck down this agreement on procedural grounds. The US and the EU, led by the Council of Ministers, renegotiated the agreement under the third pillar. The case, then, brings in stark relief how similar actor preferences were filtered through different internal institutional processes producing distinct policy outcomes.

The findings have important empirical and theoretical implications. For those interested in transatlantic terrorism cooperation, the article suggests that European governments are much more inclined towards rebalancing civil liberties in favor of security than often reported. At the same time, it signals the potential power of non-traditional actors such as national data privacy authorities and the European Parliament to disrupt the policy making process and the need to incorporate them early into transatlantic discussions to facilitate quick and smooth cooperation. Theoretically, the article underscores the importance of scrutinizing the internal structures of the European Union into models of global politics (Jupille 1999; Young 2004; Meunier 2005). Specifically, it highlights the role

that transgovernmental politics within Europe (Dehousse 1997; Slaughter 2004; Eberlein and Newman 2008) can have on international affairs more broadly.

The article proceeds in four sections. First, it highlights the dominant narrative used to explain conflict in transatlantic terrorism cooperation before presenting the theoretical foundation of the argument focusing on actor entrepreneurship within the context of European multi-level governance. It then examines the argument in the dispute over airline passenger records and concludes with implications for transatlantic cooperation on terrorism and theories of international relations.

Powerful State Interests?

The dominant argument in the literature used to explain transatlantic regulatory cooperation and conflict rests on a realist-style story. Transatlantic conflict emerges when the US and powerful European member states have divergent policy preferences on key issues. Drezner provides a number of examples in the economic sphere where regulatory disagreement between the two jurisdictions produce rival international standards (Drezner 2007). Following the liberal intergovernmental work, such arguments often focus on powerful interests such as firms in large markets (Moravcsik 1998). By extension, in the context of international terrorism, one might also expect patterns of interaction to be driven by the preferences of police and security bureaucracies represented by internal ministries. These arguments typically follow the logic of the two-level game, whereby societal preferences are aggregated nationally and then inform the international bargaining position of each jurisdiction (Putnam 1988; Milner 1997).

The state interest argument anticipates that conflict arises when governments have incompatible policy preferences. The resolution of such conflict is often determined by the

relative distribution of power in the system. In the case of airline passenger records, this argument would expect that the conflict is the result of clashing regulatory positions of the US government and powerful member states in Europe (Rees 2006). Preferences should be represented by national governments, working to integrate the positions of industry, bureaucracy, and their other societal interests. This causal argument translates into the popular narrative of an imperial security oriented US government bullying a human rights focused European government into submission (Klosek 2006).

While this might make convenient cover for many European governments that wish to avoid criticism on civil liberties issues, the historical record does not easily confirm a state interest story. The European airline industry did not resist US demands and in fact sought a quick solution to the controversy.[1] As will become clear in the case study, interior ministers from the major European countries supported the basic idea behind the US policy. How then can we explain a five-year conflict that threatened transatlantic air transport?

Multi-level Governance and Actor Entrepreneurship

A significant literature has demonstrated the importance of European institutions for international negotiations (Bretherton and Vogler 1999; Bach and Newman 2007). In particular, this work has focused on issues of international trade and demonstrated the effect that voting rules have on aggregating member state preferences (Clark, Duchesne et al. 2000; Meunier 2005). Research has also shown how the internal regional integration process,

[1] Interview with European airline trade association official, Brussels. See also, Association of European Airlines, 2007, "AEA Welcomes EU-US Passenger Data Agreement," Press Release, July 24.

particularly the use of mutual recognition, may affect the international behavior of the European Union (Young 2004).

This article builds on these works taking seriously the claim that internal institutions within the EU may have global consequences (Jupille 1999; Meunier 2005). Instead of focusing solely on voting rules in the Council or mechanisms of integration, the article takes a broader view of the public policy structure to identify the actors that might influence agenda setting and policy-outcomes at the international level (Damro 2006; Pierson 2006). In particular, it focuses on the extent to which multi-level governance processes within Europe compared to more conventional intergovernmental approaches shape the European voices that matter globally.

The multi-level governance approach highlights the fact that authority within the European Union is distributed simultaneously across a number of overlapping institutional jurisdictions. Power relations among levels are not necessarily discrete or subordinate (Börzel and Hosli 2003; Hooghe and Marks 2003). Nor does the distribution of authority within Europe remain constant across issues. Policy-making takes place in the interaction between multiple territorial units, each endowed with unique institutional characteristics. This structure of the European Union opens up access points for a diverse group of policy networks to act as policy entrepreneurs (Peterson 1995; Zito 2001; Posner 2005; Perkmann 2007). The multi-level governance framework rejects a monolithic view of the state, recognizing that nations are comprised of numerous sub-state officials from various levels of government that define and pursue their own collective interests (Thurner, Stoiber, Weinmann 2005). Public and private actors then cooperate in European policy networks (Peterson 1995; Risse-Kappan 1995; Börzel 1998). These networks include sub-systems of specialists in a given issue space that engage one another in on-going dialogue. This

scholarly approach has demonstrated that policy entrepreneurs cooperating across countries and political levels are important for regional policy-making in a host of sectors (Marks, Nielsen et al. 1996; Alter 2001; Kohler-Koch and Rittberger 2006).

Policy Entrepreneurs such as transgovernmental networks of sub-state officials, NGOs, and firms use power resources to obtain their goals in the multi-level setting. These include delegated authority, expertise, and network ties (Newman 2008). Public officials may use their ability to control budgets, market access, or hold hearings to convince other actors to alter their position. Expertise may be used to frame policy problems and possible solutions, especially when policy principals are overwhelmed by the complexity of the issue area (Haas 1992; Radaelli 1999). Finally, reputation and ties to other policy players such as interest groups or industry may enhance the position and legitimacy of a policy entrepreneur (Goodman 1991; Carpenter 2001). National and sub-national units can reach out to European institutions to lobby and form coalitions in support of their agenda.

This article makes the natural international corollary to the entrepreneurship claim prevalent in the internal European policy debate. I hypothesize that in areas that have been communitarized, non-traditional players such as transgovernmental or transnational actors will shape international agenda setting. In areas where more conventional intergovernmental processes reign, realist-style stories dominated by national government preferences will be the norm.

While many have criticized the multi-level governance literature for lacking clear causal expectations (Bache and Flinders 2004), the application to the international setting and the PNR negotiations in particular are obvious and follow closely the expectations of earlier work concerned with complex interdependence (Keohane and Nye 1977). I anticipate that during the period when the negotiations were governed by a more

communiterized process (between 2003 and 2006), non-conventional actors endowed with power resources such as national data privacy officials should have had significant agenda setting influence. This effect should dissipate after the European Court of Justice decision, when negotiations were shifted to a third pillar process. Here, I expect national government interests to dominate as the decision-making process is highly intergovernmental. The area of police and judicial cooperation is a particularly useful area for such a study as the distribution of competencies are still in flux (Börzel 2005).

Before proceeding to the historical narrative, the next section offers a brief background on the governance of privacy within Europe and the US.

Background on European and US Data Privacy Regime

Europe has a complex web of institutions involved in the governance of privacy concerns spanning all of the major levels of policy-making within the region. Starting in the 1970s, European countries passed national laws that created comprehensive rules for the protection of information privacy in the public and private sectors (Bennett 1992; Newman 2008b). These rules based on a set of Fair Information Practice Principles are enforced by independent agencies – data privacy authorities. Since their creation in 1970s, they have amassed considerable expertise and relations with their national governments, industry, and European institutions. The exact delegated powers and institutional design of these agencies vary by country, but generally they are buffered from direct political intervention and have the authority to monitor and implement national privacy rules. Several agencies were granted the authority to block the transfer of personal data from moving across national borders (Flaherty 1989). At several critical moments in European integration, national regulators leveraged their authority to block data transfers to lobby for regional policy change (Newman 2008a).

In 1995, the European Union officially entered privacy regulation with the passage of the data privacy directive.[2] Adopted under the first pillar of the European Union concerned with the internal market, the directive integrates the basic components of the comprehensive system into European law. The directive also contains an influential extraterritorial component. Article 25 of the directive limits the transfer of personal information to jurisdictions that lack adequate privacy protections. The European Commission, then, is required to determine the adequacy of privacy rules in other countries before permitting data exchanges (Long and Quek 2002; Farrell 2003; Heisenberg 2005).

In an important institutional innovation, the directive incorporates a network of national regulators into the oversight and implementation of European law (Eberlein and Newman 2008). The Article 29 Working Party is comprised of national regulators and provides advice to the European institutions on developing data privacy issues, harmonizes enforcement processes, and monitors implementation at the national level. As the substantive experts in the issue area, national data privacy officials play an important role in helping the Commission reach adequacy rulings under Article 25 of the directive.

While the directive required that national governments implement privacy rules for the public and the private sectors, the institutional authority of the Working Party is limited to first pillar issues and does not have oversight over the use of personal data by European institutions. In 2003, therefore, the European Union created a European Data Protection Supervisor, who is primarily responsible for information processing among European institutions. The EDPS advises the European institutions on data privacy issues that affect

[2] See *The Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data* 95/46/EC, 1995 O.J. (L 281) 31.

the institutions' operations and monitors the implementation of such rules. The EDPS has also been very active in third pillar issues although its delegated authority in this area is unclear. In addition to its independent efforts, the EDPS sits on the Article 29 Working Party and cooperates with national data privacy authorities. The EDPS and national data privacy authorities create a dense web of multi-level oversight that monitors and promotes data privacy issues within Europe.

In contrast to this thick web of public officials involved in data privacy regulation in the EU, the US has a limited approach to privacy regulation (Schwartz 1996; Newman 2008b). Federal regulations focus on the use of personal information by federal agencies with sectoral laws that cover sensitive sectors such as financial services and health care. There is no independent agency dedicated to privacy protection and much of the private sector is left to industry self-regulation. The institutional differences between the two approaches provided the impetus for international action in the issue area. The level of conflict and the ultimate resolution, however, cannot be explained simply from the existence of different privacy rules.

The Transatlantic Flight Fight

The controversy of passenger name records began in 2001, when the US government passed the Aviation and Transportation Security Act. It required that foreign air carriers report extensive personal information to the Customs Bureau before permitting entry. The list of required information included meal options, credit card numbers, and previous flight data, which is contained in an individual's passenger name record (PNR). The US government requested that the Customs Bureau have direct access to European airline databases as the need arose. The initial demand included the right to retain information for a significant period of time (possibly 50 years) without any right to review or

correct stored data. The US government asked foreign governments to comply with these demands in late 2002 and threatened to levy fines of thousands of dollars per passenger per flight against non-compliant European carriers and to possibly limit landing rights (Field 2003).

This requirement sparked transatlantic friction because of differences in national data privacy regimes. As explained above, the two regions have very different approaches to privacy protection. The US has no specific regulation for the airline sector and therefore does not on face meet the adequacy requirement of Article 25 in the European data privacy directive. The passenger data transfers, then, threatened to potentially breach European privacy rules. European privacy rules were then pitted against US domestic security legislation with European airlines stuck in the middle.

The First Experiment: Limits on Unilateral Action by the Commission

Fearing that European and US demands had placed European airlines in a catch 22, the European Commission under Article 25 of the data privacy directive sought to obtain an adequacy ruling for the US Customs Bureau. The Commission hoped that it could find a quick compromise that would mitigate any economic impact for European airlines (EU Observer 2003). Given the importance of the transatlantic air transport market, the Commission feared that the failure to resolve the dispute could threaten a major component of European competitiveness. After several rounds of negotiations between the Commission and the Department of Homeland Security, the two sides developed a Joint Statement in February 2003 (European Commission 2003). In the agreement, the Commission pledged to delay the implementation of European privacy laws and permit transfers. The US agreed to limit the exchange of sensitive information to other US agencies and restrict access to the data within the Customs Bureau. Most important, the two sides agreed to continue the

dialogue and develop a legal framework for such data exchanges. The Commission indicated that data privacy authorities might accept the Joint Statement as sufficient to permit data transfers.

Given the complex nature of multi-level governance in the issue area, however, the Commission was not alone in defining the policy agenda. And in contrast to its agenda focused on maintaining the transatlantic air transport market, other players were much more interested in the potential privacy implications of an agreement. National data privacy authorities repeatedly rejected the Commission's interpretation and used their delegated authority and expertise to undermine the Joint Statement. This began in October of 2002 when the Article 29 Working Party preemptively released an opinion arguing that such transfers were in direct violation of the 1995 privacy directive (Article 29 Data Protection Working Party 2002). The regulators were particularly skeptical of US direct access into European airline databases, the sharing of sensitive data such as meal choices that might indicate religious affiliation, the extended retention period, the vague standard for collecting and transferring the information to other agencies, and the lack of a formal control mechanism to monitor use (Article 29 Data Protection Working Party 2003). Through a series of expert opinions, national privacy regulators framed the terms of a political compromise that would bolster the protection of privacy.

In addition, they began to use their nationally delegated authority over the transfer of personal data across borders to force the Commission to renegotiate the agreement. In March 2003, the Chair of the Working Party and the head of the Italian data privacy authority, Stefano Rodota, warned the European Parliament that continued transfers threatened to result in regulatory or judicial intervention. Given the requirements of the European privacy directive, data privacy authorities might be forced to sanction carriers that

transferred data under the Joint Statement (Rodota 2003). And this began to happen. The Italian data privacy commissioner limited data transfers from Alitalia to the US to information contained in a passport. Similarly, the Belgian authority ruled in late 2003 that US/EU transfers violated data privacy laws.

Leveraging ties to policy-makers at different levels, the arguments of the Working Party quickly found their way into the European Parliament. European Parliamentarian Sarah Ludford (UK-Liberal), citing the argumentation of the Article 29 Working Party Chair Rodota, summarized the dispute,

> This is a stunning rebuff to the Commission. He [Chairman Rodota] said in essence that National Data Protection Commissioners and courts were not free to suspend application of relevant laws just on the say-so of the Commission. That must be right. It is a reminder to the Commission that if it will not be the guardian of Community law, then others have to be (Ludford 2003).

The position of the data privacy authorities forced the Commission to return to the negotiating table as Frits Bolkestein, Internal Market Commission, explains in a letter to Tom Ridge, head of Homeland Security:

> Data protection authorities here take the view that PNR [Passenger Name Record] data is flowing to the US in breach of our Data Privacy Directive. It is thus urgent to establish a framework which is more legally secure… The centerpiece would be a decision by the Commission finding that the protection provided for PNR data in the US meets our 'adequacy' requirements (Bolkestein 2003).

Data privacy authorities kept up the pressure on the Commission through fall 2003. In September, at the International Conference for Data Protection Commissioners in Sydney, the world's data privacy authorities released a recommendation calling for a clear

legal framework protecting privacy before transferring airline passenger records. Referencing this resolution, the European Parliament passed a series of resolutions skeptical of any agreement with the US (Waterfield 2004).

Far from taking an absolutist position, the data privacy officials determined that such transfers could be permitted to Canada and Australia because they had an adequate protection system in place. Still, as the Article 29 Chairmen Rodota argued in an address to the European Parliament, the concessions made by the US were not sufficient to satisfy the Working Party (Rodota 2003).

After a long negotiation with the US, the Commission agreed in December of 2003 to the transfer of data from European airlines to the US Customs Bureau. This would not include direct access to carrier databases, and the information transferred would filter out sensitive information. The compromise solution included: reduction of the categories of data collected from 39 to 34, deletion of sensitive data, limit the purpose of collection to terrorism and transnational crime, a retention period of three and half years, a sunset clause that forces renegotiation after three and half years, and annual joint audits of the program (Bolkestein 2003). While data privacy officials were unable to get their preferred outcome – the adoption of data privacy legislation for the private sector in the US – they forced considerable compromise, which significantly bolstered the privacy protections in the agreement. Using their expertise, delegated authority, and network ties, transgovernmental actors framed the international debate, raised the cost to the Commission of inaction, and worked with the European Parliament to change the course of international policy-making.

Taking the Commission to Court – an institutional backfire

Despite the concessions reached, data privacy officials and the Parliament were still unsatisfied with the compromise. The Parliament filed a suit with the European Court of

Justice in the summer of 2004 (Council of the European Union 2004). The complaint rested on two basic arguments. First, the Commission had overstepped its authority by concluding the agreement under the first pillar of the European Union dealing with the internal market when the transfer of airline data was clearly a security concern governed by the third pillar. Second, following the logic of argumentation presented by the Working Party, the Parliament argued that the agreement was in violation of Article 8 of the European convention on Human Rights, which protects the private life of European citizens.[3] Specifically, data in the US was not monitored by an independent regulatory agency and the limitation of purpose was weak, allowing security agencies to use the information for unspecified "transnational crimes". The European Data Protection Supervisor (EDPS), who was established just prior to the court case, submitted its own opinion supporting the Parliament's position.

The European Court of Justice sided with the Parliament and the EDPS, on the point concerning Commission authority. The Court concluded that the Commission did not have the authority under the first pillar to negotiate the agreement because it was an issue directly tied to home and justice affairs. The Court, however, sidestepped the more fundamental debate about privacy, requiring that the agreement be renegotiated under the

[3] The European Court of Justice, in the 2003 Lindqvist case, ruled that the European Convention on Human Rights protects individual privacy within Europe. See Lindqvist C-101/01, November 6 2003.

third pillar.[4] In short, there was no basis for supranational action. The decision sets up the second phase of the natural experiment as it did not speak to the substance of the agreement only that it must be negotiated using a different procedural mechanism.

Ironically, this ruling effectively sidelined the transgovernmental network of data privacy officials from the future evolution of the PNR regime. Under the third pillar, the Council of Ministers, comprised of national executives, negotiates external relations. In these issue areas, data privacy authorities have no formal jurisdiction and could not rely on the Parliament to promote its views regionally. The institutional process shifted overnight from a highly communitarized process to a much more conventional intergovernmental one.

The Second Experiment: Member States Find Common Ground with the US

After the Court ruling, the negotiation shifted to the third pillar process headed by the Council of Ministers. Following the expectations laid out above, the second round of negotiations followed an intergovernmental course. The Council of Ministers, led by Interior Minister Schäuble from Germany, was much more predisposed to the US position and reluctant to privilege privacy over security. Many of the national interior ministers (especially from the UK, Germany, Ireland, and Spain) spoke in support of finding a quick resolution. After signing a temporary agreement in October 2006, the Council and the Department of Homeland Security worked to find a lasting agreement over the spring of 2007.

[4] See European Court of Justice, C-317/04 and C-318/04, May 30 2006. See also Nicola Clark, "EU Court bars giving passenger data to US," International Herald Tribune May 31(2006):1&8.

Both the transgovernmental network of national data privacy officials and the European Data Protection Supervisor (EDPS) condemned the agreement (Hustinx 2007). Specifically, the EDPS noted his concern regarding the retention period and the potential transfer from the Customs Bureau to other agencies. These concerns were once again taken up by the European Parliament, which vocally opposed the terms of the new agreement. Citing the letter of the EDPS, the Parliament passed a strong resolution and called on national parliaments to evaluate the legality of the agreement (European Parliament 2007). It also called on the EDPS and national data privacy officials to conduct comprehensive reviews. Despite the harsh words and condemnations, neither the transgovernmental network nor the European Parliament had any real institutional levers to use in the negotiations. The agreement finds the US level of protection adequate eliminating the ability of national regulators to ban data privacy transfers. The adequacy ruling ultimately neutralizes delegated authority enjoyed by national data privacy officials at the national level. And because the adequacy ruling is determined under the third pillar, national data privacy officials do not play a formal role in reaching that decision as they would under a first pillar decision. Similarly, the Parliament does not enjoy co-decision rights under the third pillar and thus cannot serve as an ally to national data privacy authorities.

The final agreement was reached in July 2007 between the Council and the Department of Homeland Security (Council of the European Union 2007). In terms of data privacy, it contains few improvements over the Commission brokered deal and in many areas is much weaker. It specifies the transfer of similar types of data from the earlier agreement. The agreement also calls for the use of a "push" system whereby airlines send data to the Customs Bureau, as opposed to the original "pull" system whereby the Customs Bureau would have had direct access to European air carrier databases. In a blow to data

privacy protection, it includes an extended data retention period of seven years. In addition to this, a "dormant" period of eight years was created. This new classification of data allows information to be kept but not used in active searches. The agreement does not prohibit the further transfer of data from the Customs Bureau to other agencies or to third countries. Theoretically, data could be shared with a large number of US agencies and foreign security services. It has no sunset clause or review as the previous arrangement had. Finally, many of the privacy protections are not contained in the agreement itself but in an accompanying exchange of letters, which could be unilaterally withdrawn. Most advocates of strong data privacy rules have concluded that despite a number of protections, the new agreement offers fewer safeguards than the compromise struck down by the European Court of Justice and provides the US with significant amounts of relatively unmonitored data.[5]

An EU PNR Signals Member State and Commission Preferences

Internal European developments since the conclusion of the transatlantic dispute support the claim that national governments were not the cause of the conflict and in fact supported the basic US position. After the conclusion of the PNR agreement with the US, the national internal ministers drafted a Council framework decision that would create a European PNR system.[6] This initiative, which is supported by the Commission, would

[5] A comprehensive review of the privacy implications of the agreement is available at www.statewatch.org.

[6] The progress of the initiative is detailed in Council of Ministers, *Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes - State of play*, Brussels May 29 2008.

expand a 2004 airline passenger data directive to include the fields of information collected in the agreement with the US. It would also require a thirteen-year retention period of five active years and eight dormant years. This, in turn, expands the agencies with access to the data. All passengers entering the European Union would face similar procedures to those entering the US.

Far from a tit-for-tat retaliation against the US, the Commission unveiled its interest in a European PNR system as part of a larger package of anti-terrorism efforts (Nahashima 2007; Bossong 2008). Then Commissioner for Justice Frattini argued on multiple occasions that a European PNR was a vital tool for the successful protection of European citizens against potential terrorist attacks. Commission interest in a European PNR system date back at least to 2004, when it sent a communication to the Council and Parliament on the issues (Commission of the European Union 2004). In late 2007, it completed a draft framework decision, which would translate many of the provisions of the US-EU agreement into European law. Since the terrorist attack on the US in 2001, the Commission has looked to issues like internal security to demonstrate its relevance to the European citizenry (Bossong 2008), a strategy that has only grown in importance since the failed referendum of the European constitution. The EU PNR proposal indicates that the Commission has far more than economic interests in this debate.

Similarly, the member states have been strong advocates for a European PNR system. The German internal minister, Schäuble, has recently argued that a failure to adopt a PNR system for Europe would be "inexcusable" (Tomik 2007). Even the SPD Justice minister supports the proposal (Schiltz 2006). German support is bolstered by the fact that France, the UK, and Denmark have already implemented a PNR system. The British government has gone so far as to call for the data to be used for more general public policy

purposes than just terrorism (Traynor 2008). A Commission sponsored questionnaire sent to the member states found that a majority of members support the initiative and a recent meeting of national internal ministers called for the speedy adoption of a European PNR. Slovenian Interior Minister Mate, reporting for the EU presidency in January 2008, claimed that "there was general support from all ministers on a European Passenger Name Record" (Melander 2008). As was the case with earlier US-EU negotiations, industry supports the initiative so long as the rules harmonize the regulatory burden (Nahashima 2007).

Not surprisingly, national data privacy authorities have come down hard on the proposal. In their response to the Commission questionnaire, the Article 29 Working Party argued that a European PNR system failed to meet the basic requirements necessary to guarantee privacy – too much information would be collected for too long of a time without enough specification about who might access the data and for which purposes (Article 29 Working Party 2007).

The fate of a European PNR system will most likely depend on the fate of the Reform Treaty. If EU PNR moves ahead prior to the Treaty, there is little that those opposed to the legislation can do. National data privacy officials have few formal powers under the third pillar or allies such as the European Parliament that they can activate to influence the process. If the Treaty succeeds and increases the role of the Parliament in internal security issues, however, the argument presented would expect much more significant accommodation of privacy issues promoted by national data privacy officials.

Regardless of the European PNR system's ultimate fate, it is clear that neither the Commission nor the majority of member states oppose a PNR system.[7] Since the very first

[7] This position was confirmed in an interview by a European Parliamentarian active in the issue area. Brussels.

negotiation with the US to the introduction of a European PNR, the Commission has sought to facilitate data transfers while protecting industry's desire to avoid regulatory uncertainty. Similarly, national member state governments – particularly those from the large states of France, Germany, and the UK – have actively pushed to expand the surveillance data available to their security forces.

Conclusion

For over half a decade, the US and Europe engaged in a difficult negotiation over the sharing of the personal data of airline travelers. Although they ultimately reached a working solution, the strained cooperation tested the US belief that the European Union could be a credible partner in anti-terrorism cooperation and the on-going conflict further enflamed anti-American sentiment in European populations. It is thus crucial to understand why the conflict emerged, persisted, and was finally resolved.

Both the popular press and mainstream IR theories often attribute such clashes to differences in state preferences. US security interests conflicted with the desire of European governments to protect civil liberties. The case study, however, reveals that the traditional "heads of state" fundamentally shared the same policy preference. Even the Commission generally supports the policy. This draws into question the trope of the Commission as a rule of law bound bureaucracy incapable of privileging security interest (Kagan 2002) and recent scholarly suggestions that the EU might be able to transform security debates (Wiener 2008). Far from malevolent European leaders balking at US demands, governments in Europe were happy to use the US as cover for policies that they hoped to achieve domestically. This does not mean, however, that US and European interests never conflict in issues of terrorism cooperation. European governments clearly privilege law enforcement strategies over direct military "war on terror" solutions (Monar 2007; Keohane 2008). Similarly, the US has made

demands through the Visa Waiver program, for example, that attempt to divide European loyalties and has stoked transatlantic tension. As the narrative around PNR concerns a single issue, a critical area for future research will be to identify the conditions under which such tensions are driven by inter- vs. intra-regional preference divergence.

The case of PNR demonstrates an important source of internal European conflict that can spill over into the transatlantic relationship. The multi-level governance system in the EU opens up an opportunity structure for sub-state actors to influence international negotiations. Data privacy authorities, who were created in the 1970s to deal with the computer, have developed their own preferences and power resources to affect regional policy. Their resources were then augmented by the passage of the 1995 privacy directive, which incorporated the transgovernmental network into European policy-making through the Article 29 Working Party and the EDPS. The conflict with the US was fueled by their protests, which hindered the negotiating parameters of the Commission and sparked Parliamentary resistance.

The ultimate resolution of the conflict does not demonstrate a shift in preferences on the part of Europe. Rather, the intervention by the ECJ, shifting the institutional foundations of the debate (from the first to the third pillar), changed those that could speak for Europe on the issue. The Working Party and the Parliament were effectively silenced, allowing national internal ministers to reach a broad PNR agreement with the US.

Theoretically, the case has several important implications. First, it supports a growing literature that examines how the internal institutional configurations of the European Union affect its interaction globally. In the airline passenger data case, the pillar structure significantly shaped international patterns of cooperation and conflict. This supports earlier work on international interdependence, which expected non-traditional actors to play a

larger role in more interdependent environments (Keohane and Nye 1974). Second, the narrative suggests that the recent integration of regulatory networks into European governance has an important international component. In sectors ranging from energy to financial services, networks of national regulators have been formally incorporated into European-level decision-making. The actions of national data privacy officials demonstrate that the work of such networks is not limited to internal policy debates. Recent negotiations between the Securities and Exchange Commission and the Commission of European Securities Regulators suggest that this phenomenon is not limited to privacy (Posner 2008). As these agencies have their own preferences and their own authority, they will no doubt alter the policy-making process at the international level. Finally, the narrative presents a paradoxical case for those concerned about democratic accountability within the EU (Follesdal and Hix 2006). Despite that fact that the European Parliament and popular sentiment protested the Council efforts, interior ministers were able to use the third pillar to skirt national debates to obtain an agreement with the US. At the same time, non-elected sub-state actors repeatedly interjected on behalf of the rights of citizens. Technocratic regulators attempted to destabilize the policy debate and bolster civil liberties (Sabel and Zeitlin 2007). In the end, national governments were able to use the third pillar process to policy launder an issue that they could not easily obtain domestically. The highly communitarized setting offered more opportunity structures for voices of protest than the conventional intergovernmental process.

Governments across the globe have been emboldened by the threat of transnational terrorism to expand surveillance activities. The US is far from the exception. This push for more information, however, interacts with very different pre-existing institutional legacies. No one would expect data privacy authorities to be able to halt this process altogether. The

case of airline passenger records demonstrates how internal European institutional differences that give voice to distinct groups can alter the balance of transnational civil liberties.

Bibliography

Aldrich, R. (2004). "Transatlantic Intelligence and Security Cooperation." *International Affairs* 80(4): 731-753.

Alter, K. (2001). *Establishing the Supremacy of European Law*. New York, Oxford University Press.

Archick, K. (2006). *US-EU Cooperation Against Terrorism*. Washington DC, Congressional Research Service, January 19.

Article 29 Data Protection Working Party (2002). Opinion 6/2002 on transmission of Passenger Manifest Information and other Data from Airlines to the United States. Brussels.

Article 29 Data Protection Working Party (2003). Opinion 4/2003 on the Level of Protection ensured in the US for the Transfer of Passengers' Data. Brussels.

Article 29 Working Party (2007). Joint opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. Brussels, Article 29 Working Party.

Bach, D. and A. Newman (2007). "The European Regulatory State and Global Public Policy: Micro-Institutions and Macro-Influence." *Journal of European Public Policy* 16(4): 827-846.

Bache, I. and M. Flinders (2004). *Multi-Level Governance*. Oxford, Oxford University Press.

Bennett, C. (1992). *Regulating privacy: data protection and public policy in Europe and the United States*. Ithaca, Cornell University Press.

Bensahel, N. (2003). *The Counterterror Coalitions: Cooperation with Europe, NATO, and the European Union*. Santa Monica, RAND.

Bolkestein, F. (2003). EU/US talks on Transfers of Airline Passengers' Personal Data. Committee on Citizens' Freedoms and Rights. Brussels.

Bolkestein, F. (2003). Letter. T. Ridge. Brussels, www.statewatch.com.

Börzel, T. (1998). "Organizing Babylon: on different conceptions of policy networks." *Public Administration* 76(2): 253-273.

Börzel, T. (2005). "Mind the Gap! European Integration Between Level and Scope." *Journal of European Public Policy* 12(2): 217-236.

Börzel, T. and M. Hosli (2003). "Brussels between Bern and Berlin: Comparative Federalism Meets the European Union." *Governance* 16(2): 179-202.

Bossong, R. (2008). "The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance." *Journal of Common Market Studies* 46(1): 27-48.

Bretherton, C. and J. Vogler (1999). *The European Union as a global actor*. London, Routledge.

Carpenter, D. (2001). *Forging of Bureaucratic Autonomy: reputations, networks, and policy innovation in executive agencies*. Princeton, Princeton University Press.

Clark, W., E. Duchesne, et al. (2000). "Domestic and international asymmetries in United States-European Union trade negotiations." *International Negotiations* 5: 69-95.

Commission of the European Union (2003). Joint Statement. February 17/18, Brussels.

Commission of the European Union (2004). Transfer of Air Passenger Name Record Data: A Global EU Approach. Brussels, Commission of the European Union.

Council of the European Union (2004). Case before the Court of Justice. 11876/04, August 6, Brussels.

Council of the European Union, Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security (DHS). Brussels.

Dalgaard-Nielsen and D. Hamilton (2006). *Transatlantic Homeland Security: Protecting Society in the Age of Catastrophic Terrorism*, Routledge.

Damro, C. (2006). "Transatlantic Competition Policy: Domestic and International Sources of EU-US Cooperation." *European Journal of International Relations* 12(2): 171-196.

Dehousse, R. (1997). "Regulation by Networks in the European Community." *Journal of European Public Policy* 4(2): 246-261.

Drezner, D. (2007). *All Politics is Global: Explaining International Regulatory Regimes*. Princeton, Princeton University Press.

Dunning, T. (2007). "Improving Causal Inference: Strengths and Limitations of Natural Experiments." *Political Research Quarterly* (3): 1-12.

Eberlein, B. and A. Newman (2008). "Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union." *Governance* 21(1): 25-52.

European Parliament (2007). Resolution of 12th July 2007 on the PNR agreement with the United States of America. Brussels, July 12.

EU Observer (2003). "Decimated Airlines seek solution to passenger data feud." March 26: online.

Farrell, H. (2003). "Constructing the International Foundations of E-commerce: The EU-US Safe Harbor Arrangement." *International Organization* 2: 277-306.

Field, C. (2003). "Wrangling over Passenger Lists; Trans-Atlantic Tensions." *International Herald Tribune*: September 19: 8.

Flaherty, D. (1989). *Protecting Privacy in Surveillance Societies*. Chapel Hill, University of North Carolina Press.

Follesdal, A. and S. Hix (2006). "Why There is a Democratic Deficit in the EU." *Journal of Common Market Studies* 44(3): 533-62.

Goodman, J. (1991). "The Politics of Central Bank Independence." *Comparative Politics* 23(3): 329-349.

Haas, P. (1992). "Introduction: Epistemic communities and international policy coordination." *International Organization* 46(1): 1-35.

Heisenberg, D. (2005). *Negotiating Privacy: The European Union, the United States, and Personal Data Protection*. Boulder, Lynne Rienner.

Hooghe, L. and G. Marks (2003). "Unraveling the Central State, but How? Types of Mult-Level Governance." *American Political Science Review* 97(2): 233-243.

Hustinx, P. (2007) "New PNR Agreement with the United States," Letter to Wolfgang Schauble, Brussels, June 27.

Jupille, J. (1999). "The European Union and international outcomes." *International Organization* 53(2): 409-21.

Kagan, R. (2002). "Power and Weakness: Why the United States and Europe See the World Differently." *Policy Review* (113).

Keohane, D. (2008). "The Absent Friend: EU Foreign Policy and Counter-Terrorism." *Journal of Common Market Studies* 46(1): 125-146.

Keohane, R. and J. Nye (1974). "Transgovernmental Relations and International Organizations." *World Politics* 27(October): 39-62.

Keohane, R. and J. Nye (1977). *Power and Interdependence: World politics in transition*. Boston, Little, Brown.

Klosek, J. (2006). *The War on Privacy*. Westport, Praeger.

Kohler-Koch, B. and B. Rittberger (2006). "The 'Governance Turn' in EU Studies." *Journal of Common Market Studies* 44(Annual Review): 27-49.

Long, J. W. and M. P. Quek (2002). "Personal Data Privacy Protection in and Age of Globalization: the US-EU Safe Harbor Compromise." *Journal of European Public Policy* 9(3): 325-344.

Ludford, S. (2003). Debate on the Resolution Concerning PNR. European Parliament Plenary Session. Brussels, Statewatch.

Marks, G., F. Nielsen, et al. (1996). "Competencies, Cracks and Conflicts; Regional Mobilization in the European Union." *Comparative Political Studies* 29(2): 164-93.

Melander, I. (2008). "EU Considers Air Passenger Profiling in 2009." *The Gazette*: January 26: A17.

Meunier, S. (2005). *Trading Voices: The European Union in International Commercial Negotiations*. Princeton, Princeton University Press.

Milner, H. (1997). *Interests, Institutions, and Information*. Princeton, Princeton University Press.

Monar, J. (2007). "The EU's Approach Post-September 11: Global Terrorism as a Multidimensional Law Enforcement Challenge." *Cambridge Review of International Affairs* 20(2): 267-83.

Moravcsik, A. (1998). *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca, Cornell University Press.

Nahashima, E. (2007). "EU Seeks Data on American Passengers." *Washington Post*: A18.

Newman, A. (2008a). "Building Transnational Civil Liberties: Transgovernmental Entrepreneurs and the European Data Privacy Directive." *International Organization* 62(1): 103-30.

Newman, A. (2008b). *Protectors of Privacy: Regulating Personal Data in the Global Economy*. Ithaca, Cornell University Press.

Occhipinti, J. (2003). *The Politics of EU Police Cooperation: Toward a European FBI*. Boulder, Lynn Rienner.

Perkmann, M. (2007). "Policy Entrepreneurship and Multi-Level Governance: a comparative study of European cross-border regions." *Environment and Planning* 25(4): online.

Peterson, J. (1995). "Policy Networks and European Union Policy-Making." *West European Politics* 18(2): 389-407.

Pierson, P. (2006). "Public Policies as Institutions." *Rethinking Political Institutions*. I. Shapiro, S. Skowronek and D. Galvin. New York, NYU Press.

Posner, E. (2005). "Sources of Institutional Change: The Supranational Origins of Europe's New Stock Markets." *World Politics* 58(October): 1-40.

Putnam, R. (1988). "Diplomacy and Domestic Politics: The logic of two-level games." *International Organization* 42(3): 427-60.

Radaelli, C. (1999). "The public policy of the European Union: whither politics of expertise?" *Journal of European Public Policy* 6(5): 757-74.

Rees, W. (2006). *Transatlantic Counter-Terrorism Cooperation: The New Imperative*. New York, Routledge.

Risse-Kappan, T. (1995). *Bringing Transnational Actors Back in*. Cambridge, Cambridge University Press.

Rodota, S. (2003). Letter to European Parliament Committee on Citizens' Freedom and Rights. J. Mollar. Brussels.

Sabel, C. and J. Zeitlin (2007). "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union." EUROGOV Papers, March 22.

Schiltz, C. (2006). "Zypries will Passagierdaten auch in der EU nutzen." *Die Welt*: October 7: 6.

Schwartz, P. a. J. R. (1996). *Data Privacy Law: A Study of United States Data Protection.* Charlottesville, Va, Michie.

Shaffer, G. (2000). "Globalization and social protection: the impact of EU and international rules in the ratcheting up of US privacy standards." *Yale Journal of International Law* 25(Winter): online.

Slaughter, A.-M. (2004). *A New World Order*. Princeton, Princeton University Press.

Stevenson, J. (2003). "How Europe and America Defend Themselves." *Foreign Affairs* 82(Mar/Apr).

Thurner, P., M. Stoiber, C. Weinmann (2005). "Informelle transgouvernementale Koordinationsnetzwerke der Ministerialbuerokratie der EU-Mitgliedstaaten bei einer Regierungskonferenz." *Politische Vierteljahresschrift* 46(4): 552-74.

Tomik, S. (2007). "Die EU will Fluggastdaten speichern - eigentlich konnte sie das schon lange." *Frankfurter Allgemeine Zeitung*: July 7:1.

Traynor, I. (2008). "Government wants personal details of every traveler." *The Guardian*: February 23: 1.

Waterfield, B. (2004). "MEPs defy air passenger data deal." *EUpolitix*: March 13: 13.

Wiener, A. (2008). "European Responses to International Terrorism: Diversity Awareness as a New Capability." *Journal of Common Market Studies* 46(1): 195-218.

Young, A. (2004). "The Incidental Fortress: The Single European Market and World Trade." *Journal of Common Market Studies* 42(2): 393-414.

Zito, A. (2001). "Epistemic communities, collective entrepreneurship and European integration." *Journal of European Public Policy* 8(4): 585-603.