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Transatlantic flight fights: multi-level governance, actor entrepreneurship and international anti-terrorism cooperation

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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 multi-level governance processes within Europe that present different opportunity structures for actors to influence international debates. The case of airline passenger name records offers a unique within-case comparison akin to a natural experiment with which to examine the multi-level governance hypothesis.

KEYWORDS

Transatlantic relations; terrorism; privacy; multi-level governance.

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; De Goede, 2008; Keohane, 2008; Mohan and Mawdsley, 2007). 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 issues have 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 (Andreas, 2004). In addition, the failure to resolve these disputes threatens future transatlantic

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cooperation on anti-terrorism (Archick, 2006; Dalgaard-Nielsen and Hamilton, 2006).

Much of the popular narrative in this area of regulation, especially since the unilateral invasion of Iraq by the United States, focuses on US coercive pressure. According to this narrative, public disputes over anti-terrorism cooperation have occurred largely as a product of divergent preferences on the two sides of the Atlantic, with the US calling for greater security and European Union members pushing for a measured response that privileges law enforcement and human rights protection (Monar, 2007; Stevenson, 2003).[1] 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 (Klosek, 2006; Occhipinti, 2003; 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, many of the counter-terrorism and surveillance 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; De Goede, 2008). Second, the EU long resisted many US demands in these areas resulting in years of negotiations and conflict (Farrell, 2003; Newman, 2008a; Shaffer, 2000). Third, and finally, many of the disputes centered not on the legitimacy of a particular security practice per se but in the rules and conditions surrounding its implementation.

In contrast to those who 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 opportunity structures for many different actors with distinct interests to influence regional politics (Börzel and Hosli, 2003; Zito, 2001) This is particularly true in areas that are highly communitarized with considerable supranational competence, where actors from numerous levels endowed with distinct power resources are integrated into the policy-making process (Perkmann, 2007; Newman, 2008b). European 'interests' are then complicated by the multi-level governance system, which expands the potential voices involved in policy development and implementation. Specifically in the area of anti-terrorism cooperation, interior ministers from the member states seeking broad surveillance authority have faced off against a civil liberties alliance between national data privacy authorities, non-governmental organizations and the European Parliament. In short, I argue that recent international conflicts were frequently less

between US and European capitals and more between sub-state actors in Europe and their capitals, which spilled over into the transatlantic relationship because of the nature of multi-level governance in Europe. The resolution of the conflict, then, was the product of a shift in institutional procedures within Europe used to aggregate and express preferences regionally and not a transformation of those preferences.

To investigate this claim, I examine the most high profile and protracted dispute 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 incur 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 the drawn-out negotiations 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 as it bolstered the image (often promoted by European politicians) of the bullying US hegemon in the minds of the average citizen (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 within-case temporal comparison that shares many elements of a natural experiment.[2] Owing to a European Court of Justice decision, the negotiation was run twice under two different institutional processes while other significant alternative factors that might account for variation were held constant over time. During the course of this study, the institutional rules for policy-making within the European Union were organized thematically whereby different procedures existed for issue areas categorized as first (internal market), second (foreign policy), or third (police and judicial) pillar. Under the different pillars, the authority and veto powers of the major EU bodies varied with the European Commission, the European Parliament and data privacy authorities enjoying considerable power under the first pillar and the Council of Ministers composed of representatives from the member states wielding more authority in the third pillar.[3] 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, which contained several important privacy safeguards. A European Court of Justice decision in 2006, however, struck down this agreement on procedural grounds unrelated to privacy concerns. Because of this ruling, the US and the EU, led by interior ministers represented in the Council of Ministers, were required to renegotiate the agreement under the third pillar of the European Union. The resulting agreement stripped out most of the original privacy provisions. The case, then, brings in stark relief

how actors with clear 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 anti-terrorism cooperation, the article suggests that European national governments, particularly interior ministries, 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 international actors such as national data privacy authorities and the European Parliament (which have been further empowered by the Lisbon Treaty) to disrupt the policy-making process and the need to incorporate them early into transatlantic discussions to facilitate quick and smooth cooperation. The complex nature of European governance combined with the divergent preferences of the multiple players involved has the potential to inject difficult mixed signals into the strategic area of transatlantic anti-terrorism cooperation. Theoretically, the article underscores the importance of integrating the internal structures of the European Union into models of global politics and negotiation (Bach and Newman, 2007; Jupille, 1999; Meunier, 2005; Posner, 2005; Young, 2004). Specifically, it highlights the role that multi-level governance within Europe can play in 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 (Milner, 1997; Putnam, 1988).

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 predict that the conflict would be 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).[4]

While it is clear that the US had a structural advantage in the negotiations due to its large market and significant regulatory control over customs and immigration, the state interest story has difficulty accounting for the drawn out nature of negotiations followed by their quick resolution in 2007. Furthermore, although the narrative 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.[5] 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 and then its sudden resolution?

MULTI-LEVEL GOVERNANCE AND ACTOR ENTREPRENEURSHIP

A significant literature has demonstrated the importance of internal European institutions for international negotiations (Bach and Newman, 2007; Bretherton and Vogler, 1999). 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 *et al*., 2000; Meunier, 2005). Research has also shown how the internal regional integration process, 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. Authority relations among levels are not necessarily discrete or subordinate (Börzel and Hosli, 2003; Clarkson, 2001; Hooghe and Marks, 2003). Nor does the distribution of authority within Europe remain constant across issues. Those institutional procedures that prioritize community institutions and the supranational level accentuate multi-level dynamics while governance remains more intergovernmental in other areas. 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 (Perkmann, 2007; Peterson, 1995; Posner, 2005; Zito, 2001). 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 *et al*., 2005). Public and private actors then cooperate in European policy networks (Börzel, 1998; Peterson, 1995; Risse-Kappan, 1995). 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 (Alter, 2001; Kohler-Koch and Rittberger, 2006; Marks *et al*., 1996).

Policy entrepreneurs such as transgovernmental networks of sub-state officials, non-governmental organizations (NGOs), and firms use power resources to obtain their goals in the multi-level setting. These include delegated authority, expertise, and network ties (Newman, 2008b). 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 (Carpenter, 2001; Goodman, 1991). National and sub-national units can reach out to European institutions to lobby and form coalitions in support of their agenda.

The degree and nature of multi-level governance in Europe is significantly shaped by the distribution of institutional authority among European member state and sub-state actors conditioned by the treaties of the European Union. Implemented as part of the Maastricht Treaty compromise, governance in the EU prior to the Lisbon Treaty was organized around three pillars with the first pillar concerned with the internal market,

the second pillar dealing with common foreign and security policy, and the third pillar focusing on police and judicial cooperation.[6] The institutional rules for legislative development and passage varied across the three pillars. In the first pillar, for example, the Commission dominated the legislative initiation phase and the European Parliament had significant rights to review and amend legislation. Under the third pillar, by contrast, the Council of Ministers, which is comprised of member state representatives, enjoyed much broader authority than the Commission or the Parliament. Additionally, ultimate decision-making in the first pillar was conducted by qualified majority voting whereas it was conducted by unanimity under the third pillar. This has led observers to describe the first pillar as highly communitarized and the third pillar as more intergovernmental. These different institutional environments offer distinct opportunities and barriers for non-traditional actors to engage the multi-level governance process.

This article explores the natural international corollary to the multi-level governance argument prevalent in the internal European policy debate. I hypothesize that in areas that have been communitarized, non-traditional players in international affairs such as transgovernmental or transnational actors have access to a number of important opportunity structures that allow them to 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 communitarized process under the first pillar concerned with internal market affairs (between 2003 and 2006), non-conventional actors endowed with power resources such as national data privacy officials and the European Parliament would have had significant agenda setting influence. Given their strong commitment to the protection of civil liberties, these non-traditional actors push for a broader set of protections and procedures that attempt to limit the potential for abuse of new surveillance policies. Their inclusion in the process will naturally complicate quick transatlantic bargaining among interior ministers hoping for an unencumbered expansion of surveillance authority. This effect should dissipate after the European Court of Justice decision, when negotiations were shifted to a third pillar (police and justice) 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). Changes in transatlantic conflict and cooperation are then explained

by changes in the institutional setting, which aggregated and expressed internal European preferences.

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). 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 have developed strong 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, 2008b).

In 1995, the European Union officially entered privacy regulation with the passage of the data privacy directive.[7] 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 (Farrell, 2003; Heisenberg, 2005; Long and Quek, 2002; Newman, 2008a).

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. As part of the Article 25 review process, the

Commission must engage a comitology process in order to reach an adequacy ruling. As part of this review, the Working Party prepares an opinion to the Commission concerning adequacy. While not legally binding, the Commission risks the reputational costs and political capital of contravening a public recommendation of the Working Party. Importantly for the case to follow, because the directive was passed under the first pillar, the Article 25 procedure does not apply to third pillar issues.

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 (EDPS), who is primarily responsible for information processing among European institutions. The EDPS advises the European institutions on data privacy issues that affect the institutions' operations and monitors the implementation of such rules. The EDPS has also been very active in third pillar issues, although the extent of 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 (Newman, 2008a; Regan, 1995; Schwartz, 1996). 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. While there are a number of civil liberties organizations active in the policy space, they lack a consistent politically active partner within government that can carry their advocacy efforts forward (Bennett, 2008). The institutional differences between the two approaches provided the impetus for international action in the issue area as legal differences produced regulatory frictions. The timing and character of the various rounds of agreements, however, cannot be explained simply by referring to the existence of different national and regional privacy laws.

THE TRANSATLANTIC FLIGHT FIGHT

The controversy over 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. 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 does not have comprehensive privacy protections and therefore does not on face meet the adequacy requirement of Article 25 in the European data privacy directive. More importantly, however, the US PNR proposal sought broad surveillance authority including extensive periods of data retention, access to the data by other federal agencies, and limited access or correction of stored data. The civil liberties coalition in Europe protested the expansive version of the PNR system proposed and moved to impose a set of privacy protections that would guard against excessive government abuse. European privacy rules were pitted against US domestic security legislation with European airlines stuck in the middle.

The base-line negotiation: 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 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 did not resist PNR transfers *per se*, but 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. The Commission faced the difficult task of publicly justifying its compromise with the US in the face of continual opposition from the Working Party and potentially conducting a comitology review in which they would have to contravene the opinion of the technical experts.

In addition, data privacy authorities began to use their nationally delegated authority over the transfer of personal data across borders to press 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 might 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.[8] In short, national data privacy authorities used their nationally delegated power to frustrate the nascent transatlantic PNR regime.

Leveraging ties to policy-makers at different levels, the arguments of the Working Party quickly found their way into the European Parliament, which had authority under the first pillar to review and amend first pillar policy under the co-decision process. 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 alliance between the data privacy authorities and the European Parliament pushed 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, 2003b)

Data privacy authorities kept up the pressure on the Commission through autumn 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 of the more limited amount of data involved and the restrictions placed on the storage and use of the data. Still, as the Article 29 Chairman 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). The Commission risked further delay and internal institutional conflict with the Parliament in the form of a drawn-out co-decision process if they failed to move the agreement closer to the demand of the Parliament and the data privacy authorities.

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, 2003a). 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 – assigning the institutional treatment

Despite the concessions reached, data privacy officials and the Parliament were still dissatisfied 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). 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.[9] 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 EDPS, who was appointed just prior to the court case, submitted its own opinion supporting the Parliament's position.

The European Court of Justice ruled against the agreement but on purely procedural grounds.[10] 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 justice and home affairs. The Court sidestepped the more fundamental debate about privacy, requiring that the agreement be renegotiated under the third pillar.[11] In short, there was no basis for supranational action. The court decision, then, sets up a within-case comparison akin to a natural experiment, whereby the negotiation was conducted a second time (Dunning, 2007). As is central to a natural experiment, the decision did not speak to the substance of the agreement only that it must be negotiated using a different procedural mechanism. The second negotiation holds many of the key confounding variables constant which helps to examine the role of the institutional setting and derive causal inferences.[12]

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. Because the 1995 privacy directive was enacted under the first pillar, data privacy authorities have no authority to review adequacy decisions. Additionally, the European Parliament has no substantial authority to review and amend legislation passed under the third pillar, eliminating the Parliament–Working Party alliance forged

in the first round. The institutional process shifted overnight from a highly communitarized process to a much more conventional intergovernmental one.

The 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 Wolfgang 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 with the US over the spring of 2007.

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 to review and amend legislation under the third pillar and thus cannot serve as an ally to national data privacy authorities. Finally, because of the third pillar process, the Parliament does not have direct standing to challenge the decision in front of the European Court of Justice and therefore could not use the threat of further judicial action to alter the policy trajectory.

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. Finally, many of the privacy protections are not contained in the agreement itself but in an accompanying exchange of letters, all of which could be unilaterally withdrawn at a later date. 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.[13]

An EU PNR system signals member state 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 interior ministers drafted a Council framework decision that would create a European PNR system.[14] This initiative, which is supported by the Commission, would 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 13-year retention period of five active years and eight dormant years. The proposal, 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 simple retaliation against the US, the Commission unveiled its interest in a European PNR system as part of a larger package of anti-terrorism efforts (Bossong, 2008; Nahashima, 2007). Then-Commissioner for Justice Franco 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 dates back at least to 2004, when it sent a communication to the Council and Parliament on the issues (Commission of the European Union, 2004). Such early interest undermines alternative explanations for the final agreement that focus on learning or new information. In late 2007, the

Commission completed a draft framework decision, which would translate many of the expansive 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 on 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, argued that a failure to adopt a PNR system for Europe would be 'inexcusable' (Tomik, 2007). Even the Social Democratic Party (SDP) Justice minister supported 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 Dragutin 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). At the final meeting of the Home and Justice ministers in November 2008, the French presidency released a report supporting a European PNR system. As was the case with earlier US–EU negotiations, the airline industry supports the initiative so long as the rules harmonize the regulatory burden (Nahashima, 2007). In the summer of 2009, the Council submitted a revised draft of an EU PNR proposal for consideration.

While not universally opposed to PNR systems, particularly in regions such as Europe with comprehensive privacy rules, 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 based on the US agreement failed to meet the basic requirements necessary to guarantee privacy – too much information would be collected for too long without enough specification about who might access the data and for which purposes (Article 29 Working Party, 2007). By extending the basic provisions of the US agreement to the regional setting, the Commission and Council constructed a PNR system that in the opinion of the Working Party would threaten fundamental privacy principles.

The prospects of a European PNR system will most likely depend on the future of the Reform Treaty. With its passage, the European Parliament is set to receive considerable more governing authority in the area of Home and Justice Affairs. Similarly, the Commission is reviewing the role

of the Article 29 Working Party as the separation between the first and third pillars collapse. Given these changes, the argument presented would expect much more significant integration of the interests of Parliament and national data privacy officials in future negotiations over a European PNR.

Regardless of the European PNR system's ultimate fate, however, it is clear that neither the Commission nor the majority of member states opposed a US-style PNR system.[15] Since the very first 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 interior ministers from the large states of France, Germany, and the UK – have actively pushed to expand the surveillance data available to their security forces.[16]

CONCLUSION

For over half a decade, the US and Europe engaged in a difficult negotiation over the sharing of personal data of airline travelers. Although they ultimately reached a working solution, the dispute 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 inflamed anti-American sentiment in European populations. Empirically, it is thus crucial to understand why the conflict emerged, persisted, and was finally resolved.

Both the popular press and mainstream international relations 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). In a range of issues from trade to competition, the Commission often takes collusive positions that attempt to facilitate cooperation with the US (Pollack, 2005). 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 implement 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 (Keohane, 2008; Monar, 2007). Similarly, the US has made demands through the visa waiver program, for example, that attempt to divide European loyalties and have 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 (and the stark within case comparison) 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 opportunity structures for non-traditional 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 were filtered through the opportunity structures present in the first pillar, and constrained the negotiating parameters of the Commission and sparked Parliamentary resistance. The passage of the Lisbon Treaty, which will communitarize many areas related to internal security and police cooperation, will no doubt further empower these non-traditional international actors. Although they were ultimately sidelined in PNR negotiations, the case hints at their potentially expanded role under the new treaty.

The ultimate resolution of the conflict does not demonstrate a shift in preferences on the part of Europe. Rather, the intervention by the European Court of Justice, shifting the institutional foundations of the debate (from the first to the third pillar), changed those who 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. In contrast to power-based arguments that would predict a quick victory by the US, an explanation highlighting multi-level governance can then account for the *duration* of the conflict and the *timing* of its resolution.

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 multi-level governance system 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). With the passage of the Lisbon Treaty, the importance of internal multi-level governance for the external policy of the European Union should only increase.

Second, the narrative suggests that the recent integration of regulatory networks into European governance has an important international implication. 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, 2009). As these agencies have their own preferences and their own authority, they will no doubt alter the policy-making process at the international level.

Third, the narrative presents a paradoxical case for those concerned about democratic accountability within the EU (Follesdal and Hix, 2006). Despite the 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 such as regulators repeatedly interjected on behalf of the rights of citizens. Technocratic regulators attempted to destabilize the policy debate and bolster civil liberties (Sabel and Zeitlin 2010). In the end, national governments were able to use the third pillar process to 'policy launder' an issue regionally to obtain an outcome that they could not easily obtain in their home legislatures. The highly communitarized setting offered more opportunity structures for voices of protest than the conventional intergovernmental process.

Finally, it signals a new research agenda focusing on the role of the European Court of Justice in the external relations of the Union. This paper has used the court intervention in the PNR debate to highlight within case variation akin to a natural experiment. In a number of critical issue areas such as competition policy and air transport, the Court has played a decisive role in altering how the EU engages the world. Nevertheless, scholarly attention as of yet has largely ignored this dynamic. A next step in this program would be to assess how theories of judicial interaction internally (e.g. Alter, 2001; Weiler, 1991) translate to the external policy field.

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, however, can alter the balance of transnational civil liberties.

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NOTES

1 For examples of the press version of this argument see Webster (2004) and Pfaff (2002).
2 A natural experiment presents itself when subjects are 'as-if' randomly assigned to a treatment through social or political forces (Dunning, 2008). They help scholars make inferences as they hold many measurable confounding variables constant and allow for a focused examination of a key causal factor. In the case of airline passenger records, the Court intervention assigns a new institutional procedure. It is important to highlight that the Court did not rule on privacy grounds but on process. This limits the threat of endogeneity within the case study as the participants in the negotiation were not told how they should negotiate but rather under what procedure. Nevertheless, temporal comparisons often raise validity issues associated with learning or the revelation of private information. I attempt to address these issues within the case study. For an example of a natural experiment in a temporal comparison see (Cox *et al*., 2000).
3 It is worth noting that the Commission and the European Parliament play a significant role in first pillar decision-making while the Council of Ministers, which most closely reflects member state interests, dominates in the third pillar. For a discussion of the pillar structure within the EU see Wallace *et al*. (2005).
4 See, for example, Webster (2004) and Pfaff (2002).
5 Interview with European airline trade association official, Brussels. See also, Association of European Airlines (2007).
6 For a discussion of the pillar structure within the EU see Wallace *et al*. (2005).
7 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.
8 See, for example, the decision of the Belgian data privacy authority from 19 January 2004, available at http://www.edri.org/edrigram/number2.2/bolkestein
9 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, 6 November 2003.
10 The role of the European Court of Justice in the external affairs of the European Union has not yet been adequately studied. In issue areas ranging from competition policy to trade, the Court has defined the international authority of the EU. PNR is an important case as it demonstrates an instance when the Court rejected a broad interpretation of the Commission's authority in external relations.
11 See European Court of Justice, C-317/04 and C-318/04, 30 May 2006. See also Clark (2006).
12 For more on natural experiments see note 2.
13 A comprehensive review of the privacy implications of the agreement is available at http://www.statewatch.org/pnrobservatory.htm

14 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, 29 May 2008.
15 This position was confirmed in an interview by a European Parliamentarian active in the issue area, Brussels.
16 For the general push by government security bureaucracies to expand surveillance see Lyon (2004).

NOTES ON CONTRIBUTOR

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