

Committee on Civil Liberties, Justice and Home Affairs
Transatlantic Dialogue
Monday May 14 2007
(unofficial record)

Mr Wolfgang Schäuble (German Presidency of the Council) began the session by highlighting the strong links between the EU and the US, and underscored the significant position of the fight against terrorism in the dialogue between the EU and the US. A high-level contact group on data protection was established last year.

Vice President Frattini believes the European Institutions, the Member States and the US have a common goal, and that is to fight terrorism and criminality while protecting fundamental rights. Security is in itself a fundamental right, and it is one of the preconditions to enjoy the other fundamental rights. Privacy and the protection of people in a security context should go hand in hand. Therefore, closer cooperation with the US will galvanise a comprehensive approach to security in Europe.

Mr Michael Chertoff (US Secretary of the Department of Homeland Security) underscored the common interests and common challenges of the EU and the US, and signalled the desire of the US to continue to work in close partnership with the EU to the benefit of citizens on both sides of the Atlantic. He recently joined the G6 Ministers in Venice, to discuss shared challenges with respect to preventing acts of terrorism, while ensuring that civil liberties and privacy continue to be protected. No one wants to forsake their civil liberties in the name of security. Security should be string and effective, but consistent with freedoms and values cherished by free and democratic nations.

Emphasis was placed upon the tremendous cooperation the US has received from the EU on many fronts to deal with the challenges of terrorism in the 21st century. A lot of progress has been made through a united approach in defending citizens of the EU and the US; to disrupt terrorist plots both in Europe and the US; security has been enhanced across borders, oceans and skies. Unprecedented cooperation has been achieved through a host of international initiatives, from setting standards, to sharing information, to boosting security at airports and seaports. However, this work has not been completed. There are still many challenges facing the US. Some of these challenges are a result of different perspectives both parties have on what faces them, in terms of the nature of the enemy and the appropriate response. Other challenges reflect the fact that some of the tools and legal and policy approaches that are at their disposal are not perfectly suited for the 21st century adversary. While at the G6 meeting in Venice, John Reid said that policy-makers have to consider whether they need to adapt the legal tools and the policy tools that have served nations in the 20th Century to deal with a different threat that has emerged.

How do the EU and the US move beyond their differences to achieve a new level of cooperation and understanding in areas such as information sharing and privacy and data protection? How can these goals be achieved in a way that respects the fundamental principles and the security goals of the EU and the US? If policy-makers

do not do their jobs properly, more innocent people will perish in wanton acts of terrorism as the decade continues to unfold.

The shared fundamental principles of the EU and the US, and how they are approached in dealing with the threat of terrorism were also discussed. The most fundamental question is what are we fighting and why are we fighting it. In other words, what is the nature of the threat facing the EU and the US? One of the side effects of globalisation in the 21st century is the globalisation of terror. The same international systems that have bound European and US societies together, such as air travel, global supply, communications and financial networks are the same systems that terrorists seek to exploit and use against them to cause destruction on a global scale. Modern terrorists fund their operations internationally; they recruit and train members, plan and carry out attacks by exploiting the gaps in the seams in the international systems. The 9/11 attack was a clear illustration of this. The plot was hatched in Central Asia, the recruits came from Saudi Arabia, the training occurred in Afghanistan, the planning occurred in Europe and the attack culminated in the US. EU and US enemies are determined, sophisticated and pose a threat to the US, Europe, North Africa, East Africa, South Asia, and virtually every place around the globe. The persistence of these threats were recently realised in Algeria and Morocco, virtually on the doorstep of Europe. Earlier attacks in Madrid and London, and the notable failed attack in August against transatlantic airliners departing from the UK. In May, a British jury convicted a number of British citizens who had plotted to use fertiliser bomb to attack a shopping mall, a nightclub and other targets in London.

Mr Chertoff focused on what is an appropriate response to terrorism? Some say terrorism is just another form of criminal activity to be dealt with in the traditional way authorities deal with crime. However, while law enforcement techniques have some use, Mr Chertoff does not agree that this is the only tool the US and the EU can use in order to face this threat. He believes we are at war, and it is essential that the threat posed by 21st century global terrorism is viewed in the context of what it means to fight a war. It is a different kind of war than the war seen in the battlefield in the last century or in earlier centuries. It is a war that cannot be won by military might alone; it requires all of the elements of national and international power, including law enforcement, diplomacy, the use of intelligence and soft-power (the battle for ideas). The threat the EU and the US faces is not that of a criminal gang or conspiracy; it is an ideological threat, borne by ideological extremists who seek to advance a totalitarian vision through the use of terrorism. Al Qaeda and other groups affiliated with it have a world vision, one that is notably different to that of political terrorists of the past, and distinct from some of the regionally focused terrorist groups.

Reference was made to Peter Clarke, the head of counter- terrorism for Scotland Yard, who fought the Irish Republican Army (IRA) for over 30 years. Mr Clarke drew a distinction between the terrorists of the IRA and al Qaeda in a speech last month. The IRA had specific political goals, did not seek to destroy themselves, and did not seek to wantonly kill innocent people. He described al Qaeda as reverse of the IRA; global in origin, reaching ambition with "networks that are large, fluid, mobile and incredibly resilient". The threat posed by al Qaeda is qualitatively different than threats faced before in Europe and the US. History teaches us how corrosive ideologies can become, ideas that begin in the early stage graduate to having real military power on the world stage. In the earlier parts of last century, the ideologies of

communism or fascism did not initially seem to constitute a serious threat to world peace. Those ideologies left unchecked led to devastation and destruction upon innocent civilised people of the world.

Focus shifted to the goal of the Islamist extremist groups behind the terrorist attacks here in Europe and in the US. They do not seek merely political revolution in their own countries, they seek the ultimate domination in many countries. Their goal is a totalitarian, theocratic, religious Empire, to be achieved by waging perpetual war on soldiers and civilians alike, up to and including the use of weapons of mass destruction. While some may say this intent is grandiose, and it cannot be achieved, Mr Chertoff disagrees. Extremists such as those in al Qaeda, the Taliban and other groups from North Africa, Iraq, South Asia, and East Africa are fighting for, and are beginning to achieve control of parcels of territory in which they can train, assemble their own advanced weaponry, and impose their own vision of repressive law dominating local freedom. The 9/11 attacks were the most devastating single blow ever visited upon the US by foreign enemies. The plot last year to blow up multiple transatlantic airliners in Britain, had it succeeded, would not only have caused the loss of thousands of lives, but would have devastated the international aviation system and a rupture in the ability to travel between Europe and the US.

Attention moved to finding ways to fight this network. Mr Chertoff believes it should be fought by developing a network of our own; a network of free and civilised people who believe in the rule of law and democracy. The US and its partners should build a unified set of capabilities that allows them to: prevent terrorist infiltration; strengthening of borders without making them difficult for innocent people to cross; increase the level of document security; and share information and intelligence to pinpoint threats. Intelligence is the 21st century version of radar; in the last century when a state feared a bomb attack, radar could be used to detect enemy aircraft that might be coming into Europe or the US. That is of no avail in dealing with terrorists; terrorists come in under the cover of innocence, and cannot be detected by mechanical radar. They can only be detected by the use, analysis and sharing of intelligence that allows a state to separate who is a threat from those who are innocent.

How has intelligence been used? Passenger Name Record (PNR) system is one example. A system has been built to analyse air traveller information combined with other intelligence, and is part of the process of building a layer of protection for the US. Mr Chertoff noted how it has been the subject of serious discussion with the EU, and the ongoing negotiations provide the opportunity to take a fresh look at the issue of sharing this information. He asked how the EU and the US can develop a long term framework to share information that allows the two entities to protect their citizens against the aforementioned threats. In his opinion, there are common fundamental principles that serve as a firm edifice on which sharing arrangements can be built; one that reflects the institutional arrangements in the various countries, but that ultimately reflects the shared values of liberty and privacy of the EU and the US.

PNR is collected by the travel industry or the airlines when a person makes an airline reservation. It is basic information (i.e. name, passport number, frequent flyer number, credit card information, telephone number and address). The US takes the information and runs it against lists of known and suspected terrorists, and they use it to analyse links that may arise between travellers and others who are known to be

terrorists, in order to ascertain who needs a closer look. It is a valuable tool as it enables the authorities to seek out hidden connections to keep out dangerous people.

Mr Chertoff provided example of how the US has benefited from collecting this information. For example, in June 2003, an inspector at Chicago O'Hare International Airport identified an individual traveller coming in from the Middle East. Based on the information shown through the analysis of information, the inspector interviewed this individual. The inspector did not permit leave to this individual in the US. In 2005, this individual's fingerprints were later found on the steering wheel of a truck which has been used as a vehicle borne improvised device detonated in Iraq, causing the death of 132 people. He claimed that through three simple analytical moves, and the utilisation of data as occurs today, could have identified and prohibited the entry to the US of 11 of the 19 9/11 hijackers. This tool therefore has a minimal cost to civil liberty, and the tremendous potential to save lives.

The discussion moved to PNR, and aimed to clarify some misconception about it. It is not used to profile based on race or ethnicity. This information allows the US to focus on relevant behavioural criteria developed from investigative or intelligence work. PNR data does not guarantee that a person that arrives in the US can be identified as a terrorist or not; but it does allow the US immigration officers to make a more informed assessment to determine who should be questioned further at the border. It is not used to label people or to create a risk score that stays with the person for the rest of their life; it gives the authorities a way of analysing their behaviour in conjunction with other things the authorities know to pursue further inquiry.

The Privacy Act and the Freedom of Information Act among other laws, as well as oversight by Congress, American Courts and the Inspector General provide a strong guarantee against misuse of this information. The Privacy Act has criminal and civil penalties against its violation, and under the mixed use policy, the Privacy Act guarantees extend to foreign nationals. The Traveller Redress Inquiry Programme allows travellers of any nationality to seek redress if they feel they have been inappropriately selected by our targeting systems.

The visa waiver programme (VWP) was also addressed, and Mr Chertoff drew attention to the announcement made last year by President Bush that he would ask Congress to pass legislation that would enable the US to admit additional countries to the VWP by creating greater flexibility in the standards currently applicable. That legislation is before Congress, and will hopefully be inaugurated during this session. If passed, it would welcome additional European countries in the VWP.

The EU and the US should begin with shared principles along the line being developed with the high-level contact group. Open democracies should be able to respect each other's privacy frameworks, especially when the countries share fair information principles. The US wants to work constructively and in a transparent manner. Sharing PNR and identity information will be a net gain for privacy and civil liberties, and will foster a better understanding of who actually poses a risk and should receive more targeted scrutiny. He hoped the EU and the US can negotiate a new arrangement that demonstrates their joint commitment to protection privacy while meeting security needs.

Baroness Sarah Ludford (MEP) reflected upon how the European Parliament is trying to address the internal and external aspects of terrorism in a coherent manner. She asked if Mr Chertoff recognised the damage the excesses of the war on terror had done to the fight against terrorism. She signalled how the EU and the US have not won the hearts and minds. The European Parliament are afraid that the ideologies of democracy and human rights has not been maintained. She stated we need to look at why our laws on terrorism are inadequate rather than representatives of the US administration persuading Europeans like John Reid that there is a gap in criminal law. She appealed to Mr Chertoff, the Presidency and the Commission to support the greater involvement of the EP and Congress in the legal discussions taking place between the legal advisor of the State Department and legal representatives of the Member States, and in the work of the high-level contact group on data protection.

Mr Chertoff responded by stating he believes that hearts and minds are the ultimate battleground that we face in respect to this ideology. No one in the US would claim the approach they have undertaken is perfect (i.e. elements of Abu Ghraib are very distressing). However, time and again the rule of law has continued to triumph in the west. In the US, when the courts have ruled on issues, the binding authority of the court has been respected. Criminal laws can be one effective tool against terrorism. However, it is not the only tool that is effective. He agreed with the views of John Reid, in that we should look for gaps in the law that fail to address the realities of the 21st century. On the issue of openness, he agreed that it is very helpful to have dialogue on openness and to share views.

Mr Jonathan Evans (MEP) stated there while there is no doubt that there are differences of view in the transatlantic basis, but what unites Europe and the US is more important than what divides us.

Mr Herbert Reul (MEP) underlined how the need for action is very important, and that one must be careful when talking about ideological questions, prosecution and other issues. He asked what general timetable the US was thinking about concerning legislative coordination.

Mr Stavros Lambrinidis (MEP) agreed with Mr Chertoff's views on the conflict of cultures towards security. There seems to be a sense in mainland Europe that maybe in the context of fighting terrorism, there has been in the US in the past three or four years an ease in ignoring some fundamental rights issues. Secondly, there are concerns that the battle on hearts and minds is being lost. He signalled how he believes we are losing this war, and he made mention of a US Security services report indicated that they felt the war in Iraq has increased the danger of terrorism. He continued with a few questions. The Swift case raised concerns, and he asked Mr Chertoff if any similar cases have occurred. Which types of PNR data, that are not already included in the APIS data, were used to stop a particular terrorist? Was he on a terrorist list? If so, could APIS not have flagged this? The final question concerned the VWP. In the new draft legislation in Congress there is a new requirement for Member States who are not already in the VWP, to agree to exchange PNR. At the same time, there are multilateral negotiations for a new PNR agreement. Why is it that individual countries will have to agree to something that the EU is trying to agree upon as a whole with the US. Will the new requirements of the VWP also apply to old waiver countries, or just the new ones?

Ms Sophia in't Veld (MEP) began by clarifying how Europeans fully share the security concerns of the Americans. Do all these measures actually make us safer? Until recently, there has been no evidence at all due to the US being concerned about disclosing operational information. She would like some sort of evaluation of the results of programmes such as the collection of PNR data. As a law maker, she would like more evidence rather than anecdotal information. She asked could something like 9/11 have been prevented if we had more information. Was inadequate information sharing between services not the real problem? She addressed the use of data for the prevention of infectious diseases and other risks. It is a very open interpretation. Are ATS data being used by employers to scrutinise job applicants, or by commercial companies? Does ATS not allocate risk profiles that stick to the person for 40 years? She asked if the US is willing to conclude an agreement on PNR that reflects the American and the EU legal principles and interests instead of unilaterally imposing US standard. Regarding the Privacy Act covering European citizens, until recently it did not cover European citizens. Why is not a legislative act? Will it cover the cases in which the FBI have used National Security Letters to retrieve customer records from telecoms providers that contain data concerning European citizens.

Mr Cem Özdemir (MEP) commented on how the sale of firearms in the US could help terrorists in the US.

Lord Wright of Richmond (Sub-Committee F: Social Affairs, Education and Home Affairs, House of Lords) referred to report on the PNR agreement currently being prepared by a committee in the House of Lord which will examine the ways in which the 2004 and 2006 agreements could be improved in the current negotiations. The committee finds it very unsatisfactory that the terms of both agreements should in effect have been unilaterally amended by the letter Mr. Stewart Baker wrote to the Council and the Commission in October 2006. Can we be assured that the new agreement will contain specified terms and agreements in writing, and that they will only be amended after full consultation and with the agreement of both parties?

Mr Michael Chertoff made reference to the Interim Agreement set to expire in July, and signalled the desire of the US to work to resolve this matter for the expiration. No reason as to why we cannot agree.

With respect to Mr Lambrinidis' questions, he stated that the balance of law becomes somewhat different when one aims to prevent attacks. When the question of a failure to act could result in the perishing of many innocent people, you must ask whether you would be satisfied to be constrained by slow moving processes if a consequence were to allow an attack to go forward that killed thousands of people. The law must be one that will work effectively in light of the challenges the US and the EU faces. The US is very faithful to the rule of law. When the US government loses it abides by the result. It is a vindication for the rule of law. There are some differences in the legal institutions and cultures of the EU and the US. For example, the debate in Europe on banning distinctive types of Muslim garment in certain circumstances would not be a subject for debate in the US. It would be strictly forbidden to bar anyone from wearing religious dress, with the rare exception of people in prison or in the military.

Swift is a matter outside Mr Chertoff's competence, and he could not provide any information on the issue.

Regarding the question on which types of PNR not in APIS were used in stopping terrorist attacks, and how it relates to the issue of proportionality. Mr Chertoff provided some examples. APIS data gives name, passport number and some information contained in passports. It does not provide telephone numbers, frequent flyer numbers, and it does not have the credit card number. Each of the three elements not present in APIS would have yielded the identity of additional hijackers. APIS is therefore not sufficient alone.

To answer the question whether the standards in the VWP are to be applied uniformly across all countries or to be applied selectively, he stated that it is clear that if one looks at the legislation it will be applied uniformly. As to why the issue of PNR data is in the visa waiver legislation, it reflects the fact that the US authorities do not know whether the legislation will pass, and as there is no PNR agreement as of yet, once a PNR agreement is reached it will be synchronised with other requirements.

In response to the question, do these measures make us safer? Mr Chertoff referred to specific examples of how they do make us safer. The US does not catalogue every instance in terms of keeping a statistical database of each time these measures make us safer as the information is not always captured. The examples that were provided do focus on serious threats that were deterred through the use of data.

He anticipated a question, and that was why the US does not provide very specific information about which data field yielded a particular result. The US wants to be cautious, and does not wish to tell people how to avoid the ability of the US to analyse their data by fully indicating the range and the kind of analysis the US is able to do. At some level, some of the tactical specifics need to be concealed.

Regarding the question as to whether in 9/11 the real problem was the lack of this information or the lack of information sharing among the services; the answer is both. This information was not captured, collected and analysed prior to 9/11 the way it is now. Mr Chertoff agreed with the point that the US had information and it was not shared, and that it was a critical deficiency that led to 9/11. This is one of the reasons as to why the US has been very insistent upon ensuring that within the US government they are able to share information among responsible agencies, in the PNR negotiations.

Concerning the question of the use of this data for infectious diseases and whether the ATS is used by employers and insurance companies, Mr Chertoff responded that it would be against the law for employers or insurance companies or private companies to be given the data. If it were happen, it would result in prosecution. If there was to be an outbreak of an infectious disease that could have the same effect as to what happened in 1918, authorities would be interested in finding out whether a person had travelled to an affected area.

Finally, with respect to the question of applying US standards, the US believes that their fundamental approach to most of these issues is similar to that of the Members of the EU. The legal standards of the US in many respects derive from the laws and

the traditions of Europe; there are not tremendous divergences. Nevertheless, the US must take the necessary steps to determine who should be permitted entry. The right to collect PNR data is explicitly recognised in international law through the Chicago Convention. However, the US does not want to make it a case of them insisting that it be done their way and no other way, and they do want to take account of the concerns expressed by their European counterparts to demonstrate their system is consistent with the European attitude to privacy. Recent administrative action taken by the US signalled how the authorities are willing to treat information from European and other foreign citizens in the same way as American citizens under the Privacy Act.

Regarding the use of firearms, there is simply a difference in attitudes, and reference was made to the previous point stated on headdresses.

To answer the question as the US having exited from the original agreement, Mr Chertoff stated that it was the ECJ that struck down the agreement as it was beyond the competency of the original authorities that negotiated it. When negotiating the Interim Agreement, the US did take account of some real problems relating to the old agreement. No country will sacrifice the fundamental ability to protect itself.

Vice President Frattini underlined the importance of mutually respecting differences between different traditions, legislations and specific laws. There should be an umbrella response to the Member States of the EU, to prevent different Member States receiving different treatment on the same issue. Each and every air company should not regulate in a different way the treatment of personal data. A common understanding of problems, solutions, and some common principles should be arrived at. A balance is required; some rights are absolute rights, and on the other hand, it is not possible to interfere with the domestic legislation of a Member States. Balance therefore has to be found between these two principles.