Freedom, Security, and Democracy in the European Union: the intervention of the European Parliament in the negotiation of the Passenger Name Record Agreement

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Richard M. Spooner

Supervised by Dr Christoph Meyer
King's College London
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Abstract

The intervention of the European Parliament in the negotiation of the Passenger Name Record Agreement, which states that for reasons of aviation security and public order airlines flying from the EU to the USA must electronically transfer data relating to their aircraft's passengers and crew to US authorities before they depart, has created a nexus of three crucial debates currently facing the EU: those related to freedom, security, and democracy. This paper argues that in adopting a position opposed to the PNRA the EP reflected a substantial strand of European opinion, but also acted according to its institutional self-interest. The failure of the strategies it pursued to influence the outcome of the agreement, due to its lack of formal powers, has degraded the position of human rights in the EU. However, sustained and widespread calls for the expansion of the EP's competences more firmly into the field of security are likely to happen only once the parliament is regarded as a vital mouthpiece for the importance of the preservation of liberty in the fight against terrorism; the emergence of this strength of feeling is reliant upon a media that reflects the true importance of the EU, both positively and negatively, in the lives of its citizens.

Introduction

The Passenger Name Record Agreement, made between the European Union and the United States of America, states that airlines flying from the EU to the USA must electronically transfer data relating to their aircraft's passengers and crew to the US authorities before they depart. This data is required on the grounds of aviation security and public order. The passage of the agreement has not been a straightforward one, due to concerns raised about the adequacy with which it protects personal data from misuse; the European Parliament has been at the forefront of this opposition. Commencing with the essential context of the PNRA - the debate over the place of human rights in the fight against terrorism, and criticism levelled at the EU's role in this field - this paper moves on to analyses of the reasoning behind the EP's position on the issue, and the strategies that it adopted to influence the outcome of negotiations, despite its status as an institution that need only be consulted. It concludes by arguing that the EP's status as a directly elected body should give it a privileged place in protecting from erosion the values that form the foundations of all liberal and democratic societies, and in articulating what are often felt to be particularly important aspects of the EU's identity. However, as long as the citizens of the EU continue to receive most of their knowledge of current affairs from national media, focused on national news, this identity is likely to remain too weak for it to lead to sustained and widespread calls for the EP's powers to be amended so as to reflect it in the formulation of counter-terrorism legislation.

I: Human Rights, Security, and the European Union

The debate that has arisen over the place of human rights in societies threatened by terrorism, its resonance in Europe, and criticism levelled at the development of the EU's role in the field of counter-terrorism, form a central part of any understanding of the PNRA; in these areas are revealed the philosophical and historical basis of the position of the EP, and the broader context of the securitising tendencies evident in the content of the agreement. These tendencies have been particularly prevalent since the current wave of terrorist attacks began in September 2001. Charles Clarke, the former British Home Secretary, was representative of the consensus in many Western governments when he argued in a speech to Members of the European Parliament that 'the human right to travel on the underground in London on a Thursday morning without being blown up is also an important right'.[1] The restriction of certain civil liberties, in order to protect the lives of citizens, is adjudged a worthwhile trade. Clarke's view, although representative of that of many Western governments, is not one that is universally held. The American legal philosopher, Reginald Dworkin, counters that 'rights would be worthless - and the idea of a right incomprehensible - unless respecting rights meant taking some risks.'[2] There is no simple arithmetical calculation that can be made concerning the fundamental values of liberal and democratic societies.

Dworkin is by no means the originator of ideas about the unique value of rights, but he is an eloquent advocate. His fundamental point is that individual rights constitute an

[1] 'Security must take priority over rights, UK Home Secretary tells MEPs', *European Parliament Press Service*, September 7th 2005, accessed through: http://www.europarl.europa.eu/news/expert/infopress_page/019-1434-238-8-34-902-20050826IPR01416-26-08-2005-2005--false/default_en.htm

[2] Dworkin, R., 'Terror and the Attack on Civil Liberties', in Rockmore, T., Margolis, J, and Marsoobian, A.T., eds., *The Philosophical Challenge of September 11* (Oxford 2005) p.95

objectification of our shared humanity, which is 'among the most fundamental of all moral principles.'[3] This principle is violated by the 'new balance between liberty and security', which is posited as a reasoned appraisal of whether new policies will be in our overall interest, but which is in fact no such thing; the only balance that exists is 'a balance between the majority's security and *other* people's rights',[4] justifying repressive measures against those who match a given ethnic, religious, or political profile. For example, it is virtually inconceivable that a non-Muslim, with no links to Islam, would be labelled as an enemy combatant and incarcerated indefinitely.[5] This approach is of only limited worth in preventing acts of terrorism, and causes significant and lasting damage to the fabric of society, possibly marking 'an irreversible step to a new and much less liberal state.'[6] The context within which Dworkin wrote was an article concerned primarily with the provisions of the USA Patriot Act and the treatment of the inmates of the Guantánamo Bay detention facility. Although these studies appear, superficially at least, far removed from the measures that have been enacted on the other side of the Atlantic, it is clear that his conclusions are more resonant with the parliaments, courts, academia, and press of Europe than of the USA. This similar perception of an erosion of human rights in the fight against terrorism, and calculation of the worth of freedom of the individual, forms the intellectual foundation of what may otherwise be perceived as the EP's obscure and pedantic criticism of minor aspects of data protection mechanisms.

It is important to ask for what reason this might be the case; why have EU governments been more cautious than the USA in the measures that they have enacted to

[3] Dworkin, 'Terror and the Attack on Civil Liberties', p.86
[4] Dworkin, 'Terror and the Attack on Civil Liberties', p.86, author's italicisation
[5] Dworkin, 'Terror and the Attack on Civil Liberties', p.86
[6] Dworkin, 'Terror and the Attack on Civil Liberties', p.85

fight terrorism? There are several possible factors, all of which would likely form part of a total explanation. Firstly, and most obviously, the countries of the EU have not been affected in the same way as the USA - the attacks in Madrid and London cannot compare in scale or symbolic power to the destruction of the twin towers of the World Trade Centre - and so the same sense of outrage, and desire for action, is not felt. Secondly, they do not have the same fiscal or technological resources to dedicate to the issue, and it is arguable that any policy 'preference' is a simple reflection of this fact.[7] Finally comes the theory that certain policy responses 'trigger memories of the way claims about immediate dangers have led to the erosion of liberalism and democracy at other moments of European history',[8] implicitly calling to mind Hitler's Germany, Mussolini's Italy, and Franco's Spain. Accordingly, the history of post-war Europe has been that of an escape from this marred legacy, and of a positive choice to embrace those values that had been shown to be so fragile, and even export them to the rest of the world. Europe's real 'other' is its own past, motivating a desire to escape the turmoil that has so often seized the continent,[9] and it is this dynamic interaction of policy and identity that constrains the form of measures that may be enacted to protect its citizens,[10] rendering certain options unacceptable.

This interpretation is a valuable analytical tool in the study of European security, particularly at the level of the EU, whose identity is more bound up than its component states with respect for human rights, in part as a result of its status as the organisation that 'rescued

[7] See Kagan, R, *Paradise and Power: America and Europe in the New World Order* (London 2003)
[8] 'Security Issues, Social Cohesion and Institutional Development of the European Union', *ELISE Final Synthesis Report*, p.3, accessed through:
http://www.libertysecurity.org/IMG/pdf/ELISE_FINAL_SYNTHESIS_REPORT.pdf
[9] Diez, T., 'Europe's Others and the Return of Geopolitics', *Cambridge Review of International Affairs*, Vol. 17, No. 2, July 2004, p.321
[10] See Sedelmeier, U., 'EU Enlargement, Identity and the Analysis of European Foreign Policy: Identity Formation through Policy Practice', *European University Institute Working Paper* (San Domenico 2003) accessed through:
http://www.iue.it/RSCAS/WP-Texts/03_13.pdf

the nation state'[11] from its degradation in the earlier part of the century. Ian Manners sees as part of this legacy the 'relative absence of physical force' in the EU's external action policy.[12] Similarly, it is possible to point to the automatic expiry after two years of the exceptional security measures passed by the French Parliament in October 2001.[13] Yet it must also be accepted as a politicised discourse rather than an objective reality, whose very existence amounts to evidence of strong countervailing developments. In the UK Prime Minister Brown has been attempting, in the face of sustained parliamentary opposition due to the lack of an unambiguous justification on security grounds, to double the amount of time suspected terrorists may be held without being charged.[14] The governments of several EU member states have been accused of complicity in the illegal transfer by the USA of suspected terrorists from their soil to secret places of detention. So, the accusation that a given policy is 'un-European' due to its illiberal nature must find its limitation in the fact that such policies have been pursued by European nations, and that all have had judgements against them in the European Court of Human Rights.[15]

The EU itself has not been immune from criticism of its role in the fight against terrorism, relatively limited though that role might seem. In fact, the expansion by the EU of its competences into the field as a result of the Treaty of Maastricht in 1992 amounted to an only belated recognition of the value of systematised cooperation between European nations on the security agenda. Despite the creation of TREVI (*Terrorisme, Radicalisme Et Violence*

[11] See Milward, A., *The European Rescue of the Nation-State, 2nd Edition* (Abingdon 2000)
[12] Manners, I, 'Normative power Europe reconsidered: beyond the crossroads', *Journal of European Public Policy*, 13:2 March 2006, p.184
[13] Haubrich, D., 'September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared', *Government and Opposition*, Vol. 38, No. 1, 2003, p.10
[14] 'MPs oppose terror detention plans', *BBC News*, July 30th 2007, accessed through: http://news.bbc.co.uk/1/hi/uk_politics/6921512.stm
[15] Alegre, S., and Leaf, M., 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - The European Arrest Warrant, *European Law Journal*, Vol. 10, No. 2, March 2004, p.201

Internationale) in the 1970s as an intergovernmental forum in which to share intelligence, inspired by the contemporary rise in international terrorism, it was the realisation of the economic imperative of the Single Market in 1990 that proved to be a more compelling motive force for change. It meant that the European Community, as it was then, had become a unified space, without hindrance to the movement of people and goods. As a consequence of this, a common external frontier with its own governmental structures and security mechanisms was established, to reduce vulnerability to penetration by criminal activity.[16] Furthermore, the end of the Cold War foreshadowed the emergence of a wider security agenda which the EC, as an organisation with competences in several fields, was able to address effectively.[17] Yet, in setting out the circumstances of the PNRA controversy, a more recent event is of great significance: the EU's reaction to the pressure to demonstrate strong support for the USA after September 2001.

Days after the attacks, a joint declaration was issued from the Heads of State and Government, the Presidents of the European Parliament and Commission, and the High Representative for the Common Foreign and Security Policy, promising that the USA could 'count on our complete solidarity and full cooperation to ensure that justice is done.'[18] In common with elsewhere, the form which this solidarity and cooperation took - the introduction of novel measures, and the acceleration of those already proposed, such as the European Arrest Warrant[19] - was not universally welcomed, and the undesirability of the erosion of civil liberties appears to have been felt particularly strongly as regards the EU; in

[16] Rees, W., 'The External Face of Internal Security', in Hill, C., and Smith, M., eds., *International Relations and the European Union* (Oxford 2005) p.207
[17] Rees, 'The External Face of Internal Security', p.208
[18] 'EU Joint Declaration, September 11 Attacks in the US', September 14th, 2001, accessed through: http://www.europa-eu-un.org/articles/en/article_46_en.htm
[19] 'EU Joint Declaration, September 11 Attacks in the US'

pursuing the chimera of absolute security there is a risk of leaving behind the individual freedoms that form the fundamental bedrock of society. Although the EU does indeed have a history that lends itself to reading in terms of respect for rights, more positive grounds for expectation of such a position are found in Article 29 of the Consolidated Version of the Treaty on European Union, as amended by the entry into force of the Treaty of Amsterdam in 1999: 'the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters.'[20]

And yet, despite this balanced tripartite concept being built upon later that year in the conclusions of the Tampere European Council - a 'shared commitment to freedom based on human rights, democratic institutions and the rule of law'[21] - the Hague Programme five years later seemed to change it in a critical way. Thierry Balzacq and Sergio Carrera propose that this change amounts to a repositioning of security of the state as something that 'predates the liberty of the individual',[22] prompting the marginalisation of the role of the Fundamental Rights Agency and the European Court of Justice,[23] the devotion of substantial parts of the programme to 'strengthening security', and the inclusion of security-related measures, such as countering illegal immigration, in sections ostensibly covering the strengthening of freedom.[24] It is evident that the framing of issues similar to immigration as ones of security is accepted, in spite of the implication that in consequence actions are justified that are 'outside

[20] 'Consolidated Version of the Treaty on European Union', Title VI, Article 29, accessed through: http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf
[21] 'Tampere European Council - Presidency Conclusions', October 16th 1999, accessed through: http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm
[22] Balzacq, T, and Carrera, S., 'The Hague Programme: The Long Road to Freedom, Security and Justice' in Balzacq, T, and Carrera, S., eds., *Security versus Freedom: A Challenge for Europe's Future* (Aldershot 2006) p.5
[23] Balzacq and Carrera, 'The Hague Programme', p.6
[24] Balzacq and Carrera, 'The Hague Programme', p.5

the normal bounds of political procedure',[25] but the designation of security measures as freedom and justice measures strikes Didier Bigo as 'Orwellian newspeak',[26] with its concomitant totalitarian associations. 'Strengthening freedom, strengthening security, and strengthening justice' becomes 'Strengthening security, strengthening security, and strengthening security.'[27]

The EAW, mentioned specifically in the EU Joint Declaration, is considered by some to be an excellent example of the legislative consequences of this logic, given the impetus by September 11th to 'sail through a political window of opportunity.'[28] It relies upon the mutual recognition of judicial orders between member states, allowing a criminal suspect to be extradited from one EU country to another without recourse to the potentially unpredictable decisions of politicians, as was previously the case.[29] As such it facilitates the rapid bringing to justice of a suspect who has fled from one zone of jurisdiction to another, which could prove to be important if they were in possession of knowledge of imminent terrorist attacks. However, the assumption upon which it rests - equivalency of criminal justice systems and adequate protection of the rights of defendants across the EU[30] - is seen as not yet being truly the case, raising questions about its compatibility with the European Convention on Human Rights, of which all EU states are signatories. The most serious possibility is that due to the closing down of individual scrutiny of extradition requests, one member state may become complicit in abuses of fundamental rights - for example, the foundation of a request on

[25] Buzan, B., Waever, O, de Wilde, J., *Security: A New Framework for Analysis* (London 1998) p.24
[26] Bigo, D., 'Liberty, whose Liberty? The Hague Programme and the Conception of Freedom' in Balzacq, T, and Carrera, S., eds., *Security versus Freedom: A Challenge for Europe's Future* (Aldershot 2006) p.37
[27] See Bigo, 'Liberty, whose Liberty?'
[28] den Boer, M., and Monar, J., '11 September and the Challenge of Global Terrorism to the EU as a Security Actor', *Journal of Common Market Studies*, Vol. 40, Annual Review, 2002, p.21
[29] Jimeno-Bulnes, M., 'After September 11th: the Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples', *European Law Journal*, Vol. 10, No. 2, March 2004, p.250
[30] Alegre and Leaf, 'Mutual Recognition in European Judicial Cooperation', p.201

evidence extracted using torture - carried out by another. In Germany the concern was such that the Constitutional Court annulled the transposition of the Framework Decision into law.[31]

The legal flaws in the mechanism of cooperation for the EAW are echoed in flaws that exist in the intense exchange of information between law enforcement agencies: the administration of the data collected, its nature, and the fields to which it is applied. Immediately after the attacks on Madrid in March 2004, the post of EU Anti-Terrorism Coordinator was created, to promote counter-terrorism coordination and intelligence sharing.[32] A report by the British House of Lords' European Union Committee, published in 2005, applauded such activities as crucial, but expressed concern at the absence of a general framework for data protection in the Third Pillar, with individual bodies such as Europol and Eurojust possessing their own legislation, tailored to their own specific function.[33] Information exchange has also played an increasing role in EU asylum and immigration policy, due to the development of the Visa Information System and the Schengen Information System. Their use of biometrics, and evolution from reporting systems into reporting and investigation systems has raised the fear that the placing of too much faith in technological solutions may have negative consequences upon individuals when the technology fails;[34] it has been estimated that between 100,000 and 200,000 people per year will have their visa applications negatively affected as a result of unreliable data,[35] and that its overuse forms part of the trend of emphasising difference and prioritising security, with little thought given to

[31] 'European Arrest Warrant - Recent Developments', *Report with Evidence of the House of Lords' European Union Committee,* April 2006, p.10
[32] Lavenex, S., and Wallace, W., 'Justice and Home Affairs: Towards a "European Public Order"?', in Wallace, H., Wallace, W., and Pollack, M., eds., *Policy-Making in the European Union* (Oxford 2005) p.470
[33] 'After Madrid: The EU's Response to Terrorism', *Report with Evidence of the House of Lords' European Union Committee,* March 2005, p.19
[34] Brouwer, 'Data Surveillance and Border Control in the EU', p.149
[35] Brouwer, 'Data Surveillance and Border Control in the EU', p.149

the immigrants themselves, and their integration as equals into the community. A tension exists between the desire for flexibility and the pressure for transparency and accountability,[36] and it appears to be endangering the rights of individuals, whether they are suspected criminals, suspected terrorists, or a family seeking asylum. The tension that exists between the formulation of the PNRA and the position of the EP is comparable to that which exists between the shortcomings of the EAW and VIS and the critiques of academics like Bigo; they are, of course, intimately linked.

[36] Lavenex and Wallace, 'Justice and Home Affairs: Towards a "European Public Order"?', p.471

II: Positions Adopted

On September 11th 2001 the then President of the European Parliament, Nicole Fontaine, who is a member of the European People's Party group, released a statement expressing her shock, and a desire that the international community would prove capable of 'meeting the challenges of those who seek to destroy our very concept of civilization.'[37] In the months that followed, the Citizens' Rights Committee of the EP approved overwhelmingly, and with no amendments, two Council Framework decisions on terrorism, including a new and wide ranging definition of terrorism, and of the introduction of the EAW.[38] Nevertheless, even within such apparent unanimity of sentiment there were detractors; the minority opinion of the EP commented that there was neither scope 'for anything approaching serious consideration of the proposal […] nor for a measured assessment of its particularly wide-ranging implications for the rules of criminal procedure.'[39] It has, in fact, been the case that the position of the EP on counter-terrorism issues has been considerably more critical - and 'European' - than the hyperbolic initial reaction of its President, and its own rapid endorsement of the early Council Framework decisions might suggest, and it is worth looking briefly at a few pertinent examples of this - relating to cooperation by the EU and its members with the US, and data protection - in advance of moving on to its attitude towards the PNRA itself.

[37] 'Nicole Fontaine "shocked and appalled" by the terrorist attacks in New York and Washington', *European Parliament Press Service*, September 11th 2001, accessed through: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+NR-20010911-1+0+DOC+XML+V0//EN

[38] 'Council definition of terrorism and European arrest warrant approved', *European Parliament Press Service*, January 9th 2002, accessed through: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+NR-20020109-1+0+DOC+XML+V0//EN

[39] 'The Minority Opinion of the European Parliament on the Commission Proposal for a Council Framework Decision, A5-0387/2001', quoted in Alegre and Leaf, 'Mutual Recognition in European Judicial Cooperation', p.202

The indefinite detention by the USA of terrorist suspects found in Afghanistan and elsewhere in the facility at Guantánamo Bay, and the allegation that the Central Intelligence Agency ran illegal detention centres in Europe and used European airports to transport prisoners to countries where they might face torture, warranted the interest of the EP as EU citizens and governments were tacitly involved. The Foreign Affairs Committee, as early as March 2002, asked that the right against terrorism must not lead to breaches of human rights, calling for a clarification of the legal status of those held at Guantánamo,[40] and slightly under two years later it adopted a draft report that supported the use of an *ad hoc* UN international criminal court in the cases, and questioned the impact on the transatlantic partnership if this was not carried out.[41] On the issue of CIA activities in EU countries the EP was able to take a more robust line; in addition to outright condemnation from all parties,[42] a resolution was adopted in plenary that set up a temporary committee to investigate the allegations, particularly focusing upon possible complicity of Member State governments, and anticipating sanctions, including losses of voting rights, if serious and persistent breaches of the ECJR were proved.[43] With respect to data protection, the Citizens' Rights Committee agreed in April 2002 that protection of data privacy could be lifted 'in exceptional and specific cases in order to conduct criminal investigations or safeguard national or public

[40] 'Priority for human rights in EU external policy', *European Parliament Press Service*, March 27th 2002, accessed through:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+NR-20020327-1+0+DOC+XML+V0//EN&language=EN#SECTION3

[41] 'Guantánamo prisoners must not be kept in legal limbo', *European Parliament Press Service*, February 19th 2004, accessed through:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+NR-20040219-1+0+DOC+XML+V0//EN&language=EN#SECTION3

[42] 'MEPs concerned about secret detention centres in Europe', *European Parliament Press Service*, November 15th 2005, accessed through:
http://www.europarl.europa.eu/news/expert/infopress_page/030-2277-318-11-46-903-20051111IPR02230-14-11-2005-2005-false/default_en.htm

[43] 'MEPs welcome the decision to set up a temporary committee on alleged CIA flights and detention camps in Europe', *European Parliament Press Service*, December 15th 2005, accessed through:
http://www.europarl.europa.eu/news/expert/background_page/008-3561-349-12-50-901-20051206BKG03221-15-12-2005-2005-false/default_p001c011_en.htm

security.'[44] However, this was framed as being where it is a 'necessary, appropriate and proportionate measure within a democratic society', as defined by Community law, the ECHR, and the rulings of the European Court of Human Rights.[45] In its attitude to these issues, therefore, in spite of the diplomatic sensitivities in the former instance, the EP has not shied away from reprimanding the parties involved.

The PNRA, of course, is intimately concerned with transatlantic cooperation in the fight against terrorism and data protection, and therein may lie one of the key reasons behind the intensity of feeling it has generated. The crux of the agreement, as it was originally put to the European Commission by the American government in light of the USA's Aviation and Transportation Security Act, passed on November 19th 2001, is that airlines flying from the EU into the USA must electronically transfer data relating to passengers and cabin crew to the US authorities before the aeroplane takes off; although the 'Commissioner of Customs' is the official recipient, the data is transmitted to a centralised database from which it will be shared with other federal agencies, and the purpose of its retention is said to relate not only to aviation security, but also to public order.[46] Quite crucial are the fields of data required of the airlines. A core of information derived from the flight taken, the visa or residence permit of the individual, and their passport, such as their name, date of birth, and nationality is stored. In addition to this is a more extensive list of data processed by reservation and departure

[44] 'No unlimited storage of electronic user data', *European Parliament Press Service*, April 28th 2002, accessed through:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+NR-20020418-1+0+DOC+XML+V0//EN
[45] 'Compromise on data protection', *European Parliament Press Service*, May 28th 2002, accessed through:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+NR-20020528-1+0+DOC+XML+V0//EN&language=EN#SECTION3
[46] 'Opinion 6/2002 on transmission of Passenger Manifest Information and other data from Airlines to the United States', *Article 29 Data Protection Working Party*, October 24th 2002, accessed through:
http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp66_en.pdf

control systems - including Passenger Name Records - which may relate to areas such as special dietary requirements, medical data, frequent flyer programme details, and personal e-mail addresses.[47] An airline's provision of incorrect or incomplete information may lead to substantial penalties.[48]

A resolution passed by the EP with 414 votes in favour and only 44 against,[49] having been proposed in response to a statement by the Commission on February 19th 2003 which announced the signing of a 'Joint Declaration' with the USA regarding access to PNR, summarises its early position neatly. The legal basis for their concern lies in Directive 95/46/EC of October 1995 concerning the protection of personal data, and Council Regulation (EEC) No. 2299/89 of July 1989 which constitutes a code of conduct for computerised reservation systems; the reservation system data may be used for purposes other than those directly linked to the transport contract - it is asked whether legalised access to the data may be the result of 'an over-broad interpretation on the part of the present [US] administration'[50] - and the adequacy of data-protection systems in the USA is not guaranteed. Furthermore, the Commission is decried for its delay in submitting to the EP proposals which would have a huge impact upon Community (First Pillar) policies and Union (Third Pillar) policies, and it is suggested that if negotiations are to be imminently launched they should be

[47] 'Opinion 9/2002 on transmission of Passenger Manifest Information', *Article 29 Data Protection Working Party Report*, p.3
[48] 'Opinion 9/2002 on transmission of Passenger Manifest Information', *Article 29 Data Protection Working Party Report*, p.4
[49] 'Massive majority in European Parliament against deal with US on access to passenger data', *Statewatch News Online*, March 12th 2003, accessed through:
http://www.statewatch.org/news/2003/mar/12epvote.htm
[50] 'Motion For A Resolution, B5-187/2003', *European Parliament*, March 11th 2003, p.3, accessed through:
http://www.statewatch.org/news/2003/mar/12epvote.htm

based upon the EU's competences in the fields of air transport and immigration, and that it is surprising that this issue has not been considered.[51]

A less technical insight into the arguments is provided by the debate in plenary that preceded the vote; Baroness Sarah Ludford, a British member of the Alliance of Liberals and Democrats for Europe, was representative in her acceptance of the Commission's good intentions with regard to protecting airlines from a situation where they faced the choice of either breaking Community law or US law, but her condemnation of the failure to consult the EP or the Article 29 Data Protection Working Party before the joint statement, which constituted a strong signal of intent to proceed, and of the belief that laws could be suspended 'just on the say-so of the Commission.'[52] The essential problem was the lack of data-protection legislation in the USA, and the wide distribution between agencies of the information submitted, both of which were indicative of a skewed balance between security and civil liberties. The collection of information pertaining to special dietary requirements could be used in conjunction with name records to ascertain the religion of an individual - as Dworkin said, the only balance that exists is 'a balance between the majority's security and *other* people's rights' - and due to the lack of sufficient data-protection measures medical data could conceivably be misused by insurance companies.

It is clear that at this early stage an overwhelming majority of MEPs from all of the major political groups supported this censure of the Commission. Why was this the case? As was related in the previous chapter, there is a sense that Europe, and the EU in particular, possesses an identity that is bound up with respect for human rights, and this is reflected in

[51] 'Motion For A Resolution, B5-187/2003', *European Parliament*, p.4
[52] Baroness Sarah Ludford, quoted in 'Massive majority in European Parliament against deal with US on access to passenger data', *Statewatch News Online*

documents such as the ECHR, and the preamble to Article 29 of the Treaty on European Union. Over the course of the March 2003 plenary session Commissioner Bolkestein, present due to his responsibility for the internal market, taxation, and the customs union, even accepted the point made by Kathalijne Buitenweg, of the European Greens, that 'our norms should be the touchstone for the acceptability of any agreement that might be achieved in future.'[53] As the forum in which the democratic will of the citizens of the EU is expressed, it appears obvious that such views should predominate; it is consistent with their positions on other issues in this field, such as Guantánamo, and makes the very rapid approval of the EAW appear anomalous. A failing of this argument is that the EP's mandate as a representative chamber is a weak one. In spite of its increasing relevance within the structures of the EU, and the EU's increasing bearing upon the lives of those who live within its borders, the turnout in EP elections remains very low. Those who do vote treat the elections like second-order national affairs, due to the domination of the political process by national parties and debates.[54] So, no quantifiable European *demos* exists, though this is not to say that human rights are irrelevant to the EU's citizens, and certainly not to its parliamentarians.

Explanations may be found that do not deny the importance of human rights in the EU, but which also factor in its institutional structure and theories predicting the behaviour of its constituent parts. Firstly, the Commissioners, as the executive body of the EU, are appointed by the governments of their respective member states, and not formed from within the ranks of the political party which commands a majority in the legislature. As a result the decisions made by MEPs are not bound by the necessity of supporting a government or seeking preferment, and so measures put to them cannot rely upon the votes of members of

[53] Commissioner Bolkestein, quoted in 'Massive majority in European Parliament against deal with US on access to passenger data', *Statewatch News Online*
[54] Hix, S., *The Political System of the European Union, Second Edition* (Basingstoke 2005) p.89

the ruling party, or parties;[55] in the case of the PNRA the Commission is able to see more clearly the desirability of the rapid conclusion of the agreement due to the pressure it is under from the USA, for whom security is paramount, and from the airlines, who face financial penalties if they do not provide the data, whilst the EP is to a great extent insulated from these pressures, and arguably from the negative consequences of its actions, and so is able to prioritise human rights over diplomatic and commercial interests. It is interesting to note that Commissioner Bolkestein was formerly the leader of the Dutch People's Party for Freedom and Democracy, before arriving slightly later at the belief that politics must be 'practical, not theoretical.'[56]

Secondly, Simon Hix regards the EP as just another 'supranational actor with a vested interest in further policy integration.'[57] The motion put to the EP on March 12th 2003 expressed surprise that negotiations were not conducted on the basis of the EU's competence in air transport and immigration; this is because were this the case the resulting agreement would need to be approved using a Community method decision-making process, in which the EP would be co-legislator, and not simply subject to a non-binding consultation procedure. In the past the EP has successfully argued that procedures in the Third Pillar removed the necessity of accountability to national parliaments without replacing it with equivalent powers at the EU level,[58] and it has rehearsed this argument again in relation to the PNRA. The promotion of its own powers serves as a powerful incentive to institutional coherence in the EP, and behaviour as if it were a single actor.[59]

[55] Hix, *The Political System of the European Union*, p.96
[56] Commissioner Bolkestein, quoted in 'Massive majority in European Parliament against deal with US on access to passenger data', *Statewatch News Online*
[57] Hix, *The Political System of the European Union*, p.371
[58] Hix, *The Political System of the European Union*, p.371
[59] Hix, *The Political System of the European Union*, p.96

However, as Baroness Ludford stated in her contribution to the initial plenary debate, members of the EPP and European Democrats were unwilling to sign an amendment requesting that the Commission secure suspension of the US demands until a decision was made on compatibility with Directive 95/46/EC on the protection of personal data, on the grounds that it would leave the airlines exposed.[60] Only one year later the votes on motions rejecting the Commission's finding of 'adequacy' - conformity with the data-protection directive - and reserving the right to take the matter to the ECJ, were passed with only narrow majorities, due to the EPP's opposition.[61] At this stage, therefore, defections from the British and German members of the Party of European Socialists grouping, whose national parties had decided they must support the deal - significantly the Labour Party in the UK and the Social Democratic Party in Germany were in power at the time - were considered crucial to the outcome of the fifth vote on the issue, though in the event 162 new MEPs from the accession countries, present in plenary for the first time, resisted strong pressure from the Commission, their own governments, and the USA, and largely opposed the deal.[62]

In conclusion, although it is possible to regard the EP's desire to achieve high data-protection standards and preference for communitarised measures as the inevitable result of a combination of European norms and its institutional position and interests, the reluctance of the EPP to pursue the claim to the ECJ, and the acquiescence of the British and German factions of the PES with the wishes of their governments, suggest that that on this issue the

[60] Baroness Sarah Ludford, quoted in 'Massive majority in European Parliament against deal with US on access to passenger data', *Statewatch News Online*

[61] 'European Parliament debate taking the Commission to court on EU-US PNR deal', *Statewatch News Online*, April 20th 2004, accessed through:
http://www.statewatch.org/news/2004/apr/12ep-eu-us-pnr.htm

[62] 'EP rejects EU-US PNR deal by an even bigger majority', *Statewatch News Online*, May 5th 2004, accessed through:
http://www.statewatch.org/news/2004/may/04ep-eu-us-pnr-vote.htm

EP was a partially fragmented, rather than wholly unitary, actor. MEPs, in spite of their relative independence due to their separation from the executive, are still elected largely on the basis of the popularity of their national party, and selected as candidates by the leadership of their national party;[63] although all the major party in the EP are strongly pro-EU, the centre-right parties of the EPP are more likely to prioritise commercial interests and the transatlantic relationship, and at a time when the Iraq War was under intense scrutiny, it would have been unwise for British Labour Party MEPs to cause further problems for their government. The aggressive strategies pursued by the EP, however, are suggestive of the broad support that intervention in the PNRA retained from most of its members.

[63] Hix, *The Political System of the European Union*, p.89

III: Strategies Pursued

The EP's involvement in the PNRA came under the terms of the so-called consultation procedure. This means that the Commission submits the proposed legislation to the EP, which adopts an 'opinion', normally consisting of a series of proposed amendments to the text, formulated by whichever EP committee has prepared the report on the proposal. The Commission then considers the amendments, and issues a revised proposal, either incorporating or rejecting the EP's amendments, which is then submitted to a vote in Council; it is up to the Council to decide when the obligation to consult has been fulfilled,[64] and there is no legal compulsion to take the EP's views into account.[65] This system, which is most common in the fields of JHA and the CAP, severely limits the formal powers of the EP, and the strategies adopted by the body reflect this reality. This chapter will analyse the key features of these strategies, through reference to the resolutions, motions, decisions, and letters that form the mass of evidence on the PNRA, and will examine their evolution in reaction to changes in circumstance, and the results that they achieved.

In reaction to the narrow degree of its formal powers in this field, the EP has used its committees, particularly the Committee for Citizens' Freedoms and Rights, Justice and Home Affairs, to intensify the level of its engagement.[66] Issues are allocated to committees on the basis of their given competence - hence the LIBE Committee's role in the PNRA - which allows for a high degree of specialisation; this allows a reduction of the 'informational advantage'[67] enjoyed by the executive, and gives their members a key role in determining the

[64] Lord, C., and Harris, E., *Democracy in the New Europe* (Basingstoke 2006) p.79
[65] Hix, *The Political System of the European Union*, p.100
[66] Lavenex and Wallace, 'Justice and Home Affairs: Towards a "European Public Order"?', p.469
[67] Raunio, T., 'Political Interests: The EP's Party Groups', in Peterson, J., and Shackleton, M., eds., *The Institutions of the European Union* (Oxford 2002) p.268

positions of their respective groups on the issues involved. This was clearly the case in 1996, when the Budgetary Affairs Committee refused to discharge the budget as it was unhappy with lax financial administration; as a result the plenary session of the EP also refused to discharge the budget, and although a motion of no-confidence was not successful, the sense of outrage generated forced the Commission to empower a committee of independent experts to report on allegations of fraud, mismanagement, and nepotism to the EP. Its conclusions were so damning that the Commission resigned rather than face a second vote of no-confidence.[68] Some parallels may be drawn between this famous example and the controversy over the PNRA. The opinions of the LIBE Committee were instrumental in shaping the position of the parliament, which declined to follow the Commission's wishes and sanction the agreement. When the Commission went ahead and signed the PNRA the EP appealed to a third party - the ECJ - which struck down the deal, and achieved what the EP could not have done without its intervention. However, as will be seen, this did not represent such a clear-cut victory for the EP of 2006 as the Commission's resignation did for the EP of 1999.

The essentials of the EP's strategy are set out in the motion passed by it on March 12th 2003. The 'Joint Declaration' on the PNRA by the EU and the USA, signed four weeks previously, served as its primary stimulus; although it was not legally binding, the document created a strong expectation of cooperation from the EU, even to the point of an undertaking that 'EU data protection authorities may not find it necessary to take enforcement actions against airlines complying with the US requirements.'[69] Faced with this *fait accompli*, and apparent disregard for Community law, the EP decided upon two courses of action. It called

[68] Bache, I, and George, S., *Politics in the European Union, Second Edition* (Oxford 2006) p.303
[69] 'European Commission/US Customs talk on Passenger Name Record (PNR) Agreement, Joint Statement', February 19th 2003, accessed through:
http://ec.europa.eu/external_relations/us/intro/pnr-joint03_1702.htm

upon the Commission to ascertain the legitimacy of the demand under US law and its compliance with EU data-protection legislation, and to keep the public, 'who should be the first to know what is being done with information about them', informed of any developments.[70] In addition, an amendment supported by all of the major parties 'calls on the President of Parliament to activate the procedure provided for in Rule 91 of the Rules of Procedure with a view to determining whether an action may be brought before the European Court of Justice.'[71] Therefore, even though the EP is not able to participate directly in the decision-making process - negotiations between the EU and USA, and EU comitology - it can attempt to respond to and influence the context of the implementation of measures,[72] through lobbying the Commission, raising public awareness of the issue through their adoption of it, and ultimately through the threat of legal action; unlike the EP, the ECJ's opinions must be heeded.

The declaration made in February 2003 by the EU and USA, though phrased as if to express a consensus, did state that 'if necessary [there would be] additional undertakings especially as regards the necessity and proportionality of data processing.'[73] A letter written by Commissioner Bolkestein, leading the negotiations on behalf of the EU, to Tom Ridge, the US Homeland Security Secretary, in June of that year urges that these issues be looked at 'from a political perspective', and warns that fundamental rights and liberties 'are fiercely cherished in the European Union [and] political support for them […] is already backed by strong jurisprudence from the European Court of Justice and the European Court of Human

[70] 'Motion For A Resolution, B5-187/2003', *European Parliament*, p.3
[71] 'Amendment 6 to Motion For A Resolution B5-187/2003', *European Parliament*, March 11th 2003, accessed through:
http://www.statewatch.org/news/2003/mar/12epvote.htm
[72] Shackleton, M., 'The European Parliament', in Peterson, J., and Shackleton, M., eds., *The Institutions of the European Union* (Oxford 2002) p.109
[73] 'European Commission/US Customs talk on Passenger Name Record (PNR) Agreement, Joint Statement'

Rights.'[74] In his words it is possible to see evidence of the pressure emanating from the EP, and its threat of recourse to the ECJ, affecting the Commission's position in the negotiations, and Commissioner Bolkestein's statement to the LIBE Committee on September 9th gave four improvements gained: no generalised access to the PNR data by other federal agencies, a shortening of the period for which data may be held, the appointment of a Chief Privacy Officer who must report annually to Congress, and the filtration and deletion of data defined as sensitive by Directive 95/46/EC on the protection of personal data. The same statement also gave four ongoing shortcomings in the agreement - the possible use of the data for purposes other than fighting terrorism, the number of elements of data required, the still lengthy period for which it would be stored, and the non-legally binding nature of the US Government's concessions[75] - and the lack of subsequent movement on these issues was to prove to be the greatest obstacle to the EP's approval of the PNRA.

After this point it appears that the EP became increasingly set upon recourse to the ECJ, due to the Commission's rejection of its motion of 9th October calling for an immediate halt to the data transfers, and its endorsement of the adequate protection of personal data under the terms of the PNRA in February 2004.[76] A report adopted by the LIBE Committee, and passed by the plenary session on March 31st, called on the Commission to submit to the EP a new - and presumably negative - adequacy finding, and reiterated the requirement for

[74] 'Letter from the European Commission to US Secretary of Homeland Security Tom Ridge', June 12th 2003, accessed through:
http://www.statewatch.org/news/2003/sep/Bolkestein-12JUN2003.html
[75] 'Meeting of Parliament's LIBE Committee. Speaking note for Mr Bolkestein on U.S./EU talks on PNR', September 9th 2003, accessed through:
http://www.statewatch.org/news/2003/sep/Bolkestein-libe-9-09-03.pdf
[76] 'Draft Commission Decision on the adequate protection of personal data contained in the PNR of air passengers transferred to the United States' Bureau of Customs and Border Protection', *European Commission*, February 2004, accessed through:
http://www.statewatch.org/news/2004/feb/Draftdecision-20040128.pdf

cooperation between institutions, and its willingness to bring an action before the ECJ;[77] on the 6th April the Legal Affairs Committee agreed to the referral of the issue to the court, but the Conference of Presidents decided, unusually, to put the question once again before the plenary session. It was reported on eupolitix.com that this was because the President of the EP, Pat Cox (ALDE), was 'nervous about the prospect of a high-profile legal battle' so soon after the bombings in Madrid.[78] Nevertheless, a second plenary vote confirmed the EP's previous decision,[79] and on May 4th it refused to vote on an 'urgency request' to approve the PNRA, put to it by the Commission and the Council.[80] The Council decided to ignore the EP, and on 17th May it adopted the PNRA without debate.[81] Just over one week later Pat Cox decided that the EP would commence proceedings in the ECJ, seeking the annulment of the PNRA, and appealing against the finding of data-protection adequacy. Six grounds were cited:

> i. Article 95 EU is not a proper legal basis for the contested decision;
> ii. The Council should have followed the procedure laid down in the 2nd sub-paragraph of Article 300 (3) EC (assent of the European Parliament instead of mere consultation), insofar as the PNR agreement involved an amendment of Directive 95/46/EC on data protection;
> iii. Infringement of the right to privacy and data protection (Article 8 of the European Convention on Human Rights);
> iv. Breach of the principle of proportionality;
> v. Failure to state reasons;
> vi. Breach of the principle of loyal cooperation between the institutions (Article 10 EEC), in view of the fact that the Council concluded the PNR

[77] 'Resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records (PNRs) transferred to the US Bureau of Customs and Border Protection (2004/2011(INI))', *European Parliament*, March 31st 2004, accessed through: http://www.statewatch.org/news/2004/mar/ep-pnr-report.pdf

[78] 'EU-US PNR (passenger name record) "deal" to go for a second vote in European Parliament', *Statewatch News Online*, April 16th 2004, accessed through: http://www.statewatch.org/news/2004/apr/11eu-us-pnr-ep2.htm

[79] 'European Parliament votes to go to court on EU-US PNR deal', *Statewatch News Online*, April 21st 2004, accessed through: http://www.statewatch.org/ news/2004/apr/13ep-vote-pnr-court.htm

[80] 'EP rejects EU-US PNR deal by an even bigger majority', *Statewatch News Online*, May 4th 2004, accessed through: http://www.statewatch.org/ news/2004/may/04ep-eu-us-pnr-vote.htm

[81] 'EU agrees US PNR deal', *Statewatch News Online*, May 18th 2004, accessed through: http://www.statewatch.org/ news/2004/may/10eu-us-pnr-deal.htm

> agreement whilst there was a request pending for an Opinion from the Court pursuant to Article 300 (6) EC[82]

The EP's desire to go to the ECJ may be understood in several different ways. Taken at face value, it is a statement of the importance of legal certainty in relation to human rights, and the insufficiency of simple assurances as to their protection; this is consistent with the position of the EP throughout the controversy. However, an explanation is also possible that focuses more on the EP's institutional characteristics. The possibility of an appeal to the ECJ formed a key part of the EP's strategy, as its own powers are not such that it could threaten a veto, or force through amendments. It is likely that it encouraged the Commission to seek concessions from the US government, but once no more concessions were forthcoming the Commission was content to pass an adequacy ruling in February 2004, and put pressure on the MEPs to concede. At this point putting a case to the ECJ became not only a matter of the PNRA itself, but also of preserving the EP's position within the EU's institutional hierarchy. A letter circulated on the eve of the April 21st vote on recourse to the ECJ to their colleagues by three MEPs, including the rapporteur of the LIBE Committee, Johanna Boogerd-Quaak (ALDE), argues that 'the agreement in question creates a new competence for Community institutions and thus modifies the Community Legislation adopted by the EP. […] The Commission and the Council have gone out of their way to avoid effective parliamentary scrutiny.'[83] Two further letters from Boogerd-Quaak emphasise the importance of defending the EP's prerogatives;[84] the ECJ's reputation for possessing an activist streak might have

[82] 'Case before the Court of Justice - Case C-317/04: European Parliament against Council of the European Union', *Council of the European Union*, August 6th 2004, accessed through: http://www.statewatch.org/news/2004/aug/pnr-court.pdf

[83] 'European Parliament votes to go to court on EU-US PNR deal', *Statewatch News Online*

[84] 'Letter from Johanna Boogerd-Quaak to Giuseppe Gargani', May 4th 2004, accessed through: http://www.statewatch.org/news/2004/may/gargani.pdf
-and-
'Letter from Johanna Boogerd-Quaak to Pat Cox', May 7th 2004, accessed through: http://www.statewatch.org/news/2004/may/letter-Pat-Cox.pdf

given her good reason for optimism. Simon Hix's description of the EP as possessing a 'vested interest in further policy integration' would appear to be apt in this case.

The verdict of the ECJ was delivered on May 30th 2006, and deemed that 'neither the Commission decision finding that the data are adequately protected by the United States nor the Council decision approving the conclusion of an agreement on their transfer to that country are founded on an appropriate legal basis.'[85] In spite of the apparently unequivocal nature of this statement, the content of the judgment by no means amounted to a victory for the EP. Although the PNRA was to be annulled, after a ninety day transition period, it was not the case that the protection of personal data granted to the US government or the institutional position of the EP were irrevocably guaranteed; the adequacy decision was incompatible with the data-protection directive because the PNRA related to public security, and not data processing necessary for a supply of services, and for the same reason the Council's approval of the agreement was void. The Commission immediately proposed that an intergovernmental replacement be negotiated, so that the EU's data-protection rules would not need to apply, and the EP would once again only need to be consulted on the decision. American officials present in Brussels agreed that the ECJ's judgment was something of a technicality.[86] Over the subsequent months the Commission resisted the EP's pleas for a greater level of involvement, and a new agreement was signed in October 2006, whose legal basis lay in the Third Pillar, rather than the communitarised First Pillar. Significantly, its provisions state that data shall be passed over 'as required by DHS', and that data shall be

[85] 'Judgment of the Court of Justice in Joined Cases C-317/04 and C-318/04', *European Court of Justice*, May 30th 2006, accessed through:
http://curia.europa.eu/en/actu/communiques/cp06/aff/cp060046en.pdf
[86] 'New EU-US air data agreement a "technicality"', *www.eupolitix.com*, May 31st 2006, accessed through:
http://www.eupolitix.com/EN/News/200605/92670bca-05e6-47f5-97c5-991aa2e9cb1c.htm

treated 'in accordance with applicable US laws and constitutional requirements';[87] the editor of 'Statewatch' expressed his fear that this means that the agreement is prone to changing without negotiation, as US law evolves in reaction to the terrorist threat.[88]

Given this point, it appears that the results achieved by the EP's intervention in the negotiation of the PNRA have been limited, or even counter-productive; the interim intergovernmental agreement signed in October 2006 offers far fewer safeguards to the privacy and rights of the EU's citizens than the one that it replaced. Such an outcome could not have been predicted, but it is reflective of the limitations of any strategy that is heavily reliant upon the decision of an independent third party to achieve its desired goal. It would, however, have been unacceptable for the EP to have surrendered to the pressure that the Commission and member state governments were applying in the spring of 2004, both in terms of its ideational self-construction and its institutional aspirations. The interim agreement was replaced by a permanent settlement on June 28th 2007. The terms of this settlement were little changed from the previous one, with apparent improvements in data-protection terms, such as a reduction in the fields of data accessed from each PNR file from 34 to 19, disguising the merging of data fields, instead of actual deletion, and an actual lengthening of the period of time for which data can be retained.[89] Predictably, the EP adopted, and with a large majority in favour,[90] a resolution condemning the new agreement's

[87] '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', *Council of the European Union*, October 11th 2006, accessed through:
http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_298/l_29820061027en00290031.pdf
[88] 'EU-USA PNR agreement renegotiated to meet US demands', *Statewatch News Online*, October 6th 2006, accessed through:
http://www.statewatch.org/news/2006/oct/05eu-us-pnr-oct-06.htm
[89] 'MEPs fear that new PNR agreement fails to protect citizens' data', *Statewatch News Online*, July 12th 2007, accessed through:
http://www.statewatch.org/news/2007/jul/04ep-pnr-resolution.htm
[90] 'European Parliament adopted harsh resolution on the new PNR agreement', *www.edri.org*, July 18th 2007, accessed through:
http://www.edri.org/book/print/1240

'lack of democratic oversight of any kind', 'persistent lack of legal certainty', and 'lack of clear purpose limitation',[91] yet it is unlikely to be able to bring about a reassessment of the legal basis of the PNRA. Indeed, the Commission is intending to present a Framework Decision for an EU PNRA in October; Commissioner Frattini, for JHA, is reported to have said that in the wake of the attempted bombings in London and Glasgow 'all member states should equip themselves with a PNR system and share information with others when relevant.'[92]

[91] 'European Parliament Resolution P6_TA-PROV(2007)0347 on the PNR agreement with the United States of America', *European Parliament*, July 12th 2007, accessed through:
http://www.statewatch.org/news/2007/jul/ep-pnr-resolution-jul-07.pdf
[92] 'EU: European Commission to propose EU PNR travel surveillance system', *Statewatch News Online*, July 15th 2007, accessed through:
http://www.statewatch.org/news/2007/jul/03eu-pnr.htm

IV: Prospects for the Future

In its first chapter this paper looked at the place of civil liberties in the response to a terrorist threat, and criticism of the measures enacted by the EU in this respect. The subsequent two chapters took a case study in which the EP, with its limited formal powers, attempted to influence the content of such a measure, with little success. This final chapter aims to bring these strands together, through an exploration of the Commission's role in the PNRA, and asking whether this is the only model for the negotiation of counter-terrorism policy, or whether there may be a different route. It will conclude that the actions of the Commission, supported by the EU's member states, have been consistent with a desire to minimise scrutiny of what is being agreed to, and to maximise security, with the protection of individual rights only pursued to the extent that they did not jeopardise the USA's assent. An alternative, given sufficient support from the EU's citizens, is the empowerment of the EP to embody the commonly expressed sense the EU's identity is connected to respect for human rights; this is dependent upon the emergence of a media that reflects these concerns, and their existence at a European level.

Before entering into a more detailed discussion of what conclusions may be drawn from the PNRA, it is worth setting out once again, in a consolidated form, the actions of the Commission, which was the principal EU actor in its negotiation. Although the Commission received the opinion of the Article 29 Data Protection Working Party on the agreement in October 2002, which warned of potential problems in relation to the ability of airlines to conciliate compliance with the US Aviation and Transportation Security Act and compliance

with Directive 95/46/EC on Data Protection,[93] it chose to ignore it, and entered into talks with the USA. The Council of the European Union was only informed of US demands at the end of January 2003, and its Working Party on Aviation was presented with the already-signed 'Joint Declaration' on February 20th. The limited concessions extracted from the US government were arrived at on the basis of 'undertakings', instead of a proper legal framework, and were consequently subject to changes in the administration's policy; in spite of this the Commission found them sufficient to express satisfaction at their 'adequacy'. Finally, the Commission, and member state governments, exerted a great deal of pressure on MEPs to not subject the PNRA to a legal test, and when the verdict annulling the agreement arrived it chose the option of negotiating a new agreement that would not have to meet EU data-protection standards.

This brief - and much compressed - narrative does not do justice to the provisions of the PNRA itself, which have already been extensively discussed in terms of their allowing the logic of security to overwhelm that of the protection of individual rights, but gives an impression of the Commission's approach; although the Commission was not the originator of the PNRA, inasmuch as it was reacting to the requirements of US law, it did little to mitigate its effects, and actively colluded in trying to conceal its full implications. Commissioner Bolkestein's letter to Tom Ridge, the US Secretary of Homeland Security, states in its concluding paragraph that 'if current efforts [to reach a favourable compromise] fail we risk a highly charged trans-Atlantic confrontation, with no obvious way out.'[94] These are strong words indeed, yet they are not reflected in the Commission's professed satisfaction

[93] 'Opinion 6/2002 on transmission of Passenger Manifest Information and other data from Airlines to the United States', *Article 29 Data Protection Working Party*, October 24th 2002, accessed through: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp66_en.pdf

[94] 'Letter from the European Commission to US Secretary of Homeland Security Tom Ridge', June 12th 2003

at the US Government's 'undertakings' guaranteeing the few concessions they succeeded in extracting. The accusation of collusion is a serious one, but there are few other ways to describe the claim that significantly fewer fields of PNR are required as a result of the June 2007 agreement; in actuality, for example, 'all available contact information' is listed as one field, whereas previously it was four.[95] It is difficult to conceive of what other motive could exist for this action apart from the projection of a misleading impression. However, in the short to medium term the Commission and Council are likely to remain the predominant actors in EU security policy, particularly where it involves international relations, and so in looking to the future it is necessary to try to understand the reasoning behind the decisions they have taken.

Previous chapters have touched upon several possible motivating factors. Firstly, there was pressure from the USA, not only in the general sense of wanting support in the fight against terrorism, but also specifically on the issue of rapidly completing a deal that allowed the maximum access to, and use of, PNR. An internal Commission document, dating from around November 2003, rejects the option of a binding international agreement with the USA, which would require the full involvement of the EP, because 'it is not the US's preferred option';[96] the EP's assent would not necessarily be forthcoming with sufficient promptness. Secondly, as the executive will have to deal with the political fall-out from any successful terrorist attack, they will tend to favour measures that cannot lead to accusations of complacency. As Commissioner Bolkestein said, politics should be 'practical, not theoretical.' Finally, in terms of democratic input into the process, Andrew Moravcsik and

[95] 'EU: European Commission to propose EU PNR travel surveillance system', *Statewatch News Online*, July 15th 2007

[96] 'EU: Form of deal on handing over passenger data to USA in doubt', *Statewatch News Online*, November 2003, accessed through: http://www.statewatch.org/news/2003/nov/16pnrnov.htm

others have argued that this is one of the areas of governance that 'tend to involve less direct political participation.'[97] Although it is not supremely technical, like the Common Agricultural Policy, many of the sensitivities involved in combating terrorism do not lend themselves to complete transparency. Neither the EU, nor its member states, nor the US, possess governments intent upon dictatorial rule and 'emergency powers', but the net effect of the fight against terrorism has been the adoption of legislation that is easily perceived as tending in that direction.

An alternative vision of the future, distinct from the forbidding *realpolitik* - the 'counsel of shame'[98] - expounded above, is one in which the marginalisation of human rights and democratic scrutiny is strongly rejected, in favour of the celebration and preservation of these principles as an essential part of our societies. The failure of the EU's only directly-elected institution to force the Commission to observe one of the EU's own data-protection directives should encourage its citizens out of their complacency, and into making this vision a reality; the Challenge Research Project, which investigates illiberal practices by liberal governments, and websites like Statewatch, through their exploration of and comment upon these issues, bring them to the public's attention and enable them to make a critical assessment of whether this is how they want their personal data to be treated. However, these books, articles, and websites are accessed by a relatively limited audience, and it remains the case that the majority of news that people read, or watch, comes from national sources, and is focused on national issues; to the 'democratic deficit' may be added an 'information deficit.'

[97] Moravcsik, A., 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, Vol. 40, No. 4, 2002, p.606
[98] Dworkin, 'Terror and the Attack on Civil Liberties', p.95

Benedict Anderson's *Imagined Communities* argued that the technology of mass communication was the decisive factor in the creation of nations.[99] Fundamental to the idea of nationhood is the sense that its members are bound together by certain common ideas and values, though they may be geographically distant.[100] The inchoate sense that the EU's identity is tied to individual freedom and human rights may be a valid one, but as long as there is an 'information deficit' on the organisation's activities it will remain just that. Its transformation into something more solid can only come about as result of a genuinely pan-European media, that reproduces the web of interdependencies that has come about as a result of European integration. Then, and only then, would there develop a more concrete idea of what it is the EU stands for, and calls might emerge for the powers of the EP to be increased so that it, as a representative body, could articulate this more substantial identity in the EU policy arena. If the basic tenet of modern political science - preferences combined with institutions determine outcomes - is accepted, it is to be expected that under these circumstances the PNRA would have been a very different document. MEPs would not need to have been present at the negotiating table for the knowledge that they possessed a veto on the outcome to have made the Commission significantly less prepared to concede to the US demands.

Would such a scenario put lives at risk? In the case of the PNRA, the answer appears to be strongly in the negative. A legally binding international agreement which only permitted access to a limited number of data fields to agencies with a direct interest in fighting terrorism would have been equally effective in fighting terrorism, if a little more complicated in administrative terms. This principle holds true for other areas of policy; for

[99] Anderson, B., *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London 1991) p.145
[100] Anderson, *Imagined Communities*, p.6

example, the provision of appeal procedures for those sought by an EAW would grant some protection against requests based on spurious evidence. The existence of a single data-protection framework for the Third Pillar of the EU would not only be of benefit to the privacy of those whose information is stored on the systems concerned, but also to the management of the data and its deployment towards its designated tasks, such as threat assessment. Finally, the treatment of those seeking to move to the EU to live or work as potential criminals has a detrimental effect upon society as a whole, through its encouragement of a lack of community cohesion, and lack of tolerance, contributing to public disorder in several EU states. Charles Clarke was quite wrong to suggest that there is some sort of dialectical choice to be made between respecting human rights and being murdered by terrorists.

The EP is particularly well placed to protect and preserve human rights, if granted sufficient powers, because of the institutional set-up of the EU, and the status of the concept in the EU's self-construction. Through the use of its specialised committees it is able to intensively scrutinise legislation, and utilise expert opinion and witnesses to provide as full a picture as possible of its nature and consequences. The committee's findings are then put to a plenary session, in which MEPs may vote without the need to support the executive, and in the knowledge that their mandate includes opposition to measures that infringe upon civil liberties. As in any bargaining process, the outcome is not guaranteed - there has been a great deal of controversy over the relative merits of cooperation and co-decision[101] - and pressures, both internal and external, to limit freedom and pursue security, would not disappear. Nonetheless, the position of human rights in the EU would be far less endangered than it is at

[101] Bache and George, *Politics in the European Union*, p.302

present, and this would be of undoubted and practical benefit to all those who find themselves within its borders.

Conclusion

The connection between 'security' and the erosion of human rights is a powerful one. Similarly, the connection between democracy and the protection of human rights is also a powerful one. It is to be hoped that the latter will cancel out, or at least mitigate, the former: that the authority vested in the views of democratic institutions by virtue of their representation, albeit imperfectly, of the will of the people, will be used by their members to curb the tendency of executive bodies to fear terrorism more than the loss of the values that underlie the societies that they govern. Although its motives for desiring to do so are not entirely untainted by self-interest, in the case of the PNRA the EP has so far been unable to fully carry out this role, due to a lack of formal influence in the policy-making process, and the uncertainties of relying upon informal influence and the decisions of the independent ECJ to gain a favourable outcome. This has resulted in the signing into law of an agreement that fails to protect the individual from the collection and wide distribution of their personal data by the US Government, ostensibly for use in the fight against terrorism, but open to misuse by other agencies and organisations. In the absence of any relevant changes in the EU's institutional structure this pattern is likely to continue. However, if the broad sense that such policy options are 'un-European' was transformed, through the existence of a genuinely pan-European media, into a call by EU citizens for change, the EP would have a strong claim to an increase in its prerogatives. This is not to say that it would become the predominant actor in the field, but its input would ensure that liberalism and democracy could not simply be swept aside in the name of counter-terrorism, and in so doing allow us to 'keep faith with our own humanity.'[102]

[102] Dworkin, 'Terror and the Attack on Civil Liberties', p.95

Glossary of Abbreviations

ALDE - Alliance of Liberals and Democrats in Europe
CIA - Central Intelligence Agency
DHS - Department of Homeland Security
EAW - European Arrest Warrant
EC - European Community
ECHR - European Convention on Human Rights
ECtHR - European Court of Human Rights
ECJ - European Court of Justice
EP - European Parliament
EPP - European People's Party
EU - European Union
JHA - Justice and Home Affairs
LIBE - Committee for Citizens' Freedoms and Rights, Justice and Home Affairs
PES - Party of European Socialists
PNRA - Passenger Name Record Agreement
TEU - Treaty on European Union
USA - United States of America
UK - United Kingdom
VIS - Visa Information System

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