SKATING ON STILTS

Why We Aren't Stopping Tomorrow's Terrorism

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6 To the Brink

On May 30, 2006, we got what we had hoped for. And so did the European Parliament.

The European court struck down the agreement.[1] But only on the jurisdictional ground. The European Court of Justice was reluctant to decide just how much human rights law Europe could impose on the United States. Instead of finding U.S. law "inadequate," it ruled that the commission had fatally mixed up the commercial and the criminal enforcement pillars.[2]

The agreement was dead. But the court agreed to keep it on life support a little longer. Europe, after all, didn't want to kill the agreement right away. It wanted a renegotiation. Unless the court granted a grace period, there would be no time for DHS and the commission to put the arrangement on a new and proper basis. Accommodating the European negotiating interest, the court delayed the effective date of its decision for four months. The adequacy finding would expire on September 30.

On that date, if we did not have a new agreement, the "adequacy" determination would come to an end. Airlines flying to the United States would have no special protection from European data-protection law. But they would still have to comply with U.S. law requiring them to submit reservation data on all their passengers.

For the airlines, September 30 marked the beginning of Armageddon. Without a new agreement, they would face conflicting legal obligations. The European Union's data-protection law would require

them to withhold reservation data from the "inadequate" United States. At the same time, U.S. law would require them to hand it over.

If worse came to worst, the airlines that observed U.S. law could be prosecuted criminally and fined by European privacy bureaucrats. And those that refused to comply with U.S. law would be fined by DHS and could lose their landing privileges. Chaos would ensue. Some airlines might cancel flights. Those that flew would fly in fear.

Or so the Europeans thought. Me, not so much. I had confidence in the airlines' defenses to a privacy claim. And I was eager to put my theory to the test.

Oddly, then, the court's decision was welcomed on both sides of the Atlantic. The European Parliament was celebrating, as were European privacy bureaucrats. They had not won a human rights condemnation of the United States, but they were sure that a new negotiation would bring the United States to heel. This time they'd insist on a tougher line. This time they would get the privacy protections they wanted by threatening to throw all transatlantic travel into disarray.

DHS was just as pleased. We, too, thought the old arrangement was unacceptable. And, like the European Parliament and the privacy bureaucrats, we were confident that we could get a better deal the second time around.

Faull called as soon as the court's decision was formally announced.

—I don't think this is a surprise, he began, but I wanted you to hear it from me. The European Court of Justice has invalidated the PNR agreement.

It wasn't a surprise. I was delighted. But this was no time to say so.

—I remember quite well your remarks at the dialogue last year, Faull continued. I understand that you don't like the agreement. And of course we appreciate that the agreement was scheduled to be renewed next year.

What was going on here? I wondered. Jonathan Faull seemed surprisingly muted. He couldn't possibly agree that the deal should be tossed out.

—Under the court's decision, Faull added, we have only four months to find a substitute agreement and to avoid a crisis in transatlantic travel. That is not enough time to complete the careful review and negotiation that I know you'll want.

Ah, I thought, now I see where he's going. Very clever.

—There's an easy way to make this work, he went on. The problem is purely a matter of EU procedure. If the EU approves the agreement under our third pillar procedure, we can solve the problem. So I'd like to get your agreement to simply adopt the same agreement but put it on a different pillar. It will still expire in 2007, and I know you will want to renegotiate it. We will do that, in an orderly way, starting very soon. But we should fix this awkwardness without trying to negotiate with our backs against a four-month deadline. We don't want chaos on September 30.

I took a breath. Faull was being cautious, keeping emotion out of the call. I would do the same. But this proposal was utterly unacceptable. The European court had given us our best chance to remake the agreement, or kill it, and I had no interest in postponing the opportunity.

—Thanks, Jonathan, I said. I understand your thinking. It's like that scene from *Indiana Jones*, where Jones tries to quickly put a bag of sand in place of an idol. Do it fast enough, and perhaps no one will notice the change. But if I remember right, that scene ended with Jones running for his life and a giant boulder rolling after him.

—So I don't want to encourage you to think we'll take the Indiana Jones option. If we don't, though, I promise that we'll do all we can to avoid chaos four months from now.

—I understand, said Faull. Just so you know, I will be seeking a mandate from the European Council authorizing me to negotiate for renewal of the agreement as it now stands. And I hope you will obtain authority to do the same.

—Completely understood, I said, which is what you say in international negotiations when the other side says something you have no intention of agreeing to.

It was an odd conversation, I thought, after we hung up. Faull knew how strongly I felt about the evil the agreement was working;

and he must be under pressure to make progress on the privacy agenda of the European Parliament. Yet there had been no fireworks, no posturing. We had barely sparred.

Why not? The answer was in Faull's mention of his negotiating mandate. The fact was that neither of us had permission to stake out a position. The first task for each of us was to bring our own side into alignment. Only then could we engage each other.

Many negotiations in the private sector skip this step entirely. When negotiating the sale of a house, both the buyer and the seller know what price they want. At the negotiating table, buyer and seller exchange offers; they can decide quickly whether to accept or reject the other's offer. Even in the private sector, however, negotiations may be more complex. If the seller offers to re-shingle the roof rather than reduce the price, the couple buying a house may have to negotiate between themselves before deciding whether to insist on a price reduction or to settle for the new roof.

Government negotiations are closer to the second scenario, except that the buyer has to contend not just with a spouse, but with a mother-in-law, two uncles, and the guy next door who wandered in to borrow a hedge trimmer and has strong views on shingles. Arriving at a single U.S. position for international talks is in itself a major negotiation.

"I always knew when the United States had clear negotiating goals," one British diplomat told a State Department friend of mine in a moment of candor. "Then, they'd just send a negotiator. As soon as they sent an interagency team, I knew they couldn't agree on a final position. The team was there to make sure the lead negotiator didn't go beyond his authority."

Most of the time, he might have added, the United States sent a team.

So did the European Union. The EU has heavily laden processes for getting authority to negotiate anything, particularly with the United States. Any negotiations require a formal mandate from the

ambassadors representing twenty-seven nations, all of whom have their own special interests and relationships with the United States. In the best of times, the commission would have had difficulty bringing all twenty-seven to a single position.

But in this case, there were more than twenty-seven agendas to reconcile. The parliament was clamoring for a greater role—and a tougher line. So were the privacy bureaucrats. And because the next negotiations would be based on third pillar authorities, the Brussels institutions that stand atop the third pillar would expect primacy. Those institutions—the European Council and the European presidency (held by a different nation every six months)—have little role in commercial negotiations but would expect a large one now.

As he tried to find consensus, Faull's advantage, a powerful one in any government debate, was inertia. That was his best argument for the quick deal he'd proposed—simply taking the old agreement and putting it on a new jurisdictional pillar. Restoring the status quo would disappoint the parliament and the data-protection bureaucracy, which hoped to squeeze more concessions out of the United States. But they didn't understand the risk they were running, Faull must have thought. Reopening the agreement meant reopening everything, not just the issues the parliament wanted to raise. That, he knew, would play into DHS's hands.

My remarks the year before had made clear that a complete renegotiation was precisely what we wanted. Al Qaeda was looking for radicalized Western Europeans who needed no visas across the Atlantic to attack the United States; passenger name records and advance passenger information were the earliest line of defense that DHS had against these travelers. Why should DHS agree to destroy that data quickly, or to look at it in a tiny window that opened only seventy-two hours before the flight? Why should it put information out of bounds that might reveal plots involving leg casts or wheelchairs or false pregnancies? Why should we let privacy advocates or European negotiators determine in advance what information was useful to DHS and what was not?

I knew where DHS stood. The agreement would have to be rethought and renegotiated from the ground up. All that remained was to get the uncles and cousins and mothers-in-law that made up the interagency process to agree.

That would be my toughest challenge. The costs of the PNR agreement (in time, money and limitations) fell entirely on DHS. They didn't inconvenience any other agency. But the cost of reopening the deal would certainly be felt by other agencies. The State Department had an interest in smooth relations with Europe. It didn't need another dispute if it could avoid one.

DHS had allies, of a sort. Defense and the intelligence community wanted a more effective border defense system, and better information about travelers. They too believed in information sharing. But like the other agencies, they had little stake in particular DHS programs.

As I sketched the roster of supporters and adversaries that I'd face in the interagency debates, the Justice Department was the wild card. It should have been with us. After all, during the first passenger name record negotiations under Tom Ridge, the Justice Department had fought to keep DHS from making concessions on things like information sharing. Justice had been right, I thought, and our entire negotiating strategy would be aimed at taking back that concession. What's more, the Brussels approach was a threat to Justice too. The EU was using the privacy issue as a wedge to create new tensions in the law-enforcement relationship between the United States and Europe. Instead of relying on exchanges with the United States, Brussels wanted to build its own European institutions, such as Europol and Eurojust. So it was strengthening law enforcement exchanges within Europe at the same time that it was raising barriers to sharing of information across the Atlantic.

As I saw it, Justice and the FBI were in the same boat as DHS. The European approach—using the data-protection issue to slowly throttle investigative information exchanges with the United States—was irresponsible. It was going to get Americans—and Europeans—killed. Justice and the FBI should be as eager as DHS to confront

Brussels and back the EU away from this tactic. Wasn't that why Justice had tried to keep DHS from agreeing to the PNR arrangement in the first place?

Now that I was ready to admit that Justice had been right all along, I hoped the two agencies could make common cause to undo the worst aspects of the PNR arrangement.

It was not to be. Justice was still smarting from what it had lost when DHS was created. Until DHS came along, the uncontested representative of U.S. law enforcement abroad had always been the Department of Justice. The FBI was the biggest single federal law-enforcement agency. There might be more law enforcement officials elsewhere in the federal government, but they were specialized and dispersed. Now, though, DHS had pulled most of those law enforcers into one department. DHS's border and investigative duties matched well the responsibilities of interior ministers in other countries. They saw DHS as a natural partner. None of that was good for Justice. And Justice's pique at having to share the table with a second law-enforcement agency was making it hard for us to work together.

I thought that in the end Justice would be foolish not to stand with us. This wasn't just a renewal of the old deal. It would be the first explicit law-enforcement arrangement to set these kinds of data restrictions. For the first time, we'd be taking rules that were written for Safeway and Allstate and agreeing that they could apply to the FBI and Customs and Border Patrol. Once that happened, there'd be more and more demands from Europe to expand the principle—to make us run our criminal and antiterrorism investigations in accord with European standards and sensibilities.

My first job was to come up with a negotiating position—and a strategy—and then to sell it to the rest of the government. The negotiating position fell naturally from the many problems I'd found in my first review of the deal—the wall; the strict ten-day limit on using the data; an annual review that felt like an annual renegotiation; and an arbitrary and dangerous ban on ever using "sensitive data." Our

position, I thought, was simple: any new deal would have to cure all of these problems before it would be acceptable. To this list, I added another negotiating goal. I thought any new agreement would need a much tougher reciprocity clause.

At bottom a reciprocity clause means that the rules are the same for both sides of an agreement. I did not believe that European data protection law really demanded as much from law-enforcement agencies as the Europeans had claimed. There had never been a European investigation finding fault with Russian or Chinese or Syrian investigative agencies' use of information obtained from European companies. Was that because their law enforcement agencies had a better privacy record than U.S. agencies? Indeed, there had been practically no efforts to set data-protection standards for *European* law-enforcement agencies.

I suspected that the harsh rules in the 2004 arrangement had been made up by Europeans especially for Americans—that they wouldn't dream of applying the same rules to their own police agencies. But that suspicion undercut the whole rationale of the agreement, which was supposedly to force the United States to live up to high European standards for handling European data. If European privacy standards weren't as high as claimed, we should be able to reduce our own to match the European reality. A tough reciprocity requirement would provide long-term strategic flexibility for DHS; at any time, we could modify our undertakings if it turned out that Europe wasn't following the same rules.

This was an ambitious negotiating agenda, particularly since the Europeans were hoping to get new concessions—not to give them. To overcome their resistance, we needed a strategy. The strategy I came up with was simple but risky: Either the agreement would be completely overhauled or we would let it expire on September 30. I knew the pressure that the European Commission was under to get a better deal than in 2004. We could only combat that pressure if the United States was willing to let the agreement fail entirely.

The last time a deal on travel data had been negotiated, the risk of chaos in the skies over the Atlantic had been used to bludgeon DHS

into a quick settlement. This time around, buoyed by my own sense that the threat of chaos was overwrought, I was willing to let the September 30 deadline pass without an agreement.

If we went to the brink, I believed, the Europeans would cave. And if we went beyond, well, we'd find out who was right—the European prophets of doom or the DHS leaders who thought the threat was mostly manufactured.

To take that stance, the United States had to be willing to live with the consequences—expiration of the September 30 deadline without an agreement that protected the airlines. But were we?

I needed to persuade the rest of the government that the airlines didn't need an adequacy determination to avoid privacy sanctions in Europe.

I was sure they didn't. I knew that the 1995 directive offered many defenses for the airlines—data sharing is permitted for public safety or law enforcement, for protection of the interests of the passengers who provide the information, and for compliance with the laws that govern air travel. And, even without those defenses, airlines could fully insulate themselves from liability by obtaining the consent of their passengers for the data transfer to the United States.

The strategy didn't rely entirely on law. It was also grounded in *realpolitik*. The European Commission sets data-protection rules, but it does not enforce them. So if any airline were going to be fined for complying with U.S. law and providing travel data, the decision would have to be made by the country where it operated. Each country would have to decide whether to punish local airlines flying out of local airports. And any country that threatened to punish local carriers for following U.S. law would put those carriers at risk of DHS penalties—fines, delays and the loss of their rights to fly to the United States.

European solidarity went only so far, I thought. If French privacy bureaucrats made it impossible to fly to the United States from Charles de Gaulle airport, well, Schiphol, Heathrow, and Frankfurt would be only too happy to pick up the slack. When September 30 came around and no deal was done, who would want to be the first country to punish its airlines and its airports?

Europe, I figured, was bluffing.

If I was right, it would be no big deal to let the agreement expire. We should be happy to see the entire arrangement die, and the risk that it would hurt the airlines was small. So why not dramatize our confidence? We could take a tough line in the talks, insisting that the undertakings be completely overhauled and all their problems cured. At the same time, we should begin visibly and noisily planning for the end of the arrangement on September 30.

At the National Security Council (NSC), we ran into a buzz saw. The State Department had no interest in another confrontation with Europe—especially not at a time when U.S.-Europe relations were tender from the rancor over Iraq. DHS had signed this agreement two years earlier, State said, and if DHS was willing to live with it then DHS should be willing to live with it now. The Justice Department, which had counseled DHS not to negotiate a passenger names records agreement in 2004, now wanted to leave the agreement in place. DOJ insisted that DHS must renew it without change. It blamed DHS and the passenger names flap for increasing European restrictions on law enforcement data sharing. We should do nothing that might increase transatlantic tension over law enforcement.

Even more troubling, the National Security Council staff made no effort to disguise its determination to keep DHS from pursuing a hard-nosed strategy. The NSC was supposed to be an honest broker, shaping and narrowing disputes among cabinet departments so that only the most difficult and heartfelt conflicts got to the president for decision. But the NSC knew little about DHS, and what little it knew it didn't much like. The Homeland Security Council, created after 9/11, was viewed by many in NSC as an unnecessary subtraction from NSC's authority; and DHS in its infancy was thought incapable of handling hard diplomatic tasks.

NSC had many irons in the fire with Europe. Letting DHS blow up the existing agreement to get better terms sounded risky to the NSC staff. They doubted that DHS was up to the job. Better not let

the new guys rock the boat. This attitude showed up in every NSC memorandum, every summary of conclusions from NSC meetings, and even in the invitation list. DHS had to fight just to get NSC to invite Defense and the intelligence community when the NSC met to discuss travel reservation data.

DHS stood alone. But we were determined not to reinstate the old agreement. Secretary Chertoff and I simply would not accept a made-in-Europe version of the wall. The interagency participants and the NSC staff bitterly opposed the DHS strategy, but DHS had two advantages.

First, DHS was the agency whose interests were truly at stake. The others had strong passing interests in the dispute, but only DHS had direct operational responsibility for keeping terrorists out of the country. If DHS believed that a better PNR agreement was necessary to accomplish that end, it was very hard for other agencies to persuasively argue for a different view.

Second, the lines of communication from the bottom of DHS to the top were clear, short and quick. When new issues arose, Chertoff could be briefed and give decisions in hours. This was critical to the interagency debate, because many of the other participants might take weeks to get cabinet-level backup for their positions. Time and again, DHS officials were able to scotch opposition at the NSC by saying, "We've talked to our secretary. That's his view. If you disagree, you'd better bring your secretary to the table to close the deal."

But NSC and the rest of the interagency group had weapons of their own, most especially the power of delay. NSC could refuse to approve DHS's most ambitious and hard-nosed proposals. In a bureaucracy, the power to delay a proposal is often the power to kill it. The agencies that wanted DHS to quietly renew the PNR arrangement might not be able to force us to agree, but they could achieve the same end simply by delaying any decision that would allow us to negotiate an alternative.

So, in the weeks following the decision of the European Court of Justice, an eerie quiet settled over the Atlantic. Both sides were trying

to agree on how they would approach the negotiations. The commission was seeking a mandate simply to renew the old agreement. This took time, but the commission seemed confident that time was on its side. The closer we got to September 30, the commission seemed to think, the greater the pressure on DHS to accept a simple renewal.

At the same time, DHS was pressing for authority from the National Security Council to put forward an ambitious rewrite of the PNR arrangement. DHS also wanted authority to go directly to individual member states to begin planning for the expiration of the September 30 deadline. Reluctant to approve these tough tactics, the NSC was slow-rolling the DHS request. It had made the same calculation as the commission, and it seemed to want the same thing. The closer we got to the deadline, the more likely it would be that DHS would have to roll over the existing deal.

I could see the opposition strategies starting to unfold—both in Brussels and inside the interagency process. Both of our adversaries were playing a delaying game. They thought that the approach of the September 30 deadline would force DHS to make concessions. They thought that the deadline helped them, because they couldn't imagine letting the agreement actually expire. They were sure we'd have to get more flexible as September 30 neared.

But the strategy I'd devised for DHS saw the deadline as DHS's friend. I thought that the best thing that could happen to us was for September 30 to come and go. That would expose the Europeans' bluff.

And in the interagency process, DHS's unity would allow it to stand firm as September 30 approached. I was gambling that the September 30 deadline would turn out to be a bigger problem for the Europeans and the interagency players than for DHS. So the key for now was to keep them thinking that delay was their idea, not ours.

With everyone playing for time, June passed without action. Faull told everyone that he was seeking a mandate to renew the agreement without change. Before the EU enters into formal international

negotiations, the twenty-seven member states authorize those negotiations and set out the EU's objectives in a negotiating "mandate." This process means that the EU's negotiators are often kept on a very short leash—unable to make concessions or deals that materially vary from the mandate they have been given. The story was often told (I suspect it is apocryphal, though indicative of a larger truth) that an agricultural negotiator had to return to the European Council for a new mandate in order to remove a comma from a trade agreement.

Finally, in July, Brussels reached consensus, giving Faull the mandate he had sought. It was the *Indiana Jones* option—renewal of the old agreement on a new jurisdictional foundation. Faull called to let me know, and to tell me that, as a technical matter, it would be necessary for the United States and the EU to "denounce" the old agreement, since it had been overturned by the court. He wanted to make sure we weren't upset when that request was sent over.

I wasn't upset. I was overjoyed.

I agreed with enthusiasm to join Brussels in denouncing the old agreement. But I made no formal proposal for replacing it. That would have required interagency consensus, and consensus was slow in coming. Instead, I waited for the European Commission to put forward a draft. Once we saw the European draft, I would have to persuade a reluctant National Security Council to authorize DHS's proposal for a complete rewrite. That would be a hard slog, and I was in no hurry to start.

Brussels finally put forward its draft in mid-July. Had it really served up the *Indiana Jones* option, simply repeating the old agreement without change, my strategy might have been in trouble. There was plenty of interagency support for Faull's proposal that we simply renew the 2004 arrangement. But in the end, Brussels had not been able to achieve consensus on a straight renewal. Instead, perhaps driven by its privacy bureaucrats, it put on the table a draft that went well beyond the 2004 agreement. The new draft tried to turn all the U.S. undertakings into a formal and binding international agreement, rather than a loose *quid pro quo*. Worse, it allowed the privacy

bureaucrats of the member states authority to investigate DHS and to take enforcement action if they concluded that DHS was not living up to those obligations.

Brussels had overplayed its hand. No one in the interagency process was willing to argue that DHS should accept a worse deal than it got in 2004. The Brussels draft was not a basis for serious discussion. I had unanimous support for rejecting it out of hand. And in that moment, Brussels lost its best chance to force renewal of the 2004 deal.

It was now late July. Two months were gone from the four-month negotiating window that the European Court of Justice had allotted. And August vacation is nearly sacred in Europe. No serious negotiations could be expected then. Pointing out that combining August in Europe with the Labor Day holiday in the United States would leave only three weeks for substantive negotiations, DHS insisted that planning for a possible September 30 crisis should begin.

It was only prudent to do some quiet contingency planning, we told the interagency, and it agreed that we could approach individual member states and ask them what plans they had for avoiding a crisis on October 1.

This, too, fit our strategy. It allowed DHS to bypass Brussels and begin dealing with individual European countries. No matter how quiet the conversations, we knew they would get back to Brussels almost immediately. And that would make the Europeans realize that DHS might not be bluffing, that expiration of the deadline raised no undue fears in Washington. Best of all, we soon learned that several governments were indeed planning steps to avoid lawsuits or disruption of flights if the agreement expired on September 30.

This discovery bolstered DHS's interagency argument that chaos was unlikely on September 30, even if no agreement was reached. The airlines and the member states, I argued, were already working on ways to defuse the crisis and forestall chaos.

In August, the real world broke in. British authorities uncovered a plot to kill innocent transatlantic passengers on a nearly unprecedented

scale. British Muslims with ties to al Qaeda planned to smuggle liquid explosives disguised as sports drinks onto as many as ten transatlantic flights. The idea was to blow all of them up the same day. Thousands would have died.

Thanks to British surveillance, the authorities knew that preparations for an attack were well along. They bugged the plotters' apartments and listened, appalled, as some of the men videotaped their final testaments. Unsure exactly when the plan would go into effect, on August 10, 2006, the British moved in, arresting twenty-five people. At the same time, UK and U.S. authorities imposed restrictions on liquids in carry-on baggage.

The incident, which could have caused a death toll that rivaled 9/11, deepened DHS's determination to reshape the 2004 arrangement. If the liquids plot were a test, the 2004 procedures had failed it. We tried to use the plotters' reservation data to track their plans, but only one part of DHS—Customs and Border Protection—had access to that information, and it was hard to share the data with other agencies. Worse, when we turned to the plotters' reservation data to get advance warning of the attack, we ran into the provision that made it hard to get information about travel reservations more than seventy-two hours before the flight. At a time when we needed as much advance warning as possible about the plot, we were instead struggling with an arbitrary EU limit on how quickly we could get reservation data. That made no sense.

Even the liquids plot did not disturb the rhythm of the negotiations, or the vacation schedule in Brussels. Soon August, too, had slipped away, and still no negotiations had been held. September 30 loomed.

DHS and the European Commission still believed that time was on their side. Not so the interagency. The National Security Council was getting visibly anxious. The first negotiations were scheduled for early September, and the United States had to have a position.

DHS was unwilling to consider the *Indiana Jones* option—the same deal on a new footing. We wanted a complete revamping of the

2004 arrangement. Other agencies feared that such a demand would put an end to the talks. But DHS's firmness was beginning to bring the others around. They had no answer to our objection that the 2004 deal was too constraining, particularly after the August plot. They agreed that some renegotiation was needed but they took refuge in delay and procedural objections. Why not wait until the old deal expired by its terms, in 2007? There wasn't time, they said, for a wholesale renegotiation. Couldn't we keep the old deal for a few more months?

I wouldn't budge. I knew that rolling over the deal would give it greater power. It would be even harder to kill after it had been signed twice. And besides, the deadline would work in DHS's favor, I still believed. Why give that up?

DHS was constrained by interagency consensus in the formal negotiations, but it could not prevent Michael Chertoff from speaking his mind in public. In a late August *Washington Post* op-ed, Secretary Chertoff made the case for revision of the agreement in blunt terms, saying that European privacy concerns had limited the ability of counterterrorism officials to do their jobs.[3]

The op-ed made my job as negotiator easier. The NSC could hardly order me not to say in the negotiations what Chertoff had already said in the newspapers. It agreed that I could spend the first negotiating sessions explaining our objections to the 2004 deal and proposing that the deal be reworked. But I could not say that the deal would end on September 30.

There was no consensus in Washington for letting the deal die then. If I couldn't persuade the Europeans to rewrite the agreement by that date, most of the interagency members hoped they could force DHS to roll over the old deal, at least for a while and perhaps for another year.

At last even Labor Day had passed. Everyone was back at work, and we had to meet the Europeans. The interagency remained divided. Even so, I was determined not to compromise DHS's goals. As the lead negotiator, I was determined to make the best of my limited instructions.

With Faull sitting across the table, I blasted the 2004 arrangements. That agreement, I said, was "unacceptable to DHS," a formulation that left open the possibility that other agencies might find it acceptable. I insisted that it would have to be renegotiated, and I laid out the many objections that DHS had identified.

Faull was a formidable negotiator, but he had been given an impossible mandate. He was supposed to get us not only to restore the old agreement, but to accept the privacy bureaucrats' proposals, which would make the deal even harder on DHS. He must have known that he'd never get a deal on those terms. So he acknowledged that DHS's concerns were worth discussing, and he promised to do so. But not now.

We don't have time to negotiate a new agreement in three weeks, he declared, and I don't have a mandate to do anything other than renew this deal.

Hoping to break DHS's resistance at the start, Faull had gone straight to the issue that divided Washington. It was almost as if he were reading our interagency memos—or getting briefed by the U.S. agencies that opposed us.

If we are going to have productive talks, one thing must be understood, Faull told me. The only way to handle these talks is to proceed on the understanding that, while we are discussing the issues that DHS has raised, it must be common ground that we are going to roll over the 2004 agreement on September 30. That is the only basis on which I have a mandate to talk to you. If that's not understood, I might as well pack up and go home.

It was an ultimatum.

Whether we were going to take the *Indiana Jones* option was the crucial issue, and Faull wanted to force a concession right away. The EU's slow pace in scheduling talks now made sense; the Europeans thought that leaving only a few weeks for agreement would force us to postpone substantive negotiations and take the rollover.

Faull was smart enough simply to make his statement and move on. He wasn't asking for explicit assent from the United States, he was

putting the EU position on the table. But this would be his position from now on. If the talks went on after his ultimatum, it would be the basis for all further discussion.

For me, the ultimatum posed a tricky problem. I knew that DHS was united in rejecting the 2004 deal and in wanting an immediate revision. Indeed, DHS was willing to let the old agreement expire without renewal, since we thought that the risk of crisis was low. But there was no interagency consensus for the DHS position. The State Department, the Justice Department, and the NSC—all agreed with Faull; they too wanted us to take a rollover. I had no authority to insist that the deal expire without renewal.

But Faull had overreached without realizing it. By stating the understanding so explicitly, he created an opportunity that I would not have had on my own. I had no mandate to threaten the collapse of the deal on September 30, but I certainly could reject Faull's explicit ultimatum.

I waited. After more back and forth, Faull again declared that talks could only go forward on the assumption that the agreement would be renewed by September 30. Choosing my words carefully, I interrupted.

"I'm afraid that these talks can't go forward on the basis you've stated," I said. "I simply cannot promise you that we will renew this agreement at all."

In the dead silence that followed, I wondered whether I had gone too far.

No, I thought, that was a technically accurate statement of the interagency debate. As long as DHS held firm, no one could promise that the agreement would be renewed. Of course, no one could promise that it wouldn't. The issue was still being debated inside the U.S. government.

But in the negotiations with the Europeans, this formulation suddenly put the shoe on the other foot. By categorically rejecting Faull's assertion that the talks could only go forward with a rollover as the goal, we left Faull with the same harsh choice he had tried to force

on us. He either had to abandon his earlier ultimatum or walk away from the talks.

Faull called a break.

He had to consult with his delegation. Faull could not have been surprised at my position; he'd heard much the same informally before. But the other European representatives were shocked. Viewed from Brussels, the 2004 deal looked like a capitulation to the United States. Its privacy protections were far too weak, the Europeans thought; the deal had been criticized by the European Parliament, the press, and the privacy bureaucrats—by all right-thinking people, really.

The European negotiators had begun the session expecting to win a new and tougher deal. Now the United States seemed willing to let the deal die entirely—and in just three weeks. Worse, they now had to decide, over a coffee break, whether to fly home empty-handed or to start discussing ways to weaken an agreement their constituents had already spent years condemning as too weak.

The break stretched on and on. Finally Faull and his delegation returned. They would keep talking. Brussels had abandoned its ultimatum.

A new note of urgency suddenly filled the room. If we were truly going to rework the 2004 agreement in three weeks, we would have to begin immediately. Perhaps for the first time, the European negotiators understood just how much was at stake for them in these talks.

To soften us up, the Europeans realized, they had to restore our fear of the September 30 deadline. If the United States really was willing to let the deal die on September 30, then Europe had no leverage.

Faull began to stress the risks for both sides if there was no agreement on September 30. Just a threat of data-protection litigation could cause chaos if no agreement had been reached, he said. Airlines might withhold data from DHS. They might refuse to fly across the Atlantic at all. Hoping to add to this leverage, one or two of the European negotiators hinted that they might open a new front. They noted that Canada could not share PNR

data with the United States unless the United States was deemed "adequate" under EU law, a status that would expire on September 30. Did we want to lose access to Canadian data as well, the most anti-American members of the delegation asked.

The tactic was Europe's best hope, but it didn't change the dynamic of the talks. I explained that the airlines should be able to avoid liability and I expressed doubt that Canada would take actions counter to its own interest. I deeply resented the European effort to hold Canadian data-sharing hostage, but as a practical matter the data supplied by Canada was so hobbled by restrictions that it had only limited value. I was willing to roll the dice if those were the only stakes.

The tide of the talks had turned. From now on, the negotiations would be focused not on how the agreement could be made more favorable to European privacy campaigners but on how to address DHS's security concerns. The only question was how much ground Brussels would give up.

Faull declared that he found some of the U.S. concerns to be reasonable, but that he did not have any authority to renegotiate the 2004 deal. I can't possibly get a new mandate in the next few weeks, he explained. He added that he thought some of our concerns were based on too strict an interpretation of the 2004 arrangement.

—You're reading it so strictly that it is hurting your security more than necessary, he said.

It is not usually good negotiating tactics to emphasize your weakness and inability to cut a deal. But in choosing this formulation, Faull seemed also to be hinting at a solution. Could we leave the agreement from 2004 in place while reinterpreting it to avoid the consequences to which DHS objected? We could see that this fallback position had appeal from the European point of view. It would keep the commission within its mandate, if barely. And "interpreting" the 2004 agreement set natural limits on the concessions that Brussels could be asked to make. Interpretation might allow

the negotiations to stretch the terms of the agreement; it would not allow the negotiators to rewrite them.

Perhaps to Faull's surprise, I was also willing to explore the idea. That was because I believed the 2004 agreement could in fact be rewritten under the guise of interpretation. The arrangement included a clause that allowed DHS to adapt to changes in U.S. law. If amendments to U.S. law affected any of DHS's undertakings, then the amendments would trump DHS's promises, as long as DHS gave notice to Brussels. I thought that this clause might open the door to major changes, as long as I could tie the revisions to a change in U.S. law enacted after the 2004 agreement.

And there had been such a change. A bill implementing the recommendations of the 9/11 Commission had been signed into law in December of 2004, less than six months after the agreement. The legislation wasn't very specific. It didn't address travel reservation data; but it had the usual post-9/11 provisions requiring more information sharing. The act created a federal "information sharing environment" to facilitate the exchange of all terrorism information among federal, state, and local agencies. Because this measure was intended to respond to the 9/11 Commission's criticism of the "wall," we thought, it could be the basis for undoing the new wall constructed by the 2004 agreement for sharing of travel data.

In fact, read broadly, it could be the basis for repudiating large swaths of the 2004 agreement that affected information sharing. That, plus a generous view of what constituted "interpretation," meant that I could squeeze most of the changes that DHS wanted into Faull's formula, allowing him to stay at least technically within his current mandate. The 2004 agreement could be rolled over, in accordance with the commission's instructions, but with a sweeping set of changes based on the new U.S. law.

I was happy with the first negotiating session. It had forced the talks onto our terrain; I had been able to pooh-pooh the September 30 "deadline" without misrepresenting the state of interagency deliberations; and the way had been paved for a potential compromise—the

interpretive letter. I couldn't have planned on any of that, but our hard fights in the interagency process had left me prepared to pursue each of these opportunities when they arose.

But we had no victories yet. Time was short, and the Europeans had not agreed to any concessions. They couldn't. I had not actually asked for any. Indeed, we had no authority to put forward a proposal of our own. The interagency was still deadlocked. With only three weeks left, though, it was time to force the issue. Faull and I agreed to meet again in a week—at which time I would offer U.S. proposals for an interpretive letter and for what would be done on September 30 if agreement had not been reached.

Now came the hard part. We would have to fight off the other federal agencies that still wanted DHS simply to renew the 2004 agreement despite its troubling privacy restrictions. But DHS's interagency position was improving. First, DHS's judgment had been vindicated. We had successfully called Brussels's bluff. Its negotiators had stayed at the table after DHS refused to treat a rollover as the only possible outcome. The agencies that predicted a breakdown in the talks if DHS took a tough line had been proven wrong. And their efforts to minimize DHS's objections to the 2004 deal had been undercut when Faull acknowledged that our concerns had weight. Interagency debate was now moving to a battleground that favored DHS.

But compromise is the soul of interagency discussion. The process is designed to force agencies to make more and more compromises as disputes move up the ladder from assistant to deputy to secretary. If we walked into the interagency process and put our bottom line on the table, we'd soon find that we had in fact put it on the block, that serious security measures would be knocked down just to satisfy demands for compromise from State, Justice, and the NSC. To keep that from happening, we decided to ask again for what we really wanted—either the 2004 agreement should be rewritten from scratch or it should be scrapped. DHS put forward a rewritten draft of the agreement, reducing the whole thing to broad principles; the resulting

document emphasized that passengers could consent to U.S. security measures, and it dropped the strict regulation of DHS's data practices.

Interagency opposition to this proposal was heavy, and—oddly—it was led by the Justice Department. We thought that Justice would want privacy limits on law enforcement to be carefully circumscribed and reciprocal. As it turned out, Justice did feel that way about privacy limits on its own law-enforcement practices, but it saw no reason to apply the same principle where DHS's practices were concerned. As the interagency debate raged, Justice replayed earlier arguments: The EU would walk away if we put forward our proposal, and a failure of the talks would spoil the atmosphere for what Justice thought of as "real" law-enforcement data exchange—the trading of information in criminal investigations. To avoid even the possibility of a chill in that area, Justice wanted us to stop defending our own interests.

Our proposal had forced the interagency debate to focus on whether to put forward a complete rewrite of the 2004 agreement. For DHS, this was good news. We recognized that a sweeping reconsideration of the passenger names records arrangement would be hard to achieve. But our interagency opponents were concentrating all their fire on that part of our agenda. And that had the effect of making the rest of DHS's position less controversial.

There were two other pieces to DHS's interagency proposal. The first was an "interpretation" letter that would largely tear down the EU-imposed data-sharing wall and interpret away DHS's other problems with the agreement. It was a sweeping document that we believed could solve nearly all of our immediate concerns about the 2004 deal. Of course it went well beyond what most lawyers would call interpretation; parts of it were in truth a revocation of the original arrangement. But if the EU was willing to accept those provisions and to call them interpretations rather than amendments, why should we disagree? Calling them interpretations would give Europe a victory on paper while giving DHS a victory on substance. And if the alternative was giving up the 2004 agreement entirely, I thought, a paper victory

might look good to Brussels. It was aggressive, but I thought it might look good to the interagency when compared to DHS's other, more sweeping proposals.

Our final proposal was certainly harder for the interagency to swallow. I wanted to put complete abandonment of the 2004 agreement on the table. That was the best response to the European claim that there wasn't enough time to revise the entire agreement in just two weeks. There might not be time to rewrite it, but there was plenty of time to kill it. So we asked for authority to propose a joint statement that the parties could issue if we didn't reach agreement by September 30. I liked this proposal because it dressed up a hard-nosed negotiating position as simple prudence. There were only two weeks left, after all, so it only made sense to plan for the possibility that the talks would fail. But the very fact of planning for failure emphasized again how unconcerned we were about the September 30 deadline.

As drafted by DHS, the joint statement was uncompromising. DHS proposed to say that the two sides had not reached agreement but they were committed to keep talking and the EU would not take any action that would harm airlines or the flow of data during this period. Conspicuously, DHS did not commit to keep its undertakings in effect. We would make no promises about what we'd do come September 30. After much discussion, however, NSC brokered a compromise. DHS agreed to promise that it would give Europeans all of the privacy rights that Americans had under U.S. law—other than the right to sue the U.S. government (a right the executive branch could not confer in any event). We were happy to make this promise, first because we had already begun to apply U.S. law to all passenger name records and second because the formulation dramatized our view that U.S. privacy law was already at least as good as EU law and that the two should be treated as equivalent.

That was a small price to pay for approval of the rest of the document, which would dramatize how lightly we took September 30. Putting it forward would show for the first time that the U.S. government was united in that stance. Important as it was, approval of the

document came surprisingly easy. With the other agencies focusing all their fire on DHS's completely rewritten version of the 2004 agreement, I finally agreed to drop that proposal in favor of the "interpretive" letter and the joint statement.

But at the last minute the interpretation letter ran into a completely new set of Justice Department objections. Justice did not want to say that the 9/11 implementation law required the sharing of airline reservation data within the U.S. government. It argued that the new law was more or less meaningless, imposing no serious sharing obligations on U.S. agencies.

Since the interpretation letter was widely viewed as the best way to reach agreement and avoid a blow-up, Justice seemed to have switched sides. After insisting for months on compromise at any cost, now Justice was holding up the best hope for achieving a compromise.

Finally, after long discussions, we figured out what the problem was. The FBI apparently had many agreements with foreign agencies that required it to keep the data to itself and not share it with other U.S. agencies. Such clauses are disconcertingly common in international agreements—especially if the agreements are not reviewed by other agencies. The clauses are common because both sides are happy to adopt them. The foreign agency providing the data wants to know that its distribution will be limited; and the receiving agency (often the FBI) is happy to be given a legal monopoly on important data.

If the United States declared that the 9/11 implementation law required reconsideration of such restrictions, we realized, the FBI and Justice might have to reconsider their own restrictions on sharing data with other agencies. And Justice did not want to do that. These were the same prosecutors who had fought like tigers to tear down the wall that restricted their access to intelligence agencies' information; but now, with the shoe on the other foot, they were fighting almost as hard to keep other agencies from seeing the data they were getting from foreign partners.

I was disgusted. After suggesting that DHS should sacrifice its interests almost without limit just to keep the negotiations from

blowing up, now Justice was prepared to put the entire deal at risk, and in the worst possible cause—preserving the FBI's authority to keep terrorism data behind walls. The irony ran deep. DHS was fighting tooth and nail to win the right to share terrorism data with Justice, to break down the wall; and Justice was fighting just as hard to keep us from succeeding—for fear that it might then have to share more data with us.

It was the worst sort of bureaucratic politics, but Justice was determined. It played its trump card, saying, "We're the Justice Department. We're in charge of interpreting the laws of the United States, and we reject your interpretation of the 9/11 law." It looked as though the entire strategy would founder on the rock of Justice's self-interest.

But for once NSC took DHS's side. It badly wanted a compromise with Europe, and the interpretation letter was its best hope. NSC pressed for a solution. Finally, in a series of tense weekend phone calls, DHS proposed one. Instead of saying that the 2004 agreement's limits on information sharing were "inconsistent" with the statute, could we say that the limits, if read restrictively, would "impede" operation of the statute? The 2004 deal allowed us to modify our obligations if the obligations "impeded" compliance with U.S. law. I felt ashamed of this compromise, because it would give Justice and the FBI an excuse to keep their own barriers to information sharing in place. But it broke the deadlock over the letter. We had what we needed for the next negotiating session—a unified U.S. negotiating position on the substance of the deal, even if we still hadn't quite agreed on what would happen if we had no agreement on September 30.

That was looking more and more likely. The interagency squabbling had eaten up a lot of time. Now there was just a week left before September 30.

But the collapse of interagency resistance left the EU with no options. It was quite clear now that the United States was determined to rewrite the 2004 deal. And, it looked willing as well to let the old deal expire without regret.

With just days to go before September 30, the Europeans dropped their effort to postpone negotiations until the next year. But old assumptions die hard. The EU negotiators still seemed to believe that it was the United States that needed a deal or a rollover by September 30, and they seemed surprisingly unhurried as the days ticked away.

This was fine with me. My biggest worry all along was that the NSC would intervene at the last moment to force DHS to keep the 2004 deal in place if we missed the deadline. But the closer we got to the deadline without NSC forcing the issue, the less likely that became. I was sure that inertia and delay were on DHS's side. If we did nothing, and NSC did nothing, the deadline would pass. If I was right, that event would prove that the deadline was no big deal, and DHS's leverage would increase. If I was wrong, well, all hell would break loose.

I was starting to get a feel for just how bad it could be. Industry had been following the talks through intermediaries, but it had assumed, along with the EU and much of the interagency, that a rollover was inevitable and that DHS would have to cave in eventually. So the airlines had not pressed the two sides to reach substantive agreement. But when the U.S. proposed a joint statement to be issued if no agreement was reached, everyone suddenly realized that failure really was an option. The "adequacy" determination that the industry was relying on might simply evaporate on October 1 with nothing to take its place. The airlines would be flying naked. They didn't want that. They began pressuring DHS to accept a deal, any deal. But they were too late. Our course was set. The slow-moving interagency process had labored and brought forth the two documents. They could not be changed now; they would have to be the basis of further negotiations.

Talks proceeded all through the last week, as Saturday, September 30 loomed. The interpretive letter was proving to be the key to a deal. As I hoped, it allowed EU negotiators to stay technically within their mandate to renew the 2004 agreement while giving DHS time to argue for all the substantive changes it wanted. But many of the substantive changes were hard for Brussels to swallow. Finally on

Friday we put our best offer on the table. Only then did the EU realize that we weren't bluffing. They had evidently hoped against hope that with less than a day to go, we'd be forced to compromise further.

This wasn't in Europe's script. It could not accept DHS's last offer without further consultations in Brussels.

So, they asked, would we agree to leave the 2004 deal in place while negotiations continued? I was firmly opposed, of course. I wanted everyone to see that the threat of chaos and liability all around was mostly hype. But the issue was going to be decided well above me. That was good news. Chertoff was firm in wanting to break free from the European data-protection shackles, and he understood the value of ending the threat of transatlantic chaos. What's more, with the interagency issues elevated well above the usual players, the entire process was growing smoother. At the Deputy and Secretary level, both State and Justice were more supportive of DHS. At that level, the interagency reached agreement on a final step to demonstrate U.S. resolve.

Chertoff contacted his counterpart in Brussels, Franco Frattini. Commissioner Frattini was a charmer. As far as I know, he never really wore his topcoat over his shoulders like a cape, yet somehow that's the impression he left. Always smiling and full of energy, he had the dash of a young Marcello Mastroianni. He had made his career not in Brussels but in Italy, as a right-of-center politician and interior minister. He represented the European Commission's views with enthusiasm, but when push came to shove, he was on the side of law enforcement. His practical experience as a law enforcement minister allowed him to reach across the Atlantic and find common cause with Chertoff whenever tensions rose.

Encouraged by his conversations with Frattini, Secretary Chertoff decided to dramatize how close the parties were. He initialed the last DHS offer and sent it to Frattini. And he issued a public statement revealing that the ball was in the EU's court. The commission had only to initial the same document by the end of the day to avoid any further delay.

If it did not, though, the 2004 undertakings were dead. DHS made clear that it would unilaterally implement the changes it had proposed in the interpretive letter as promptly as possible. And we also declared that on October 1, "planes will continue to fly uninterrupted and our national security will not be impeded. Importantly, the proposal ensures the appropriate security information will be exchanged and counterterrorism information collected by the department will be shared, as necessary with other federal counterterrorism agencies."[4]

The wall was going to end, agreement or no agreement.

The crunch had truly arrived. All Saturday, airline representatives burned up the phone lines, trying to reach the negotiators. One association called me to insist that the United States had to get a deal; some airlines were already making plans to put their planes on the ground at midnight, the association claimed. Only a deal, or perhaps an agreement to roll the arrangement over for a time, would forestall chaos.

But we were determined not to bend. The threat of chaos was the weapon that Brussels had used in 2004 to extract dangerous concessions on security from the United States. No more. The statement we issued on Saturday quite deliberately made no mention of continuing to abide by the undertakings. DHS was willing to acknowledge informally that changing its procedures would take a bit of time, but the undertakings would be at an end—dead—at midnight.

Once the EU's negotiators had left for the airport, there was nothing to do but wait. The other negotiators and I were on tenterhooks all Saturday night and Sunday morning. Had we miscalculated? Would the European airlines stop flying or stop providing data? Would DHS have to begin imposing fines to force the airlines to cooperate? Would the EU lean on Canada to end its cooperation on passenger name records with the United States?

If the gamble failed, and the threat of chaos turned out not to be a bluff, my strategy would be discredited, and DHS's control of the talks would be at risk. Those who believed that DHS was not competent to manage a high-stakes negotiation successfully would roll out

their I-told-you-so's. And resistance to the EU's information restrictions would begin to crumble.

By Sunday afternoon, though, it was over.

Not one airline had canceled a single flight. Not one had withheld passenger name records. The UK had even issued an order requiring its airlines to continue supplying them to the United States. And on Monday, Canada quietly let the United States know that it would continue to share data despite the end of the EU adequacy determination.

In Brussels, too, Sunday was a strategic turning point. But not a good one from the EU's point of view. The airlines had been pressing DHS to reach a deal right through Saturday. But when that didn't work, they shifted their tactics. Now they were pressing the EU to take the deal that Chertoff had sent to Frattini on Saturday. The airlines didn't care who gave ground, or what compromises had to be made. Every day without a deal was a day of risk, the airlines believed. And since the United States had made clear that it wasn't moving, the airlines now wanted movement from the European Union.

Even as its leverage was collapsing, though, the EU could not take the deal that was on the table. By Wednesday, sources in Brussels were complaining that Chertoff had scuppered the deal by introducing new last-minute demands, and EU negotiators sent back a marked-up draft of the U.S. proposal that made dozens of changes. Indeed, the draft tried to pull back concessions the EU negotiators had already signaled they would accept.

I was puzzled. This kind of negotiating tactic was almost willfully self-defeating. It was like the first EU text, which Brussels had claimed would simply roll over the 2004 agreement but which in fact made it worse. That aggressive proposal had united the U.S. government behind DHS for the first time.

Now the EU's Wednesday draft had the same effect. With the planes still flying and the data still flowing, DHS's interagency stock had risen, and the EU's Wednesday draft was so unacceptable that

DHS's tough line came to seem like the only appropriate response. There was no more talk in the interagency of showing good faith by agreeing to leave the wall in place voluntarily.

Why did the EU take this tack, I wondered, not once but several times? Faull was too good a negotiator not to realize the harm done by such maximalist positions. The source of the problem, I thought, had to be the EU's own internal politics.

Negotiating with the United States was in the European Commission's blood. For some of the EU's founders, the whole point of uniting Europe was to act as a counterweight to the United States. In trade talks with the United States, Brussels had made real headway by taking a tough line. Parts of the commission viewed their job as finding ways to confront the United States. Unless Faull had extraordinary authority, these elements would always press for the toughest possible line. And it was simple group dynamics that negotiating positions would harden if there was not a single clear decision maker. Proponents of aggressive measures could always say, "Well, why not try it? They can always say no." But the result of that approach was to produce drafts that lacked credibility in Washington and undermined the assumption that Brussels and Washington shared the same antiterrorism goals. And it ratified our view that only the toughest tactics would yield an acceptable outcome when dealing with Brussels.

Once again unified by the EU's overplaying of its hand, the interagency now backed DHS in its determination simply to stare down the maximalists on the European side. DHS was given broad authority to reject practically all of the European positions. As the airlines continued to pressure Brussels, a videoconference negotiating session was set for the end of the day on Thursday, with the hope that a deal could be reached and recommended to a permanent representatives' meeting on Friday.

The timing was bad from the start for the EU. The U.S. negotiators were beginning the talks at 11 a.m. Washington time. For the commission, that meant starting at 5 p.m. in Brussels. And as the United States rejected change after change proposed by Brussels, the

time difference grew more important. Impasse after impasse forced delays and consultations on the European side. The phones would be muted but the video showed the European team's body language. It was not pretty. Bitter arguments were clearly breaking out whenever the talks paused. But in the end, each argument was followed by a European retreat.

It became clear that the commission itself had a deadline. It had to have an agreed document to recommend the next morning to the permanent representatives. We were in the catbird seat. If they wanted a document by the following morning, they would either have to persuade us to accept their change, at best a lengthy process, or recede. Moving systematically through dozens of proposed changes took many hours, so that the last issues were not finally addressed until eight or nine at night in Washington—two or three in the morning in Europe. At last we had not just the calendar on our side, but the clock as well.

That did not mean that DHS had everything its own way. This was still a negotiation among equals, and there were some issues where DHS did not press for unequivocal victory. It's never a good idea to press a tactical advantage so hard that the other side feels trounced. That only sets up a grudge match for the next set of talks.

DHS gave ground on information sharing, mainly to defuse a few of the most explosive fantasies being peddled about U.S. practices. To reassure the EU that other agencies would not have free rein to rifle travel records at will, DHS agreed not to grant "unconditional" and "direct" electronic access to other agencies. This formulation would, of course, allow other agencies to log into the database, as long as their access was conditioned by the requirement that they obey the rules that governed access. Perhaps most important, DHS agreed to share data only on a case-by-case basis. We could live with this because "cases" were defined very broadly. They did not have to be classic criminal investigations but could include all the common-sense circumstances in which DHS needed another agency's expertise or assistance to address an actual concern.

And DHS retreated at least for a time on the question of how long it could retain passenger name records. The three-and-a-half-year limit on record retention was a sore point for DHS; we believed that travel data was likely to have value for many years. But Faull stressed that there was no need to address the issue now. The retention period could be revisited in the next negotiation; no data would have to be destroyed before then. Much as DHS wanted to expand the retention period, Faull's point made sense. We agreed that the issue could be postponed.

These compromises sealed the deal as dawn broke outside the windows in Europe. With no time for sleep, Faull carried the marked-up documents to the member states' permanent ambassadors and got their approval that day.

The last round of negotiations was tough for the Europeans, but not as tough as their next task. They had to explain the deal to the parliament members and the privacy bureaucrats who had pressed to reopen the negotiations.

"European data protection authorities are choking on their baguettes after seeing the detail of the data-sharing agreement the EU signed with the U.S. on Friday," a reporter for *The Register* in Britain summed up colorfully. "European data protection authorities said they were 'amazed' when they saw the letter yesterday because it watered down the new agreement so that it was even weaker than the last."[5]

It was true. The European privacy bureaucrats—and the European Parliament— had gambled and lost.

"Unfortunately, the outcome of the court hearing was such that we basically sidelined ourselves," said Sophie in't Veld, a parliament member who opposed the U.S. deal, in an appearance before the UK House of Lords.[6]

But it was worse than that. The European Parliament had not been on the sidelines. By going to court and getting the first deal knocked out, it was the parliament that made it possible for DHS to remove the most onerous privacy terms from the arrangement.

What's more, letting the September 30 deadline expire had done permanent damage to Europe's position in future talks. The fear of chaos that was the EU's most valuable bargaining chip had been devalued by two weeks of calm between the expiration of the first agreement and adoption of the second.

Recognizing the facts of life, parliamentary and data-protection agency complaints about the second agreement and the interpretive letter sputtered on for a time and then died away.

The lesson was not lost on either side. Each now knew that the bark of the data-protection ideologues was worse than their bite. It seemed likely that the next negotiations would end much as the last negotiations did—with the EU in gradual retreat.

Within a few months, of course, we were back at the negotiating table. As Faull had pointed out, the 2004 agreement had to be replaced in 2007. The drama surrounding September 30, 2006, was followed almost immediately by another round of negotiations, this time about whether to renew the agreement. DHS again took a tough line, suggesting that the agreement simply be allowed to expire in July 2007.

"It has outlived its usefulness," I insisted. But the interpretive letter had taken much of the fire from our opposition. It gave DHS the flexibility it needed in most cases. If the concessions Europe had made in the letter could be incorporated into the next agreement, and the three-and-a-half-year retention period could be greatly extended, there was no practical reason to kill the arrangement entirely.

So, in a long anticlimax, that's how the second round of negotiations in 2007 played out. Because DHS was willing to live without an agreement, the EU had to make further concessions just to hang on to an agreement of some sort. The principal issue was how long data could be kept. The old agreement had insisted that data would be kept only three-and-a-half years and that the data collected under the agreement would be destroyed on that schedule no matter what. Both provisions had to go, in DHS's view.

This time around, the negotiations quickly moved to a higher level. By now, the European Council's presidency had rotated to Germany. That was good news for us. In April 2007, Secretary Chertoff made a quick, one-day, trip to Berlin to meet with the head of the German Ministry of the Interior. The German interior minister, Wolfgang Schaeuble, was as forthright an ally as we had found in Europe. (He has since become finance minister in Germany's center-right coalition government.) The victim of an attempted assassination himself, Schaeuble was confined to a wheelchair. A practical man with a sharp mind, he had a cheery affinity for Chertoff.

They met in September 2006, when Schaeuble first came to see Chertoff in the United States. Germany had recently concluded the "Pruem Agreement," allowing European countries to share information about criminal records. We'd briefed Chertoff on the agreement. Schaeuble was impressed with Chertoff's grasp of the agreement, and before the conversation was over, he half-jokingly invited the United States to join the agreement. He must have been surprised when Chertoff, who'd been briefed on the possibility, immediately took him up on the offer. Within two years, though, the deal had been done, and a friendship had been cemented.

With Schaeuble and Frattini leading Europe's team, we hammered out a deal with far less drama than in the first talks.

The two sides agreed that data would be kept for fifteen years instead of three and a half. But to cushion the public reaction, we agreed that the data would spend only seven years in an active database and the next eight in an inactive database. All of the data was put on this schedule, including anything gathered under the old agreement with its three-and-a-half-year schedule. Faull had been right to urge that we postpone that question.

On the crucial question of information sharing, Chertoff again stood firm. He was not going to rebuild information-sharing walls after the failures of 9/11. In the end, the Europeans agreed that DHS could use and share data based on any case that it was investigating or examining. This allowed DHS to identify routes of concern and to share

travel data if the routes were the objects of DHS scrutiny. So long as the concern and the examination arose in good faith, data could be shared easily, assuming good security protections were in place.

As the talks proceeded, the text grew simpler. Many of the detailed and prescriptive security and procedural rules from the 2004 agreement were simply dropped. We began to think that we would have an uneventful second negotiation.

Unfortunately, not everyone in Brussels was reading from the same script. In 2007, the Cricket World Cup was held for the first time in the Caribbean. The Caribbean Community (CARICOM) nations worried that terrorism might mar the games, which attract visitors from India, Pakistan, and other South Asian countries. They asked the United States for help in screening travelers to the Caribbean. The United States helped CARICOM set up a system to collect and process advance passenger information. Data sent to the Caribbean nations was collected by the CARICOM nations and shared with DHS, which alerted the countries to risky travelers bound for their airports. A number of dangerous travelers were identified and refused entry or arrested as the games drew near.

The screening was a success for the United States and the CARICOM nations. But as the deadline for a third agreement on passenger name records drew near, a European representative decided to put the CARICOM arrangement in play. We learned about it when we got an agitated report from one of the top officials in a Caribbean nation that the EU was "essentially blackmailing CARICOM." The EU told CARICOM's trade negotiators in Brussels that it would withdraw all development funding for the region, if the United States did not follow "international standards." If the EU followed through on this threat, the official declared, the economy of the region would essentially be destroyed.

At the next negotiating session with the EU, I lost my temper. This was beyond the pale—an attempt to bully weaker nations into denying us information about dangerous travelers on our doorstep. After a

brief attempt to justify the action, the EU beat a quick retreat, blaming the incident on unauthorized action by a British member of the European Commission staff. The threat to CARICOM was withdrawn. The EU's effort to find additional leverage in the talks, if that is what it was, had provoked so much outrage in Washington that it backfired.

But we weren't satisfied. Counting the Canadian gambit from the earlier talks, this was the second time that the EU had tried to organize an international information boycott of DHS. In reaction, we insisted that the new agreement make clear that such efforts would not be repeated. As long as the agreement was in effect, we insisted that the EU not interfere with third-country transfers of passenger name records to the United States. Jonathan Faull reluctantly agreed.

For the same reason, we pressed successfully to strengthen the reciprocity provision. We wanted an assurance that Europe could not insist on one rule for the United States while allowing its own terrorism authorities to follow less demanding rules at home. If the EU did not apply to its own members the rules in the new agreement, then the rules would not apply to the United States either.

With these changes, the agreement was signed in July 2007. We were finally through. After three negotiations in four years, neither side was interested in a rematch. The Americans were satisfied with the changes, and the Europeans had no appetite for further negotiations on a subject where their leverage had turned out to be so limited.

In fact, the Europeans were about to execute a remarkable pivot, from confrontation to imitation. After three years of complaining about the U.S. travel data system, the commission suddenly proposed that Europe adopt one of its own. More remarkably, the system resembled the U.S. system in almost every detail—except that it provided fewer protections for personal data.

The U.S. negotiators reviewed the proposal for European PNR systems with amazement. "Thank God we insisted on a reciprocity clause," said one. "By the time they're done making the rules for themselves, they'll relieve us of half the obligations in the new agreement."

What had happened? It would be tempting to chalk the about-face to a kind of institutionalized blind spot that makes American systems look inadequate to the EU just because they're American, while European systems look adequate just because they're European. The truth is a little more complicated.

The ironic effect of the conflict over PNR was that it forced us to justify our system. And we did. While the debate was ongoing, France and Denmark enacted laws authorizing the collection of PNR. The UK and the Netherlands launched pilot PNR projects. A committee of the UK House of Lords, deeply skeptical at first, declared in the end, "We are persuaded that PNR data, when used in conjunction with data from other sources, can significantly assist in the identification of terrorists, whether before a planned attack or after such an attack."[7]

Persistence and a full-throated defense of our program had won the day. Even so, DHS had been lucky. There was still a large body of opinion in Europe that wanted to thwart—or at least hobble—most of the U.S. data programs initiated in the wake of 9/11. To understand what could have happened if DHS had been less determined, it is only necessary to look at the U.S. and European handling of the SWIFT affair.

The Society for Worldwide Interbank Financial Telecommunication (SWIFT) is one of the great rivers of financial data that flow around the world each day. It carries international bank transfer messages for thousands of banks in two hundred countries.

Some of those transfers have helped fund terrorism. Terrorist groups must raise money to pay for their outrages. Then they must move the funds to their operational units. To do so, the terrorists must either physically carry cash or use modern financial institutions. A host of electronic networks and links among banks make the international transfer of funds easy. Al Qaeda often took advantage of these networks to move its funds. The alternative, sending cash by courier, runs the risk of interdiction, since carrying large, undeclared amounts in cash is illegal in many countries.

After 9/11, the United States Department of Treasury decided to ramp up its efforts to prevent terrorist groups from using modern financial networks. Banks were already under an obligation to "know their customer" and to report suspicious transactions. But often, Treasury was aware of information about suspicious persons or activities that it could not share widely with the banks. It therefore had to gain access to a large amount of data and then sift that data, using its own classified search terms and algorithms.

Treasury was doing the financial equivalent of what DHS did on the border. Far and away the vast majority of financial transactions—like the vast majority of travelers—held no interest for the government. They were simply part of the vast ebb and flow of money from institution to institution for legitimate purposes. Hidden in that river of transactions were a tiny few that bore the hallmarks of terrorism—a known al Qaeda financier, a suspected middleman, an institution that made a business of supporting suspect groups. Using modern information technology, it was relatively easy to pluck those transactions from the stream for more detailed review. But just as DHS did not rely on the airlines to decide which passengers should be scrutinized, Treasury could not rely entirely on the banks. The names and other facts that triggered scrutiny were sensitive; Treasury could not simply hand the list to SWIFT and ask it to conduct a search.

Treasury had full legal authority to simply order SWIFT to hand over its data. SWIFT kept a full set of records for its transactions in two locations, Belgium and the United States, and records kept on U.S. soil are routinely subpoenaed in criminal investigations. But even after 9/11, SWIFT was extraordinarily reluctant to disclose the transactions it carried. SWIFT could have resisted in court, forcing Treasury through public litigation that would have greatly diminished the value of access to the data. If terrorists and their financiers knew that interbank transfers were being monitored, they would switch to other methods.

To avoid litigation, Treasury and SWIFT negotiated an agreement that seemed to give each party what it wanted. SWIFT would

carry its transaction records to Treasury, where they would be run through a "black box" that applied Treasury's patterns, names, and other algorithms. Neither side would have access to the other's sensitive data. At the end of the process, Treasury would be given only transaction data that had triggered one of its tripwires.

It worked. Treasury later credited the program with allowing it to track and capture the mastermind behind the Bali bombings that killed two hundred people. The program was also said to have allowed Treasury to identify and convict a Brooklyn man who had laundered $200,000 for al Qaeda.

Alas, the program was soon to lose much of its value. In June 2006, the *New York Times* evidently decided that the program must be scandalous; over the vehement objections of the Treasury, it published a lengthy expose′ about it.[8] The public editor of the *New York Times* would later conclude that the paper had been wrong to compromise the secret program, declaring "I haven't found any evidence in the intervening months that the surveillance program was illegal."[9] But by then it was too late. The *New York Times* had managed to create a storm over the program in Europe.

Because SWIFT was a Belgian company, Treasury's access to its records was quickly wrapped into the same storyline as PNR. Americans, the European media claimed, were overreaching to extract private European data from compliant companies without proper safeguards. Investigations were begun in more than a dozen countries. The Belgian data-protection authority seized the initiative. By September, it had issued a report declaring without citing much evidence that SWIFT was in violation of Belgian data-protection law.[10] By November, the entire working party of European privacy bureaucrats had joined in support of the Belgium ruling.[11]

This was, to say the least, an aggressive reading of European law. The data that had been subpoenaed was located in the United States. And SWIFT had done everything it could to minimize intrusions into the privacy of transactions that did not trigger suspicion.

What exactly had SWIFT done wrong?

In essence, the Belgian data-protection authority concluded, the United States Treasury had not lived up to European standards of conduct, and SWIFT had failed to force the Americans to adhere to those standards: "From the beginning, SWIFT should have been aware that the fundamental principles of European law were to be observed, apart from the enforcement of the American law, such as the principle of proportionality, the limited retention period, the principle of transparency, the requirement for independent control and an adequate protection level."[12]

No company had ever been found in violation of European law because it failed to bring a sovereign government to heel, but for European privacy advocates, that was just the beginning. SWIFT soon faced actual civil investigations in Germany and Canada, as well as Belgium, plus complaints in more than thirty countries. On top of all that, SWIFT executives were being criminally investigated and threatened with jail time. All for the crime of obeying U.S. law, in the United States, to assist in pursuit of an enemy that had killed more Americans on U.S. soil than anyone in a hundred years.

The legal theory being used against the company was dubious at best: Even the notion that the U.S. program somehow violated European law was doubtful. DHS's Privacy Office would later publish its findings that European programs to collect and analyze hotel registration were far more intrusive and less carefully constructed than Treasury's program; but they had never been questioned by the privacy bureaucrats who claimed to be so outraged by the U.S. program.

All that hardly mattered in the frenzy of objection to an American program that everyone knew, even without evidence, must be an abuse of power. For SWIFT, having legal defenses that ought to prevail was cold comfort; it could not afford even victory if the price was this public beating. SWIFT is a cooperative owned by banks in many nations; and most of the owners were none too pleased to learn about SWIFT's cooperation in breaching the secrecy of their transactions. They no doubt made this displeasure felt through their representatives on the SWIFT board. SWIFT began looking for an exit.

Desperate, Treasury opened talks with the European Commission, and within six months, in mid-2007, the two sides struck a deal that we found familiar. Treasury offered the Europeans unilateral representations, setting out the protections it was prepared to implement. And the commission relied on those representations to declare Treasury's protections "adequate," setting at rest the preposterous claim that SWIFT was somehow liable for violations of data protection law. Treasury's undertakings followed the PNR model, too; the department agreed that it would search only for terrorism data, that it would delete data that was not relevant to this search, and that most data would be deleted in five years. In another mark of European distrust, the Treasury's compliance with its promises would be audited by an "eminent European person"—who would have to be given a U.S. security clearance so as to be able to investigate even classified activities.

Separately, SWIFT agreed to apply European law to data stored in its U.S. offices, and the U.S. government agreed to enforce European law under a "safe harbor" agreement with the EU. In case there were a few terrorist financiers who had missed the *New York Times* article and the European flap, SWIFT also agreed to provide notice of the program.

By the end of the Bush administration, a kind of peace had been restored. SWIFT was protected from liability, and the furor had died down. Subpoenas were being served and honored. The Belgian data-protection authority issued a report admitting that, after a more detailed examination, what SWIFT was doing was consistent with European law. The "eminent European person" also concluded that Treasury was keeping its word.

But it was the peace of a patient on life support. The secrecy of the program had been breached fatally. SWIFT's American CEO, who had defended the program as necessary to combat terrorism, retired in 2007. He was replaced by a Spaniard. Shortly thereafter, SWIFT announced that it would restructure its data systems to store data on European transactions only in Switzerland.

European privacy bureaucrats crowed that they had crippled the American program, at least as far as European terror finance was concerned: "the creation of a new operation centre in Switzerland . . . means personal data in intra-European transactions will no longer be processed in the US."[13] The Belgian data-protection authority also cited the new Swiss center favorably when it announced in early 2008 that SWIFT actually hadn't broken Belgian law. Coincidence? Nope. SWIFT admitted that pressure from the privacy bureaucrats was one of the reasons it adopted the new architecture: "Distributed architecture will improve resilience, add capacity, control long-term average message costs, *and alleviate European data protection concerns*."[14] In short, it's pretty clear that SWIFT was forced to withhold European terrorist financing information from Treasury by European government officials.

The lessons here are disturbing, to say the least. It now appears, in the wake of the UBS tax evasion scandals, that renowned Swiss bank secrecy laws will be modified to allow the pursuit of tax cheats. Yet a substantial number of European officials seem to think that those same secrecy laws should remain inviolate when the subject of scrutiny is terrorist financing. There's no justification for this distinction.

Having made a mess of an effective U.S. terrorism program without substantially serving privacy, some in Brussels tried to minimize the damage. The European Commission negotiated an agreement to give the United States access to intra-European bank transfer data even after the Swiss operations center is set up—but only if Treasury continued to live up to European standards.

Remarkably, even this was too much for the privacy campaigners of Europe. In the first exercise of new authorities granted to it by the Lisbon Treaty, the European Parliament rejected the agreement, essentially creating a European safe haven for terrorist finance.

What lessons can we draw from these stories? Certainly the implications for U.S.-EU relations are not good. DHS's passenger screening system was deployed at the direction of a Democratic Congress and in

reliance upon a series of Supreme Court rulings; in effect, both parties and all three branches of the federal government participated in the decision. The EU could have acknowledged that, while American law policy did not comport with its own preferences, the United States nevertheless was entitled as a sovereign to choose differently. It could have let the United States follow its own path in fighting terrorism.

It did not.

Instead, Brussels claimed the right to sit in judgment on American data privacy practices. Worse, it assumed that its natural role was to thwart any new American initiative, either permanently or at least until it had been persuaded to imitate the program in Europe.

Perhaps most troubling for anyone who believes in multilateralism and international law, the tactics adopted by the European Union cannot easily be defended. The European Union never explained why its domestic commercial data-protection directive should override the spirit and text of the longstanding multilateral Chicago Convention, which clearly says that airlines must give the countries where they land personal data about the travelers they carry. Ignoring this convention and putting the airlines at risk of penalties for obeying U.S. law was a breach of settled principles of international law and comity. Nor did Europe ever justify its assumption that no criminal data-protection law could be adequate unless it was nearly identical to European law. In fact, the European Union never defined "adequacy" in the law-enforcement context, leaving the concept a moveable feast that can be modified on the basis of political, rather than legal, judgments. Finally, and most troubling for large multinational enterprises, the European Union seemed almost enthusiastic about threatening private companies with sanctions as a way of attacking U.S. government practices.

Putting private actors in a position of having to violate the laws of one sovereign in order to heed the laws of another is dubious practice under international law. But far from being reluctant to do so, the European Union seems to have concluded after the PNR episode that the tactic should be applied to new fields. It encouraged a criminal

data protection investigation of SWIFT, saying in essence that, before complying with U.S. law, SWIFT had to ensure that the U.S. government met European standards. Since no private company, particularly after receiving a subpoena, has the leverage to demand such assurances from investigators, such an analysis dooms the company to simply deciding which law to violate.

Why would Europe sacrifice its traditional commitment to multilateralism and international law for the purpose of thwarting terrorism investigations in other countries? There are many possible explanations, but in fact the fights over SWIFT and PNR seem more and more to be of a piece with fifty years of Brussels policy making. The first instinct in Brussels, it seems, is always to oppose U.S. initiatives, perhaps directly, perhaps obliquely, and then to call for negotiations. There's an institutional reason for such a stance. Forcing the United States into negotiations demonstrates Brussels's relevance; at the same time it pulls authority away from the member states and toward the commission and its negotiators.

This dynamic is not just an artifact of Europe's dislike for President George W. Bush. President Obama got a taste of the same thing within months of taking office. After years of clamoring for the United States to close Guantánamo, how did Brussels react when President Obama proposed to do just that, and got a few European countries to agree to take a handful of the prisoners?

With a kind of genteel horror the EU asked, "How could the United States do such a thing without first getting permission from Brussels?" The European Commission insisted on interposing itself between the United States and the European countries that were willing to take a few prisoners. It then took months of negotiations to get Brussels to agree that, yes, the member states really could help out the new administration by accepting detainees. Only then could the United States and the member states negotiate actual transfers of prisoners.

The Brussels instinct to say "*non*" to American initiatives, at least until they have been milked for a contribution to European solidarity, is a force for global conservatism. If Europe's first inclination is always to slow the Americans down, question their motives, and make them pay for any changes in policy, there will be no quick responses to the challenge of accelerating technologies. This international conservatism is among the most powerful forces favoring a kind of exponential status quo.

It was a force we'd have to face again as we implemented the next step in our strategy for responding to the challenge of commercial jet technology.

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